BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of Sprint Communications Company, L.P. for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with U S West Communications, Inc.	)))))	Docket No. UT-003006

POST ARBITRATION BRIEF OF SPRINT COMMUNICATIONS COMPANY, L.P.

Pursuant to the Prehearing Conference Order issued March 8, 2000 and the agreement of U S West Communications, Inc. ("U S West") and Sprint Communications Company, L.P. ("Sprint") of May 22, 2000, Sprint hereby submits its Post-Arbitration Brief.

ISSUES UNDER CONSIDERATION AND SUMMARY OF SPRINT'S POSITION

The issues presented to the Commission for resolution in this matter are as follows:

Should U S West be required to include provisions for reciprocal compensation for ISP-bound traffic in its interconnection agreement with Sprint?

Yes. The Commission should require U S West to include reciprocal compensation for ISP-bound traffic in the Sprint interconnection agreement. There are several factors that mandate this result:

- Recent rulings of this Commission specifically require reciprocal compensation for ISP traffic, in interconnection agreements with Competitive Local Exchange Carriers ("CLECs") which provide the same type of services as Sprint.

- CLECs like Sprint incur switching, transport, and termination costs when they terminate calls originated by customers on U S West's network. Reciprocal compensation is the only mechanism available to compensate Sprint for its costs of

terminating calls originated by customers on U S West's network. U S West concedes that Sprint incurs these costs of terminating calls from U S West's customers.

- Sprint supports the Commission's plan to consider alternative cost recovery mechanisms in a statewide generic docket.

Refusing to mandate reciprocal compensation for Sprint's ISP-bound traffic would result in unlawful discrimination against Sprint, which would have a profoundly anti-competitive effect.

U S West's arguments that reciprocal compensation should not be applied to Sprint's ISP traffic are inconsistent with this Commission's recent rulings. In addition, implementation of U S West's position would violate section 151 of the Telecommunications Act of 1996, and the decisions of the Federal Communications Commission, which have made it clear that internet service providers ("ISPs") are to be treated as customers, not as interexchange carriers ("IXCs").

Does the phrase "currently combined" describe those pre-existing combined network elements (i.e. active services) in the U S West network or those network elements that are of the type that U S West ordinarily and normally combines in its network?

"Currently combined" describes any combination of UNEs that U S West ordinarily and normally combines in its network at any given time for any given customer.

Is U S West obligated to provide UNE combinations for UNEs that are not currently combined or pre-existing (i.e. not active services) within the U S West network?

As it has done in the past, the Commission should require U S West to include provisions in the interconnection agreement which make available combinations of UNEs that are currently combined in its network without regard to whether they pre-exist for a given customer, and which permit subsequent amendments to add new combinations of UNEs as they become available.

Should U S West be permitted to recover its costs for each element that comprises a UNE combination?

The Commission should only allow U S West to recover costs that it actually incurs. When U S West makes available elements that are already combined in its network, it has recovered already the cost of combining those elements, and the Commission should only allow U S West to recover the record change or administrative charge for switching those elements to Sprint.

I. THIS COMMISSION SHOULD ORDER THAT RECIPROCAL COMPENSATION BE ADOPTED FOR ISP-BOUND TRAFFIC.

A. There Is No Real Dispute That This Commission Must Decide An Appropriate Mechanism For Inter-Carrier Compensation and Washington Law Requires U S West to Pay Reciprocal Compensation for ISP Traffic.

As U S West's witnesses concede, there is no real dispute that this Commission must decide an appropriate mechanism for inter-carrier compensation for ISP-bound traffic. This Commission has considered the issue of reciprocal compensation for ISP traffic both generically and in specific interconnection arbitration and enforcement proceedings, and has established that reciprocal compensation is due for such traffic. This Commission has further determined that its own existing rulings requiring the payment of reciprocal compensation for ISP traffic should be applied until the FCC provides further guidance on this issue. In its 17th Supplemental Order in Docket Nos. UT-960369, 960370, 960371[1], the Commission considered this question in a general, costing and pricing context, weighing the FCC's then-recent decision to find that ISP traffic is primarily interstate in nature and leave the specific application of reciprocal compensation to the

[1] In the Matter of the Pricing Proceeding for Interconnection, Unbundled Element, Transport and Termination, and Resale, et al., WUTC Docket Nos. UT-960369, 960370 and 960371.

states. Addressing similar (if not identical) policy arguments to those U S West raises here in opposition to paying reciprocal compensation, the Commission concluded:

> This Commission has authority to resolve this issue pending a FCC rule requiring one outcome or another. The FCC currently exempts ISP-bound traffic from access charges (footnote omitted), so the resolution most consistent with existing FCC rules is to require reciprocal compensation. The FCC's conclusion that ISP-bound traffic is primarily interstate is not dispositive because neither the Act nor FCC rules preclude interstate traffic from reciprocal compensation. The Commission concludes that ISP-bound traffic should remain subject to reciprocal compensation.

17th Supplemental Order at ¶ 54 (emphasis added).

Further, in arbitrating and enforcing interconnection agreements between the ILECs and CLECs in Washington, the Commission has repeatedly faced the same issue and has declined to change its position.[2] For example, in the Nextlink Washington v. U S West interconnection enforcement proceeding, WUTC Docket No. UT-990340, the Commission addressed the issue of whether ISP traffic should be considered "local" for the purposes of reciprocal compensation in the context of a provision of the TCG/U S West interconnection agreement, which Nextlink had opted into under the "pick & choose" rule, 47 U.S.C. § 252(i).

The Administrative Law Judge's recommendation to the Commission in that case contained an analysis of the alleged interstate nature of ISP-bound traffic pertinent to the present situation. In particular, the ALJ cited to the Commission's prior order in the ELI-

[2] See, Worldcom, Inc., f/d/a MFS Intelenet of Washington, Inc. v. GTE Northwest, Incorporated, UT-980338; In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Electric Lightwave, Inc. and GTE Northwest Incorporated, Docket No. UT-980370; Nextlink Washington v. U S West Communications, Inc., Docket No. UT-990340.

GTE arbitration order:

> Although the Declaratory Ruling concludes that ISP-bound local-interstate traffic does not terminate at the ISP's local server, it does not necessarily terminate at a local carrier's end-office switch in some other state either. However, a cost of "terminating the call" occurs at the end-user ISP's local server (where the traffic is routed onto a packet-switched network), and the applicable rate should be determined by the state where the terminating carrier's end office switch is located [footnote omitted]. ISPs are end users, not telecommunications carriers.[3]

Further, in adopting the ALJ's recommendation that ISP traffic remains local for the purposes of reciprocal compensation in the Nextlink enforcement proceeding, the Commission considered – and rejected – the same arguments that U S West makes here: that the FCC's determination that ISP-bound traffic is primarily interstate requires the Commission to consider ISP traffic as "non-local" and therefore exempt from reciprocal compensation. In rejecting U S West's arguments, the Commission opined:

> U S West's argument that the FCC Declaratory Order supersedes the Commission's decision in the TCG-U S West arbitration is unpersuasive. Although the treatment of ISP-traffic was discussed in the FCC Declaratory Ruling, the FCC's determination that a substantial portion of dial-up ISP-bound traffic is interstate is not dispositive of the disputed issues in this case. (Footnote omitted). The Commission agrees with the recent State of Pennsylvania Public Utility Commission (PA-PUC) decision that its treatment of ISP-bound traffic as local for the purpose of inter-carrier compensation is consistent with the FCC's determination that ISP-bound traffic is largely interstate. (Footnote omitted).

Sprint notes with interest that U S West's legal and policy expert, Mr. Brotherson

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[3] Arbitrators Recommended Decision in WUTC Docket No. UT-990340 at p. 12, quoting the Commission's Order approving Negotiated and Arbitrated Interconnection Agreement, ¶¶ 29-33 in WUTC Docket No. UT-980370.

recognizes this Commission's rulings on this issue yet he fails to reconcile U S West's position with the current regulatory policy in Washington, merely asserting that the Commission should consider other with factors in revisiting this issue. (Direct Test. of Larry Brotherson, Exhibit LBB-T p. 8; 8-15 and Rebuttal Test. of Larry Brotherson Exhibit LBB-R pp. 3-4). Therefore, in light of the Commission's consistent position that it will await the FCC's order addressing whether ISP-bound traffic will remain subject to reciprocal compensation as local traffic, it must also do so here.

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Using this information absent a generic docket or an order from the FCC to prevent the payment of reciprocal compensation for ISP traffic would discriminate against Sprint. Further, such a finding would undermine the Commission's 17th Supplemental Order and potentially open the doors to a flood of interconnection enforcement proceedings.

Since US West has failed utterly to present evidence in this proceeding which would justify any divergence from this Commission's precedent, the Commission must

continue to apply the same legal standard, and order inclusion of reciprocal compensation in the Sprint-U S West interconnection agreement, as it has required in other agreements.

It should be noted that the recent ruling of the D.C. Circuit Court of Appeals in Bell Atlantic Telephone Companies v. Federal Communications Commission, 206 F.3d 1, 2000 WL 273383 (March 24, 2000) supports continuation of this Commission's policy set forth in the cases cited above. While the prospect of awaiting an order from the FCC clarifying the ISP reciprocal compensation issue may have previously seemed remote, the Bell Atlantic Court's vacating the ISP Order and remanding the issues to the FCC has properly encouraged the FCC to address this issue again in the foreseeable future.

Also, recent decisions by the U.S. Courts of Appeal that have considered the issue of reciprocal compensation for ISP-bound traffic underscore this Commission's responsibilities to see its orders enforced on this issue. In quoting a recent decision of the Seventh Circuit with approval, the Fifth Circuit unequivocally stated in Southwestern Bell Tel. Co. v. Public Utility Commission of Texas, 2000 WL 332062 (5th Cir. March 30, 2000) that:

> The FCC could not have made clearer its willingness—at least until the time a rule is promulgated—to let state commissions make the call. We see no violation of the Act in giving such deference to state commissions; in fact, the Act specificaly provides state commissions with an important rule to play in the field of interconnection agreements. . . .

Southwestern Bell, 2000 WL 332062 at *7; quoting Illinois Bell Tel. v. Worldcom, 179 F.3d 566, 574 (7th Cir. 1999). Accordingly, as there is no real dispute that this

Commission must decide the issue, reciprocal compensation should be ordered for ISP-bound traffic under the proposed agreement for the reasons set forth in more detail below.[4]

Accordingly, this Commission must follow its prior rulings and address the issue of reciprocal compensation for ISP traffic in a generic docket – UT-003013, and in any event should follow the FCC's guidance once its order on remand is issue. In the interim, the relevant law – in this case the Commission's 17th Supplemental Order in UT-960369, 960370 and 960371 must govern and Sprint should receive full reciprocal compensation for terminating ISP traffic.

B. U S West's Reliance On The FCC's ISP Order To Show That ISP-Bound Traffic Is "Interstate" Is Misplaced Not Only Because The Order Has Been Vacated, But Because Its Rationale Fails To Account For The Provisions Of The Telecommunications Act of 1996.

U S West's assertion in this proceeding that ISP-bound traffic is "interstate" simply because the FCC concluded as much in the now vacated ISP Order not only constitutes a circular argument, but is not compelling because it flatly ignores the requirements of the Act. Moreover, U S West's reliance on decisions from other jurisdictions is misplaced because those decisions do not address the statutory requirements, were decided without guidance from the D.C. Circuit or Fifth Circuit decisions, or were expressly limited to the

[4] Only Dr. Taylor apparently makes the argument in his rebuttal testimony that because the entirety of the FCC ISP Order was vacated, the Commission may lack authority to consider the issue of reciprocal compensation for ISP-bound traffic. (See Taylor Rebuttal Test., p. 5, lines 10-22 to p. 6 lines 1-2). Dr. Taylor's testimony, however, plainly ignores the Commission's obligations under Section 252 of the Act, and notes in any event that he "is not a lawyer and the decision will speak for itself." Id., line 10.

facts at hand.

Although U S West's Mr. Brotherson, admitted that any filed testimony implying that all ISP-bound traffic is "interstate" is inaccurate and misleading, he also admits that clearly the FCC's ISP Order has been vacated, and has no binding precedential effect. (Arizona Hearing Transcript ("AZ TR"), pp. 117-19). In any event, notwithstanding the FCC's now vacated conclusion that ISP-bound traffic is jurisdictionally "mixed" and "predominantly" or "largely" interstate in nature for jurisdictional purposes, even the FCC noted that "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." FCC ISP Order, ¶ 26. The FCC, of course, expressly noted that a rule that reciprocal compensation be paid for ISP-bound traffic does not "conflict with any Commission rule regarding ISP-bound traffic." Id. The FCC also noted, that although it has not adopted a specific rule governing the matter, its policy of "treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." Id. at ¶ 25.

1. U S West Testimony And Argument Regarding Access Charges Is Irrelevant Here.

More importantly, however, the bulk of U S West's testimony here is irrelevant because it has been offered only to show that the FCC's ESP access charge exemption is bad, or that ISPs should be treated like IXCs for purposes of applying the access charge

"paradigm," which amounts to requiring ISPs to pay access charges. U S West implicitly conceded the irrelevance of such testimony in preliminary questioning from the bench when it failed to identify either access charges or its functional equivalent—the PRI revenue split—as its proposals in this case. (AZ TR, p. 33: 22-25; p. 34:1-6; p. 35:19-25; p. 35:8-22). Furthermore, Mr. Brotherson expressly admitted that neither this Commission, nor any other state commission, has the authority to eliminate, alter or modify the FCC's ESP access charge exemption. (AZ TR, p. 126:19-25; p. 129:6-14). Finally, even the NPRM portion of the FCC's ISP Order makes clear that modification of the ESP access charge exemption is not presently being considered:

> We emphasize, however, that we do not seek comment on whether interstate access charges should be imposed on ESPs as part of this proceeding. We recently reaffirmed that exemption in the Access Charge Reform Order, and we do not reconsider it here.

FCC ISP Order, ¶ 34, citing In the Matter of Access Charge Reform, 12 FCC Rcd 15982, 16133 (1997); see also AZ TR, pp. 125-26. Thus, U S West's testimony and argument regarding access charges should be disregarded.

2. U S West Ignores That ISPs Are Not Telecommunications Carriers Under The Act.

Similarly, U S West's reliance on the "end-to-end" analysis is misplaced and is entitled to little, if any, weight here. In vacating the FCC's ISP Order, the D.C. Circuit expressly recognized that although the FCC's end-to-end analysis had

been used for jurisdictional purposes, "[h]ere it used the analysis for quite a different purpose, without explaining why such an extension made sense in terms of the statute or the Commission's own regulations." Bell Atlantic, *2-3. The analysis is incorrect because it fails to account for the terms of the statute. Although Mr. Brotherson asserts that ISPs should be treated like IXCs, he also admitted that while IXCs are clearly "telecommunications carriers" under the Act, ISPs are not:

> Q: It's true, is it not, that IXCs are telecommunications carriers, that's obvious; right?
>
> A: Correct.
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> Q: But the ISPs are not defined as telecommunications carriers under the 1996 act, are they?
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> A: No.
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> Q: In fact, the FCC has made clear in the Universal Service Fund report that ISPs are information service proviers; correct?
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> A: Yes, they're information service providers, and I think—yes.

(AZ TR, p. 135:16-25; p. 136:1-2).

The D.C. Circuit opinion in Bell Atlantic, therefore, eviscerates U S West's assertion. As the Court concluded, the cases relied upon by the FCC (and U S West now by extension) to extend the jurisdictional analysis to the substantive analysis for reciprocal compensation "are not on point." Bell Atlantic, at *5-6. Mr. Brotherson also agreed that both cases relied upon involved telecommunications carriers (IXCs), and not information service providers like ISPs. (AZ TR, p. 135:1-

15). Although the FCC noted in a footnote that the cases appeared to be distinguishable on such grounds, and even admitted that in its 1997 Access Charge Reform Order that "it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs," like U S West, it swept aside the statutory relevance by stating that it did not matter for jurisdictional analysis. See also Bell Atlantic at *6. Again, as noted by the D.C. Circuit, when the statute is considered, it is clear that the argument advanced by U S West here is flawed:

> Even if the difference between ISPs and traditional long-distance carriers is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation. Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long-distance carriers).

Bell Atlantic at *6. Accordingly, as Sprint argues here, the Court noted that ISPs appear no different than many businesses that use a variety of communications services to provide their goods or services to their customers. Id.

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3. U S West Ignores The Relevant Definition Of Termination.

The failure to consider and apply the statute does not stop there, however. As the D.C. Circuit and Mr. Brotherson acknowledge, nowhere in the FCC's ISP Order does the Commission mention or consider the relevant definition of "termination." Bell Atlantic at *5; AZ TR, pp. 131:16-25; p. 132:1-6. This absence

is startling given that state commissions are being asked to decide again whether and what rates should apply for transport and termination of local traffic. The relevant definition is "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic to the called party's premises." See 47 C.F.R. § 51.701(d); Bell Atlantic at *5; AZ TR p. 131:17-23).

Courts that have engaged in appropriate statutory and regulatory analysis have concluded that ISP-bound traffic appears to be covered. As the D.C. Circuit observed for calls to ISPs, "the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'" Bell Atlantic at *5. Decided only days after Bell Atlantic, the Fifth Circuit unequivocally concluded in Southwestern Bell:

> As for the modem calls here at issue, the ISPs are Time Warner's customers, making Time Warner the terminating carrier. So, under the foregoing definition [47 C.F.R. § 51.701(d)], "termination" occurs when Time Warner switches the call at its facility and delivers the call to 'the called party's premises,' which is the ISP's local facility. Under this usage, the call indeed 'terminates' at the ISP's premises.

Southwestern Bell at *9.[5] As the relevant call indeed terminates at the ISP's premises, ISP-bound traffic is local traffic subject to reciprocal compensation or should be treated as local traffic for compensation purposes.

4. U S West's Arguments Rely Upon A Term That Is Not In The Act And Ignore Statutory Definitions Of "Exchange Access" and "Telephone Exchange Service."

U S West's other arguments rely upon the term "access service" in the FCC's ISP Order which is not contained anywhere in the Act, and totally ignore the statutory definitions of the types of services that are covered by the Act. Although Mr. Brotherson could not recall whether the term "access service," was contained in the Act, he did admit that he quoted from the FCC's decision that relied upon a finding that ISPs were users of "access service." (AZ TR, p. 136:3-8). As the Court stated in Bell Atlantic, the FCC (and U S West by extension) simply "brushed aside" the fact that ISP-bound traffic under the statute must be either "exchange access" or "telephone exchange service," and expressly found that the term "access service" was a pre-1996 Act term. Bell Atlantic at *8-9.

Mr. Brotherson admitted that the FCC conceded on appeal that the relevant terms "exchange access" (defined at 47 U.S.C. § 153(16)) and "telephone exchange service"

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[5] Although the FCC Regulations at 47 C.F.R. § 51.701 et seq. relate to local telecommunications traffic, U S West begs the question by refusing to consider them because the FCC concluded that the traffic was largely interstate. The regulations regarding reciprocal compensation clearly relate to the FCC's implementation of the Act, and are persuasive whether ISP-bound traffic is local as the D.C. and Fifth Circuits conclude, or is treated as local for compensation purposes. As the Fifth Circuit stated, "[p]erceiving such calls as terminating locally for compensation purposes is clearly condoned by the FCC." Southwestern Bell at *10; see also Sprint proposed contract language, (C)2.3.4.1.3. Accordingly, the FCC's definition of "termination," is relevant here, as both the D.C. Circuit and Fifth Circuit found.

(defined at 47 U.S.C. § 153(47)) occupy the field. (AZ TR p. 136:15-25; p. 137:1); see also Bell Atlantic at *8. As Mr. Brotherson also recognized, ISP-bound traffic cannot be "exchange access" because the Act requires exchange access to be the offering of access to telephone exchange services for the purpose of origination and termination of telephone toll services. 47 U.S.C. § 153(16)). Mr. Brotherson stated:

> Q: . . . And what ISPs provide through information services is not telephone toll services, is it?
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> A: Say again, please.
>
> Q: What ISPs provide when they provide the information services that we've agreed that's what they provide, they are not providing telephone toll service; isn't that right?
>
> A: That's right, it's not toll services, enhanced services.

(AZ TR, p. 137:11-19). If ISPs are not telecommunications carriers under the Act, and do not provide "telephone toll services" as U S West now concedes, the ISP-bound traffic must be considered "telephone exchange service," which even U S West admits is local and is subject to reciprocal compensation. Accordingly, when the statute is properly applied (as courts and commissions must do), it is clear that ISP-bound traffic is either local, or should be treated as local for purposes of inter-carrier compensation.

C. The Other Authorities Relied Upon By U S West Are All Distinguishable, Not On Point Or Otherwise Precisely Limited To Facts Not Present Here.

U S West's reliance on decisions from other state commissions purportedly embracing its analysis is equally misplaced. Although Dr. Taylor relies extensively in his direct testimony (Direct Testimony of Dr. Taylor pp. 23-26) from the Massachusetts Department of Telecommunications and Energy ("DTE") decision in MCI Worldcom v. New England Tel. and Tel. Co., et al, DTE 97-116-C (May 19, 1999), and even purports to discuss the reasons for its decision (Direct Test. of Dr. Taylor p. 24, lines 9-19; p. 25, lines 1-11), he plainly ignores the fundamental distinction between holding and dicta. Therefore, Dr. Taylor substantially overstates the decision.

As the DTE itself took pains to point out, it was compelled to reverse its earlier decision requiring reciprocal compensation because the only basis for the decision appeared to have been repudiated by the FCC's ISP Order. The decision upon which Dr. Taylor relies is not a manifesto to "cost causation," but instead, an erroneous attempt at invoking stare decisis (erroneous, as it turns out, by virtue of the D.C. Circuit's reversal of the FCC ISP Order). The DTE explained:

> The Department's October Order [requiring reciprocal compensation for ISP-bound traffic] thus confined its enquiry [sic] in this matter solely and exclusively to whether the ISP-bound traffic in question was 'local' (i.e., intrastate) or interstate calling. This limitation of the basis for the Department's holding was express; and no other basis may be reasonably inferred from the Order. The October Order's effectiveness was thus ransom to the validity of its legal or jurisdictional conclusion.
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> To repeat, less it be misunderstood: there was no other basis for the Department's holding in MCI Worldcom, D.T.E. 97-116. If that express legal basis were to prove

> untenable (as, in the event, it has), the efffectiveness of the Order could not hold.
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> * * *
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> [O]ur Order stood squarely, expressly and exclusively on a 'two-call' premise. . . .In view of the FCC's practical negation of the legal and analytical basis of our October Order, we see no logical alternative to vacating that Order in response to the Motion for Modification.

MCI Worldcom v. New England Tel. and Tel. Co. at pp. 21-22; 24-25 (1999). Moreover, although never addressed by U S West in its testimony here, the DTE expressly noted that CLECs incur costs in terminating ISP-bound traffic (pp. 28-29), and it never concluded or stated that the costs should be zero. Id. at pp. 28-29. Instead, the DTE argued that the parties should negotiate an appropriate resolution. Id.

Similarly, the South Carolina Commission's decision in In re: Petition of DeltaCom Communications, Inc. for Arbitration with BellSouth Telecommunications, Inc., Docket No. 1999-259C, Order No. 1999-690 (October, 1999) is of questionable value because it, too, relies merely on the FCC's finding that ISP traffic is largely interstate. The decision, which was decided before Bell Atlantic and Southwestern Bell, is flawed for the same reasons addressed above.

Moreover, although the DeltaCom decision recognized that the ISP Order allowed state commissions to treat ISP-bound traffic as local for compensation purposes, the decision never explained why reciprocal compensation was inappropriate in that context. The Commission appears to reason, as does U S West here, that although ISP traffic can be treated as local, it should not be so

treated, because it is not local. Such analysis ignores that CLECs like Sprint incur costs to terminate such traffic, that the traffic is provided and routed in exactly the same way as local voice traffic, and that it is indistinguishable from other types of data traffic that have the same characteristics (i.e., LAN traffic) exhibiting the same characteristics as ISP traffic, and for which even U S West does not contest is subject to reciprocal compensation.

The decision in In the Matter of BellSouth Telecommunications, Inc., Docket No. P-561, Sub. 10 (North Carolina Utilities Commission, March. 31, 2000) was expressly limited to the facts presented before it. Unlike here, where U S West concedes Sprint is passing no traffic, the case involved the creation of an artificial network connection between a "customer" and a CLEC solely for the purpose of generating reciprocal compensation payments. The testimony of David Stahly is unrebutted that Sprint has no plans to serve only ISPs in Washington or any state. (Stahly Rebuttal Test., p. 20, lines 2-6; AZ TR p. 63; 1-4; p. 70; 10-13; p. 94; 2-10). Moreover, BellSouth does not suggest that reciprocal compensation should be rejected for legitimate ISP-bound traffic. The North Carolina Commission unequivocally stated that the FCC's ISP Order was not "controlling" or "dispositive." The Commission stated that its case "involves facts which are far different from those addressed by the Commission in the ISP Order dealing with typical dial-up Internet calls placed by an end-user customer where the customer actually dials a local exchange number and the call to the ISP is delivered in the customer's same local exchange or an EAS exchange serving the called

telephone number." Id. at 80.[6]

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[6] U S West's reliance on the Louisiana Public Service Commission decision in KMC Telecom, Inc. v. BellSouth Telecommunications, Inc., Order No. U-23839 (October 13, 1999) is curious because the Commission there only determined the parties' intent under an existing agreement executed in 1996 in a complaint proceeding. The Louisiana decision construes evidence about the parties' intentions not before this Commission, considers specific contract terms also not at issue here, relies on the FCC ISP Order, and fails to account for any subsequent Court of Appeals decisions on reciprocal compensation vacating that decision.

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D. ISP-Bound Calls Are Routed In Exactly The Same Manner As Other Calls, Use the Same Network Elements, Have Similar Costs, And U S West Offers No Support For the Proposition That Such Calls Should Be Treated Differently.

The record in this case reveals that ISP-bound traffic and voice traffic use the same network elements, and there is no compelling reason to treat this type of traffic any differently from other types of traffic—including other data calls—for compensation purposes. This is perfectly consistent with the Commission's rulings in other arbitration proceedings as well as in its 17th Supplemental Order in Docket Nos. UT-960369, 960370, and 960371. Moreover, to the extent traffic patterns and other characteristics demonstrate

that the two calls may have different cost structures, U S West never explains why such differences demand that reciprocal compensation be entirely eliminated or why an adjustment to the termination rates—in a generic cost proceeding—is not appropriate.[7] Accordingly, on this record, there is no basis to eliminate reciprocal compensation.

Although U S West attempts to argue in pre-filed testimony that there is only an "incidental resemblance" between how voice traffic and ISP-bound traffic are routed and use carrier networks (see e.g., Direct Test. of Dr. Taylor, p. 4, sub. par. (3), p. 26, lines 14-77, p. 27, line 1), Mr. Brotherson admitted at the hearing that ISP-bound calls and voice calls are routed in exactly the same way. (AZ TR, p. 162:5-18). Mr. Brotherson admitted that ISP-bound calls use the same switching facilities, the same transmission facilities, and the same termination facilities as voice calls. (Id. at lines 15-18; see also, Direct Testimony of Mr. Brotherson, LBB-T at p. 9).

Mr. Brotherson also conceded that U S West cannot determine at the time the call is switched whether a given call is voice or data. (AZ TR, p. 162:19-22; see also Resp. to Sprint's Data Request Nos. 47 and 50, Ex.__ (S-2) and Ex.__ (S-3)). U S West also concedes, as it must, that ISPs are treated as local for purposes not only of purchasing facilities to connect to the local and internet networks, but that the prices charged for such

[7] In fact, even Dr. Taylor seems to support such a notion. Implicitly conceding that the bulk of his testimony on cost causation is merely academic, Dr. Taylor seems to acknowledge that adjustment of termination rates is a viable option. In his direct testimony, Dr. Taylor asserts that if the cost per minute to terminate a local voice call were the same as an ISP-bound call, "I would have no hesitation in recommending that compensation rates for the two types of traffic be the same." (Taylor Direct Test. p. 27 lines 14-16). For at least this part of his testimony, Dr. Taylor apparently has no problem with a cost recovery mechanism that is based on a reciprocal transport termination rate, contrary to his academic discussion of cost causation.

facilities also are contained in local tariffs. (AZ TR, p. 124:6-17; Resp. to Sprint's Data Request No. 64, Ex. __ (S-6)). Mr. Brotherson admits further that U S West treats revenue from its ISP customers as intrastate for separations purposes. (AZ TR, p. 123:5-25; p. 124:1-5; Resp. Sprint Data Request Nos. 67-69, Ex.__ (S-7), Ex. __ (S-8), and Ex.__ (S-9)). Although U S West insists that it "continuously" and "publicly" maintained that ISP-bound calls were interstate, Mr. Brotherson admitted that even though other LECs attempted to characterize ISP revenue as interstate for separations purposes, U S West never made an attempt to recharacterize its revenue, and never asked the FCC for permission to do so. Id.

The testimony and discovery responses are clearly significant here because they demonstrate that there is no barrier to treating ISP-bound calls like local calls for purposes of compensation. U S West does not dispute that it has ISP customers on its own network, that it receives ISP-bound traffic from CLEC end users in Washington, or that it receives compensation at the full rates for "termination" of such traffic on its network. (AZ TR, pp. 167-68). As Mr. Brotherson testified, there is no reason or data to suggest that characteristics of ISP end users differ in any appreciable way when the ISP is a customer of U S West or is a customer of a CLEC. (AZ TR, p. 138:15-25; p. 139:1-7). Significantly, the "hold times" associated with interstate use appear not to differ between U S West ISPs and CLEC ISPs. Id.

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Although U S West claimed in discovery responses to consider manual requests by CLECs for refunds of payments made to U S West for delivery of traffic to U S West ISPs, it also admitted that no CLEC ever made such a request in Washington, and it has never actually adjusted traffic in Washington to return a portion of such money to CLECs. (See Resp. to Sprint Data Request Nos. 50, 52-54, Ex.__(S-2), Ex.__ (S.3), Ex. __ (S-4), Ex.__ (S-5)). Accordingly, U S West apparently adopts a "heads we win—tails you lose" approach to reciprocal compensation. When U S West terminates such calls to its ISP customers, the calls are no longer interstate, but are local for compensation purposes; however, when CLECs terminate calls to ISPs that are made by U S West end users, the calls are interstate, and no longer should be treated as local. Such patent discrimination is not permitted by the Act, and should not be countenanced by this Commission.

Perhaps even more important than U S West's inconsistent treatment, it does not contest that reciprocal compensation is due for other types of calls, including data calls, that exhibit the same characteristics as ISP-bound traffic. As David Stahly testified, there are many types of business calls that exhibit similarly long "hold times," or generate a disproportionate amount of "one-way" traffic for which U S West does not deny reciprocal compensation. (Direct Test. of David Stahly, pp.17-18). One of the most compelling

examples of such traffic is local calls to a company's local area network ("LAN") which enables employees to dial a local call and log on to their company's LAN.

As Mr. Stahly testified, the proliferation of second lines has enabled many employees to remain logged on to a LAN for times that meet or even exceed the recognized average of 27-30 minutes associated with dial-up ISP calls. (Id.).

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A result like that proposed by U S West is untenable and demonstrates that U S West's CroSS7 system cannot consistently identify the full range of ISP traffic. Accordingly, this Commission should afford this evidence little weight, if any.

Further, as there are many indicia that ISP-bound calls are treated as local calls, and other types of data calls with similar characteristics are treated also as local for compensation purposes, U S West offers no compelling reason to treat ISP-bound calls differently. See also Bell Atlantic at * 6 ("[i]n this regard, an ISP appears . . . no different from many businesses, such as 'pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies' which use a variety of communication services to provide their goods and services to their customers.").

E. None Of U S West's Real Proposals Compensates Sprint For Legitimate Costs Of Terminating ISP Calls From U S West End Users, And It Is Unlawful And Discriminatory To Permit U S West Or Other CLECs To Receive Full Reciprocal Compensation Rates While Denying Compensation To Sprint.

As admitted at the Arizona transcripts, each of the three "proposals" offered by U S West shares the single characteristic of denying CLECs like Sprint recovery of any costs imposed by U S West end users when ISP-bound calls are made. (AZ TR, p. 36:2-7; p. 181-82). As even U S West repeatedly acknowledges, CLECs like Sprint will incur costs on their networks to terminate calls to ISPs. Adoption of any of the U S West proposals is patently discriminatory and violative of the Act. It is discriminatory regardless of whether U S West continues to receive full termination charges for calls it routes to its own ISPs, or other CLECs receive reciprocal compensation in separate arbitration proceedings that is not granted to Sprint here. Denying Sprint recovery of undisputed costs of termination effectively constitutes a barrier to entry, and guarantees that U S West can re-assert its monopoly in the presently competitive ISP market. Thus, even if the traffic were somehow regarded to be interstate, Sprint must be entitled to recover its cost of terminating traffic caused by U S West end users.

U S West's first requests that this Commission determine that ISP-bound calls are interstate, and thus excluded from the reciprocal compensation obligations under relevant federal regulations. As discussed above, U S West relies only upon the FCC's now vacated determination that such calls are interstate, and ignores the statutory framework.

U S West's second alternative is to deny reciprocal compensation until this

Commission has ruled on and alternative rate in Docket No. UT-003013. (Direct Test., of Larry Brotherson, LBB-T, p. 25, lines 15-18, AZ TR, p. 181:22-25; p. 182:1-2). This Commission, however, cannot avoid its statutory obligation contained in § 252 to arbitrate unresolved issues relating to the proposed interconnection agreement by deferring consideration of this issue in the interim. Even in the vacated ISP Order, the FCC made clear that state commissions can and must decide this issue, including in arbitration proceedings. FCC ISP Order, ¶¶ 25-26. As this Commission has already ruled in its generic cost docket and in other interconnection arbitration and enforcement proceedings to require the payment of reciprocal compensation for ISP traffic, it should do so again here. In any event, although U S West concedes repeatedly that CLECs like Sprint will incur costs to terminate this traffic (see e.g., Direct Test. of Dr. Taylor, p. 29:8-10), it also admits that these proposals effectively result in a total denial to Sprint of any cost recovery. (AZ TR, p. 180:25; p. 181:1-25; p. 182:1-7). It is impossible to square such a result with the Act's non-discrimination provisions.

Like its other proposals, U S West's last proposal—bill and keep—also effectively denies Sprint any recovery of costs imposed by U S West end users, and cannot be considered a viable option.[8] (Comments by counsel, AZ TR, p. 36:2-7). As Mr.

[8] As addressed above, to the extent Dr. Taylor's proposals relate to requiring payment of interstate access charges, this Commission cannot consider them. Only the FCC can alter its ESP access charge exemption, which it has said it presently is not considering. FCC ISP Order, ¶ 34. Seeking to force ISPs to split revenues paid to CLECs for PRI trunks is merely the flip-side of an access charge system, something U S West concedes this Commission cannot consider. U S West's semantic distinction is unpersuasive. Moreover, requiring ISPs to pay anything cannot be accomplished without regulation of the ISPs themselves, something even the FCC has reiterated it is reluctant to do. See FCC ISP Order, ¶ 6 ("[w]e emphasize the strong federal interest in ensuring that regulations does nothing to impede the growth of the Internet—which has flourished to date under our 'hands off' regulatory approach—or the development of competition").

Brotherson conceded, to the extent the CroSS7 data have any validity at all, they show a clear imbalance of traffic originating from U S West and terminating with CLECs. (AZ TR, p. 177:8-19; p. 180:18-21). Under the relevant FCC regulations that would be considered regardless of whether this Commission determines that ISP-bound traffic is local or should be treated as local for compensation purposes, bill and keep cannot be imposed precisely because U S West has rebutted any presumption that is traffic is "roughly balanced." See 47 C.F.R. § 51.713 (b) and (c) (1999); see also AZ TR, p. 179:12-18 (Mr. Brotherson agreeing that premise behind bill and keep is that traffic has to be roughly in balance). A bill and keep arrangement is also flawed because, while U S West clearly has something to bill and thus keep (i.e., local revenues from its end users), there is no such revenue source for CLECs like Sprint to keep.

U S West's remaining policy justifications for denying reciprocal compensation are no more compelling. The assertion that reciprocal compensation amounts to a subsidy by non-internet users of internet users is no less true of any flat-fee product. When such reasoning is extended, all such products result in a subsidy. A local telephone user that does not use his phone very much in some sense naturally heavy users of the telephone. (AZ TR, p. 56:2-25). Similarly, a flat-fee an internet user who merely logs on to check e-mail and occasionally surf some web pages necessarily subsidizes the user who logs on several hours a day to play games, download files or who continuously accesses websites.

U S West offered no data or other documentary support for its assertion that it has made millions of dollars of investment to meet the demand caused directly by the internet.

(AZ TR, p. 171:11-16). At the same time, U S West fails to recognize that CLECs too, have spent millions of dollars to meet the demand occasioned by increased internet use, which they need to recover through the reciprocal compensation mechanism. In fact, while it admits that there are several other causes of increased use of the ILEC network, U S West presented no data or documentary support relating to such causes of increased use. (AZ TR, p. 172: 2-25; p. 173:1-8). U S West admits, again, that it also stimulates use of the internet, through its own ISP, and through other products such as its xDSL/Megabit products that should work to reduce, not expand, its reciprocal compensation payments. (AZ TR, pp. 173-74).[9] U S West, however, presented no data or documentary support in this record addressing the impact of any other method of accessing the internet, although Mr. Brotherson did concede that xDSL (and other "always on") connections to the internet do not access the public switched telephone network, and do not involve transport and termination costs. (AZ TR, p. 175).

Finally, U S West's implicit assertion that it will go out of business if forced to pay legitimate costs associated with calls made by its end users is unsupported and contrary to the competitive intent of the Act. In passing the Act, Congress did not guarantee ILECs

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[9] U S West's response to questions from Judge Gibelli in Arizona regarding its own ISP (USW.net) was both illuminating and unpersuasive. It appears to be another manifestation of U S West's "heads we win—tails you lose" approach to this issue. Apparently, calls that U S West terminates to its ISP customers are "local," while similar calls terminated by CLECs are "interstate." U S West never adequately explained why it is not offering interstate services illegally in violation of 47 U.S.C. § 271 (1999) when it completes calls to its own ISP. Mr. Brotherson did say, however, that U S West merely carries the first "leg" of the call to the ISP modem. (AZ TR, p. 169:10-17). This effectively destroys U S West's assertion that the call is one-call (end-to-end), and proves that the two segments of calls (or two "legs") can and should be separated for purposes of applying the statute. As addressed above, ISPs are not telecommunications carriers, but information service providers, and although they are the "called party," the fact that they initiate further communication to deliver the information service, does not mean that reciprocal compensation is inappropriate.

that they would or could earn the same rates of return as when the regulated monopoly existed. As long distance carriers have had to do, U S West will have to earn such rates of return by vigorous competition. More importantly, however, U S West never explained in this proceeding why the solution to the ISP-bound traffic issue could not be handled with more vigorous competition—which is exactly what Congress intended. With more ISPs as customers of U S West, it either collects more reciprocal compensation from a growing segment of CLEC end users making such calls, or its collects the full transport and termination rates when it acts as both the originating carrier (ISP calls from its end users) and "terminating" carrier (routing calls to its ISP customers). Either way, U S West eliminates or reduces the reciprocal compensation burden, or brings such traffic into balance by acquiring more ISP customers.

U S West's assertion that because it has the larger customer base, and therefore cannot compete as effectively for ISP customers, amounts to an argument that because it built a large monopoly customer base, it cannot compete in a new, more competitive segment of the local market for ISP customers, because it has a large monopoly customer base. U S West is as capable as IXCs are today or CLECs will be to install PRIs to hook up ISP customers—which, after all, are ordered from U S West. Finally, the assertion that compensation should be eliminated because traffic is "one-way" does not comport with the law in this Circuit.

In Pacific Bell v. Cook Telecom, Inc., 197 F.3d 1236 (9th Cir. 1999), the Ninth Circuit concluded that reciprocal compensation was appropriate in the paging industry,

notwithstanding that the traffic was admittedly one-way. Id. at 1242-43. Although one-way paging is subject to different pricing standards, the Ninth Circuit credited the FCC's interpretation of § 252(d)(2)(A)(i). The Ninth Circuit read that provision to mean simply that when traffic originates with one carrier and terminates to another, the terminating carrier must receive reciprocal compensation. It did not uphold Pacific Bell's interpretation that traffic must actually flow two ways for a reciprocal compensation arrangement to be valid. Id. at 1244-45.

Therefore, the fact that traffic is one-way, alone, is an insufficient basis to deny compensation to Sprint. In any event, to the extent that current rates are inadequate to justify differences between the two types of traffic, the solution is not to do away with the only compensatory system for termination costs, but to adjust the rates—something Sprint supports in a generic proceeding. U S West's legal and policy analysis is clearly flawed and untenable. When the key provisions of the statute are applied, it is clear that ISP-bound calls are either local, or should be treated as local for compensation purposes. Finally, even if this traffic is somehow regarded as "interstate," the FCC has expressly granted this Commission the authority to require compensation for costs of termination.

It would be discriminatory and anticompetitive for the Commission to deny Sprint any means of recovery for costs imposed by U S West end users that even it concedes are imposed on the CLEC network. In the current environment with the ESP access charge exemption, only a system of reciprocal compensation covers costs imposed upon CLECs for traffic which U S West is relieved of the obligation to terminate.

II. U S WEST SHOULD NOT BE PERMITTED TO DISCRIMINATE AGAINST SPRINT IN ITS PROVISIONING OF UNE COMBINATIONS.

F. This Commission Should Order U S West To Combine Unbundled Network Elements For Sprint In The Same Manner It Combines Unbundled Network Elements For Itself And Other CLECs.

U S West should be not be permitted to limit the type of UNE combinations it is required to provide under the interconnection agreement in a manner that is competitively injurious to Sprint (Issues 2 and 3 on Joint Matrix). U S West's proposed limitation to only make available the UNE combinations that presently exist for a given customer at the time the order unreasonably restricts competition, and is patently discriminatory. The Act does not permit U S West to limit combinations with reference to each one of its customers in Washington. Instead, under the relevant law in this Circuit and in other jurisdictions where U S West is the ILEC, the Act requires that U S West make available to CLECs UNEs that are ordinarily combined in the U S West network without reference to whether a given combination actually exists for the end user that subject to the service request. U S West routinely combines other types of UNE combinations to serve its own customers. This Commission should not approve U S West's discriminatory solution.

The controlling law in this Circuit holds that U S West cannot separate out UNE elements that are currently combined in its network, because it is not a violation of the Act to contractually require U S West to make available UNEs upon the request of CLECs if currently combined in its network. In MCI Telecommunications Corp. v. U.S. West

Communications, 2000 U.S. App. LEXIS 3139, 2000 WL 232273 (9th Cir. March 2, 2000), the Ninth Circuit considered an interconnection agreement between MCI and U S West which required U S West to combine otherwise separate elements at MCI's request. In holding that such a provision in the agreement did not violate the Act, the Court stated,

> Unlike its decision with regard to Rule 315(b) [barring separation of already combined network elements], however, the Eighth Circuit's decision with regard to Rule 315(c)-(f) was not before the Supreme Court. The Court's holding concerning Rule 315(b), however, confirms that the Eighth Circuit's interpretation of the Act was incorrect. The Court firmly stated that the Act's mention of 'unbundled access' does not even 'remotely imply' that elements must be provided only in uncombined form and never in combined form.

Id. at *4. (Emphasis added). Accordingly, the Ninth Circuit held that the "Supreme Court's interpretation of the Act makes absolutely clear" that a provision requiring U S West to combine separate elements at the CLEC's request does not violate the Act. U S West's reliance, at this hearing, on the fact that the Eighth Circuit did not reconsider Rules 315(c)-(f) is clearly contrary to controlling law that this Commission is bound to apply.

Similarly, in U S West Communications v. MFS Intelenet, Inc. 193 F.3d 1112 (9th Cir. 1999), the Ninth Circuit relied upon the Supreme Court decision in AT&T v. Iowa Utilities Bd., 525 U.S. 366 (1999) sustaining a provision that prohibited an ILEC from separating already-combined elements before leasing. In holding that the Supreme Court's decision mandated a finding that the FCC regulation prohibiting an incumbent carrier from separating out already-combined

elements was not inconsistent with the Act, the Court specifically rejected the argument made by U S West regarding the Eight Circuit's invalidation of the regulation. Although U S West remarkably raises the identical argument here in Washington as well as in response to questioning from the Arizona panel, the Ninth Circuit has rejected it:

> The Supreme Court opinion, however, undermined the Eighth Circuit's rationale for invalidating this regulation. Although the Supreme Court did not directly review the Eighth Circuit's invalidation of § 51.315(c)-(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.

MFS Intelenet, Inc., 193 F.3d at 1121. U S West's suggestion at this hearing, that the Eighth Circuit somehow has greater jurisdiction over this issue than the U.S. Supreme Court is unpersuasive, and ignores the law that the Commission must apply.

Sprint again notes that while U S West's witness Perry Hooks acknowledges the Commission's deference to the Ninth Circuit, he fails to explain why the Commission should deviate from its prior rulings in this instance.[10] In several recent instances, this Commission has expressly followed the rulings of the Ninth Circuit on this issue. In the interconnection arbitration proceedings involving American

[10] See, Direct Testimony of Perry W. Hooks Jr. at p. 12, lines 15-20; and Rebuttal Testimony of Perry W. Hooks Jr. at p. 2, lines 12-15; p. 3, lines 10-15 and p. 5, lines 9-16.

Telephone Technology, Inc. ("ATTI") interconnecting with both GTE Northwest, Incorporated ("GTE") and U S West[11], this Commission ordered both GTE and U S West to perform combinations of UNEs as Sprint requests here, including combinations of UNEs available in U S West's network but not necessarily combined for a given customer:

> [T]he Commission follows the Ninth Circuit Court's decision. Procedural objections aside, U S West presents no compelling argument in support of its position that it should not be required to combine network elements at the request of other carriers. U S West must perform and ATTI must pay for the functions necessary to combine requested UNEs in any technically feasible manner with other UNEs from U S West's network, or with network elements possessed by ATTI. However, U S West need not combine UNEs in any manner requested if not technically feasible, but must combine UNEs ordinarily combined in its network in the manner they are typically combined.

(Commission Order Adopting Arbitrator's Report, In Part; Modifying Report, In Part and Approving Negotiated and Arbitrated Interconnection Agreement, WUTC Docket No. UT-990385 at ¶ 88 (emphasis added)). Thus, while Mr. Hooks attempts to draw a line between "currently combined" and "ordinarily combined," this Commission has already refused to recognize such a distinction. Accordingly, this Commission should again order U S West to provide UNE combinations without restriction (other than technical feasibility) for any CLEC customer.

Moreover, other state public utility commissions in U S West's region that have

[11] In the Matter of the Petition for Arbitration of an Interconnection Agreement Between American Telephone Technology, Inc and U S West Communications, Inc. Pursuant to 47 U.S.C. Section 252, WUTC Docket No. UT-990385; In the Matter of the Petition for Arbitration of an Interconnection Agreement Between American Telephone Technology, Inc. and GTE Northwest, Incorporated, WUTC Docket No. UT-990390.

directly considered U S West's improper attempt to limit UNE combinations to pre-existing combinations have also rejected it as a violation of the Act. For example, on March 14, 2000, the Minnesota Public Utilities Commission expressly rejected "U S West's claim that its obligation to combine network elements is limited to those elements actually combined at the time of the request on behalf of the specific customer to whom the CLEC intends to provide service."[12]

The Minnesota Commission found that U S West's reading of the FCC rule was "unreasonably narrow," and if adopted, "would undermine the purposes of the Act." Id. at 10. The Commission concluded that the "currently combines" language in the FCC rule referred to the company's normal business practices and ordinary operation of its network. Id. Furthermore, the Commission flatly rejected U S West's position—also advanced here—stating that the FCC rule requiring U S West to combine UNE elements that are currently combined in its network does not refer "to the specific network configuration it uses for each of its two million customers." Id. Therefore, the Commission held that requiring U S West to combine all elements that are currently and ordinarily combined in its network, without regard to whether the specific customer possessed such elements at the time of a service request, "is also the only reading that makes sense in light of network realities and the competitive purposes of the Act." Id.

As noted above, § 251(c)(3) of the Act requires U S West to provide

[12] Order After Remand, In the Matter of the Federal Court Remand of Issues Proceeding from the Interconnection Agreements Between US WEST Communications, Inc. and AT&T, MCI, MFS and AT&T Wireless, P421/CI-99-786, p. 10, (March 14, 2000).

nondiscriminatory access to UNEs. Section 51.313 of the FCC rules implementing that requirement supports Sprint's position that U S West must make approved UNEs available to it that are currently combined without regard to whether a pre-existing customer had such UNEs at the time of the request. The regulations state:

> (a) The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers.
>
> (b) Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements… shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.[13]

Accordingly, the FCC rule makes clear, U S West must provide Sprint with access to UNEs under equal terms and conditions as it provides to itself. U S West, as a matter of law, cannot restrict its provision of UNE combinations to "pre-existing" combinations only for Sprint, when it does not impose such restrictions on itself. U S West's position on this issue consequently cannot be sustained.

As David Stahly stated in his direct testimony, Sprint's ability to compete would unquestionably be impaired under U S West's proposed restriction. While U S West has "easy access to its own network that enables it to provide itself unlimited forms of network element combinations, Sprint has no such ability because Sprint is reliant on U S West to provide it with nondiscriminatory

[13] 47 C.F.R. 51.313(a)-(b).

services."[14] It is clear that none of these options allow Sprint to compete with U S West on an equal playing field.

Accordingly, it is clear under the Supreme Court's reasoning and controlling Ninth Circuit decision that U S West cannot seek to destroy real competition by only combining the very same elements that exist for a given customer at the time of a local service request. Such a restriction would plainly prohibit a CLEC like Sprint from ever offering any different combinations of services other than what a customer presently had. Thus, even if U S West routinely combines call waiting and call forwarding with local service, if a customer wishing to switch service to Sprint desired to have such products on a second line, it could not be offered as a UNE combination. Mr. Brotherson's statements at the hearing that Sprint can always order any elements it desires merely sidesteps the issue. The unresolved issue in this proceeding is not whether Sprint can order any UNE element for resale, but whether U S West must make available combinations of elements that are currently combined in its network The relevant law holds that it must do so, and this Commission should not sanction its discriminatory restriction.

G. U S West Should Not Be Permitted To Recover A Windfall By Obtaining Non-Recurring Charges For Work It Does Not Perform.

Sprint should not have to pay nonrecurring charges ("NRCs") that represent costs that are not actually incurred. By seeking a NRC for each element of a UNE combination,

[14] (Stahly Direct Test. p.23 lines 20-23)

U S West seeks to recover twice for such elements, notwithstanding that in most cases it will not have to perform any work other than a simple record change. If Sprint is acquiring UNE combinations of elements that are already combined, there should be no costs associated with combining the elements.[15]

Although the U S West proposed language in the Issues Matrix indicates that U S West wishes to charge all the NRCs for each element in the combination, the U S West testimony is more equivocal. U S West claims that it is not proposing to charge for services it is not providing and that it will incur "nonrecurring costs for several one-time activities" in addition to the billing system changes that Sprint acknowledges. Thus, although U S West may not disagree with Sprint's position, it has presented Sprint with no proposed NRCs that justify why Sprint should have to pay for work that is not performed. Sprint requests a finding from this Commission that it merely be required to pay NRCs for legitimate work performed by U S West. The NRCs for network elements exist only because U S West must provide some labor to combine one network element with another. In contrast, when U S West is making available elements that are already combined in its network, it has already recovered the cost of combining those elements, and the only new charge must be the record change or administrative charge to switch those elements to Sprint. If Sprint requests, and U S West provides, an additional element as part of the combination under the Ninth Circuit law, then Sprint does not dispute that the NRC would be due for the new element only. However, permitting U S West to recover twice for the

[15] (Stahly Direct Test. p. 27).

same combination when no additional work is performed is discriminatory, anticompetitive and violates section 252 of the Act.

III. CONCLUSION

For the foregoing reasons, this Commission should determine that reciprocal compensation apply to ISP-bound traffic under the proposed interconnection agreement, or alternatively that it order an interim rate until such time as the rates are re-set in a generic cost proceeding. Further, the Commission should determine that U S West's limitation on UNE combinations restricting UNEs to only those combinations of elements that exist for a pre-existing customer at the time of the order is invalid. Sprint's proposed contract language should be adopted that requires U S West to make available combinations of UNE elements that are currently combined in its network without regard to whether they pre-exist for a given customer. Moreover, the agreement must permit subsequent amendment to add new combinations of elements that become "currently" combined. Finally, U S West should not be permitted to recover again, NRCs for UNE elements when work is not performed.

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