BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of Interconnection Rates, Terms, Condition and Related Arrangements Between	**DOCKET NO. UT-003006**
SPRINT COMMUNICATIONS COMPANY L.P. and U S WEST COMMUNICATIONS, INC.	**QWEST CORPORATION'S BRIEF IN SUPPORT OF PETITION FOR REVIEW AND REQUEST FOR APPROVAL OF INTERCONNECTION AGREEMENT WITH SPRINT COMMUNICATIONS COMPANY, L.P.**
Pursuant to 47 U.S.C. Section 252	

I.INTRODUCTION AND SUMMARY

U S WEST Communications, Inc. now known as Qwest Corporation ("Qwest") petitions the Commission to review and modify the Arbitrators' Report and Decision issued on July 5, 2000 (the "Arbitrators' Report") in the arbitration proceeding between Qwest and Sprint Communications Company, L.P. ("Sprint") under the Telecommunications Act of 1996 (the "Act").

This proceeding arises from an interconnection arbitration between Qwest and Sprint pursuant to section 252 of the Act. Because the parties had already participated in arbitration hearings in three other states on issues identical to those in dispute in Washington, they agreed to forego the evidentiary hearing scheduled in this docket and to have all disputed issues decided based on transcripts from the other arbitration hearings, written testimony, exhibits, and a stipulation of fact. See Arb. Rep. at ¶ 5. On July 5, 2000, Administrative Law Judges Lawrence J. Berg and Dennis J. Moss issued an Arbitrators' Report and Decision. Pursuant to paragraphs 71 of this report, Qwest submits this petition for review.

As set forth below, the Commission should reject the Arbitrators' Report mandating the payment of reciprocal compensation on traffic bound for Internet Service Providers ("ISPs"). In addition, the recent decision of the United States Court of Appeals for the Eighth Circuit requires that the Commission modify the Arbitrators' Report requiring Qwest to combine unbundled network elements ("UNEs") for Sprint.

First, the Commission should reverse the Arbitrators' conclusion that reciprocal compensation must be paid for traffic bound for ISPs. While Qwest acknowledges the body of prior Commission analysis upon which the Arbitrators based their conclusion, Qwest respectfully submits that new evidence and accumulated experience provide compelling reasons for departing from prior analysis and for halting the undesirable market effects of this compensation scheme. Based on substantially the same evidence, the Colorado Commission recently rejected Sprint's request for reciprocal compensation for ISP-bound traffic in the interconnection arbitration in that state between QWEST and Sprint, despite earlier rulings that had permitted a competitive local exchange carrier ("CLEC") to collect reciprocal compensation for ISP-bound traffic. See In the Matter of the Petition of Sprint Communications Co. for Arbitration Pursuant to U.S. Code § 252(B) of the Telecommunications Act of 1996, Docket No. 00B-011T, Decision No. C00-479,

Initial Commission Decision at 10-18 (Mailed Date May 5, 2000)("Colorado Decision"). In re-evaluating its earlier position, the Colorado Commission commented that in the earlier cases, "no one, including the Commission, appreciated the economic ramifications of ordering termination compensation for ISP traffic." Id. at 12.

Similarly, based on essentially the same evidence that Qwest presented here, the Arizona Commission recently determined as a result of its arbitration of a new interconnection agreement between Qwest and Sprint that no reciprocal compensation was to be paid for ISP-bound traffic. See 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. T-02432B-00-0026 and Docket No. T-015051B-00-0026, Decision No. 62650 (Docketed June 13, 2000) ("Arizona Decision"). In reaching this result, the Arizona Commission stated that it shared "U S WEST's concern that establishing reciprocal compensation for ISP bound traffic would result in ratepayers subsidizing the Internet." Id. at 7. As in Colorado and Arizona, the record Qwest has presented in this case provides new information about the perverse economic effects of requiring reciprocal compensation for ISP-bound traffic. The Commission should act on this new information now and not, as the Arbitrators conclude, adhere to prior analyses (based on prior records) pending a generic determination by the Commission or a preclusive federal rule or statute.

Second, the Commission should reject the Arbitrators' rulings relating to Qwest's obligation to combine UNEs for Sprint. The Arbitrators' conclusion that Qwest must combine network elements "in any technically feasible manner" when providing UNEs to Sprint, Arb. Rep. at ¶ 60, disregards the decision of the United States Court of Appeals for the Eighth Circuit vacating the Federal Communications Commission's ("FCC's") combination rules and erroneously relies upon two decisions of the Ninth Circuit which misinterpret the Eighth Circuit's ruling relating to the obligation to combine UNEs. As Qwest pointed out in its opening brief on this issue, under the Hobbs Act, the Eighth Circuit has exclusive jurisdiction to review regulations promulgated by the FCC under the Act. Moreover, on July 18, 2000, the Eighth Circuit issued an opinion *re-affirming* its earlier decision *vacating* the FCC's rules upon which the Arbitrators predicated their decision on the UNE combination issues. Accordingly, Qwest respectfully submits that the Arbitrators' Report on these issues must be set aside, and Qwest's proposed interconnection agreement language should be adopted. This language, fully in accord with the express language of Section 251(c)(3) of the Act and the Eighth Circuit's July 18, 2000 ruling, provides that Qwest will provide to Sprint UNE combinations that are already combined (i.e. pre-exist) at the time that Sprint places an order for them.

II.DISCUSSION

A. The Commission Should Reject the Arbitrators' Report Requiring Qwest to Pay Reciprocal Compensation for Internet-Bound Traffic.

Qwest respectfully submits that the Arbitrators erred in concluding that the parties' interconnection agreement should provide reciprocal compensation for ISP-bound traffic. While past Commission decisions have required that reciprocal compensation be paid for such traffic, those decisions were predicated upon rudimentary evidentiary records and were not informed by

meaningful marketplace experience with reciprocal compensation as the compensation mechanism for Internet-bound calls. Qwest respectfully submits that prior decisions, based on prior records, should not form the basis of the Commission's decision concerning whether reciprocal compensation is the appropriate compensation scheme for Internet-bound calls in this new interconnection agreement between Qwest and Sprint. As set forth below, there are compelling legal and policy reasons why this Commission should draw different conclusions from this new record than it has drawn in the past from very different records.

1. Internet Traffic Is Interstate and Is Not Subject To the Reciprocal Compensation Provisions of Section 251(b)(5).

The Arbitrators reason that the FCC's February 26, 1999 Declaratory Ruling on the issue of inter-carrier compensation for ISP-bound traffic ("ISP Order") does not preclude the Commission from ordering reciprocal compensation for ISP-bound traffic, Arb. Rep. at ¶¶ 31, 34, 36, 37, and, therefore, the Arbitrators place little weight on the interstate characteristics of this traffic in their Report. As Qwest demonstrated, however, this traffic is indisputably interstate.[1] Because this traffic is interstate, it should not be subject to reciprocal compensation under Section 251(b)(5) of the Act, which, by regulation, the FCC has limited to local telecommunications traffic only. 47 C.F.R. § 51.701(a). Thus, under the Act, because ISP traffic is primarily interstate in nature, the reciprocal compensation mechanism prescribed by the Act does not apply. In a recent decision, the Public Service Commission of South Carolina concluded that, because ISP traffic is interstate in nature, it cannot be subject to reciprocal compensation: "As ISP-bound traffic does not terminate at the ISP's server on the local network, this Commission finds that ISP-bound traffic is non-local traffic. Further, since Section 251 of the 1996 Act requires that reciprocal compensation be paid for local traffic, the Commission further finds that the 1996 Act imposes no obligation on parties to pay reciprocal compensation on ISP-bound traffic." In re Petition of DeltaCom Communications, Inc., for Arbitration with BellSouth Telecommunications, Inc., Docket No. 1999-259C, Order No. 1999-690, Order on Arbitration at 64 (October 4, 1999).

Like the South Carolina Commission, the Colorado Commission found that Internet calls are primarily interstate in nature and are not properly the subject of reciprocal compensation. Colorado Decision at 14-15. Moreover, the Colorado Commission's decision was based on the same evidence that Qwest presented here. Qwest respectfully submits that the same conclusion follows from the evidence Qwest presented here.

2. Strong Public Policy Reasons Counsel Against Imposing Reciprocal Compensation for Internet Traffic.

The Arbitrators acknowledge the policy arguments that Qwest presents against imposing reciprocal compensation obligations upon Qwest in this new interconnection agreement. The Arbitrators nevertheless conclude that it is "inappropriate to consider these arguments in detail or attempt to resolve them in the context of this arbitration proceeding." Arb. Rep. at ¶ 40. Instead

[1] Qwest submitted substantial testimony documenting the similarity of ISP traffic to other long distance traffic. Brotherson Direct at 8-9; Craig Direct at 10-14.

of addressing these arguments in the context in which they are presented, the Arbitrators suggest that "the generic proceedings in Docket UT-003013 may be the appropriate vehicle for that discussion and determination. " Id. at ¶ 46. In sum, the Arbitrators would entirely defer an analysis of the compelling record evidence presented by Qwest and the public policy implications of that record evidence. Qwest respectfully submits that the issue of whether Qwest should pay Sprint reciprocal compensation for Internet-bound traffic is squarely raised in this arbitration of this interconnection agreement and should be decided on the basis of the record these parties have submitted to the Commission. While the Arbitrators chose not to consider them, there are strong policy reasons why Internet calls should not be subject to reciprocal compensation.

First, application of reciprocal compensation to Internet traffic conflicts with the basic economic principle of cost causation. The party that initiates a call to an ISP does so as a customer of the ISP, not as a customer of the local exchange carrier. When a customer logs on to the Internet, that customer is doing so as a user of the ISP's services, not as a user of the ILEC's services. The Internet user pays a monthly fee to the ISP, and the ISP encourages that user to place the call by designing, marketing (e.g. distributing free Internet software that offer free usage), and selling its Internet services. Thus, the conduct of the ISP causes the end-user to generate costs, and the end-user generates those costs as a customer of the ISP, not as a customer of Qwest. The same principle holds true when a caller makes an interstate call using an IXC. The IXC markets its service to the customer and contracts with the caller regarding the terms and conditions governing that call. In the case of the long distance call, the customer is a user of the IXC's long distance service, and the IXC is the cost causer. Taylor Direct at 14-22.

Just as is the case in the IXC regime, the cost causer of ISP traffic should be responsible for collecting the charges from its customers necessary to cover the network costs that are incurred. In both situations, the subscriber that originates the call is making the call as a customer of the IXC or the ISP, not of the ILEC with which the call originates. Accordingly, the ISP compensation structure should mirror that of IXC exchange access. The ISP should pay the ILEC (and CLEC) that serve the ISP usage charges analogous to carrier access charges that the IXCs pay. In this way, the CLEC that switches Internet calls for the ISP is compensated, not from reciprocal compensation paid by the originating ILEC, but rather from the charges paid by the ISP. Id.

Second, subjecting ISP traffic to reciprocal compensation creates an implicit subsidy for ISP traffic and those Internet subscribers who generate that traffic. This problem is exacerbated by the fact that the FCC has already created an implicit subsidy for ISP traffic by exempting it from access charges.[2] In addition to being inconsistent with Congress' intent in the Act to eliminate such implicit subsidies, the implicit subsidy created by reciprocal compensation for Internet traffic gives rise to perverse economic incentives -- most strikingly reflected by the creation of sham LECs whose sole purpose is to deliver traffic to ISPs and generate reciprocal compensation payments. In fact, the significant profit margins that CLECs receive through reciprocal compensation has led to the creation of CLECs that specialize in Internet traffic and

[2] Because ISP traffic is not subject to access charges, Qwest loses substantial revenues due to Internet traffic in Washington. The amount of access revenues that Qwest is losing in Washington because of the access exemption is set forth in the confidential direct testimony of Larry Brotherson at pages 11-12.

provide little or no genuine local exchange service. In the worst case, some CLECs actually generate artificial Internet traffic for the specific purpose of reaping the significant financial benefits of reciprocal compensation. See, e.g., In the Matter of BellSouth Telecommunications, Inc., Docket No. P-561, Sub 10, Order Denying Reciprocal Compensation (NCUC March 31, 2000). This practice obviously undermines a fundamental purpose of the Act -- to develop vigorous competition for all services in the local exchange markets. Id.

It is precisely because of the perverse economic incentives created by reciprocal compensation that the North Carolina Utilities Commission recently ruled that BellSouth need not compensate a competitor for delivering traffic that was generated to raise reciprocal compensation revenue. Id. According to the Commission, reciprocal compensation in such circumstances "would be ultimately destructive to competition and represent a severe misallocation of resources . . . The destructiveness arises not only from the draining of resources of existing ILECs but from the incentive to prospective recipients of reciprocal compensation to construct artificial and inefficient networks resulting ultimately in endangerment to the public switched network." Id.

Internet traffic has dramatically increased the usage of Qwest's network. As established in the testimony of Qwest witness Joe Craig, this increased usage results in large part from the significantly longer hold times of Internet calls as compared to the average hold times of local voice calls. Craig Direct at 14-16. As Sprint's witness confirmed, the average hold time of a local voice call is in the range of three to five minutes, while the average hold time of an Internet call is nearly 30 minutes. AZ Tr. at 77-78. **[Confidential data begins]**

[Confidential data ends]

The increased usage caused by Internet calls has required Qwest to invest millions of dollars to increase the capacity of its network in Washington and elsewhere. Id. at 15. For example, in Washington alone, Qwest's capital expenditures for interoffice facilities, which consist primarily of trunking facilities, increased by nearly 100 percent from 1998 to 1999. In the same period, investment in Qwest's Washington network for switching increased by more than 35 percent. While these increases are not caused exclusively by Internet traffic, this type of traffic is a substantial cause of the need for more network capacity. Id. Moreover, without additional capital expenditures, increased usage of Qwest's network will result in call blocking. Id. at 18-19.

If, in addition to the capital expenditures resulting from Internet traffic, Qwest is required to pay reciprocal compensation for the delivery of that traffic, the result is nothing less than a large subsidy of the Internet and its users. Indeed, reciprocal compensation payments can rapidly consume the revenues that telephone usage otherwise produces. For example, in Washington, the Commission set the monthly rate for basic residential service at $12.50. If an Internet subscriber uses the Internet for just one hour a day, the reciprocal compensation payments (based on the end office rate of $.005416 from the MFS/U S WEST interconnection agreement) amount to about $9.75 per month, or 78 percent of the residential basic service rate in Washington. Brotherson Direct at 18. If an Internet subscriber uses the Internet for three hours a day, which is

not uncommon, the reciprocal compensation payments would total about $29.25, more than double the flat monthly rate for basic residential service. Id. As the Arizona Commission stated (in determining that the new interconnection agreement between Qwest and Sprint would not provide reciprocal compensation for ISP-bound traffic) it shared "U S WEST's concern that establishing reciprocal compensation for ISP-bound traffic would result in ratepayers subsidizing the Internet." Arizona Decision at 7.

Third, Sprint incorrectly suggests that it has no other means to recover the costs it incurs delivering Internet traffic to ISPs. However, there has been no showing from Sprint that it cannot recover the costs of delivering Internet calls to ISPs from the revenues it already can collect from ISPs. See AZ Tr. at 61-62. Further, as Sprint acknowledges, there is no legal restriction that prevents it from increasing the rates it charges for the Primary Rate Interconnection ("PRI") connections that it provides to the ISPs. Colorado Transcript ("CO Tr.") at 48. This fact alone refutes Sprint's suggestion that reciprocal compensation is the only means it has to recover its costs. Of course, Qwest also sells PRI connections to ISPs, and under the Washington local exchange tariff, an ISP can purchase PRIs from either Sprint or Qwest. QWEST also understands that it may ultimately lose some of this business to Sprint through competition. However, Qwest should not be required, in addition to losing its PRI business, to pay its competitor for accepting the interstate traffic for which the competitor has chosen to compete.

Fourth, as discussed previously, the application of reciprocal compensation to Internet traffic raises significant issues of distributive justice. Under Sprint's proposed contract language, the carrier that does not directly serve the ISP (here, Qwest) ultimately bears the costs associated with the use of two local exchange networks -- its own network and Sprint's network. Qwest must recover these costs from its customers, the ratepayers, including those who do not use the Internet. This will result in a subsidy that will be paid, in some cases, by non-Internet ratepayers who can least afford it.

Fifth, while Sprint claims that it will be placed at a competitive disadvantage if it does not receive reciprocal compensation for Internet traffic, it wholly ignores the substantial negative effects to Qwest resulting from the proposed compensation scheme and the ESP exemption. These multiple effects include: (1) paying millions of dollars annually in reciprocal compensation to Sprint and, potentially, other CLECs; (2) being unable to collect tens of millions of dollars annually in access charges from ISPs; (3) losing the revenues that are obtained currently by selling primary rate interconnection facilities ("PRIs") to Sprint and other carriers; and (4) having to invest substantial amounts of capital in the Washington network to accommodate traffic demands caused by the ISPs Sprint has chosen to serve.[3]

Sprint would contend that these negative effects are offset by the fact that under its proposal, Qwest would be entitled to receive reciprocal compensation from Sprint and other CLECs. However, that is an empty response that does not address the significant disparity that would result from Spint's proposal. As the testimony of Larry Brotherson shows, Qwest's large customer base ensures a steady flow of traffic from Qwest subscribers to the ISPs that Sprint will serve. By contrast, Sprint currently has no local customers in Washington and, hence, no

[3] In the proprietary testimony of Larry Brotherson, Qwest quantifies some of these amounts. See, e.g., Brotherson Direct at 10, 16.

customers to generate reciprocal compensation for Qwest by placing Internet calls to ISPs that Qwest serves. See, e.g., Brotherson Direct at 16-17; AZ Tr. at 94.

The absence of any significant offset resulting from reciprocal compensation that Qwest may receive for Internet traffic is demonstrated further by the fact that in Washington in January and February 2000, the number of minutes of use going to CLECs from Qwest's customers was 1.5 billion, while the minutes of use going from CLEC end users to Qwest was only 109 million. Brotherson Direct at 14. In other words, 93 percent of the traffic exchanged between Qwest and CLECs originated from a Qwest customer and was delivered to a CLEC customer. Further, more than 91 percent of the more than 1.5 billion minutes delivered to CLECs were ISP-bound minutes. Id. Adding further context to these data is the fact that of the 1.5 billion minutes of Internet calls, only 700 telephone numbers are associated with these minutes. These 700 telephone numbers will receive more than 13 million minutes annually; each telephone number will receive more than 36,500 minutes of Internet calls per day. Id.

These data also demonstrate the dramatic financial effects of requiring reciprocal compensation for Internet traffic. Extrapolating the number of Internet minutes that went to CLECs in January and February out to an annual number, without assuming any growth in calls placed to ISPs, yields 8.429 billion ISP-bound minutes originated from Qwest customers. While the Commission has not established a final end office rate, using the rate of $0.005416 from the MFS/U S WEST interconnection agreement, the projected compensation to CLECs could exceed $45 million for this year alone. This massive transfer of reciprocal compensation dollars will inevitably affect Washington ratepayers. Brotherson Rebuttal at 3-4.

For those compelling policy reasons, the Commission should reverse the Arbitrators' ruling and decide on the record presented here that the parties' new interconnection agreement will not provide reciprocal compensation for Internet-bound traffic.

B. The Eighth Circuit's Recent Re-Affirmation of Its Vacatur of the FCC's Combination Rules Requires Modification of the Arbitrators' Report on Issue Nos. 2 and 3.

The parties' dispute over UNE combinations centers upon whether there is any duty on Qwest's part to combine UNEs for Sprint when such UNEs are not "currently combined" at the time Sprint requests them from Qwest. Qwest proposes to define the term "currently combined" to describe UNEs that correspond to finished services that are being offered by Qwest to a particular customer at the time Sprint orders such UNEs for that same customer at that same location. Qwest will provide such UNE's in their "currently combined" form to Sprint upon request from Sprint. Sprint, on the other hand, sought to impose on Qwest an obligation to combine UNEs "in any manner," provided the UNE combination is technically feasible and would not impair the ability of other carriers to obtain access to UNEs or to interconnect with Qwest. Agreeing with Sprint's position, the Arbitrators concluded that the parties' interconnection agreement should incorporate language "that is consistent with FCC Rule 315 in its entirety." Arb. Rep. at ¶ 62.

At the time that the Arbitrators issued their Report and Decision, the Eighth Circuit had,

on direct Hobbs Act[4] review of FCC Rules 315(c)-(f),[5] ruled that a duty to combine unbilled network elements cannot be squared with the plain meaning of the Act. Nevertheless, the Arbitrators rejected Qwest's argument that the expansive duty to combine sought by Sprint is contrary to the Eighth Circuit's authoritative interpretation of the Act. In so ruling, the Arbitrators relied upon the reasoning of the Ninth Circuit in MCI Telecomms. Corp. v. U S WEST Communications, Inc, 204 F.3d 1262, 1268 (9th Cir. 2000) and U S WEST Communications v. MFS Intelenet, 193 F.3d 1112, 1121 (9th Cir. 1999). See Arb. Rep. at ¶¶ 52-61. In those cases, the Ninth Circuit reasoned that the Supreme Court's reinstatement of FCC Rule 315(b),[6] which the Eighth Circuit had also vacated, meant that the Eighth Circuit's rationale for vacating Rules 315(c)-(f) was erroneous.

On July 18, 2000, 13 days after the Arbitrators issued their Report and Decision, the Eighth Circuit, on remand from the Supreme Court, issued its decision. See Iowa Utils. Bd. v. FCC, No. 96-3321, 2000 U.S. App. LEXIS 17234 (8th Cir. July 18, 2000). A copy of this decision is attached hereto. In its decision on remand, the Eighth Circuit reviewed its earlier decision to vacate FCC Rules 315(c)-(f), noted that the Supreme Court had reversed its prior vacatur of Rule 315(b), and re-affirmed its decision to vacate Rules 315(c)-(f) as inconsistent with the Act. See id. at 22-25. In so holding, the Eighth Circuit expressly rejected the Ninth Circuit's decisions MFS and MCI:

> Nor do we agree with the Ninth Circuit that the Supreme Court's opinion undermined our rationale for invalidating the additional combination rules. See U S WEST Communications, v. MFS Intelenet, Inc., 193 F.3d 1112, 1121 (9th Cir. 1999), cert. denied, 68 U.S.L.W. 3669 (U.S. June 29, 2000) (No. 99-1641)[7]. The Ninth Circuit misinterpreted our decision to vacate subsections (c)-(f). We did not, as the Ninth Circuit suggests, employ the same rationale for invalidating subsections (c)-(f) as we did in invalidating subsection (b). See MCI Telecomms. V. U S WEST, 204 F.3d 1262, 1268 (9th Cir. 2000) ("The Eighth Circuit invalidated Rules 315(c)-(f) using the same rationale it employed to invalidate Rule 315(b). That is, the Eighth Circuit concluded that requiring combinations was inconsistent with the meaning of the Act because the Act calls for 'unbundled' access.").

Id. at 23-24.

The Eighth Circuit explained its strongly-worded rejection of the Ninth Circuit's reasoning, stating that "the issue we addressed in subsections (c)-(f) was who shall be required to do the combining, not whether the Act prohibited the combination of network elements." Id. at 24 (citing Iowa Utils. Bd., 120 F.3d 120 F.3d 753, 813 (8th Cir. 1997), aff'd in part, rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999)) (emphasis in original). Thus,

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[4] 28 U.S.C. § 2342.

[5] 47 C.F.R. § 315(c)-(f).

[6] 47 C.F.R. § 315(b).

[7] In light of the Eighth Circuit's decision, Qwest has filed a petition for reconsideration of the denial of certiorari.

the Eighth Circuit reiterated what it had said in its prior opinion: "'[T]he Act does not require the incumbent LECs to do all the work.'" Id. at 24-25 (quoting Iowa Utils. Bd., 120 F.3d at 813) (emphasis in original). Accordingly, any duty to combine unbundled network elements imposed upon incumbent local exchange carriers ("ILECs") – whether purportedly under authority of federal or State law – is contrary to the Act, as authoritatively declared by the Eighth Circuit on direct Hobbs Act review.

As Qwest explained in detail its brief submitted to the Arbitrators, incorporated herein by this reference, under the Hobbs Act, the court of appeals reviewing an FCC order "has exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." 28 U.S.C. § 2349(a) (emphasis added). If the court of appeals reverses the FCC order, in whole or in part, "it shall remand the case to the [FCC] to carry out the judgment of the court and it shall be the duty of the [FCC] . . . to forthwith give effect thereto." 47 U.S.C. § 402(h).

The Hobbs Act ensures the uniformity of FCC rules and regulations by entrusting a single court of appeals with the exclusive power to review an agency order. Litigants may not "evade these provisions" by "rais[ing] the same issues" in a different court, where the effect would be to review the same agency action subject to the provisions of the Hobbs Act. See FCC v. ITT World Communications, 466 U.S. 463, 468 (1984). If a case requires a court to "determine the validity of" an FCC order or rule, then the court lacks jurisdiction to decide the issue unless it is a proper court under the Hobbs Act. Wilson v. Belo Corp., 87 F.3d 393, 397 (9th Cir. 1996) (quoting 47 U.S.C. § 2342).

Accordingly, under the Hobbs Act, the only court that can render a judgment on the validity of rules 315(c)-(f) – barring further review by the Supreme Court – is the Eighth Circuit, the court of appeals that reviewed the FCC order promulgating those rules and is the court most familiar with the Local Competition Order, the administrative and judicial record, and the history of the prior proceedings. The Ninth Circuit's decisions in MFS and MCI improperly intrude on the exclusive statutory jurisdiction of the Eighth Circuit to determine the validity of the FCC's rules 315(c)-(f). As set forth above, the Eighth Circuit has, upon remand from the Supreme Court, re-affirmed its original ruling that those rules violate the Act and are, therefore, vacated on a national basis pursuant to the Hobbs Act.

Thus, the Arbitrators and this Commission can not, consistent with the Act, impose upon Qwest a duty to combine elements as described in the Arbitrators' Report under either federal or State law. See 47 U.S.C. § 261(b) ("Nothing in this part shall be construed to prohibit any State commission from . . . prescribing regulations after [the date of enactment of the Act], in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.") (emphasis added). To permit otherwise would run afoul of the intent of Congress and the Supreme Court's declaration that "[w]ith regard to matters addressed by the 1996 Act," Congress "unquestionably has" "taken the regulation of local telecommunications competition away from States." AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 n.6 (1999).

In sum, because the Eighth Circuit has now removed any ambiguity that may have influenced the Arbitrators' conclusions regarding the continuing validity of rules 315(c) - (f), it is incumbent upon the Commission to conform the UNE obligations contained in this interconnection agreement to the governing law. The UNE obligations that the Arbitrators would

impose, like vacated rules 315(c) - (f) upon which they are based, violate the governing law and, accordingly, should not be adopted here. By contrast, the UNE contract language proposed by Qwest is consistent with the Act as interpreted by the Eighth Circuit.

C. The Commission Should Approve The Remaining Sections Of The Interconnection Agreement.

In accordance with the Arbitrators' Report and Decision, Qwest and Sprint are filing a complete copy of the signed interconnection agreement, incorporating all negotiated terms and all terms intended to fully implement the arbitrated decisions. For the reasons stated above, however, the Commission should not approve the sections of the agreement that incorporate the Arbitrators' rulings regarding reciprocal compensation and the obligation to combine UNEs. Instead, the Commission should order that ISP-bound traffic is not subject to reciprocal compensation and the Commission should order that the agreement incorporate Qwest's proposed language relating to UNE combinations, language that reflects the July 20, 2000 decision of the Eighth Circuit. With these changes, the Commission should approve the agreement.

III.CONCLUSION

For the foregoing reasons, the Commission should reverse the Arbitrators' Report on the issues set forth above.

Dated: August 14, 2000.

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