BELLSOUTH

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December 15, 2000

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition to Convene a Contested Case Proceeding to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements*
Docket No. 97-01262

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Motion for Clarification. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

Re: ***Petition to Convene a Contested Case Proceeding to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements***
Docket No. 97-01262

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR CLARIFICATION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests clarification as to one aspect of the *Second Interim Order* issued in this docket on November 22, 2000. In particular, BellSouth seeks clarification as to a part of the opinion that could be read to require BellSouth to combine network elements for the benefit of CLECs. If the order is read that way, it would violate basic due process principles by deciding an issue that was never presented in this docket; it would conflict with this Authority's own precedent; and it would be flatly contrary to federal law, as established by the United States Court of Appeals for the Eighth Circuit and multiple other courts. For all these reasons, BellSouth asks the Authority to clarify that it did not intend to create a rule that BellSouth must combine network elements.[1]

[1] The issue presented here is more than hypothetical. On December 6, 2000, MCI WorldCom filed testimony from Don Price in its arbitration with BellSouth (Docket No. 00-00309) asserting (at pages 13-14) that the *Second Interim Order* established a requirement that BellSouth combine elements for new entrants.

BACKGROUND

As the Authority has stated, the "purpose of this docket is to establish *prices* for interconnection and unbundled network elements (UNEs)." *Second Interim Order* at 1 (emphasis added). Pursuant to the Authority's *First Interim Order* and its *Order on Reconsideration* in this docket, BellSouth filed revised cost studies with the Authority. The Authority then requested comments on whether those revised cost studies properly reflected the adjustments required by the Authority's orders. *See Second Interim Order* at 4.

In response to that request, AT&T and MCI WorldCom filed comments concerning four alleged deficiencies in BellSouth's cost studies. None of those supposed deficiencies involved an obligation to combine network elements for the benefit of CLECs. Rather, consistent with the nature of this proceeding, AT&T and MCI WorldCom raised four discrete *pricing* issues. *See id.* (summarizing AT&T's and MCI WorldCom's four pricing claims). Since no party raised an argument at this stage of the proceeding that BellSouth must combine elements for CLECs, BellSouth naturally did not address such a claim in its filings. BellSouth simply had no notice that such an issue was being considered at the time, and thus it did not seek to explain that, among other things, a requirement to combine network elements would be directly contrary to federal law and to the Authority's own decision in the Nextlink Arbitration. *See* First Order of Arbitration Award, *Petition of Nextlink Tennessee, L.L.C. for Arbitration of Interconnection with BellSouth Telecommunications, Inc.*, Docket No. 98-00123, at 14 (May 18, 1999) ("incumbent LECs are not required to combine unbundled network elements for CLECs").

Despite these facts, the *Second Interim Order* could be read to require BellSouth to combine network elements for the benefit of CLECs. In text, the order states only that "BellSouth should adjust the nonrecurring cost of UNE combinations not already combined in its network to reflect any efficiencies of providing these combinations." *Second Interim Order* at 10. But then, in a terse and unexplained footnote, the order suggests that "BellSouth must provide the combination throughout its network as long as it provides this same combination to itself anywhere in its network." *Id.* at 10 n.17.

DISCUSSION

THE AUTHORITY SHOULD CLARIFY THAT THE *SECOND INTERIM ORDER* DOES NOT REQUIRE BELLSOUTH TO COMBINE NETWORK ELEMENT COMBINATIONS FOR CLECS

A. Requiring BellSouth To Combine Network Elements for Competitors Would Violate Due Process, Federal Statutory Law, and this Authority's Precedents.

Reading the *Second Interim Order* as establishing that BellSouth must combine network elements for the benefit of CLECs raises a series of significant legal difficulties. To interpret the order in that manner, one would have to assume that, in violation of basic due process principles, this Authority had decided, without notice, to resolve an issue that was not being presented by any party to this proceeding. Moreover, one would have to conclude that the Authority had turned its back on both clear federal law and its own precedent, without even mentioning either of those sources of law.

First, BellSouth had no notice that the Authority was considering the issue of combining network elements in the context of this pricing docket. As BellSouth explained above, the relevant notice from the Authority did not request comment on that question, and none of the comments filed by the CLEC parties in response to the notice raised the issue. BellSouth thus had no reason to suspect that this question was being litigated in this docket at this time.[2]

It is a bedrock principle of law that due process requires such notice: "The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). If the Authority purported to decide this important substantive issue without any such notice, it would have breached that principle. Due process similarly mandates that an agency adhere to its own procedures. "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Because it is inconsistent with this Authority's practice and procedures to decide a substantive issue without ample notice to the affected parties, if the *Second Interim Order* is understood to

[2] BellSouth did discuss the general status of the combinations issue in the wake of the Supreme Court's *Iowa Utilities* decision in a reply memorandum filed in this docket on March 1, 1999. That document was filed before the Authority's *Nextlink* decision, however. After that decision, BellSouth had no reason to

mandate that BellSouth combine elements, the Authority would have run afoul of this rule as well.

Moreover, federal law clearly prevents this Authority from imposing such an obligation on BellSouth. In *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000), *petitions for cert. pending*, Nos. 00-511, *et al.*, the Eighth Circuit, acting on remand from the Supreme Court, reiterated its prior view (stated in *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997)) that a rule that "requires an ILEC to perform the functions necessary to combine unbundled network elements" violates the federal Telecommunications Act of 1996 (the "1996 Act"). 219 F.3d at 758. The court of appeals explained that the Supreme Court's decision reinstating the FCC rule that prevents incumbents from *separating* elements did not affect the Eighth Circuit's decision that 47 U.S.C. § 251(c)(3) does not permit a rule requiring an incumbent to *combine* elements. *See* 219 F.3d at 759 ("It is not the duty of the ILECs to 'perform the functions necessary to combine unbundled network elements in any manner' . . . . We reiterate what we said in our prior opinion: '[T]he Act does not require the incumbent LECs to do *all* the work.'") (quoting 47 C.F.R. § 51.315(c) and *Iowa Utils. Bd.*, 120 F.3d at 813). AT&T and MCI WorldCom were parties to the Eighth Circuit's decision, as was this Authority, and they litigated this same issue there; they are bound by the result in that proceeding. *See, e.g.*, *Jack Faucett Assocs., Inc. v. AT&T Co.*, 744 F.2d 118, 124 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).

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suspect that this issue was still open for consideration, much less that it was being

In any event, the Eighth Circuit's determination is the law of the land. As one federal court recently explained in rejecting a state commission's conclusion that an incumbent could be required to combine network elements, "*Iowa Utilities II makes it clear that the FCC cannot insert a bundling requirement consistent with the terms of the [1996 Act]. For the same reasons the state is also precluded from imposing such a requirement.* Accordingly, the Court finds that the [Michigan Public Service Commission's] order that Verizon provide bundling at the behest of competitive LECs conflicts with and is preempted by the [1996 Act]." *Verizon North, Inc. v. Strand*, No. 5:98-CV-38, slip op. at 14 (W.D. Mich. Dec. 6, 2000) (emphasis added) (attached as Exh. A). Other courts reached the same result even before the Eighth Circuit reiterated its holding on this point on remand from the Supreme Court. *See, e.g., U S West Communications, Inc. v. Garvey*, No. 97-913, slip op. at 18-19 (D. Minn. Mar. 30, 1999) (attached as Exh. B); *U S West Communications, Inc. v. Thoms*, No. 4-97-CV-70082, slip op. at 10-11 (S.D. Iowa Apr. 19, 1999) (attached as Exh. C).[3]

Even before the Eighth Circuit's most recent decision, this Authority also determined that it would be unlawful to mandate that incumbents combine

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considered in this docket.

[3] The Ninth Circuit has held that the Supreme Court's opinion undermined the Eighth Circuit's prior prohibition on making incumbents combine network elements that are not already combined. *See, e.g., US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000); *MCI Telecomms. Corp. v. US West Communications*, 204 F.3d 1262 (9th Cir.), *cert. denied*, 121 U.S. 504 (2000). As the Eighth Circuit has explained, however, the Ninth Circuit has simply "misinterpreted" the basis for the Eighth Circuit's rulings. *Iowa Utils. Bd.*, 219 F.3d at 759.

elements for new entrants. As discussed above, in the Nextlink Arbitration, the Authority held in no uncertain terms that under the original Eighth Circuit decision – the one that was reaffirmed this year – *"incumbent LECs are not required to combine unbundled network elements for CLECs . . . .* Since BellSouth is not required to provide combinations (such as combining a loop and transport), any charges assessed by BellSouth if it *voluntarily* agrees to do so should be negotiated between the parties outside the parameters of this proceeding." *Petition of Nextlink Tennessee, L.L.C. for Arbitration of Interconnection with BellSouth Telecommunications, Inc.*, at 14 (emphases added). Moreover, consistent with the *Nextlink* Order, the Authority's November 3, 1999 Order stated that ILECs have no duty to combine unbundled network elements for CLECs. ["<u>In light of the Eighth Circuit Court decision that ILECs did not have to combine elements</u>, (footnote omitted), the Authority concluded that existing customers served by IDLC must continue to receive the same level of service and performance when migrating to a competitive carrier." (*emphasis added*)] *See, Order Re Petitions for Reconsideration and Clarification of Interim Order on Phase I, Docket No. 97-01262.* The only other thing that has happened since this Authority issued its *Nextlink* decision is the Eighth Circuit's reaffirmation that such obligations are unlawful.

The result mandated by these decisions is not altered by the happenstance that a requested combination may exist somewhere else in BellSouth's network. The legal rule is that BellSouth cannot *separate* currently combined elements; it has no duty to combine them, whether or not the same combination exists elsewhere in BellSouth's network. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 393, 395 (1999) (reinstating FCC Rule 315(b) because that rule "forbids an incumbent to separate *already-combined* network elements before leasing them to a competitor"; Rule 315(b) is lawful as a ban on *"disconnecting previously connected elements*, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants") (emphases added; internal quotation omitted). That conclusion is strongly bolstered by the long-established principle that BellSouth need not provide "superior quality" access to its network. As the Eighth Circuit has again explained, "[the 1996 Act] requires unbundled access only to an incumbent LEC's *existing* network – not to a yet unbuilt superior one." *Iowa Utils. Bd.*, 120 F.3d at 813. For all these reasons, the happenstance that a combination may exist somewhere in BellSouth's network is simply irrelevant to the legal issue presented here.

B. The *Second Interim Order* Is Susceptible to an Interpretation that Avoids these Intractable Legal Problems.

While it is possible to read the *Second Interim Order* to create these issues, that conclusion is hardly mandated by the terms of the order. As noted above, this is a pricing proceeding, and it is reasonable enough to read the order as requiring that BellSouth provide cost studies so that the Authority may set prices for such combinations *if* the law changes on this point, as it might if the Supreme Court grants certiorari on the new combinations issue (as it has been asked to do) and reverses the Eighth Circuit. The discussion of this issue in the text of the *Second Interim Order* supports that reading completely because it talks solely of BellSouth's obligation to "adjust the nonrecurring cost of UNE combinations not already combined in its network." *Second Interim Order* at 10. The Authority should make clear that the potentially broader language of footnote 17 should not be read to go far beyond that textual statement and impose an obligation that BellSouth had no notice that the Authority was even considering and that is in direct conflict with federal law and this Authority's own precedents.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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RONALD ... CLERK
U.S. DISTRICT COURT
WESTERN DISTRICT MICH.

VERIZON NORTH, INCORPORATED,

Plaintiff,

File No. 5:98-CV-38

v.

HON. ROBERT HOLMES BELL

JOHN G. STRAND, Chairman; JOHN C. SHEA, Commissioner; and DAVID A. SVANDA, Commissioner (In Their Official Capacities as Commissioners of the Michigan Public Service Commission),

Defendants.

ORDER AND DECLARATORY JUDGMENT

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiff Verizon North Incorporated's motion for summary judgment (Docket # 35) is **GRANTED IN PART and DENIED IN PART**.

IT IS FURTHER ORDERED that a **DECLARATORY JUDGMENT** is entered in favor of Plaintiff Verizon, declaring that the tariffing and bundling requirements of the MPSC's February 25, 1998, order are in conflict with and are preempted by the Federal Telecommunications Act.

Exhibit A

IT IS FURTHER ORDERED that Verizon's request for a declaration that the tariffing and bundling requirements of the MPSC's February 25, 1998, order is actionable under 42 U.S.C. § 1983 is **DENIED**.

IT IS FURTHER ORDERED that Verizon's request for injunctive relief is **DENIED**.

Date: December 5, 2000

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

Certified as a True Copy
Ronald C. Weston, Sr. Clerk
By ________
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date 12/6/00

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VERIZON NORTH, INCORPORATED,

Plaintiff,

File No. 5:98-CV-38

v.

HON. ROBERT HOLMES BELL

JOHN G. STRAND, Chairman; JOHN C. SHEA. Commissioner; and DAVID A. SVANDA, Commissioner (In Their Official Capacities as Commissioners of the Michigan Public Service Commission),

Defendants.

______________________________/

OPINION

Verizon North Incorporated, formerly known as GTE North Incorporated ("Verizon") is an incumbent local telecommunications carrier in Michigan. In this action Verizon has sued John G. Strand, John C. Shea,[1] and David A. Svanda, Commissioners of the Michigan Public Service Commission ("MPSC"), seeking declaratory and injunctive relief from the February 25, 1998, order of the MPSC. Verizon contests two provisions of the order: the provision that Verizon offer network elements and services for sale through published tariffs, and the provision that Verizon combine unbundled network elements for its competitors at

[1]Although Plaintiff advises in its motion for summary judgment that John C. Shea has been replaced as commissioner by Robert B. Nelson, the Court has not received a motion or stipulation for the substitution of defendants.

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their behest. Verizon brings this action under the Supremacy Clause, arguing that these provisions are in conflict with and are preempted by the Federal Telecommunications Act of 1996 (the "FTA" or the "Act"), Pub. L. No. 104-104, 56 Stat. 110 (codified in various sections of 47 U.S.C.). Verizon also brings a separate and independent claim that enforcement of the order infringes its statutory rights in violation of 42 U.S.C. § 1983. This matter is currently before the Court on Verizon's affirmative motion for summary judgment.[2]

I.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In evaluating a motion for summary judgment the Court must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the moving party carries its burden of showing there is an absence of evidence to support a claim then the non-moving party must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient to create a genuine

[2]This Court previously dismissed this case for lack of jurisdiction. On appeal the Sixth Circuit Court of Appeals reversed that ruling, upheld this Court's jurisdiction under 28 U.S.C. § 1331, and remanded the case for determination on the merits. *GTE North, Inc. v. Strand*, 209 F.3d 909, 923 (6th Cir. 2000).

issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The proper inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

II.

Because the Court is limited by Article III, § 2 of the United States Constitution to the adjudication of actual cases or controversies, the Court's first consideration is whether this case is ripe for review.[3] *Dixie Fuel Co. v. Commissioner of Social Security*, 171 F.3d 1052, 1057 (6th Cir. 1999). The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agricultural Products Co.* 473 U.S. 568, 580 (1985) (quoted in *National Rifle Ass'n of America v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997)). The ripeness inquiry requires the court to consider "whether the issues are fit for judicial decision as well as the hardship to the challenging party resulting from potential delay in obtaining judicial decision." *Dixie Fuel*, 171 F.3d at 1058 (citing *Thomas*, 473 U.S. at 581). *See also Kardules v. City of Columbus*, 95 F.3d 1335, 1344 (6th Cir. 1996). A case is "fit for judicial decision" where the issues raised are purely legal ones and where the agency rule or action giving rise to the controversy is final and not contingent upon future uncertainties or

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[3]The Sixth Circuit remanded this case for determination on the merits "if and when the district court finds [Verizon's] claims ripe for review." 209 F.3d at 923.

intervening agency action. *GTE North, Inc. v. Strand*, 209 F.3d 909, 923 n.7 (6th Cir. 2000) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)).

Defendants contend this case is not ripe for decision because Verizon does not have on file any enforceable tariffs as directed by Case No. U-11281.

Defendants' assertion that there are no enforceable tariffs on file in Case No. U-11281, while technically correct, is factually irrelevant, as the lack of a tariff in Case No. U-11281 does not mean that there are no enforceable tariffs on file. Pursuant to the February 25, 1998, order in Case No. U-11281, Verizon was required to file a tariff. The tariffs Verizon filed under U-11281 were rejected by the MPSC. The MPSC has not required Verizon to submit corrected tariffs in Case No. U-11281. As Defendants themselves noted, the MPSC has "moved past" Case No. U-11281 and has conducted new cost proceedings in Case No. U-11832. The tariffs filed under the new cost proceedings implement the very same tariff filing requirement entered in Case No. U-11281, but are based upon updated cost studies. Verizon filed tariffs in Case No. U-11832 on August 2, 2000. Accordingly, there are enforceable tariffs on file that would currently enable a competitor to actually request access at the tariff rate.

The relevant inquiry in this case is "whether the ripeness inquiry demands that one of [Verizon's] competitors actually request access at the tariff rate before deciding the case, or whether the order itself gives rise to a justiciable claim because it imposes an immediate obligation on [Verizon] to sell network elements at predetermined rates." *GTE North*. 209 F.3d at 923 n.7.

Because Verizon is challenging the MPSC's authority under the FTA to require the filing of a tariff, this suit raises a purely legal issue. *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 691 (D.C. Cir. 1996). The legal question presented is ripe for review because the filing of a tariff has "immediate effects on legal rights relating directly" to Verizon's primary conduct. *Id.* at 690. This is so because once filed, a tariff binds the filing party "with the force of law." *Id.* Thus, the order itself gives rise to a justiciable claim because it imposes an immediate obligation on Verizon to sell network elements at predetermined rates. The legal issue raised in this case would not be clarified by withholding review until a competitor actually requested access at the tariff rate and Verizon came into court requesting a temporary restraining order.

This case does not present an abstract disagreement. Because the Defendant's authority to order the tariff requirement presents a purely legal question and because the February 25, 1998, order imposes an immediate obligation to file a tariff that has a binding effect on Verizon, this Court is satisfied that this matter is ripe for review.

III.

The MPSC's February 25 order requires Verizon to submit tariffs setting forth "the rates, terms and conditions for [Verizon] to provide access to unbundled network elements and interconnection services." MPSC 2/25/98 Order at 9-10. Verizon seeks a declaration that the tariffing requirement violates the FTA because it by-passes the party-specific negotiation and arbitration process crafted by Congress as the means for implementing the duties imposed by the Act. Verizon contends that pursuant to the Supremacy Clause, the State law must yield to contrary federal law.

Congress passed the Telecommunications Act of 1996 , Pub.L. No. 104-104, 56 Stat. 110 (codified in 47 U.S.C.), in an effort to promote competition in local telephone markets by ending regulated monopolies previously enjoyed by incumbent local exchange carriers ("LECs") such as Verizon. *GTE North*, 209 F.3d at 912. Under the FTA incumbent LECs are required to resell their telecommunications systems. 47 U.S.C. § 251(b)(1). This obligation is accomplished through the negotiation of interconnection agreements. If there is a request of interconnection, services, or network elements, "an incumbent local exchange carrier may negotiate and enter into a binding agreement." 47 U.S.C. § 252(a)(1). The incumbent LEC and the requesting telecommunications carrier have the duty to negotiate in good faith. 47 U.S.C. § 251(c)(1). If the parties are unable to negotiate an agreement, either party can petition for binding arbitration before the state commission under a set timetable. 47 U.S.C. § 252(b). The FTA sets the standards to be applied by the state commissions during the compulsory arbitration proceedings. 47 U.S.C. § 252(c) & (d).

Defendants dispute Verizon's contention that negotiation and arbitration are required to satisfy the FTA. Unless the State law is inconsistent with the FTA or FCC regulations, states are free to impose their own requirements that foster competition. State commissions can impose their own rules "in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of [the FTA]." 47 U.S.C. § 261. State commissions can also impose additional requirements "that are necessary to further competition in the provisions of telephone exchange service or exchange access, so long as the State's requirements are not inconsistent with" the FTA or the FCC's regulations to implement the FTA. 47 U.S.C. § 261(b) & (c). The FTA provides that in prescribing and enforcing regulations to implement the FTA, the FCC shall not preclude enforcement of any regulation, order, or policy of a State commission establishing access and interconnection obligations, so long as the regulation, order or policy is consistent with the requirements of § 251, and does not substantially prevent implementation of the requirements and purposes of the FTA. 47 U.S.C. § 251(d)(3). The MPSC contends that its tariffing order is fully consistent with its authority as established by the Michigan Telecommunications Act and Michigan case law, that it fosters competition, and that it is not inconsistent with the FTA.

The issue for this Court's determination is whether the tariff requirement imposed by the February 25 order is merely an additional requirement imposed by the state that is necessary to further competition, or whether it is inconsistent with and preempted by the FTA.

The only court that has considered this issue ruled that a state public utility commission's tariff requirement conflicted with and was preempted by the Act to the extent the incumbent LEC was required to sell unbundled elements or finished services to a competitor that had not first entered into an interconnection agreement with the incumbent LEC pursuant to the Act. *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp.2d 1157 (D. Ore. 1999).

In *MCI v. GTE* the court observed that although the FTA provides for the resale of network elements through interconnection agreements, the incumbent LEC is not entitled to separately negotiate different price terms with each competitive LEC. *Id.* at 1177. The state commission is not precluded from setting unbundled element prices and wholesale discounts for a particular incumbent LEC, and using those same prices and rates in all interconnection agreements involving that incumbent LEC. *Id.* The court noted that the FTA places on the state commission the burden of determining a just and reasonable rate for the interconnection of facilities and equipment and the wholesale rates of telecommunications services. 47 U.S.C. § 252(d), and requires the incumbent LEC to make available any interconnection, service or network element provided under an approved agreement to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. 47 U.S.C. § 252(i). The incumbent LEC also has a duty not to impose discriminatory conditions or limitations on the resale of its telecommunications services. 47 U.S.C. § 251(b) & (c).

Nevertheless, despite the state commission's duty to set rates under the FTA, the court found the tariff requirement to conflict with the federal law.

> "The record reflects that the PUC [Public Utilities Commission] has not merely adopted a short-form interconnection agreement, along with a list of resale and unbundled element prices that will be incorporated in those agreements. Rather, the PUC has dispensed with the interconnection agreement altogether and is allowing [competitive LECs] to order services "off the rack" without an interconnection agreement."

41 F. Supp.2d at 1178. "[T]he state has done more than simply enforce additional state requirements. It has required GTE to sell unbundled elements or services for resale, to [competitive LECs], via a procedure that bypasses the Act entirely and ignores the procedures and standards that Congress has established." *Id.*

The MPSC notes that this court previously upheld its right to impose tariffs in *Michigan Bell Telephone Co. v. Strand*, 26 F. Supp.2d 993 (W.D. Mich. 1998) (Enslen, C.J.). In *Michigan Bell* Judge Enslen noted that the § 252 negotiation procedure is not the sole means for the MPSC under the federal regulations to order and regulate telecommunications and held that tariffs are permissible as consistent state regulation approved the use of tariffs. *Id.* at 1000-01.

The ruling in *Michigan Bell* is not broad enough to cover the tariff at issue in this case. The tariff approved in *Michigan Bell* did not replace a negotiated interconnection agreement. The tariff merely operated to amend the interconnection agreement by replacing the shared transport tariffs with common transport tariffs. This amendment did not substantially prevent implementation of the FTA.

In contrast to the tariff approved in *Michigan Bell*, the tariff at issue in this case, like the tariff in *MCI v. GTE, supra*, completely displaces the interconnection agreement. The MPSC's order requires Verizon to file tariffs offering its network elements and services for sale on fixed terms to all potential entrants without the necessity of negotiating an interconnection agreement.

Defendants contend that the FTA does not displace any state law that furthers competition in local telephone markets, and that because their February 25 order is designed to further competition, it is not preempted by the FTA. Defendants oversimplify the preemption analysis. Even if the ultimate goal of the state law is to achieve the same goal of furthering competition that the FTA is designed to achieve, the state order may nevertheless be preempted "if it interferes with the methods by which the federal statute was designed to reach th[at] goal." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103 (1992).

The FTA sets forth with some degree of detail the negotiation and arbitration process, leading to an interconnection agreement, by which the statutory goals are to be met. The Act specifies the timetable for negotiation and for petitioning for arbitration, § 252(b)(1); restricts the issues to be considered at arbitration, § 252(b)(4)(A); establishes standards to be applied at arbitration, 47 U.S.C. §§ 252(c) & (d); sets a timetable for approving agreements adopted by negotiation or arbitration, § 252(e)(4); and provides for exclusive review in federal court. §§ 252(e)(4) & (6).

Such specificity indicates that the negotiation and arbitration process plays an integral role in achieving Congress's goals of enhancing competition. Congress designed a deregulatory process that would rely in the first instance on private negotiations to set the terms for implementing new duties under the Act. In contrast to the private, party-specific negotiation and arbitration system created by Congress, the process for sale of network elements required by the MPSC's Order is a public rule of general application. By requiring Verizon to file public tariffs offering its network elements at wholesale services for sale to any party, the MPSC's Order improperly permits an entrant to purchase Verizon's network elements and finished services from a set menu without ever entering into the process to negotiate and arbitrate an interconnection agreement. It thus evades the exclusive process required by the 1996 Act, and effectively eliminates any incentive to engage in private negotiation, which is the centerpiece of the Act. Accordingly, the Court finds that the tariff requirement in the February 25 order is inconsistent with and preempted by the FTA.

IV.

The February 25 order requires Verizon to "offer unbundled network elements as combinations or platforms" at the request of entrants. MPSC 2/25/98 Order at 23. Verizon contends that to the extent the Order requires Verizon to act at the request of new entrants to assemble new combinations of elements that do not already exist, it violates the plain language of § 251(c)(3).

The FTA requires incumbent LECs to "provide such unbundled network elements in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3) (emphasis added). Verizon does not dispute that where the elements are already combined, and the requesting carrier seeks access to them in that combined form, the incumbent cannot separate them. However, Verizon does contest the requirement that it combine unbundled elements at the request of its competitors.

This issue was addressed in *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753 (8th Cir. 1997) (*"Iowa Utilities I"*), *aff'd in part, rev'd in part sub nom AT&T Corp. v. Iowa Utils.* Bd., 525 U.S. 366 (1999). In *Iowa Utilities I* the Eighth Circuit struck down an FCC Rule, 47 C.F.R. § 51.315(c)-(f), that required incumbents to combine network elements for competitors. "While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements." 120 F.3d at 813.

On remand the Eighth Circuit reaffirmed its previous ruling vacating the combination rule because it violates the FTA. *Iowa Utils. Bd. v. F.C.C.*, 219 F.3d 744 (8th Cir. July 18, 2000) (*"Iowa Utilities II"*).

> Here, Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall "combine such elements." It is not the duty of the [incumbent LECs] to "perform the functions necessary to combine unbundled network elements in any manner" as required by the FCC's rule. See 47 C.F.R. § 51.315(c). We

> reiterate what we said in our prior opinion: "[T]he Act does not require the incumbent LECs to do all the work." *Iowa Utils. Bd.*, 120 F.3d at 813.

Iowa Utilities II, 219 F.3d at 759. The court reasoned that the Act's plain language requiring incumbent LECs to "'provide such unbundled network elements in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service' . . . unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *Id.* (emphasis in original). Requiring incumbents to combine network elements for competitors "cannot be squared with the terms of subsection 251(c)(3)." *Id.*

Defendants rely on *Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812, 821 (5th Cir. 2000), in support of their assertion that the Eighth Circuit decision does not prohibit the combination of unbundled network elements, but rather only holds that combinations are not required by the FTA. The discussion in *Southwestern Bell* regarding *Iowa Utilities* and combinations of network elements is found only in dicta. More importantly, it involves a mistaken interpretation of *Iowa Utilities I*. In *Iowa Utilities II* the Eighth Circuit clarified that the rule requiring the incumbent to combine elements must remain vacated because it violated the FTA. 219 F.3d at 759.

Where the network elements are not already combined in the incumbent's network, Congress made clear that the incumbent's only duty was to provide elements in "a manner that allows requesting carriers to combine such elements." § 251(c)(3). Under the FTA it is the duty of the requesting carriers, not the incumbent LECs, to combine the elements. *Iowa Utilities II* makes it clear that the FCC cannot insert a bundling requirement consistent with the terms of the FTA. For the same reasons the state is also precluded from imposing such a requirement. Accordingly, the Court finds that the MPSC's order that Verizon provide bundling at the behest of competitive LECs conflicts with and is preempted by the FTA.

V.

As a separate and independent basis for relief, Verizon contends that both of the alleged violations of the 1996 Act are also actionable under 42 U.S.C. § 1983.

Section 1983 imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Although this case involves the alleged preemption of state law by federal law, the Supreme Court noted in *Golden State Transit v. Los Angeles*, 493 U.S. 103 (1989), that it would be "incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law pre-empts state regulatory authority." *Id.* at 108. In order to seek redress through § 1983, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (emphasis in original). In determining whether a particular statutory provision gives rise to a federal right the court considers the following three factors:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement

> would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

Id. at 340-41 (citations omitted). Once it is established that a statute creates an individual federal right, there is a rebuttable presumption that the right is enforceable under § 1983. *Id.* at 341. That presumption will be rebutted if Congress specifically foreclosed a remedy under § 1983 either expressly, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. *Id.*

Verizon contends that its FTA claim meets the *Blessing* test, and properly states a claim under § 1983.

This Court disagrees. No evidence has been presented that the FTA's provisions regarding negotiation and bundling were designed to benefit the Plaintiff or incumbent LECs generally. Congress enacted the FTA to foster competition in local telephone service. *See GTE North*, 209 F.3d at 913; *GTE Northwest, Inc. v. Hamilton*, 971 F. Supp. 1350, 1352 (D. Or. 1997); *GTE Northwest, Inc. v. Nelson*, 969 F. Supp. 654, 656 (W.D. Wash. 1997). The intended beneficiaries of the Act are new entrants into the local telecommunications market. Where courts have concluded that the FTA provides a federal right to telecommunications companies, the finding has been in support of prospective entrants into the telecommunications market. *See, e.g. Cablevision of Boston, Inc. v. Public Imp. Com'n of City of Boston*, 38 F. Supp. 2d 46, 54 (D.Mass. 1999); (Congress intended FTA generally to benefit new entrants to the telecommunications business); *MCI Telecommunications Corp.*

v. *Southern New England Telephone Co.*, 27 F. Supp. 326, 333 (D. Conn. 1998); *National Telecommunication Advisors, Inc. v. City of Chicopee*, 16 F. Supp. 2d 117, 121 (D. Mass. 1998). Plaintiff is not a prospective entrant into the telecommunications market, and is not an intended beneficiary of the FTA.

Even in *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1329-30 (11th Cir. 2000), *vacated on other grounds*, 2000 WL 1210663 (11th Cir. Aug. 25, 2000), cited by Plaintiff, where the Eleventh Circuit permitted a § 1983 action to enforce right under the FTA, AT&T was a prospective entrant, not an incumbent, in the personal wireless services market in Atlanta. Moreover, *AT&T Wireless* is distinguishable because it involved the city council's denial of a permit request without either a written denial or a written record. As such, the case implicated a due process right. No such individual right is involved in this case.

As noted in *Omnipoint Communications Enterprises, L.P. v. Newtown Tp.*, 219 F.3d 240, 245 (3rd Cir. 2000), a claim under § 1983 could benefit a plaintiff greatly, primarily because the Civil Rights Act could potentially provide the plaintiff with an additional remedy, the recovery of attorney's fees, otherwise not available under the Telecommunications Act. Other courts have noted that "[t]he § 1983 statutory apparatus adds *nothing* to plaintiff's remedial armament under the TCA – except the opportunity to seek attorney's fees under § 1988 . . . While the desire to recoup fees is understandable, the use of § 1983 in such a way trivializes this important statute and is inconsistent with its intent."

Omnipoint Communications, Inc. v. Penn Forest Township, 42 F. Supp. 2d 493, 506 (M.D. Penn. 1999) (quoting with approval *National Telecommunication Advisors, Inc. v. City of Chicopee*, 16 F. Supp.2d 117, 120 (D. Mass. 1998) (emphasis in original)). Similarly, in this case the substantive elements of Plaintiff's § 1983 claim are precisely the same as its preemption claim. The desire for attorney fees appears to be the only purpose for Plaintiff's § 1983 claim.

The Court finds that Plaintiff has not stated a claim under § 1983. Plaintiff's request for declaratory relief under § 1983 will accordingly be denied.

VI.

Verizon contends that in addition to a declaration that the MPSC's order is preempted by federal law, Verizon is entitled to injunctive relief because it faces the threat of irreparable harm. Verizon contends that the tariffing and bundling requirements will result in Verizon losing competitive position. Competitive injuries resulting from the loss of fair competition is a form of irreparable harm that may warrant an injunction. *See Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992). Injunctive relief was granted in *Illinois Bell Telephone Co. v. MCI Telecomms. Corp.*, 1996 WL 717466, at *9 (N.D. Ill. Dec. 9, 1996), for unfair advantage in the local phone market. The court held that "[l]oss of market share . . . is irreparable injury" because it would be difficult for an incumbent to regain market share once lost. *Id.*

Notwithstanding the case law support for injunctive relief, Plaintiff has presented no evidence from which this Court could infer that Defendants will not follow federal law as declared by this Court. This Court finding no cause for entering injunctive relief, Verizon's request for injunctive relief will accordingly be denied.

An order and declaratory judgment consistent with this opinion will be entered.

Date: December 5, 2000

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

US West Communications, Inc.,

File No. Civ. 97-913 ADM/AJB

Plaintiff,

vs.

Edward A. Garvey, Chairman;
Marshall Johnson, Commissioner;
Dee Knaak, Commissioner;
Mac McCollar, Commissioner;
Don Storm, Commissioner; and
Joel Jacobs, Commissioner (in Their
Official Capacities as Commissioners
of the Minnesota Public Utilities
Commission);

MEMORANDUM OPINION AND ORDER

Minnesota Public Utilities Commission;

AT&T Communications of the Midwest, Inc.;

MCImetro Access Transmission Services, Inc.;

and

MFS Communications Company, Inc.,

Defendants.

Geoffrey P. Jarpe and Martha J. Keon, Maun & Simon, PLC; Kevin J. Saville, US West Communications, Inc.; and Wendy M. Moser, Norton Cutler, and Blair A. Rosenthal, US West, Inc., for Plaintiff US West Communications, Inc.

Dennis D. Ahlers and Megan J. Hertzler, Assistant Attorneys General, for Defendants MPUC and the Commissioners.

MAR

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FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD____________
DEPUTY CLERK______________

Exhibit B

Mark J. Ayotte, Briggs and Morgan, P.A.; Michael D. Warden, David L. Lawson, and Christopher D. Moore, Sidley & Austin; and Maria Arias-Chapleau and Rebecca B. DeCook, AT&T Law Department, for Defendant AT&T Communications of the Midwest, Inc.

Laura J. Hein and Gregory R. Merz, Gray, Plant, Mooty, Mooty & Bennett, P.A., for Defendant MCImetro Access Transmission Services, Inc.

Mark A. Jacobson, Lindquist & Vennum, P.L.L.P.; and Ky E. Kirby and Morton Posner, Swidler Berlin Shereff Friedman, LLP, for Defendant MFS Communications Company, Inc.

Theodore C. Hirt and Brian G. Kennedy, U.S. Department of Justice, for Intervenors United States and the FCC.

Plaintiff US West Communications, Inc., ("US West") brought this action pursuant to the Telecommunications Act of 1996 ("the Telecommunications Act" or "the Act"), specifically 47 U.S.C. § 252(e)(6), seeking judicial review of determinations made by the Minnesota Public Utilities Commission ("MPUC"). US West has named the individual commissioners of the MPUC as Defendants. For purposes of this order, the individual commissioners and the MPUC, itself, will be referred to collectively as the MPUC.

The above-captioned case is one of eight cases involving review of determinations made by the MPUC presently before this Court. On December 10, 1997, this Court issued an Order in this case determining the scope of review for cases brought pursuant to § 252(e)(6). US WEST Communications, Inc. v. Garvey, No. 97-913 ADM/AJB, slip op. at 3 (D.Minn. Dec. 10, 1997). The Court found the scope of review limited to an appellate review of the record established before the MPUC. Id. On May 1, 1998, the Court filed an Order addressing the standard of review in the eight Telecommunications Act cases. AT&T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998).

Questions of law will be subject to *de novo* review while questions of fact and mixed questions of fact and law will be subject to the arbitrary and capricious standard. Id. at 11-13.

I. BACKGROUND

Before 1996, local telephone companies, such as US West, enjoyed a regulated monopoly in the provision of local telephone services to business and residential customers within their designated service areas. AT&T Communications of the Southern States v. BellSouth Telecomms., Inc., 7 F.Supp.2d 661, 663 (E.D.N.C. 1998). In exchange for legislative approval of this scheme, the local monopolies ensured universal telephone service. Id. During this monopolistic period, the local telephone companies constructed extensive telephone networks in their service areas. Id.

Congress passed the Telecommunications Act of 1996, in part, to end the monopoly of local telephone markets and to foster competition in those markets. Iowa Utils. Bd. v. FCC, 120 F.3d 753, 791 (1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S.Ct. 721 (1999) ; GTE North, Inc. v. McCarty, 978 F.Supp. 827, 831 (citing Joint Explanatory Statement of the Committee of Conference, H.R.Rep. No. 104-458, at 113 (1996)). Because the local monopolies, or incumbent local exchange carriers ("ILECs" or "incumbent LECs"), had become so entrenched over time through their construction of extensive facilities, Congress opted "not to simply issue a proclamation opening the markets," but rather constructed a detailed regulatory scheme to enable new competitors to enter the local telephone market on a more equal footing. AT&T Communications of the Southern States, 7 F.Supp.2d at 663. The Act obligates the incumbent LECs, like US West: (1) to permit a new entrant in the local market to interconnect with the incumbent LEC's existing local network and thereby use the LEC's own network to compete against it (interconnection); (2) to provide competing carriers with access to individual elements of the incumbent LEC's own network on an unbundled basis (unbundled access); and (3) to sell any telecommunication service to competing carriers at a wholesale rate so that the competing carriers can resell the service (resale). Iowa Utils. Bd., 120 F.3d at 791 (citing 47 U.S.C.A. § 251(c)(2)-(4)). In order to facilitate agreements between incumbent LECs and competing carriers, the Act creates a framework for both negotiation and arbitration. 47 U.S.C. § 252. Two sections of the Act, 47 U.S.C. §§ 251 and 252, explain the basic structure of the overall scheme for opening up the local markets.

Section 251

Section 251 describes the three relevant classes of participants effected by the Act: (1) telecommunications carriers, (2) local exchange carriers, and (3) incumbent local exchange carriers. 47 U.S.C. § 251(a), (b), and (c). A telecommunications carrier is a provider of telecommunications services, 47 U.S.C. § 153(44), telecommunication services being "the offering of telecommunications for a fee directly to the public . . . ," 47 U.S.C. § 153(46), and telecommunications being "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received," 47 U.S.C. § 153(43). US West, AT&T Communications of the Midwest, Inc., ("AT&T"), MCImetro Access Transmission Services, Inc., ("MCImetro"), and MFS Communications Company, Inc., ("MFS"), qualify as telecommunications carriers. A local exchange carrier ("LEC") is "any person that is engaged in the provision of telephone exchange service or exchange access," 47 U.S.C. § 153(26), within an exchange area. 47 U.S.C. § 153(47). An incumbent local exchange carrier is a company that was an existent local exchange carrier on

February 8, 1996, and was deemed to be a member of the exchange carrier association. 47 U.S.C. § 252(h). In this action, only US West qualifies as an incumbent LEC.

Section 251 establishes the duties and obligations of these categories of participants. For example, all telecommunications carriers have a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers," 47 U.S.C. § 251(a); local exchange carriers have a duty "not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." 47 U.S.C. § 251(b); and incumbent LECs have a duty to negotiate in good faith with telecommunications carriers seeking to enter the local service market, as well as a duty to "offer for resale at wholesale prices any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c). Section 251 requires an incumbent LEC to provide interconnection that is at least equal in quality to that provided by the incumbent LEC to itself at any technically feasible point, 47 U.S.C. § 251(c)(2); to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, 47 U.S.C. § 251(c)(3); and to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. 47 U.S.C. § 251(c)(6).

Section 252

Section 252 delineates the procedures for the negotiation, arbitration, and approval of an interconnection agreement that permits a new carrier's entry into the local telephone market. 47 U.S.C. § 252. Once an incumbent LEC receives a request for an interconnection agreement from a new carrier, the parties can negotiate and enter into a voluntary binding agreement without regard to the majority of the standards set forth in § 251 of the Act. 47 U.S.C. § 252(a). If the parties cannot reach an agreement by means of negotiation, after a set number of days, a party can petition a State commission, here the MPUC, to arbitrate unresolved open issues. 47 U.S.C. § 252(b)(1).

An interconnection agreement adopted by either negotiation or arbitration must be submitted for approval to the State commission. 47 U.S.C. § 252(e)(1). The State commission must act within 90 days after the submission of an agreement reached by negotiation or after 30 days of an agreement reached by arbitration. 47 U.S.C. § 252(e)(4). The State commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1).

FCC Regulations

47 U.S.C. § 251(d)(1) directs the FCC to promulgate regulations implementing the Act's local competition provisions within six months of February 8, 1996. "Unless and until an FCC regulation is stayed or overturned by a court of competent jurisdiction, the FCC regulations have the force of law and are binding upon state PUCs [Public Utility Commissions] and federal district courts." AT&T Communications of California v. Pacific Bell, 1998 WL 246652, at *2 (N.D.Cal. May 11, 1998) (citing Anderson Bros. Ford. v. Valencia, 452 U.S. 205, 219-20 (1981)). Review of FCC rulings is committed solely to the jurisdiction of the United States Court of Appeals pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).

On August 8, 1996, the FCC issued its First Report and Order, which contains the Agency's findings and rules pertaining to the local competition provisions of the Act. Iowa Utils. Bd., 120 F.3d at 792 (citing First Report and Order, In the Matter of Implementation of the Local

Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499, CC Docket No. 96-98 (Aug. 8, 1996) ("First Report and Order")). Soon after the release of the First Report and Order, incumbent LECs and State Commissions across the country filed motions to stay the implementation of the Order, in whole or in part. The cases were consolidated in front of the Eighth Circuit. In Iowa Utilities Board, the Eighth Circuit decided that "the FCC exceeded its jurisdiction in promulgating the pricing rules regarding local telephone service." Id. The Eighth Circuit also vacated the FCC's "pick and choose" rule as being incompatible with the Act. Id. at 801. Other provisions of the First Report and Order were upheld by the Eighth Circuit.

On August 8, 1996, the FCC also promulgated the Second Report and Order, which contains additional FCC comments and regulations concerning provisions of the Telecommunications Act of 1996 that were not addressed in the First Report and Order. The People of the State of California v. FCC, 124 F.3d 934, 939 (8th Cir. 1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S.Ct. 721 (1999). Again many local exchange carriers and state commissions filed suit challenging the order. Several cases were combined in front of the Eighth Circuit, which issued another order addressing the FCC's rules. Id.

On January 25, 1999, the Supreme Court reversed a significant portion of the Eighth Circuit's decisions. AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. at 721. The Supreme Court ruled that the FCC does have jurisdiction to implement local pricing rules and the FCC's rules governing unbundled access, with the exception of Rule 319, are consistent with the Act. Id. at 738. In addition, the Supreme Court upheld the FCC's "pick and choose" rule as a reasonable, and possibly the most reasonable, interpretation of § 252(i) of the Act. Id.

Procedural History

In February and March of 1996, MFS, AT&T, and MCImetro each submitted requests to US West to negotiate Interconnection Agreements pursuant to the Act. (A1; AT&T Petition for Arbitration at 10); (A16; MCImetro Petition for Arbitration at 5); (A34; MFS Petition for Arbitration at 3). After the parties failed to reach agreement on all issues during negotiations, MFS, AT&T, and MCImetro petitioned the MPUC for arbitration. (A1, A16, A34). The MPUC granted the petitions, consolidated them for arbitration, and referred the matter to the Minnesota Office of Administrative Hearings for evidentiary proceedings.[1] (A5; Order Granting Petition at 2-6); (A24; Order Granting Petition at 2-6); (A40; Order Granting Petition at 2-5). In its orders, the MPUC placed the burden of proof on US West and stated that the facts must be proven by a preponderance of the evidence. (A5; Order Granting Petition at 11); (A24; Order Granting Petition at 14); (A40; Order Granting Petition at 10). The MPUC adopted this standard, because:

> [t]he Federal Act and the Minnesota Telecommunications Act of 1995 (Laws 1995, chapter 156) are both intended to facilitate competitive entry into local telecommunications markets. Placing the burden of proof on the incumbent carrier, U S West, is consistent with this core purpose of the federal and state laws that apply to this arbitration. Moreover, resolution of many issues in this case will depend primarily on information known only to U S West. U S West's network costs, its avoided costs and the costs it incurs terminating calls will be among the issues in this proceeding. The critical information related to these costs will be within U S West's control. Placing the burden of proof on U S West should help ensure the development of an adequate record on these and other issues.

(A5; Order Granting Petition at 12); (A24; Order Granting Petition at 14); (A40; Order Granting Petition at 10). The MPUC permitted the ALJ to shift the burden of production based on which

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[1] The Office of Administrative Hearings is an independent state agency which employs administrative law judges to conduct impartial hearings on behalf of state agencies. <u>See</u> Minn. Stat. § 14.48 <u>et seq.</u>

party had control of the information at issue. (A5; Order Granting Petition at 11); (A24; Order Granting Petition at 14); (A40; Order Granting Petition at 10).

Beginning October 7, 1996, a panel of four administrative law judges held evidentiary arbitration hearings over a seven day period. (A137-A143). At the hearings, the four telecommunications carriers, as well as the Minnesota Office of Attorney General[2] and the Minnesota Department of Public Service (DPS),[3] were represented. (A137; ALJ Hearings at 2-3). The parties presented numerous exhibits and at least 30 witnesses. (A137-A143). At the time of the hearings, a great number of open issues remained between AT&T and US West as well as MCImetro and US West. (A56). MFS and US West had resolved many of their open issues. (A54).

Following two rounds of briefings by the parties, the ALJs issued their Arbitrator's Report on November 5, 1996. (A158). The parties filed exceptions to the Arbitrator's Report, (A159-A165), and there were further rounds of briefing and hearings before the MPUC. (167). On December 2, 1996, the MPUC issued its Order Resolving Arbitration and ordered the parties to submit conforming Interconnection Agreements by January 2, 1997. (A168; Order Resolving Arbitration at 10). Interconnection Agreements consistent with the order were filed in early January of 1997. (A183).

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[2]The Attorney General of Minnesota is "responsible for representing and furthering the interests of residential and small business utility consumers through participation in matters before the Public Utilities Commission." Minn. Stat. § 8.33.

[3]The DPS is a state agency charged with the responsibility of investigating utilities and enforcing state law governing regulated utilities, as well as enforcing the orders of the MPUC. The DPS is authorized to intervene as a party in all proceedings before the MPUC. Minn. Stat. § 216A.07.

The parties filed petitions for reconsideration. (A171, A172, A173, A175). The MPUC heard arguments from the parties on January 31 and February 3, 1997. (A198, A199). On March 17, 1997, the MPUC issued its Order Resolving Issues After Reconsideration and approved identical US West-AT&T and US West-MCImetro Agreements, subject to the modifications contained in the Order. (A206; Order Resolving Issues After Reconsideration at 76). The MPUC ordered the parties to submit final US West-AT&T and US West-MCImetro Agreements within 30 days, which the parties did. (A214, A215). On March 17, 1997, the MPUC also issued its Order Approving Contract, approving the US West-MFS Agreement subject to modifications contained in the Order. (A208). The MPUC ordered the parties to submit a final US West-MFS Agreement incorporating the ordered terms within 7 days. (A209).

On April 15, 1997, pursuant to 47 U.S.C. § 252(e)(6), US West filed a complaint in this Court seeking review of the MPUC's Orders. US West alleged nineteen counts in its complaint: (1) Count I, the burden of proof selected by the MPUC violates the Act, violates US West' due process rights, is arbitrary and capricious, and is not otherwise in accordance with the law; (2) Count II, the MPUC exceeded its authority under § 252(b)(4)(C) and (c) of the Act; (3) Count III(A), the wholesale discount rate adopted by the MPUC violates § 252(d)(3) of the Act, is [illegible] arbitrary and capricious, and is not just and reasonable; (4) Count III(B), the price of unbundled network elements and interconnection adopted by the MPUC violate § 252(d)(1) of the Act, are predicated in part upon stayed FCC rules, and are arbitrary and capricious; (5) Count III(C), the rates for local switching established by the MPUC violate § 252(d)(1) of the Act, improperly permit US West's competitors to obtain vertical features without paying for them, relied upon the flawed Hatfield Model, and are arbitrary and capricious; (6) Count III(D), the rates for termination and transport services adopted by the MPUC rely upon the flawed Hatfield model and require US West to pay its competitors for switching functions that their networks do not perform; (7) Count III(E), the MPUC required US West to provide additional unbundled services at rates that are not just and reasonable in violation of § 252(d)(1); (8) Count III(F), the rates set by the MPUC for interim number portability do not permit US West to recover its costs, and they violate § 252(d)(1) of the Act and the constitutional prohibition against taking property without compensation; (9) Count III(G), the MPUC's unbundling requirements, its refusal to permit US West to recover actual costs expended for the benefit of its competitors, and its establishment of TELRIC based rates violate § 251(d)(1) and the Takings Clause; (10) Count III(H), the prices for collocation established by the MPUC violate § 252(d)(1) and the Takings Clause; (11) Count IV(A), the MPUC's orders permit US West's competitors to practice "sham unbundling"[4] in violation of §§ 251(c) & (d) and 252(d)(3); (12) Count IV(B), the MPUC's order concerning equipment collocation constitutes an unlawful expansion of US West's duties and obligations under the Act as well as a violation of the Takings Clause; (13) Count IV(C), the MPUC's order requiring US West's competitors to have only one point of interconnection per LATA, instead of one per local calling area, is contrary to the Act; (14) Count IV(D), the MPUC's orders concerning the reservation of space is overly expansive and is contrary to § 251(b)(4) of the Act, as well as a violation of the Takings Clause; (15) Count IV(E), the service quality standards and penalties adopted by the MPUC exceed the requirements of § 251(c)(2) and the MPUC's

[4]The complaint defines "sham unbundling" as the practice of purchasing all of US West's network elements necessary to provide completed telephone service on an unbundled basis and requiring US West to rebundle them so that the competitors can provide complete local service.

authority under the Act; (16) Count IV(F), the MPUC exceeded its authority when it imposed conditions on US West Dex; (17) Count IV(G), the MPUC's requirement that US West build a second billing system unlawfully expands US West's duties and obligations under the Act; (18) Count IV(H), the MPUC's orders violate § 251(c)(2) of the Act by requiring US West to unbundle aspects of its business that are not network elements; (19) Count IV(I), the MPUC exceeded its authority under the Act by requiring US West to make information services and deregulated services, services that are not telecommunications services under the Act, available to its competitors; (20) Count IV(J), the MPUC violated § 251(c)(4) by requiring US West to make available, at wholesale discount rates, various services that the Act does not require to be provided at wholesale rates, such as discounted, promotional, and below-cost services; and (21) Count V, the MPUC exceeded its authority under § 252(e) by modifying portions of the US West-MFS Interconnection Agreement.

II. BURDEN OF PROOF

The MPUC created the following burden of proof for the parties: "The burden of proof with respect to all issues of material fact shall be on U S WEST. The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute." (A5; Order Granting Petition at 11); (A24; Order Granting Petition at 14).

When Congress addresses the burden of proof or production to be applied in an administrative proceedings, the courts must defer to Congress. Steadman v. S.E.C., 450 U.S. 91, 95-96 (1981). However, when Congress is silent as to the issue, it is left to the judiciary to resolve the question. 450 U.S. at 95, 101 S.Ct. at 1004.

The provisions of the Act and the FCC rules, which address the issue, place the burden of proof on the incumbent LEC. See 47 C.F.R. §§ 51.5 ("An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.") and 51.321(d) ("An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible."). Although the MPUC has admittedly placed a heavy burden on the incumbent LEC, no evidence has been adduced that such a standard conflicts with the Act or the FCC rules.[5] To the extent Congress and the FCC have spoken to the burden of proof, the MPUC's position does not conflict with their directives.

As for the burden of proof for the remainder of the statute, normally when a federal statute is silent as to the burden of proof in an administrative proceeding, a court would turn to the Administrative Procedure Act (APA) to fill the void. However, the APA does not apply to these proceedings because the MPUC is not a federal agency. See Franklin v. Massachusetts, 505 U.S. 788, 800, 112 S.Ct. 2767, 2775 (1992). Typically an applicable state statute would determine the proper burden of proof for a state agency such as the MPUC. In fact, US West argues that the MPUC should have applied the burden of proof for contested case proceedings

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[5]The only possible conflict relates to the issue of technical feasibility of interconnection. The FCC rules create a clear and convincing standard in relation to this issue while the MPUC created a blanket preponderance of the evidence standard. In as much as this apparent conflict had no impact on this case, the Court will not address it.

found in Minnesota Rule 1400.7300, subp. 5. However, because this is a sui generis proceeding, a state agency applying federal law to review telecommunications agreements, at the time of the hearing there was no state law exactly on point.[6] The MPUC was thus given the task of developing an appropriate burden of proof.

The burden of proof the MPUC selected is in accord with the procompetitive purposes of the Act and realistically reflects the parties access to and control of information. Generally, under federal and Minnesota common law, the proponent of an issue - that is the one who wants to prove the affirmative - has the burden of proof as to that issue. Newport News Shipbuilding and Dry Dock Co. v. Loxley, 934 F.2d 511, 516 (4th Cir. 1991) (citing Selma, Rome & C. Railroad v. United States, 139 U.S. 560, 567 (1891); Fleming v. Harrison, 162 F.2d 789, 792 (8th Cir.1947)); Holman v. All Nations Insurance Co., 288 N.W.2d 244, 248 (Minn. 1980). However, under both federal and Minnesota common law, questions of fairness, such as the control of information, can alter the allocation of the burden of proof. Fleming, 162 F.2d at 792; Holman, 288 N.W.2d at 248.

In this case, placing the burden of proof on the competitive local exchange carrier ("CLEC") would present an insurmountable barrier to entry into the local telephone market. As the MPUC accurately noted, US West has held a monopoly in the local telephone market for an extended period of time and, as a result, largely controls the information about the market. It

[6]After the hearing, the MPUC adopted Minn. Rules 7812.1700, subp. 23 to govern the arbitration of intercarrier negotiations. Minn. Rules 7812.1700, subp. 23 contains the same burden of proof as the one used by the MPUC in this case. Minn. Stat. § 237.16 authorized the MPUC to promulgate rules governing local competition and to define the procedures for competitive entry and exit. Minn. Stat. § 237.16, subd. 8.

knows the operation and function of various component elements of its system as well as the costs involved. Thus, fairness supports leveling the playing field by allocating the burden of proof to the incumbent LEC, the party with the historical advantage.

In addition, the burden of proof established by the MPUC permits for the shifting of the burden in appropriate circumstances, e.g. when the CLEC controls the relevant information. Flexibility is provided to accommodate situations where it would be unjust to leave the burden of proof on the ILEC. Given this flexibility and in light of the control of information as well as the purpose of the Act, the burden of proof standard chosen by the MPUC was appropriate.

III. COMBINATION OF NETWORK ELEMENTS

US West argues that all three of the MPUC-approved Agreements unlawfully require US West to combine network elements for the new entrants. In response, AT&T argues that because US West failed to raise the issue before the MPUC, it is barred from raising the issue now.

i. Exhaustion of Administrative Remedies

In the MPUC hearings, US West claimed that the agreements would impermissibly allow "sham unbundling" if the CLECs could purchase unbundled elements and then recombine the elements, without the use of any CLEC facilities, to constitute a service. (A168; Order Resolving Arbitration Issues at 24). The Eighth Circuit resolved this issue when it upheld the FCC's determination that a new entrant "may obtain the ability to provide the telecommunications services entirely through an incumbent LEC's unbundled network elements." Iowa Utils. Bd., 120 F.3d at 814. The Eighth Circuit found that the plain meaning of

§ 251(c)(3) dictated this result.[7] In the wake of the Eighth Circuit holding, US West has altered its argument and now attacks the unbundling provisions of the agreements as requiring US West to combine network elements in contravention of the Eighth Circuit's holding in Iowa Utilities Board.

The federal district courts that have addressed whether parties can raise an argument for the first time during a district court's review of a state commission's action under § 252(e)(6) have split on the issue. The Eastern District of Virginia found that a district court cannot consider arguments not raised before the administrative agency. GTE South, Inc. v. Morrison, 6 F.Supp.2d 517, 529 (E.D.Va. 1998) (citing Pleasant Valley Hosp. v. Shalala, 32 F.3d 67, 70 (4th Cir. 1994)). The Eastern District of North Carolina, on the other hand, found that the language of § 252(e)(6) provides authority for district court review of any provision of an agreement by which a party has been aggrieved whether or not it was raised before a state commission. MCI Telecomms. v. BellSouth Telecomms., 7 F.Supp. 2d 674, 680 (E.D.N.C. 1998). The BellSouth court held an exhaustion of state remedies requirement did not exist where Congress chose to create an entirely new scheme. Id. The reasoning of BellSouth is persuasive.

Section 252(e)(6) provides that "[i]n any case in which a state commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." Congress thus provided for a broad

[7]The Supreme Court did not directly address the issue in AT&T Corp., finding that the disposition of the issue could be purely academic in light of the Court's holding concerning Rule 319. AT&T Corp., 119 S.Ct. at 737. The Court did find, however, that the FCC was reasonable when it decided not to impose a facilities-ownership requirement on local exchange carriers. Id.

scope of review in § 252(e)(6). The statute creates no limitation as to the matters to be considered by the district court, save the matters must involve an agreement and the party bringing the action must be aggrieved. There is neither an explicit nor implicit requirement that the issue must have previously been presented to the state commission.

In support of its position that US West cannot raise a new argument before this Court, AT&T cites to United States v. L.A. Tucker Truck Lines, 344 U.S. 33 (1952). In L.A. Tucker Truck Lines, the Court stated:

> We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.

L.A. Tucker Truck Lines, 344 U.S. at 36-37. The Court explained that even where an agency has a predetermined policy concerning a matter, repetition of an objection to the policy might lead to a change of policy. Id. at 37.

In the Telecommunications Act, Congress enlisted both the FCC and the state commissions in its scheme to open up local telephone markets to competition. The framework in this case is therefore different from that involved in the typical review of an agency action. The FCC can promulgate rules under the Act that a state commission must enforce and has no power to overturn. Only a federal court of appeals has the power to overturn FCC rules. See 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). Therefore, the L.A. Tucker Truckline rationale is inapplicable in this case.

Moreover, the law of the case has changed because some of the FCC rules at issue were overturned after the MPUC issued its order. As the Western District of Washington succinctly stated: "The arbitrator applied an FCC interpretation of the law that has since been repudiated. This court need not refrain from applying the current law." MCI Telecomms. Corp. v US West Communications, Inc., No. C97-1508R, slip op. at 7 (W.D.Wash. July 21, 1998).

The Court concludes that US West may now challenge the portions of the agreements that require it to combine network elements although it did not raise this argument before the MPUC.[8]

ii. US West's Combining of Network Elements

a. US West-MCImetro and US West-AT&T Agreements

Section 251(c)(3) of the Act states that incumbent LECs have a duty:

> to provide . . . nondiscriminatory access to network elements on an unbundled basis . . . . An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3). The FCC promulgated rules under this section of the Act requiring incumbent LECs not to separate and, upon request, to combine network elements for new entrants. 47 C.F.R. § 51.315. In Iowa Utilities Board, the Eighth Circuit vacated FCC Rule 51.315(b)-(f), finding that § 251(c)(3) "unambiguously indicates that requesting carriers will combine the unbundled elements themselves" and that it could not "be read to levy a duty on the incumbent LECs to do the actual combining of elements." Iowa Utils. Bd., 120 F.3d at 813. Before the Eighth Circuit decided Iowa Utilities Board, the MPUC issued its Order involving the

[8]The defendants also cite to section 20.2 of the US West-AT&T and US West-MCImetro Agreements. Section 20.2 addresses procedures for the parties in the event a legal action materially affects a material term of the Agreement. Nothing in that section bars a court from applying the current law while conducting a review of an agency decision.

combining of elements.

Although at the time this case was filed in district court a remand of the issue to the MPUC in light of the Eighth Circuit's decision would have been appropriate,[9] the Supreme Court has since reversed the Eighth Circuit and reinstated FCC Rule 315(b). The Supreme Court found that the FCC reasonably interpreted § 251(c)(3) as not requiring the incumbent LECs to provide network elements in discrete pieces. AT&T Corp., 119 S.Ct. at 737. The Court found that "§ 251(c)(3) is ambiguous on whether leased network elements may or must be separated" and that Rule 315(b), which states that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines," provides a rational interpretation of the provision. Id.

Although the Supreme Court expressly reinstated § 315(b), it did not directly do so with respect to § 315(c)-(f). The Supreme Court's ruling could mean that the Eighth Circuit's decision to vacate § 315(c)-(f) should be revisited, but absent a clear mandate this Court declines to extend the Supreme Court decision that far. See 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a) (challenges to FCC's rules must be brought before a federal court of appeals). Vacated Rule 315 (c) and (d) state that:

> (c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network provided that such combination is:
> (1) Technically feasible; and
> (2) Would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

[9] The MPUC in fact advocated a remand to the MPUC in its original response.

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

47 C.F.R. § 51.315 (c) and (d).

To the extent the Agreements require US West not to separate requested network elements they do not contravene the Act. However, because § 315(c) and (d) remain vacated, to the extent the Agreements require US West to combine network elements that it does not ordinarily combine, they violate the Act. The parties failed to identify any specific provisions in the US West-MCImetro and US West-AT&T Agreements that concern the combination of elements. The MPUC stated in its brief that it had not determined what provisions were affected by the Eighth Circuit opinion. (MPUC brief at 13). Without an indication as to which provisions are relevant, the Court cannot determine what portions, if any, of the Agreements violate the Act. This matter is remanded to the MPUC to make such a determination with respect to the US West-MCImetro and US West-AT&T Agreements.[10]

b. US West-MFS Agreement

The foregoing analysis does not apply to the US West-MFS Agreement since MFS and US West reached a voluntary arrangement concerning the issue of US West combining elements. In the parties' Joint Position Statement on Negotiated Terms, they stated that,

> [US West] agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements

[10] As was noted by the Eastern District of North Carolina, the Act does not explain what should occur if a district court finds that an Interconnection Agreement violates the Act. AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., 7 F.Supp.2d 661, 668 (E.D.N.C. 1998). Given the appellate nature of the proceeding, a remand to the state commission appears to be the most appropriate option. Id.

> from [US West's] network, or with elements possessed by MFS. However, [US West] need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.

(A54; Joint Position Statement at 73, § XXXI.A.3). Parties can enter into voluntarily negotiated agreements without regard to the standards set forth in 47 U.S.C. § 251(b) and (c). 47 U.S.C. § 252(a). Therefore, the parties were not constrained by Rule 315(b) or the vacated rules when constructing the voluntary terms of their Agreement. Because the parties voluntarily agreed to US West combining network elements, if technically feasible, this provision of the US West-MFS Agreement does not violate the Act.

IV. DIRECT MEASURES OF QUALITY

US West alleges that the MPUC unlawfully imposed interconnection and performance standards in the US West-MCImetro and US West-AT&T Agreements that are superior to those that it provides itself.[11]

The Telecommunications Act requires that an incumbent LEC provide a requesting telecommunications carrier interconnection with its network "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the party provides interconnection . . . ." 47 U.S.C. § 251(c)(2)(C). The FCC promulgated Rule 51.305(a)(4) requiring incumbent LECs to provide superior quality

[11]US West also alleges that the issue of direct measures of quality ("DMOQs") was not properly before the MPUC because it was not an "open issue." MCImetro raised the issue of quality standards in its petition and MCImetro, AT&T, and US West, each raised the issue of quality standards in their proposed contracts. (A168; Order Resolving Arbitration Issues at 54 (citing MCImetro Proposed Contract Part A § 13, Atts. VIII and X; AT&T Proposed Contract § 8. Att. 11; US West Proposed Contract §§ XXXII and XXIV)). Therefore, measures of quality can be considered an open issue and it was properly before the MPUC for resolution.

interconnection on demand, and Rule 51.311(c) requiring incumbent LECs to provide superior quality access to unbundled network elements on demand, in return for additional payments. In Iowa Utilities Board, the Eighth Circuit vacated these FCC rules as violating the plain terms of the Act. Iowa Utils. Bd. v. FCC, 120 F.3d at 812. It found that the Act "does not require incumbent LECs to provide its competitors with superior quality connection." Id. The Eighth Circuit explained that "[w]hile the phrase 'at least equal in quality' leaves open the possibility that incumbent LECs may agree to provide interconnection that is superior in quality when the parties are negotiating agreements under the Act, this phrase mandates only that the quality be equal--not superior. In other words, it establishes a floor below which the quality of the interconnection may not go." Id. The Eighth Circuit went on to state that it does not matter if the incumbent LECs are compensated for the superior quality interconnection, because the Act simply does not require such a level of quality. Id. at 813.

In imposing its quality standards and penalty provisions, the MPUC relied on the now vacated FCC rules. If the FCC rules were the MPUC's sole basis for its authority, the MPUC might have exceeded its authority if it directed US West to provide superior service.[12] However, the Act provides that a state commission can establish "other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements." 47 U.S.C. § 252(e)(3). It is appropriate for a state commission to implement its own state's laws during the review process so long as those laws do

[12]The MPUC found that US West failed to demonstrate that the performance standards would require an increase in the quality of its elements or network. (A168; Order Resolving Arbitration Issues at 55, n.8). However, whether or not the performance standards required an increase in quality is immaterial to this order.

not conflict with or impede the federal act. Although the Eighth Circuit stated that the Act does not require an incumbent LEC to offer a superior level of service, a state requirement of superior quality interconnection might not conflict with the Act.

The MPUC's order reveals that in reaching its decision concerning performance standards, it relied, at least in part, on the powers granted to it by Minnesota law. In its "Commission Decision" section, the MPUC referenced its state-imposed statutory duty "to ensure the provision of high quality telephone service throughout the state." Minn. Stat. § 237.16, subd. 8. For example, it stated that "[s]pecificity serves the interest of end users directly by establishing clear benchmarks of quality consumers can expect from each provider." (A168; Order Resolving Arbitration Issues at 56).

Given the MPUC's implicit reliance on its powers under state law, the question then becomes does Minnesota law provide the necessary authority for the MPUC to require provision of superior quality service? Minnesota law states that the MPUC has the power to investigate services and issue orders respecting services that it finds to be inadequate. Minn. Stat. § 237.081. It also has the power to "establish terms and conditions for the entry of telephone service providers . . . ," Minn. Stat. § 237.16, subd. 1(2), and to adopt any requirements, above those required by federal law, found to be necessary "to ensure the provision of high quality telephone services throughout the state." Minn. Stat. § 237.16, subd. 8. Based on its authority to issue orders concerning inadequate services, establish the terms for entry of new telephone service providers, and to ensure high quality telephone service, the MPUC has the necessary authority under state law to require US West to offer superior quality interconnection, if deemed necessary.

US West also challenges the MPUC's authority to implement performance penalties. Under state law, the MPUC only has the "powers expressly delegated by the legislature and those fairly implied by and incident to those expressly delegated." In the Matter of Northwestern Bell Telephone Co., 371 N.W.2d 563, 565 (Minn.Ct.App. 1985) (citing Great Northern Railway Co. v. Public Service Comm'n, 169 N.W.2d 732, 735 (Minn. 1969)). Implied powers must be fairly evident from the express powers. Id. (quoting Peoples Natural gas Co. v. Minnesota Public Utilities Comm'n, 369 N.W.2d 530 (Minn. 1985)).

The MPUC's authority to implement performance penalties can be fairly implied from its power "to *ensure* the provision of high quality telephone services . . ." Minn. Stat. § 237.16, subd. 8. (emphasis added). As the MPUC noted, penalties are necessary to give meaningful effect to the quality standards in the Agreements. (A168; Order Resolving Arbitration Issues at 57). Without the penalties, an incumbent LEC, in order to gain a competitive advantage, might be inclined to cause delay in the provision of quality services to CLECs and thereby hurt the end-customer. The penalties provision prevents this behavior and ensures that high quality service reaches the customer. Possessing the requisite authority under state law, the MPUC may, under § 252(e)(3), impose the quality standards and penalty provisions at issue.

US West also argues that the MPUC erroneously failed to follow formal rulemaking procedures in implementing these rules. The Minnesota Supreme Court has ruled, "[a]dministrative policy may be formulated by promulgating rules or on a case-by-case determination. An agency has discretion to decide what method is appropriate in a particular situation." Bunge Corp. v. Commissioner of Revenue, 305 N.W.2d 779, 785 (Minn. 1981) (citing Securities & Exchange Commission v. Chenery, 332 U.S. 194, 203 (1947); American

Power & Light Co. v. Securities & Exchange Commission, 329 U.S. 90, 106 (1946)). In this case, the MPUC did not abuse its discretion by taking the case-by-case approach. The MPUC appropiately elected an adjudicatory approach because the specific facts of the case and the particular Agreement between the parties should control. See In the Matter of the Proposal by Lakedale Telephone Co. to Offer Three Additional Class Services, 561 N.W.2d 550, 555 (Minn. Ct. App. 1997). Moreover, the procedure followed by the MPUC is dictated by the federal act.

V. UNBUNDLING PROVISION

US West argues that the MPUC erred in requiring it to supply dark fiber and subloop components on an unbundled basis in the US West-MCImetro and US West-AT&T Agreements. US West claims that dark fiber is not a network element and therefore should not be subject to resale. It argues that the MPUC relied on the vacated FCC standard of "technical feasibility" in requiring subloop unbundling. In addition, US West asserts that the MPUC failed to separate vertical services from the switching network element US West is required to provide on an unbundled basis. US West argues that the MPUC's order requires it to provide network elements on a bundled basis, in contravention of the Eighth Circuit's decision, and to provide vertical features without suitable cost recovery.

i. Dark Fiber

Dark fiber is fiber-optic cable that has been laid, but has not yet been activated.[13] First Report and Order, ¶ 432. Because no switches route digital impulses through dark fiber, it

[13]In its Order, the MPUC distinguished between fiber that had been laid and fiber stored in a warehouse. The MPUC found that the former had to be provided to CLECs on an unbundled basis while the latter did not.

carries no information. MCI Telecomms. Corp. v. BellSouth Telecomms., Inc., 7 F.Supp. 2d 674, 679 (E.D.N.C. 1998). US West argues dark fiber is not a network element because it is not currently in use.

Every other district court considering this issue has found that dark fiber qualifies as a network element. See id.; Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest, Inc., 1998 WL 657717 (S.D.Tex. Aug. 31, 1998); MCI Telecomms. Corp. v. US West Communications, Inc., Case No. C97-1508R (W.D.Wash. July 24, 1998). In reaching this conclusion, other district courts relied on the Eighth Circuit's expansive approach to defining network elements, see MCI Telecomms., 7 F.Supp.2d at 679-80 (citing Iowa Utils. Bd., 120 F.3d at 808), an approach later upheld by the Supreme Court. AT&T Corp., 119 S.Ct. at 734. For example, the MCI court reasoned that if the Eighth Circuit could expand the definition of network elements to include non-physical elements, then "an expansion to a true physical element which may not have been explicitly contemplated by Congress is more than warranted." MCI Telecomms., 7 F.Supp.2d at 680. The MCI court further noted that FCC language in the predecessor to the 1996 Act defined dark fiber service as "wire communication." Id. at 679. For the reasons expressed by the MCI court, this Court also finds "dark fiber" to be a network element within the meaning of the Act. The inquiry does not end there however.

US West also argues that failure to provide dark fiber will not impair the ability of new entrants to offer services. Given this assertion, the question becomes, does the provision of dark fiber meet the requirements of 47 U.S.C. § 251(d)(2)? Section 251(d)(2) provides:

> In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether-

> (A) access to such network elements as are proprietary in nature is necessary; and
>
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

The FCC interpreted the directives of this section very broadly. The FCC found that without a necessary element, a new entrant's "ability to compete would be significantly impaired or thwarted." First Report and Order, ¶ 282. The FCC stated that in order to show that a proprietary element is not "necessary" for purposes of § 251(d)(2)(A), an incumbent LEC would have to demonstrate that "a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network." Id. ¶ 283. The FCC would view the "necessary" requirement as having been met even if the "'requesting carriers can obtain the requested proprietary element from a source other than the incumbent,' since '[r]equiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act.'" AT&T Corp., 119 S.Ct. at 735 (quoting First Report and Order, ¶ 283). The FCC found that the "impairment" standard of subsection B would be met "if 'the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service over other unbundled elements in the incumbent LEC's network.'" Id. (quoting First Report and Order, ¶ 285).

In AT&T Corp., the Supreme Court vacated the FCC's interpretation of § 251(d)(2), finding that the FCC had given the section too broad a definition and robbed it of all of its teeth as a limiting standard. AT&T Corp., 119 S.Ct. at 735. The Court stated that "the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do." Id. at 734-35. In light of the Supreme Court's decision vacating the FCC's interpretation of § 252(d)(2), the matter must be remanded to the MPUC to determine, using a more substantive standard, whether failure to provide access to dark fiber would impair the new entrant's ability to provide the services that it seeks to offer and, if dark fiber is proprietary, whether access to dark fiber is necessary.

ii. **Subloop Unbundling**

For the same reasons, the issue of access to subloop unbundling must also be remanded to the MPUC. From the record, it appears that in making its determination about subloop unbundling the MPUC applied the now vacated FCC rules interpreting § 252(d)(2). (A168; Order Resolving Arbitration Issues at 19-20).

iii. **Vertical Services**

US West argues that the MPUC erred by mandating it to provide vertical services in conjunction with local switching. US West argues this effectively requires it to provide these network elements on a bundled basis. In support of its decision, the MPUC cited the FCC determination that the local switching element includes all vertical features the switch can provide, including custom calling, CLASS features, and CENTREX. First Report and Order, ¶ 412. US West argues that this FCC rule was implicitly overturned by the Eighth Circuit in Iowa Utilities Board. However, the FCC rule concerning the subsuming of vertical features is no longer determinative in light of the Supreme Court's decision that network elements can be delivered on a bundled basis. AT&T Corp., 119 S.Ct. at 737-38. Based on AT&T Corp., the MPUC could appropriately determine that vertical features must be delivered in conjunction with local switching.

US West also contests providing the vertical features without any cost recovery. The Hatfield pricing model adopted by the MPUC provides for cost recovery for *both* local switching and vertical features. As the FCC noted, under this model, the rates cover unbundled local switching services, "inclusive of associated vertical features." First Report and Order, ¶ 818. Furthermore, the MPUC explicitly stated that elements the incumbent LEC provides to the new entrants must be paid for by the new entrants. (A168; Order Resolving Arbitration Issues at 60-67). Therefore, US West must be compensated for the vertical features. If it is not, the MPUC provided for interim rates that are subject to a true-up procedure. (A168; Order Resolving Arbitration Issues at 63). To the extent any compensation is inadequate, there is a procedure to rectify the inadequacy.

VI. RESALE OF DEREGULATED AND ENHANCED SERVICES

Section 251(c)(4)(A) of the Act states that an incumbent LEC must "offer for resale at wholesale rates *any* telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." (emphasis added). The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). The term "telecommunications" is, in turn, defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id. § 153(43).

US West claims that the MPUC unlawfully applied the wholesale discount to deregulated services and enhanced services in the US West-MCImetro and US West-AT&T Agreements. US

West specifically argues that the deregulated services customer premises equipment ("CPE") (e.g. telephone sets) and the installation and maintenance of "inside wire,"do not qualify as "telecommunications" within the meaning of § 153 because they do not involve the actual transmission of services. US West also argues that enhanced services, such as Enhanced Fax Service, Voice Messaging, and Versanet, do act on or change the form or content of the information sent or received and, therefore, do not qualify as "telecommunications services" under § 153.

Other district courts have found that deregulated services and enhanced services are telecommunications services that must be made available for resale at wholesale discount. See, e.g., US West v. MFS, No. C97-222WD, 1998 WL 350588 at *4 (W.D. Wash. Jan. 7, 1998). However, several of those decisions predated the FCC Order, in which it clarified that inside wiring, CPE, and information services do not qualify as telecommunications services. Second Report and Order, In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, ¶ 45 (rel. Feb. 26, 1998) ("[I]nside wiring, CPE, and information services do not fall within the scope of section 222(c)(1)(A) because they are not 'telecommunication services.'") ("Second Report and Order"). Although this determination by the FCC only explicitly applied to section 222(c)(1)(A), terms are presumed to have the same meaning throughout a statute, United States National Bank of Oregon v. Independent Insurance Agents of America, 508 U.S. 439, 460, 113 S.Ct. 2173, 2185 (1993) (quoting Commissioner v. Keystone Consol. Industries, Inc., 508 U.S. 152, 159, 113 S.Ct. 2006 (1993)) ("Presumptively, 'identical words used in different parts of the same act are intended to have the same meaning.'"), and therefore the FCC's determination also effects the reach of 251(c)(4)(A).[14]

The MPUC erred in requiring that inside wiring, CPE, and information services be made available for resale at a wholesale discount pursuant to § 251(c)(4)(A), as that section only requires that "telecommunications services" be made available. However, to the extent deregulated and enhanced services do not include inside wire, CPE, and information services, the MPUC's determination is upheld. Given the broad definition of telecommunications services in the Act and the FCC's decision to only exclude a limited number of services from the meaning of "telecommunications services," it is reasonable to include any deregulated and enhanced services not specifically excluded by the FCC. This matter is remanded to the MPUC for reconsideration consistent with the FCC determination.

VII. SINGLE POINT OF INTERCONNECTION PER LATA

US West alleges that all three agreements unlawfully permit a single point of interconnection per local access and transport area ("LATA").[15] Section 251(c)(2) of the Act addresses an incumbent LEC's duty to provide interconnection. It states that an incumbent LEC

[14]In a footnote in the Second Report and Order, the FCC states that "Congress has directed the Commission to undertake a review of its implementation of the provisions of the 1996 Act relating to universal service, including, among other things, the Commission's interpretations of the statutory definitions of 'telecommunications' and 'telecommunications service.' . . . We do not intend, in this proceeding, to foreclose any aspect of the Commission's ongoing examination on those issues." Second Report and Order, n.172 (citations omitted). This footnote does not alter the relevant analysis because the FCC has not *yet* created a new interpretation of "telecommunications service." At this point, the only indicators of the meaning of "telecommunications service" are the definition in the Act and the Second Report and Order.

[15]A Local Access and Transport Area ("LATA") is "a contiguous geographic area" established by a Bell operating company pursuant to a consent decree. 47 U.S.C. § 153(25). Generally a state will have more than one LATA.

has a "duty to provide for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access . . . at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2). An incumbent LEC is relieved of its obligation to permit interconnection at a particular point only if it can show that interconnection at the designated point is not technically feasible. MCI Telecomms. Corp. v. US West Communications, Inc., Case No. C97-1508R, slip op. at 20 (W.D.Wash. July 24, 1998) (citing 47 C.F.R. § 51.305(e)). The Eighth Circuit upheld the FCC's determination that the term "technically feasible" should be given a broad interpretation. Iowa Utils. Bd., 120 F.3d at 810. According to the FCC, economic concerns should not be considered in determining whether a point of interconnection is technically feasible. Id.; 47 C.F.R. § 51.5.

The MPUC expressly found that US West failed to meet its burden of showing that it would be technically infeasible for US West to provide a single point of interconnection per LATA overruling US West's argument that such a requirement would raise costs and lower network efficiency. (A168; Order Resolving Arbitration Issues at 13); (A206; Order Resolving Issues After Reconsideration at 13). The MPUC did not act in an arbitrary or capricious manner in reaching this conclusion. The FCC concluded that an increase in costs does not impact upon the determination of technical feasibility, 47 C.F.R. § 51.5, and therefore US West's argument of enhanced costs is inapposite. As for lower network efficiency, US West did not present "clear and convincing evidence" that a single point of interconnection per LATA would create "specific and significant adverse network reliability impacts," the standard created by the FCC to determine technical feasibility. Id. US West's only evidence was hypothetical testimony that it might fail to construct sufficient tandem switching and transport to prevent blockage in the event of an increase in traffic. (A75; Testimony of Michael Zulevic at 5). This evidence provided no certainty that there would be an increase in traffic beyond US West's present capabilities or, if there were to be increase, that US West could not forecast the increase and construct sufficient facilities to meet the need. US West's evidence does not meet the FCC's "clear and convincing" standard.

US West argues that the terms of 47 U.S.C. § 251(c)(2) require at least one point of interconnection in each local calling exchange served by US West, rather than one per LATA. That section of the Act provides that incumbent LECs have the duty to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2). In support of its argument, US West cites ¶¶ 190 and 191 of the FCC's First Report and Order. The FCC, relying on the Act's use of "telephone exchange service"[16] and "exchange access,"[17] found § 251(c)(2) limits an interexchange carrier's

[16] 47 U.S.C. § 153(47) states that,

> The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

[17] 47 U.S.C. § 153(16) provides that "[t]he term 'exchange access' means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." "Telephone toll service" is defined, in turn, as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(s).

(IXC) ability to interconnect with an incumbent LEC's network: "[A]n IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2)." First Report and Order, ¶ 191. The provisions cited by US West do not address where or how often a CLEC may interconnect, rather they address the permissible purposes for interconnection. The FCC prohibited a long distance carrier from interconnecting to an incumbent LEC's network *solely* to terminate long distance traffic. There is no evidence that the CLECs seek interconnection *only* to terminate long distance traffic. Therefore, the Agreements do not violate this FCC directive.

Based on the foregoing, a single interconnection per LATA does not violate the Act and the MPUC's decision was not arbitrary and capricious.

VIII. <u>UNIFORM BILLING SYSTEM AND ELECTRONIC TRANSMISSION</u>

US West claims that the US West-AT&T and US West-MCImetro Agreements unlawfully require it to change its billing system and format for electronic transmissions. US West proposed using Customer Record Information System ("CRIS"), its current operating system for billing local telephone services, as a vehicle for exchange of billing information with new entrants. The MPUC rejected this proposal and instead ordered US West to provide local billing information over the Integrated Access Billing System ("IABS") that transmits access billing data in an electronic format known as Billing Output Specification ("BOS"). (A206; Order Resolving Issues After Reconsideration at 31).

AT&T and US West presently use the IABS as part of their carrier-to-carrier billing system. (A168; Order Resolving Arbitration Issues at 38). The ALJ panel noted that NYNEX and PacBell use the IABS for wholesale billing and that the telecommunications industry decided to use IABS for unbundled network elements. (A168; Order Resolving Arbitration Issues at 38). Although the MPUC recognized that there is no definitive nationwide standard, it determined that the fact US West and AT&T were successfully using IABS for other billing exchanges was probative that IABS could be used successfully for billing local services. (A168; Order Resolving Arbitration Issues at 38).

Under § 252(e)(6), federal district courts are directed to determine whether the agreement or state commission action meets the requirements of the Act. In raising its claim, US West failed to cite to any provision of the Act that the MPUC allegedly violated in making its billing system determination. Therefore, US West failed to make a claim under § 252(e)(6).

Furthermore, the FCC and Eighth Circuit have noted "that ' the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.'" Iowa Utils. Bd., 120 F.3d at 813 n.33 (quoting First Report and Order, ¶ 198). Providing billing services by utilizing IABS via BOS is a necessary accommodation to facilitate interconnection between US West and the new entrants.

IX. ADVANCE NOTICE OF CHANGE IN TERMS AND CONDITIONS

US West claims that the MPUC unlawfully adopted provisions in the US West-AT&T and US West-MCImetro Agreements requiring US West to notify AT&T and MCImetro of any changes in the terms or conditions under which US West offers retail services to subscribers, "including, but not limited to, the introduction or discontinuance of any features, functions, services or promotions, at least forty-five (45) days prior to the effective date of such change." (A214-A215, Att. 2, at ¶ 2.6.1). US West also claims the agreements unlawfully require 30 days "advance notice of the availability of new products for market testing or the ability to participate in new market tests conducted by" US West. (A214-A215, Att. 2, at ¶ 2.6.2). US West argues that these provisions create an unfair competitive advantage for the CLECs and that the MPUC lacked the requisite authority under either the Act or state law to impose these conditions. US West also claims that the MPUC effectively modified Minn. Stat. §§ 237.60(2)(f) and 237.63(4b), the statutes governing the timing of notice of new services, without following the necessary rule-making procedures.[18]

Section 252(b)(4)(C) of the Act provides that state commissions "shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement . . ." Subsection (c) states that in resolving "*any* open issues" (emphasis added) a state commission must ensure that the requirements of section 251 are not violated, that appropriate rates are established, and that a schedule for implementation is in place. 47 U.S.C. § 252(c). Given these broad directives, a state commission can resolve any issue so long as it was raised by one of the parties and the resolution does not violate a requirement of the Act.

Both MCImetro and AT&T raised the notification provisions in their petitions for arbitration (A1; Petition by AT&T for Arbitration, Ex. 6, Att. 2, § 2.6.1); (A16; Petition of

[18]The MPUC claims that US West did not dispute this issue before the MPUC and therefore waived any objections to these terms in the Agreements. Even if the MPUC is correct that US West failed to raise this issue to the MPUC, for the reasons set forth in section III, i, infra, it is permissible for US West to raise the claim for the first time before this Court.

MCImetro for Arbitration, Ex. D, section II , 5; section III, 3; section XIV, 4 and Ex. E). There is no evidence that the resolution of these issues violates a requirement of the Act. Therefore, the MPUC had the necessary authority under the Act to adopt the provisions at issue.

Furthermore, as several of the parties noted and contrary to US West's assertions, US West would have an unfair advantage if the CLECs were kept uninformed about any upcoming resale opportunity. Without the notification provisions, the CLECs would not be able to adequately prepare for changes in services. Such a situation would defeat the pro-competitive purposes of the Act.

Concerning US West's assertion that the MPUC unlawfully modified Minnesota statutes, Minn. Stat. § 237.60(2)(f) states that "[a] telephone company may offer a new service to its customers ten days after it files a price list and incremental cost study for the service with the department and the commission." Minnesota Statute 237.63(4b) similarly addresses procedures that a telephone company must follow before offering new services to customers. It states that "[a] telephone company may offer a new service to its customers ten days after it files a tariff with the department and the commission." Neither of these statutes specifies the notification of competitors concerning changes in terms and conditions of retail offerings. The Agreements may create another notification requirement for US West before offering a new service; this does not, however, conflict with or modify these statutes.[19]

[19]As for any assertion that the MPUC should have followed formal rulemaking procedures in implementing the rules concerning notification of competitors, the MPUC appropriately opted to use the adjudicatory approach. Its decision was based on the specific facts of the case and involved the particular Agreement between the parties. See In the Matter of the Proposal by Lakedale Telephone Co. to Offer Three Additional Class Services, 561 N.W.2d 550, 555 (Minn. Ct. App. 1997); see also infra section IV.

X. US WEST DEX

US West claims the MPUC exceeded its authority when it imposed provisions that impermissibly regulated US West Dex. US West argues that the MPUC does not have the authority, under either state law or the Act, to impose obligations on US West Dex.

In response, the MPUC claims that the Commission did not attempt to directly regulate US West Dex. The MPUC argues that it did what it was required to do by the Act, ensure that the CLECs had nondiscriminatory access to telephone numbers and listings, and that US West provided the CLECs with services that are "at least equal in quality to that provided by the incumbent LEC to itself." First Report and Order, ¶ 970.

US West Communications, Inc., the party in this case, and US West Dex are wholly owned subsidiaries of US West, Inc. ("US West Parent"). MCI Telecomms. Corp. v. US West Communications, Inc., Case No. C97-1508R, at 23-24 (July 21, 1998 W.D.Wash.). US West Dex is the publishing branch of the parent company and publishes US West's white and yellow page directories. Id. at 24. US West Dex is not a named party to the underlying Agreements in this case.

Contrary to the MPUC's argument, the commission did attempt to regulate US West Dex. The MPUC required the parties to include language in the Agreement that placed a direct obligation on US West Dex: "US WEST Direct[20] will give CLECs the same opportunity to provide directory listings as it provides to US WEST (for example, through some type of bidding process)." (A168; Order Resolving Arbitration Issues at 53). Even if, as the Defendants claim,

[20]US West Direct is the predecessor company of US West Dex.

other portions of the MPUC's Order were explicitly directed only at US West, the MPUC did seek to control US West Dex's business and contract agreements, and therefore to regulate US West Dex: "US WEST should make its contracts with US WEST Direct available for review by CLECs, as necessary, to ensure that the CLECS are receiving the same services at the same terms as US WEST."(A168; Order Resolving Arbitration Issues at 53). The question becomes whether the MPUC had the authority to do so under either state law or the Act, or whether it assumed authority it never had as the Plaintiff claims.

Under state law, the MPUC has only the "powers expressly delegated by the legislature and those fairly implied by and incident to those expressly delegated." In the Matter of Northwestern Bell Telephone Co., 371 N.W.2d 563, 565 (Minn.Ct.App. 1985) (citing Great Northern Railway Co. v. Public Service Comm'n, 169 N.W.2d 732, 735 (Minn. 1969)). Implied powers must be fairly evident from the express powers. Id. (quoting Peoples Natural gas Co. v. Minnesota Public Utilities Comm'n, 369 N.W.2d 530 (Minn. 1985)). As the Minnesota Supreme Court held, Chapter 237 was created to resolve issues concerning public utility telephone companies; a business that publishes directories is not a telephone company and therefore does not fall under the regulatory powers of the MPUC. In the Matter of Northwestern Bell Telephone Co., 367 N.W.2d 655, 660 (Minn. 1985). US West, as a utility, is regulated by the MPUC, while US West Dex, which is in the business of publishing directories, is not. See id. The MPUC does not have the power under state law to regulate US West Dex. The Court must therefore analyze federal law for any possible authority for the MPUC's action regulating US West Dex.

The Act states that local exchange carriers have the duty to provide competitors with nondiscriminatory access to telephone numbers, directory assistance, and directory listings. 47

U.S.C. § 251(b)(3). US West Dex is not a local exchange carrier because it does not engage in providing telephone exchange service or exchange access. See 47 U.S.C. § 153(26). As US West Dex is not a covered entity under the Act, the statute's requirement does not create any obligation for US West Dex and the MPUC cannot use the statute to regulate US West Dex or impose an obligation on it. See MCI Telecomms. Corp. v. US West Communications, Inc., Case No. C97-1508R, at 25 (July 21, 1998 W.D.Wash.).[21]

Because it lacked the power under both state law and the Act to regulate US West Dex, the MPUC exceeded its authority by ordering the addition of provisions requiring US West Dex to treat US West and its competitors the same with respect to yellow page advertising and white page directory listings. These matters are remanded to the MPUC for further deliberations.

XI. RESERVATION OF SPACE ON US WEST'S RIGHTS-OF-WAY

US West argues that the MPUC imposed obligations in the US West-AT&T and US West-MCImetro Agreements concerning the reservation of space and the modification of US West's rights-of-way, conduits, or pole attachments (collectively "rights-of-way") that are not just and reasonable, and therefore violate § 251(c)(6). US West is particularly concerned that it will not be able to reserve space on its own rights-of-way. Because the MPUC imposed obligations are not reciprocal, US West claims they violate § 251(b)(4) as well.

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[21] AT&T and MCImetro argue that US West Dex is an "affiliate" of US West within the meaning of 47 C.F.R. § 51.5 and therefore a covered entity. The term "affiliate" is never defined by the FCC. However, given the Act's express limitation of covered entities to telecommunications carriers, a telecommunications carrier's control of an entity must be a prerequisite for finding that the entity is an affiliate within the meaning of the FCC's rules. Although US West and US West Dex share a parent company that does not equate to exerting control over one another. Without some evidence of US West's control of US West Dex, the Court cannot conclude that US West Dex is an affiliate of US West.

The Agreements adopted by the MPUC state that US West shall provide MCImetro and AT&T "equal and non-discriminatory access to pole space, ducts, conduit, entrance facilities, equipment rooms, CEVs, telephone closets and other apparatus, ROW [rights-of way] and any other pathways on terms and conditions equal to that provided by [US West] to itself or to any other party. Further, [US West] shall not preclude or delay allocation of these facilities to [MCImetro and AT&T] because of the potential needs of itself or of other parties. US West may maintain spare capacity only as reasonably necessary for maintenance and administrative purposes, based on generally accepted engineering principles."(A214-A215, Att. 4, at ¶ 3.2.5). The Agreements require US West to reserve space for 90 days and permit AT&T and MCImetro up to 6 months to begin the attachment or installation of its facilities. Id. at ¶ 3.2.12. US West is also required to "relocate and/or make ready existing ROW, conduits or pole attachments where necessary and feasible to provide space" for the CLEC's requirement. Id. at ¶ 3.2.13. Under the Agreements, if the CLECs' facilities increase the costs for US West's operations, the CLECs are responsible for the reimbursement of the added costs. Id. at ¶¶ 3.2.21-3.2.24.

i. **Lack of Reciprocity**

Section 251(b)(4) of the Act provides that all local exchange carriers have "[t]he duty to afford access to poles, ducts, conduits, and rights-of-way of such carrier to competing providers." Section 224 of the Act creates a significant exception to this general duty. Section 224(f)(1) states that "[a] utility shall provide a cable television system or any telecommunication carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Although at first blush this section seems to imply broad application, section 224(a)(5) excludes any incumbent LEC from the definition of "telecommunication carrier." Given these dictates, the FCC held that "no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 *or section 251(b)(4).*" First Report and Order, ¶ 1231 (emphasis added). Because US West is an incumbent LEC, it cannot seek reciprocity from AT&T and MCImetro in relation to access to rights-of-way. See MCI v. US West, No. C97-1508R, slip op. at 8-9 (W.D.Wash. July 21, 1998).

ii. **Reservation of Space**

US West claims that it is unreasonable for it to be unable to reserve space on its own rights-of-way. In its First Report and Order, the FCC stated that:

> Allowing the pole or conduit owner to favor itself or its affiliate with respect to the provision of telecommunications or video services would nullify, to a great extent, the nondiscrimination that Congress required. Permitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) [of the Telecommunications Act of 1934, regarding Regulation of Pole Attachments] prohibits such discrimination among telecommunications carriers.

First Report and Order, ¶ 1170. The provision adopted by the MPUC in the US West-MCImetro and US West-AT&T Agreements requiring US West not to preclude the use of its facilities by the CLECs because of any potential needs of US West, follows the directives of the FCC's order. In order for the CLECs to be competitive, they must have access to the rights-of-way. If US West were able to reserve space on its own rights-of-way, the CLECs would be relegated to the anti-competitive position of constructing facilities to meet present needs while US West retained the capacity to meet both present and future needs. The provision adopted by the MPUC is directed by the FCC's order and does not violate the Act. Furthermore, the provision adopted by the MPUC protects US West's interests by setting aside space for administration and maintenance.

iii. Allocation of Cost

Finally, US West suggests that the US West-MCImetro and US West-AT&T Agreements unlawfully allocate to it the costs for equipment and expansions that benefit the CLECs. The FCC directs that modification costs are to be shared by the carriers benefitting from the modification. First Report and Order, ¶¶ 1211-1216. The Agreements provide that the CLECs are responsible for any increased costs to US West for modifications that benefit the CLECs. See (A214-A215, Att. 4, at ¶¶ 3.2.21-3.2.24). The MPUC also determined that US West may "continue to charge the annual usage fee, make ready charges, labor charges, and application fees it has charged under the provisions of the 1978 Pole Attachment Act, except as modified by § 703 of the Federal Act and by future FCC regulations." (A168; Order Resolving Arbitration Issues at 46). The MPUC's decision and the Agreements comply with the Act and the FCC's orders. Under the Agreements, US West does not unreasonably shoulder costs for modifications and services solely benefitting the CLECs.

XII. COLLOCATION OF EQUIPMENT

US West argues that the MPUC erred by requiring US West to permit new entrants to physically collocate RSUs on US West's premises because such equipment is not necessary for access to unbundled network elements under § 251(c)(6). US West further claims that the US West-AT&T and US West-MCImetro Agreements approved by the MPUC violate the Act by permitting the new entrants to choose the equipment they deem necessary for collocation, thereby placing no limitations on the entrants' right to collocate equipment.

Section 251(c)(6) states that an incumbent LEC has a duty to provide "for physical collocation of equipment *necessary* for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . ." 47 U.S.C. § 251(c)(6) (emphasis added). The FCC found that § 251(c)(6) "generally requires that incumbent LECs permit the collocation of equipment used for interconnection or access to unbundled network elements." First Report and Order, ¶ 579. In reaching that conclusion, the FCC interpreted and defined the term "necessary": "Although the term 'necessary,' read most strictly, could be interpreted to mean 'indispensable,' we conclude that for the purposes of section 251(c)(6) 'necessary' does not mean 'indispensable' but rather 'used' or 'useful.'" Id. The FCC concluded that a more expansive interpretation of the term "necessary" would further the procompetitive motivation behind the Act. Id.

The FCC then determined whether certain equipment could or could not be collocated on the incumbent LEC's premises, essentially deciding whether the equipment is "useful" for interconnection or access to unbundled elements. Id. ¶¶ 580-582. Concerning the collocation of switching equipment, the FCC stated:

> At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements. We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute, that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements.

Id. ¶ 581. The FCC left to the discretion of the state commissions the factual determination as to whether "switching equipment" is used for interconnection.

When allotting the burden of proof, the FCC placed the burden on the incumbent LEC to prove that specific equipment is not "necessary," meaning "useful," for interconnection to unbundled network elements. Id. ¶ 580. The FCC stated that:

> [W]henever a telecommunication carrier seeks to collocate equipment for purposes within the scope of Section 251(c)(6), the incumbent LEC shall prove to the state commission that such equipment is not "necessary," as we have defined that term, for interconnection or access to unbundled network elements.

Id. ¶ 580.

The FCC also interpreted the term "necessary" in relation to § 251(d)(2).[22] The FCC determined that within the context of § 251(d)(2) the term "necessary" means "that an element is a prerequisite for competition." First Report and Order, ¶ 282. Without a necessary element, a new entrant's "ability to compete would be significantly impaired or thwarted." Id. The FCC stated that a finding that a proprietary element is not "necessary" for purposes of § 251(d)(2)(A) requires an incumbent LEC to establish "a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network." Id. ¶ 283. The FCC would view the "necessary" requirement as having been met even if the "'requesting carriers can obtain the requested proprietary element from a source other than the incumbent,' since ' [r]equiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act.'" AT&T Corp., 119 S.Ct. at 735 (quoting First Report and

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[22] 47 U.S.C. § 251(d)(2) provides:
In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether-
(A) access to such network elements as are proprietary in nature is *necessary*; and
(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.
(emphasis added).

Order, ¶ 283). By means of these lexicographical permutations, the FCC created a similar definition for the term "necessary" within the context of § 251(d)(2) and § 251(c)(6); in both cases, the word means something akin to "useful."

In AT&T Corp., the Supreme Court vacated the FCC's interpretation of the word "necessary" within the context of § 251(d)(2), finding that the FCC had given the term too broad a definition and robbed it of all of its teeth as a limiting standard. AT&T Corp., 119 S.Ct. at 735. The Court stated that "the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do." Id. at 734-35.

"Presumptively, 'identical words used in different parts of the same act are intended to have the same meaning.'" United States National Bank of Oregon v. Independent Insurance Agents of America, 508 U.S. 439, 460, 113 S.Ct. 2173, 2185 (1993) (quoting Commissioner v. Keystone Consol. Industries, Inc., 508 U.S. 152, 159, 113 S.Ct. 2006 (1993)). Therefore, by rejecting the FCC's definition of the term "necessary" within the context of § 251(d)(2), the Supreme Court implicitly rejected the same overly broad definition given to the word by the FCC in relation to § 251(c)(6).

In making its factual determination whether to permit the collocation of RSUs, the MPUC utilized the "used" or "useful" standard originally promulgated by the FCC. The MPUC ordered collocation of RSUs and DLCs based on US West's failure "to meet its burden of proving that these types of equipment are not *'necessary,' as interpreted by the FCC*, for interconnection or access to unbundled elements." (A168; Order Resolving Arbitration Issues at 16) (emphasis added). In light of the rejection of this standard by the Supreme Court, the collocation issue must be remanded to the MPUC for reconsideration using a more stringent meaning of the term "necessary."

XIII. PERMANENT WHOLESALE DISCOUNT

US West claims that the MPUC erroneously relied on vacated FCC rules in determining the permanent wholesale discount. US West argues that the FCC rules were not a factor that Congress intended the state commissions to consider. US West also claims that the MPUC improperly applied the wholesale discount to below-cost retail services and services offered at promotional, term, and volume discounts. Finally, US West argues that the MPUC acted arbitrarily and capriciously when it selected several of the figures for its chosen cost study.

i. The MPUC's Wholesale Discount

The Act requires an incumbent LEC "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A). The Act directs state commissions to calculate wholesale rates "on the basis of retail rates charges to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3).

The FCC promulgated pricing rules in furtherance of the Act. See 47 C.F.R. §§ 51.501-51.515, 51.601-51.617, 51.701-51.717. Rules 51.601 through 51.617 address the terms and conditions under which LECS make their telecommunications services available for resale. 47 C.F.R. § 51.601. Incumbent LECs have a duty to make any telecommunications services that are offered on a retail basis available to a requesting telecommunications carrier at wholesale rates that are consistent with the avoided cost methodology approved by the FCC or with interim wholesale rates that "are at least 17 percent, and no more than 25 percent, below the incumbent LEC's existing retail rates." Id. §§ 51.606, 61.607, 51.609, and 51.611. In Iowa Utilities Board, the Eighth Circuit concluded the FCC lacked jurisdiction to issue pricing rules and therefore vacated the rules concerning wholesale discount rates. Iowa Utils. Bd., 120 F.3d at 800. In light of the Eighth Circuit's determination, US West alleges that the MPUC impermissibly relied on the MCImetro avoidable cost study simply because it complied with the FCC rules. However, after US West filed its complaint, the Supreme Court reinstated the FCC rules, finding that the FCC has the necessary "jurisdiction to design a pricing methodology." AT&T Corp., 119 S.Ct. at 733. US West acknowledges the cost methodology selected by the MPUC complies with the FCC rules. The MPUC's determination of wholesale discount is, therefore, appropriate under the Act.

ii. Retail Services and Promotional, Term, and Volume Discounts

The gravamen of US West's argument that the wholesale discount should not apply to below-cost retail services and services offered at promotional, term, and volume discounts is that US West should not be required to offer services at less than cost. The Act states that ILECs have a duty "to offer for resale at wholesale rates *any* telecommunications service that the carrier provides at *retail* to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4) (emphasis added). Given the broad language of the statute, when deciding whether a service must be offered for resale at wholesale rates, whether the service forms a below-cost portion of a universal service scheme is not dispositive. The FCC explicitly states that "[b]elow cost services are subject to the wholesale rate obligations under § 251(c)(4)." First Report and Order, ¶ 956.[23] As for discounts, the FCC found that "no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs." First Report and Order, ¶ 948.[24] In light of the broad language of the Act and the FCC's rules, US West's challenge to the MPUC's action cannot be sustained.

iii. __Errors in Avoided Cost Study__

a. **General Data**

US West argues that there are errors in the data used and the costs calculated in the MCImetro avoidable cost study used as the basis for the wholesale discount calculation. A correction of these errors would result in further lowering the wholesale discount. Specifically it is argued that the MCImetro study used incorrect ARMIS entries, erroneously included directory assistance and operator services as avoidable costs, and simply over-estimated certain avoided costs and services. Because these are factual determinations, they must be reviewed under an arbitrary and capricious standard. In relation to Directory Assistance and Operator Services, Marketing-Type Costs, and Total Other Customer Service Expense, US West argues that the MPUC erroneously relied on vacated FCC rules. The FCC's pricing rules have recently been reinstated by the Supreme Court. __See__ __AT&T Corp.__, 119 S.Ct. at 733. The reinstated FCC rules, as well as the testimony of the CLEC's witnesses, provided a sound foundation for the FCC's

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[23]The MPUC also found that US West failed to show that it would actually have to offer any of its services at below cost. (A168; Order Resolving Arbitration Issues at 35). There was sufficient evidence on the record, such as the testimony of John Grinager, a Senior Rate Analyst with DPS, to support this conclusion. (A133; Direct Testimony of Grinager at 7).

[24]US West failed to show that a specific exemption should apply to its discounts.

cost determinations. See, e.g., (A140; ALJ Hearing at 196-98). As for the allegedly incorrect ARMIS data, there was evidence before the MPUC that any changes in the data would have a "very, very minor effect,"(A143; ALJ Hearings at 202-04, 219), or no effect whatsoever. (A146; Initial Post-Arbitration Brief of MCImetro, App. 4). Therefore, the MPUC did not act in an arbitrary or capricious manner in making these factual determinations concerning the data for the avoided cost study.

b. DPS Proposed Correction

US West cites as error the MPUC's failure to adopt the DPS proposed correction to MCImetro's avoided cost study. At the end of its cost calculation in its cost study, MCImetro listed figures for total state revenues ($854,906), total expenses ($700,922), and total avoided costs ($150,956). (A133; Testimony of John F. Grinager at 17); (A158; Arbitrator's Report at 30). MCImetro divided the avoided costs by the *total costs* to arrive at the figure for the wholesale discount. (A133; Testimony of John F. Grinager at 17). The DPS proposed replacing *total cost* in the denominator position with the figure for *total revenues*. (A133; Testimony of John F. Grinager at 17-18).

Section 251(c)(3) of the Act states that, "a state commission *shall determine wholesale rates on the basis of retail rates charges to subscribers* for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(c)(3) (emphasis added). The FCC's regulations similarly require wholesale discounts to be based on retail rates less the avoided costs. See 47 C.F.R. 51.607(a). By basing the wholesale discount on total expenses rather than retail rates, the MPUC ignored the plain language of the Act and the FCC rules. The matter is remanded to the MPUC to use the retail rates as the basis for the wholesale discount pursuant to the dictates of the Act and FCC regulations.

The MPUC justified adopting the MCImetro final calculation by stating that DPS's "method would exclude a portion of the contribution, or overhead, and taxes from the avoided cost calculation" and no portion of the contribution would be attributed to avoided costs. (A168; Order Resolving Arbitration Issues at 34). It found that inclusion of contribution and taxes would be in keeping with the FCC's avoided cost approach. Id. If the DPS method is flawed then the MPUC should either discard it or adjust it to comport with the requirement that wholesale rates be based on the incumbent LEC's retail rates.[25]

XIV. INTERIM PRICES

i. Interim Prices

US West argues that the MPUC erroneously based the interim prices for unbundled network elements, interconnection, and transport and termination on AT&T and MCImetro's Hatfield model rather than US West's costs. US West claims that the MPUC improperly adopted a model that determines the cost to build an idealized structure and in so doing relied on vacated FCC pricing rules. After the MPUC issued its order the Supreme Court reinstated the vacated FCC pricing rules. AT&T, 119 S.Ct. at 733. The parties acknowledge that the model selected by the MPUC complies with the FCC's rules. Therefore, the MPUC did not violate the Act when it selected the Hatfield model.

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[25]This analysis is not applicable to the US West-MFS Agreement, because the parties to that agreement voluntarily negotiated a 21.5% discount. See infra section III, ii; (A168; Order Resolving Arbitration Issues at 34) ("[T]he Commission adopts the 21.5 percent avoided cost discount presented in the Joint Position Statement of MFS and US WEST.").

ii. **Tandem Switches**

With regard to compensation for switching rates, the MPUC rejected the ALJ Panel's recommendation and instead directed "the parties to charge symmetrical rates for termination and transport to the extent the relevant CLEC switch has the capability of serving the same geographic area as the incumbent's tandem." (A168; Order Resolving Arbitration Issues at 71). US West argues that the MPUC unlawfully treated the MCImetro and MFS switches as tandem, rather than end-office, switches for the purpose of compensation.

Section 251(b)(5) of the Act directs that all local exchange carriers are obligated to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). The terms and conditions for reciprocal compensation must be just and reasonable and, to meet this standard, they must allow for the recovery of a reasonable approximation of the "additional cost" of transporting and terminating a call begun on another carrier's network. 47 U.S.C. § 252(d)(2)(A). The FCC found that the "additional cost" will vary depending on whether or not a tandem switch is involved. First Report and Order, ¶1090. The FCC, therefore, determined that state commissions can establish transport and termination rates that vary depending on whether the traffic is routed through a tandem switch or directly to a carrier's end-office switch. Id. The FCC directed state commissions to "consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." Id. The FCC further instructed that where the new carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the new carrier's costs is the LEC tandem interconnection rate. Id.; 47 C.F.R. § 51.711(a)(3).[26]

Whether a switch has a geographic scope similar to a tandem or end-office switch is a factual determination. This Court must, therefore, review the MPUC's determination using the arbitrary and capricious standard of review. See AT&T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901, slip op. at 10-11 (D.Minn. April 30, 1998) (order denying motions to dismiss and determining standard of review); see also TCG Milwaukee, Inc. v. Public Service Commission of Wisconsin, 980 F.Supp. 992, 1004 (W.D.Wisc. 1997).

The MPUC found that the CLEC's switches serve the same basic function as US West's tandem switch. (A168; Order Resolving Arbitration Issues at 71). In fact, it found that the CLEC's switches had greater capabilities because they could also perform many of the functions of the end-office switch. (A168; Order Resolving Arbitration Issues at 71). In reaching its decision, the MPUC primarily relied on the fact that the CLEC's switches and US West's tandem switch had the same geographic reach. (A168; Order Resolving Arbitration Issues at 71). The MPUC reasoned that it was immaterial that MCImetro's fiber rings and switch currently serve only a subset of the geographic area covered by US West's tandem because MCImetro's switch had the capability of ultimately serving an equivalent geographic area. (A168; Order Resolving Arbitration Issues at 72).

[26]The Eighth Circuit had vacated 47 C.F.R. § 51.711(a)(3) on the ground that the FCC lacked jurisdiction to issue pricing rules. Iowa Utils. Bd., 120 F.3d at 800, 819 n.39. However, the Supreme Court reversed this determination and reinstated the FCC's pricing rules, including 47 C.F.R. § 51.711, finding that "the Commission has jurisdiction to design a pricing methodology." AT&T Corp. v. Iowa Utilities Bd., 119 S.Ct. at 733.

There was sufficient evidence before the MPUC to conclude that the CLEC's switches covered or could cover the same geographic area as US West's tandem switch. See (A97; Direct Testimony of Agatston at 4). For example, David Agatston, a Senior Manager in Local Interconnection for MCImetro, testified that MCI's switches presently serve areas at least equal in size, if not greater than, the areas serviced by any incumbent LEC's tandem switch. (A97; Direct Testimony of Agatston at 4). Furthermore, it was appropriate for the MPUC to consider the potential as well as the actual geographic capabilities of the CLEC's switches. The purpose of the Act is to open up the local telephone market to competition; because competitors do not yet have a strong foothold in the market, they are not yet functioning at full capability. In light of the Supreme Court's decision upholding the FCC's jurisdiction to make pricing rules, the fact that the CLEC's switches have the same geographic reach as US West's tandem switch supported the conclusion that their use should be compensated at the tandem switch rate.

iii. <u>Interim Number Portability</u>

The Act directs that local exchange carriers have "a duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by" the FCC. 47 U.S.C. § 251(b)(2). Number portability is defined by the Act as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30). On July 2, 1996, the FCC released an order directing LECs to provide, upon request of another carrier, currently available number portability measures, such as Remote Call Forwarding (RCF) and Direct Inward Dialing (DID), until such time as long-term number portability measures are available. <u>In the Matter of</u>

Telephone Number Portability, 11 F.C.C.R. 8352 (¶ 6, ¶ 110) (July 2, 1996). The FCC established principles to "ensure that the costs of currently available measures are borne by all telecommunications carriers on a competitively neutral basis . . . ." Id. ¶ 6. The FCC interprets the phrase, "competitively neutral basis," to mean that "the cost of number portability borne by each carrier does not affect significantly any carrier's ability to compete with other carriers for customers in the marketplace." Id. ¶ 131. The FCC also determined that a "competitively neutral" cost-recovery mechanism should include the following two criteria: (1) it should not give one service provider an appreciable cost advantage over another provider, when competing for a subscriber, and (2) "it should not have a disparate effect on the ability of competing service providers to earn normal returns on their investment." Id. ¶¶ 132, 135. The FCC determined that the meet-point billing arrangements is the proper access billing arrangement for interim number portability between neighboring incumbent LECs. Id. ¶ 140. The FCC further determined that neither the competing local service provider nor incumbent LEC should retain all terminating access charges. Id. It directed "forwarding carriers and terminating carriers to assess on [interexchange carriers] charges for terminating access through meet-point billing arrangements. The overarching principle is that the carriers are to share in the access revenues received for a ported call." Id.

US West, AT&T, and MCImetro agreed on the methods for implementing interim number portability, but could not agree on the methods for recovering the costs associated with interim number portability. (A168; Order Resolving Arbitration Issues at 40-41). The MPUC adopted a bill and keep method for cost recovery at the recommendation of AT&T and MCImetro. (A168; Order Resolving Arbitration Issues at 41). With respect to intrastate terminating access charges for ported numbers, the MPUC adopted a cost recovery method analogous to the FCC's cost recovery method for interstate terminating access charges. (A168; Order Resolving Arbitration Issues at 42).

The cost recovery methods adopted by the MPUC are alleged to fail to compensate US West for all of the costs incurred on behalf of its competitors. US West, therefore, claims that the methods are not competitively "neutral" under § 251(e)(2), or "just and reasonable" under § 252(d)(1). At the hearings, US West conceded that the MPUC's resolution of the interim cost recovery issue was consistent with the FCC's disposition of the issue in its Number Portability Order. (A206; Order Resolving Issues After Reconsideration at 35). This assessment was echoed by Susan Peirce, a Public Utility Rate Analyst for the DPS, who found the formula ultimately adopted by the MPUC to be compatible with the directives of the Number Portability Order, including the FCC's requirement that "any adopted cost recovery mechanism not 'give one telecommunications carrier an appreciable, incremental cost advantage over another telecommunications carrier, when competing for a specific subscriber.' (FCC Rules § 52.9)." (A132; Direct Testimony of Peirce at 19).

This Court, like the MPUC, is bound by the FCC regulations and because the MPUC's decision is in accord with those regulations, the Court must uphold the MPUC regarding this matter. See AT&T Communications of California v. Pacific Bell, 1998 WL 246652, at *2 (N.D.Cal. May 11, 1998) (citing Anderson Bros. Ford. v. Valencia, 452 U.S. 205, 219-20, 101 S.Ct. 2266 (1981)). US West must bring any challenge to the FCC's rulings before a federal court of appeals. See 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).

XV. MPUC IMPOSED TERMS

US West argues that the MPUC exceeded its authority under § 252(B)(4) and (C) by imposing terms unrelated to "open issues." US West does not cite any specific provision in the MPUC's order to support this proposition. US West alleges that its Petition for Rehearing shows that many of the terms in the US West-AT&T and US West-MCImetro Agreements were not identified as open issues. The pages cited by US West lack specificity as to which provisions in the agreements or MPUC order fail to relate to "open issues." (A172; Petition for Rehearing at 14-15, 22-29, and Atts. 1 & 2). AT&T included in its initial Petition for Arbitration a one and one-half inch thick matrix of issues addressed by the parties, a substantial number of which remained unresolved. (A1; Petition for Arbitration, Ex. 5). With this volume of open issues, US West was obliged to provide specificity to enable the Court to evaluate whether the MPUC exceeded its delegated authority. US West failed to provide the requisite specificity.

XVI. MODIFICATION OF NEGOTIATED TERMS

i. Unilateral Modification

US West argues that the MPUC violated § 252(e) of the Act by unilaterally modifying the US West-MFS Agreement rather than approving or rejecting the Agreement with "written findings as to any deficiencies." 47 U.S.C. § 252(e)(1). The MPUC stated that "[i]n some instances, in order for the terms to meet the reviewing standards the Commission found it necessary to condition approval upon modifications to the Agreement." (A208; Order Approving Contract at 4). Although it is skating a fine semantic line, there is validity to the MPUC's response that its Order Approving Contract is in the nature of a rejection of an agreement with written findings rather than a unilateral modification. The practical effect of the MPUC's order was to reject the Agreement as submitted. The MPUC then took the additional step of informing the parties as to the specific deficiencies and how they could be cured. Nothing in the Act restricts the MPUC from informing the parties what language, if adopted, would be approved by the MPUC.

ii. **Improper Rejection of Negotiated Provision**

US West argues that the MPUC improperly conflated the standards for rejecting negotiated and arbitrated agreements. The Act sets forth separate standards for a state commission's review of agreements adopted by negotiation and agreements adopted by arbitration. For arbitrated agreements, a state commission can reject the agreement, or any portion of the agreement, if it finds that "the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section." 47 U.S.C. § 252 (e)(2)(B). In the case of negotiated agreements, the Act creates a lower standard of review and directs that a state commission can only reject:

> an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that-
>
> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
>
> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity . . .

47 U.S.C. § 252(e)(2)(A).

With respect to the majority of the provisions in the MPUC's order, the MPUC gave explicit reasons as to why the provisions, as written, were not consistent with the public interest. For example, the MPUC found that with regard to § XXX.A.3 ("Resale"), the "lack of a wholesale discount would create a barrier to entry into the resale market for residential service; such a barrier would deny residential customers the benefit of resale competition." (A208; Order Approving Contract at 9). The MPUC appropriately applied the Act's standard of review and delineated the provisions' shortcomings. The MPUC's specific findings form the articulated basis for concluding that the majority of the provisions addressed in the order were inconsistent with public interest, convenience, and necessity. After making these findings, it was permissible for the MPUC to reject the provisions pursuant to 47 U.S.C. § 252(e)(2)(A).

The three exceptions in the MPUC's order to the above-outlined procedure involved Part 11 (dark fiber), unbundled access, and subloop unbundling. In the case of these provisions, the only reasons given by the MPUC for requiring modifications were that the provisions did not comply with the FCC Interconnection Order, ¶ 208, (A208; Order Approving Contract at 10), the Act, (A208; Order Approving Contract at 8), or prior MPUC decisions concerning *arbitrated* agreements. (A208; Order Approving Contract at 8, 10, and 11). Inconsistency with an FCC regulation or the Act is grounds for rejecting an arbitrated provision not a negotiated one.

To reject a negotiated provision because it violates an FCC regulation or the Act conflates the two review standards. Congress expressly created separate standards to determine when a state commission can reject the two types of agreements. By creating a lower standard of review for negotiated agreements, Congress encourages carriers to negotiate their agreements. See Iowa Utils. Bd., 120 F.3d at 801 ("The structure of the Act reveals the Congress's preference for voluntarily negotiated interconnection agreements between incumbent LECs and their competitors over arbitrated agreements."). The design and effect of the Act would be frustrated if the two standards of review became indistinguishable. The MPUC impermissibly rejected Part

11 (dark fiber), unbundled access, and subloop unbundling provisions of the parties' negotiated Interconnection Agreement for inconsistency with the Act, the FCC Interconnection Order, or prior MPUC decisions concerning arbitrated agreements. This issue, as it relates to the three specific provisions, is remanded to the MPUC for further deliberation.

XVII. TAKINGS CLAIM

US West makes a general claim that if the agreements are upheld, it will result in a taking of US West's property. US West alleges that the US West-AT&T and US West-MCImetro Agreements require it to provide services at below-cost prices. US West also alleges that requiring US West to permit interconnection and access to unbundled elements is a physical occupation of its property, and therefore constitutes a "*per se* taking under the Fifth Amendment."

In relation to its takings claim, US West states that it is not seeking compensation for the alleged taking but rather that it wishes an injunction to prevent a taking without just compensation. US West appears to be alleging a violation of the jurisdictional grant of the Act. In making its argument, US West relies on Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (D.C.Cir. 1994). In Bell Atlantic, the D.C. Circuit determined that 47 U.S.C. § 201 did not vest the FCC with the necessary authority to order LECs to provide physical collocation of equipment upon demand. Id. at 1444-47. It found that because the particular statute did not expressly authorize an order of physical collocation, the FCC could not impose it. Id. at 1447. Bell Atlantic is, however, inapposite to the present case, because, unlike the general Communications statute at issue in Bell Atlantic, 47 U.S.C. § 251(c)(6) expressly provides for limitations being placed on the LECs' property rights, including the requirement that incumbent LECs have a duty to provide for the physical collocation of equipment. See 47 U.S.C. § 251(c)(6). In fact, Congress was aware of the Bell Atlantic decision when it authorized the imposition of physical collocation:

> Paragraph 4(B) [of section 251] mandates actual collocation, or physical collocation, of equipment necessary for interconnection at the premises of a LEC, except that virtual collocation is permitted where the LEC demonstrates that actual collocation is not practical for technical reasons or because of space limitations. . . . Finally, this provision is necessary to promote local competition, because a recent Court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. (See Bell Atlantic Tel. Co. v. Federal Communications Commission, 24 F.3d 1441 (1994)).

House Rep. No. 104-204, at 73 (1995). Therefore, Congress clearly intended to vest the agencies with authority to place limitations on the LECs' property rights.

US West has not only challenged the MPUC's authority to impose these limitations on US West's property, but also claimed that the Agreement approved by the MPUC does not fully compensate US West for the taking of its property. This is a traditional takings claim allegation and the Court will therefore apply a traditional takings claim analysis.

The defendants argue that US West's taking claim must fail because: (1) it exceeds the scope of this Court's jurisdiction, which is limited by 47 U.S.C. § 252(e)(6); (2) the claim is not ripe for review; and (3) the agreement contains provisions which allow for full cost recovery by US West.

The Eighth Circuit explicitly noted that a takings claim can be presented to a federal district court under the review provisions of subsection 252(e)(6). Iowa Utils. Bd., 120 F.3d at 818. Therefore, this Court has jurisdiction to hear the takings claim.

In order for a takings claim to be ripe, two elements must be met: (1) the administrative agency has reached a final, definitive position as to how it will apply the regulation at issue, and (2) the plaintiff has attempted to obtain just compensation through the procedures provided by the State. Williamson Co. Regional Planning v. Hamilton Bank, 473 U.S. 172, 191, 194 (1985). Here, neither of these elements have been satisfied.

The Fifth Amendment states that, "private property [shall not] be taken for public use without just compensation." The Takings Clause is not meant to limit the government's ability to interfere with an individual's property rights, but rather to ensure compensation when a legitimate interference that amounts to a taking occurs. Glosemeyer v. Missouri-Kansas-Texas Railroad, 879 F.2d 316, 324 (8th Cir. 1989) (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987)). The compensation does not have to precede the taking: a process for obtaining compensation simply has to exist at the time of the taking. Id. (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984)). If US West ultimately receives just compensation then there has been no violation of the Takings Clause.

Public utilities, which have a hybrid public and private status, must be analyzed in a slightly different manner than other entities under the Takings Clause.[27] Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989).

> The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597, 17 S.Ct. 198, 205-206, 41 L.Ed. 560 (1896) (A rate is too low if its is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); FPC v.

[27] Although the traditional public utility rate model is not a perfect model for § 252(e)(6) cases, it is informative. See J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and Breach of the Regulatory Contract, 71 N.Y.U. Law Rev. 851, 954 (Oct. 1996).

> Natural Gas Pipeline Co., 62 S.Ct. 736, 742, 86 L.Ed. 1037 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense"); FPC v. Texaco Inc., 417 U.S. 380, 391-392, 94 S.Ct. 2315, 2392, 41 L.Ed.2d 141 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level").

Id. at 308. If the state fails to provide sufficient compensation, then the state has taken the use of a utility without just compensation and thereby violated the Takings Clause. Id. The particular theory used to determine whether a rate is fair does not matter. Id. at 310 (citing FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944)). If the overall effect cannot be said to be unreasonable then judicial inquiry is at an end. Id. (citing FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944)). Whether a rate is unfair depends on what is a fair rate of return given "the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return." Id. "Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid . . . ." Hope Natural Gas, 320 U.S. at 605.

The purpose of the Telecommunications Act of 1996 is, in part, to foster competition in the local telephone market. GTE North, Inc. v. McCarty, 978 F.Supp 827, 831 (N.D.Ind. 1997) (citing Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, at 113 (1996)). Under the Act, US West provides services to its competitors rather than the public. 47 U.S.C. § 251(c). The end goal is not a fair rate of return as in the traditional rate-setting paradigm, but rather the equitable opening up of a market. Neither party to the Agreement is expected to profit in the interconnection or resale processes. See 47 U.S.C. § 251(c)(4)(A) ("to offer for resale at wholesale rates . . ."). Because these transactions are not designed to be profitable, the analysis cannot be fair rate of return as to any individual provision concerning the sale or access of services to the CLECs. Rather the query must be whether any provision or provisions of the Agreement negatively affect the *overall* operation of the incumbent LEC to such a degree that it can no longer receive a fair rate of return from its investment.

In this case, it is premature to ask this question for two reasons. First, the MPUC has not reached a final decision concerning the prices for unbundled elements; they are still subject to a true-up procedure at the end of the Generic Cost Investigation. Until the MPUC reaches a decision on that issue, the overall effect of the Agreement cannot be determined and the takings claim is not ripe for review. Second, the incumbent LEC still has an opportunity to have its public rates increased in light of the MPUC's Orders made pursuant to §§ 251 and 252. If US West is not earning a sufficient return on its investment in Minnesota, it can petition the MPUC for a rate change. See Minn. Stat. § 237.075. The MPUC is obligated to implement a rate base upon which a telephone company can earn a fair rate of return. See id., subd. 6. US West will not have exhausted its state remedies until it has taken this final step. It would only be after such a hearing that a court could determine whether the overall utility rates are "inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme." Duquesne Light Co. v. Barosch, 488 U.S. 299, 312 (1989). The MPUC's actions under the Act establish LECs relationships with one another; the equation is not complete until the economic relationship with the public is determined in light of the intercarrier relationships. Because Minnesota offers an opportunity to US West to have its rates readjusted, US West has not yet exhausted its state remedies and its takings claim is ripe for review. US

West's takings claim is therefore dismissed without prejudice.

CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. US West's request that this Court find that the MPUC's determinations concerning the US West-MCImetro, US West-AT&T, and US West-MFS Agreements violate 47 U.S.C. §§ 251 and 252 is **GRANTED IN PART, DENIED IN PART**, and **DENIED WITHOUT PREJUDICE IN PART**. It is granted with respect to the following claims: (1) Count III(A) (the wholesale discount rate), as it relates to the data used in MCImetro's avoided cost study; (2) (combination of network elements), but only with regard to the US West-MCImetro and US West-AT&T Agreements; (3) Count IV(B) (collocation of equipment); (4) Count IV(F) (US West Dex); (5) Count IV(H) (unbundling requirement), as it relates to dark fiber and subloop unbundling; (6) Count IV(I) (resale of deregulated and enhanced services), to the extent it involves inside wire, CPE, and information services; and (7) Count V (modification of negotiated terms), as it relates to Part 11 (dark fiber), unbundled access, and subloop unbundling in the US West-MFS Agreement. It is denied without prejudice with

respect to US West's takings claim. It is denied in all other respects. The matter is remanded to the MPUC for further determinations consistent with this decision.

Ann D. Montgomery
UNITED STATES DISTRICT JUDGE

Dated: March 30, 1999

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

U S WEST COMMUNICATIONS, INC.,	*	
Plaintiff,	*	CIVIL NO. 4-97-CV-70082
v.	*	MEMORANDUM OPINION, RULING GRANTING AT&T's AND MCI'S MOTION FOR RECONSIDERATION AND ORDER AMENDING JUDGMENT
ALLAN T. THOMS et al.,	*	
Defendants.	*	

AT&T Communications of the Midwest, Inc. ("AT&T") and MCImetro Access Transmission Services, Inc. ("MCI") bring this motion for reconsideration in light of an intervening change in the controlling law regarding the interpretation and application of the Telecommunications Act of 1996 (the "Act").[1] In its order "Affirming Some Provisions of the Interconnection Agreements and Remanding Others" (hereinafter "Initial Decision"), this court relied on the law as it existed after the Eighth Circuit Court of Appeals decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) ("IUB I"). Remarkably, about one hour after this court filed its opinion the United States Supreme Court issued its decision in AT&T v. Iowa Utilities Board, 119 S. Ct. 721 (1999) ("IUB II"), affirming in part and reversing in part the judgment of the Eighth Circuit Court of Appeals in IUB I.

AT&T and MCI filed their motion for reconsideration within 10 days of entry of the judgment on this court's order, and they recite that they file it pursuant to Fed. R. Civ. P. 59. Although the Federal Rules of Civil Procedure do not recognize a

[1] The provisions of the Act most pertinent to these proceedings are located at 47 U.S.C. §§ 251-252. On page two of its initial ruling filed on January 25, 1999, however, this court mistakenly referred to title 28 of the United States Code when discussing provisions of the Act. Thus, the citations to 28 U.S.C. § 251(c), 28 U.S.C. § 251(c)(1), and 28 U.S.C. § 252, are amended to read, respectively, 47 U.S.C. § 251(c), 47 U.S.C. § 251(c)(1), and 47 U.S.C. § 252.

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Exhibit C

motion for reconsideration, per se, see Sanders v. Clemco Indus., 862 F.2d 161, 168 & 170 (8th Cir. 1988) (noting that a motion for reconsideration is not described by any particular rule of federal civil procedure), generally a motion for reconsideration that is filed within 10 days of the entry of judgment is treated as a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). See id. at 168-171 & n.11; see also In re Trout, 984 F.2d 977, 978 (8th Cir. 1993) (construing a motion to reconsider filed within ten days of the filing date of the initial order to be a 59(e) motion); DeWit v. Firstar Corp., 904 F. Supp. 1476, 1494 (N.D. Iowa 1995) (construing a motion to reconsider filed within ten days after the judgment to be a 59(e) motion); 12 James Wm. Moore et al., Moore's Federal Practice § 59.30[7] (3d ed. 1998)(same); cf. Retired Chicago Police Ass'n v. City of Chicago, 76 F.3d 856, 862 n.1 (7th Cir. 1996) (same). Because AT&T and MCI filed their motion for reconsideration within 10 days of the entry of judgment in this case, the motion is a timely filed rule 59(e) motion.[2]

A motion to alter or amend a judgment is appropriate when there has been an intervening change in the controlling law. See Laughlin v. Jensen, 148 B.R. 315, 315 (D. Neb. 1992) (recognizing that rule 59(e) motion may be based on intervening change in controlling law); see also Atlantic States Legal Found., Inc. v. Karg Bros., Inc., 841 F. Supp. 51, 53 (N.D.N.Y. 1993) (same); Gregg v. American Quasar Petroleum Co., 840 F. Supp. 1394, 1401 (D. Colo. 1991) (recognizing that motion for reconsideration under 59(e) is proper where there has been a significant change or development in the law since the submission of the issues to the court); 12 James Wm. Moore et al., Moore's Federal Practice § 59.30[5][a][i-ii] (3d ed. 1998). There is no doubt that the Supreme Court's IUB II decision constitutes an intervening change in controlling law. The question is, therefore, what issues addressed in this court's Initial Decision need to be readdressed

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[2] Fed. R. Civ. P. 59(e) provides: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

in light of the intervening change in the law. The parties have filed briefs addressing this question and the motion is submitted.

The Supreme Court's Decision

In its IUB II decision, the Supreme Court changed the law in three respects potentially affecting this court's Initial Decision. First, the Supreme Court reversed the Eighth Circuit Court of Appeals and concluded that the Federal Communications Commission ("FCC") has jurisdiction to design a pricing methodology, thereby reinstating federal pricing regulations previously vacated by the court of appeals.[3] See IUB II, 119 S. Ct. at 729-33. Second, the Supreme Court vacated 47 CFR § 51.319, previously upheld by the court of appeals, which gave competitive local exchange carriers ("CLECs") blanket access to a laundry list of network elements. The Court vacated this rule because it concluded that the FCC granted blanket access to the listed elements based upon an improper interpretation of the "necessary" and "impair" standards contained in 47 U.S.C. § 251(d)(2). See id. at 734-736. Although the Court did not specifically vacate 47 CFR § 51.317, the rule articulating the FCC's interpretation of the "necessary" and "impair" standards as it applies to other non-listed network elements, the Court's analysis of rule 319 apparently sounds the death-knell for rule 317 as well. Finally, the Supreme Court reinstated 47 CFR § 51.315(b), previously vacated by the court of appeals, which prevents incumbent local exchange carriers ("ILECs"), except upon request, from separating requested network elements that the ILEC currently combines. See id. at 736-738. The impact of these changes in the law on issues previously decided by this court are discussed, in turn, below.

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[3] The pricing rules previously vacated by the court of appeals on jurisdictional grounds include: 47 C.F.R. §§ 51.501-51.515 (inclusive, except for section 51.515(b) which was not vacated by the court of appeals), 51.601-51.611 (inclusive), & 51.701-51.717 (inclusive). See IUB I, 120 F.3d at 800 n.21.

Issues to be Reconsidered

I. The Pricing Issues

In its previous order, this court addressed two pricing issues raised by MCI: (1) the failure of the Iowa Utilities Board (the "Board") to set cost-based interconnection and access to unbundled network element rates, and (2) the failure of the Board to de-average unbundled network element rates. In both instances, this court affirmed the approach taken by the Board. The Board's approach to these issues, although consistent with the general code language, see 47 U.S.C. §§ 251(c) & 252(d), did not comply with the FCC regulations applying those code provisions. At the time the Board rendered its pricing decision, it was under no obligation to comply with the FCC's rules because they had already been vacated by the court of appeals in IUB I. Now that the Supreme Court has reinstated the FCC's pricing rules, however, the Board's approach to both of these pricing issues is inconsistent with federal law.

The FCC's rules regarding the pricing of interconnection and access to network elements are located in 47 CFR §§ 51.501-515. These rules provide that the state commission, i.e., the Board, must establish the rates either pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 51.511, or consistent with the proxy ceilings and ranges set forth in § 51.513. See 47 CFR § 51.503. The forward-looking economic cost-based pricing methodology referenced in the first option is the sum of the total element long-run incremental cost ("TELRIC") of the element, as described in section 51.505(b), and a reasonable allocation of forward-looking common costs, as described in section 51.505(c). See 47 CFR § 51.505(a). The Board adopted neither the TELRIC option nor the proxy option in establishing rates for interconnection and access to unbundled elements. Indeed, the Board specifically rejected the TELRIC methodology because the Board was unwilling to accept two of its underlying assumptions. See Board's Final Decision and Order, at 13-14 (April 23, 1998), as modified by order on June 12, 1998. In its stead, the court adopted an incremental cost approach. See id. at 14-15. By adopting a pricing methodology other than those specified in the FCC's pricing rules, the Board's pricing approach is inconsistent with current federal law. Accordingly, this pricing issue will be remanded to the Board with direction to comply with the FCC's pricing rules.

The FCC's pricing rules reinstated by the Supreme Court also address the de-averaging issue. Section 51.503(b) of code of regulations provides that an ILEC's rates for each element it offers must comply with the rate structure rules set forth in section 51.507. See 47 CFR § 51.503(b). Subsection (f) of section 51.507 requires state commissions, i.e., the Board, to "establish different rates for elements in at least three defined geographic areas within the state." 47 CFR § 51.507(f). In its Final Decision and Order, the Board refused to establish different rates for different areas of the state, deciding instead to adopt a statewide average rate for each particular element. See Board's Final Decision and Order, at 33-35. Although this court, in its Initial Decision, accepted the Board's approach as being cost-based, albeit a statewide average cost, the Board's approach is inconsistent with the FCC's pricing rules reinstated by IUB II. Accordingly, the Board is ordered on remand to readdress the de-averaging issue and to, at a minimum, comply with the requirements of the FCC's rules.[4]

II. The "Necessary" and "Impair" Standards

In 47 U.S.C. § 251(d), Congress authorizes the FCC to establish regulations to implement the requirements of section 251. That authorization includes a grant of authority to determine what network elements should be made available to CLECs on an unbundled basis pursuant to section 251(c)(3). Congress requires the FCC, in making that determination, to consider, at a

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[4] This court is well aware that the FCC pricing rules have yet to be approved by the Eighth Circuit Court of Appeals on their merits. The court cannot, however, refuse to apply the law as it currently exists based upon the possibility that the law may be changed by subsequent court opinion. Of course, if the parties truly wish to avoid such uncertainty, they should take their duties to negotiate in good faith to heart and reach a mutual agreement as to all of these contested issues. See 47 U.S.C. § 251(c)(1). I strongly encourage them to do so.

minimum, whether "(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2) (emphasis added). Pursuant to this grant of authority, the FCC established a list of network elements that satisfied the necessary and impair standards, and therefore had to be made available by ILECs upon request, and listed those elements in 47 CFR § 51.319. See IUB II, 119 S. Ct. at 734-36 (outlining the approach taken by the FCC in its First Report and Order). The Supreme Court rejected this list of network elements, however, because the Court concluded that the FCC did not properly interpret and/or apply the necessary and impair standards contained in section 251(d)(2) when developing the list. See IUB II, 119 S. Ct. at 734-35.

In 47 CFR § 51.317, the FCC articulated its standards for identifying network elements, other than those listed in section 51.319, which, upon request, must be made available to CLECs on an unbundled basis. The standards articulated by the FCC in section 51.317 are the same interpretation of the necessary and impair standards the Supreme Court found wanting in its analysis of section 51.319. Accordingly, the standards articulated in section 51.317 no longer appear to be good law.

The only network element required by the Board to be provided on an unbundled basis pursuant to the standards articulated in section 51.317, and challenged by a party to the interconnection agreement, is the "dark fiber" element. In its Final Arbitration Decision on Remand, the Board concluded that dark fiber should be provided as a network element because it satisfies the FCC's test for a nonproprietary element "that denial of unbundled access to the network element would decrease the quality or increase the cost to a CLEC of providing a service." Board's Final Arbitration Decision on Remand, at 31-32 (citing the IUB I decision which upheld the FCC's interpretation of the impairment standard). This court affirmed the Board's finding based upon the Board's application of the now-defunct impairment standard articulated by the FCC. See Initial Decision, at 40-41. Because the Board and this court relied on an improper interpretation of the impairment standard in requiring the ILEC to provide dark fiber on an unbundled basis, the dark fiber issue is remanded to the Board for a re-determination as to whether the ILEC must provide access to its dark fiber, a network element, on an unbundled basis.[3]

MCI urges this court to not remand this issue to the Board, but instead hold the question in abeyance, pursuant to the doctrine of primary jurisdiction, until the FCC has completed its rulemaking process and adopted a revised interpretation of the impairment standard. This court declines to do so. It is extremely unlikely that the FCC's new regulations would allow this court, as MCI suggests, to adjudicate the dark fiber issue on the record as it exists. Rather, this court would eventually have to remand the issue to the Board for a determination, in the first instance, of whether the provision of dark fiber satisfies the new standard. This court would then review, upon request, the Board's decision. See 47 U.S.C. § 252(e)(6) (establishing that it is this court's duty to review determinations made by state commissions, not to make such determinations in the first instance). It is precisely because the Board is better equipped to handle such a determination in the first instance that this court remands the issue to the Board at this time. See MCI's Brief in Support of Motion to Reconsider, at 18 (citing Far East Conf. v. United States, 342 U.S. 570, 574-75 (1952), for the proposition that agencies are better equipped than courts by specialization, insight gained by experience, and more flexible procedures to resolve specialized or technical issues). On remand, the Board can determine whether there is another basis for requiring the ILEC to provide dark fiber, whether it should delay the determination until after the FCC's new rules are

[3] The Supreme Court's decision in IUB II did not affect the Board's and this court's determination that dark fiber is a network element. Accordingly, the Board need not reexamine that issue on remand.

released, or whether it should take another course of action.

III. The Combination of Elements Issue

The initial interconnection agreement arbitrated and accepted by the Board required the ILEC to provide network elements individually, and in combination with other network elements. See Original Agreement § 37. This approach was called into question by the court of appeals in IUB I. In that decision, the court of appeals vacated subsections (b)-(f) of 47 CFR § 51.315, which speak to the issue of an ILEC's duty to provide network elements in combination. Subsection (b) of section 51.315 prohibits an ILEC, except upon request, from separating requested network elements that the ILEC currently combines. See 47 CFR § 51.315(b). Subsections (c)-(f) of section 51.315 require the ILEC, upon request, to combine other network elements, even if those elements are not ordinarily combined in the ILEC's network, provided that certain conditions are met. See 47 CFR § 51.315(c)-(f). The court of appeals in IUB I vacated subsection (b) of section 51.315 because section 251(c)(3) of the Act provides for access to network elements only on an unbundled basis, not a combined basis. See IUB I, 120 F.3d at 813. In addition, the court of appeals concluded that allowing CLECs to purchase the ILEC's elements on a combined basis would obliterate the distinction between access to unbundled network elements and the purchase of an ILEC's retail services for resale. See id. The court of appeals vacated subsections (c)-(f) of section 51.315 because the court concluded that the language of section 251(c)(3) of the Act—"[an ILEC] shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements"—unambiguously indicates that requesting carriers, not incumbents, have the responsibility of combining those network elements provided by the ILEC on an unbundled basis. See id.

In light of the court of appeals' decision, the Board modified the interconnection agreement on remand to provide:

> The ILEC shall offer each Network Element individually or may, in the ILEC's sole discretion except where Network Elements are inextricably combined, e.g.

> switching and signalling, offer them in combination * * *.
>
> * * * *
>
> For each Network Element, the ILEC shall have only the following options with regard to recombining with other Network Elements:
>
> (1) The ILEC can elect to not separate the Network Element from other Network Elements with which it is combined;
> (2) The ILEC can provide its own personnel to the CLEC to recombine the Network Element with other Network Elements as requested by the CLEC;
> (3) The ILEC can elect "recent change" technology, which is switching software somewhat like an on/off switch that allows the CLEC to recombine some Network Elements;
> (4) The ILEC can elect to have a third-party technician acceptable to both the ILEC and the CLEC recombine the Network Elements; and
> (5) The ILEC can elect to allow the CLEC's technician recombine the Network Elements.
>
> Where options 4 or 5 are selected, ILEC may require that ILEC personnel accompany the third-party or CLEC personnel as they do the recombining of Network Elements. Where ILEC personnel accompany the third-party or CLEC personnel, ILEC shall bear the expense of its personnel, and CLEC shall bear the recombining expense of the third-party or its own personnel.

Interconnection Agreement on Remand § 37. This approach was consistent with IUB I, in that the ILEC was not required to provide network elements in combination nor required to recombine unbundled elements on behalf of the CLEC. Accordingly, in its Initial Decision, this court affirmed the Board's approach. See Initial Decision, at 28-30.

In IUB II, however, the Supreme Court reversed the court of appeals' decision as it related to subsection (b) of 47 CFR § 51.315. See IUB II, 119 S. Ct. at 737 (finding rule 315(b) to be a reasonable interpretation of the Act). In so doing, the Court concluded that the language of section 251(c)(3) of the Act—"[an ILEC] shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements"—merely forbids ILECs from sabotaging unbundled network elements in such a way as to preclude them from ever being recombined. See IUB II, 119 S. Ct. at 737. This language does not, the Court reasoned, "say, or even remotely imply," that the ILEC must provide the network elements only in an unbundled, and never a combined, form. See id. Accordingly, the Court found section 251(c)(3) of the Act to be ambiguous on whether leased network elements may or must be separated, and concluded that the FCC's interpretation contained in section 51.315(b) had a rational basis in the Act's nondiscrimination requirement. See id. Indeed, the Court cited with approval the FCC's rationale for the rule—the rule "is aimed at preventing incumbent LECs from 'disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants.'" Id. (quoting Reply Brief for Federal Petitioners 23).

The change in law brought about by the Supreme Court's IUB II decision renders the Board's approach to the combination issue, at least in part, inconsistent with federal law. To the extent section 37 of the Interconnection Agreement on Remand allows the ILEC to choose to unbundle network elements that it currently combines, even in the face of a request from a CLEC for the elements to be provided in their combined form, the agreement is inconsistent with current federal law. See 47 CFR § 51.315(b). Thus, the combination issue will be remanded to the Board to modify the interconnection agreement so as to prevent the ILEC from unbundling network elements that it currently combines in contradiction of 47 CFR § 51.315(b).[4]

It should be noted that the Supreme Court reversed only the court of appeals' decision as it related to subsection (b) of section 51.315; it did not address subsections (c)-(f), which were also vacated by the court of appeals. See IUB II, 119 S. Ct. at 736-38. Accordingly, the Board's approach to combining

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[4] The Board apparently predicted such a change in the law, as it included a clause in section 37 of the Interconnection Agreement on Remand notifying the parties that the combination approach adopted by the Board was subject to modification in the event the Supreme Court reversed the combinations portion of the IUB I decision. See Interconnection Agreement on Remand § 37.

network elements not currently combined in the ILEC's network system—allowing the ILEC to choose between combining the elements for the CLEC, utilizing recent change technology, allowing a third party to combine the elements, or allowing the CLEC to combine the elements—remains a viable approach under the law. The Board need only modify the agreement so as to eliminate any suggestion that the ILEC can choose to unbundle elements that it currently combines in its own system, in contravention of a request from a CLEC for the elements in their combined form. In other words, an ILEC may not be given discretion to deny a request for network elements in a combined form if the ILEC combines those same elements in its own system. If the elements requested by the CLEC are not utilized in a combined form by the ILEC in its own system, the ILEC need only provide the elements in an unbundled form, and the ILEC cannot be required to combine the elements for the CLEC's benefit. The Board should modify the interconnection agreement accordingly.[7]

IV. Other Issues

In its Initial Decision, this court remanded the issue concerning the collocation of remote switch modules ("RSMs")

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[7] US West Communications, Inc. ("US West") contends that this court lacks jurisdiction to revisit its initial ruling on the combination issue because neither AT&T nor MCI, the parties who filed this motion to reconsider, challenged the Board's approach to the combination issue in the initial section 252(e)(6) proceeding. I disagree. Pursuant to MCI's and AT&T's motion to reconsider, this court may reconsider any of its determinations in its Initial Decision which are affected by the intervening change in the controlling law, regardless of which party initially challenged the agreement provision or which party filed the motion to reconsider. For example, upon reconsideration, the court accepted US West's argument and remanded the dark fiber issue even though US West did not file the motion for reconsideration.

Moreover, a practical reason supports a remand of the combination issue at this time. Undoubtedly, this issue would have been revisited pursuant to the renegotiation provision in the interconnection agreements. *See* Interconnection Agreement on Remand § 20.2. It is this court's conclusion that by immediately remanding the issue to the Board, the court is accelerating the renegotiation of the combination issue, a result consistent with the Act's purpose to bring about effective competition as quickly as possible.

because the Board failed to make an explicit finding that the RSMs were going to be "used for interconnection." See Initial Decision, at 54-57. On remand, the Board may, in its discretion, reconsider whether "used for interconnection" remains the appropriate test after the Supreme Court's decision in IUB II. See IUB II, 119 S. Ct. at 734-36 (disapproving of the FCC's broad interpretation of the word "necessary," as it is used in section 251(d)(2) of the Act); Initial Decision, at 54 (explaining that FCC interpreted the word "necessary," as it is used in section 251(c)(6) of the Act, the collocation provision, to mean "used or useful").

The rest of this court's findings and conclusions contained in its Initial Decision will remain unaltered.[8]

ORDER

MCI's and AT&T's motion for reconsideration is GRANTED. Upon reconsideration, all provisions of this court's original order and judgment shall remain unaltered, except IT IS ORDERED that the two pricing issues, the dark fiber issue and the network element combination issue are remanded to the Board.[9]

Dated this 19 day of April, 1999.

HAROLD D. VIETOR
Senior U.S. District Judge

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[8] Throughout US West's "Brief on the Effect of the Supreme Court's Decision," US West repeatedly suggests that the Supreme Court's decision somehow changes the number or nature of network elements US West is obligated to provide AT&T and MCI under the interconnection agreement. In its Initial Decision, this court addressed only US West's obligation to provide dark fiber as a network element because that was the only network element that US West claimed it had no duty to provide. This court cannot reconsider a decision it did not make in its Initial Decision nor an issue that was not pursued by any party in the original proceeding. Therefore, US West remains obligated to provide all the unchallenged network elements contained in the Interconnection Agreement on Remand, including operational support systems ("OSSs") and shared transport.

[9] Nothing in this opinion is intended to limit the procedures available to the Board for resolving these issues on remand, including allowing the parties to negotiate agreement.

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2000, a copy of the foregoing document was served on the parties of record as indicated:

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