

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MCI METRO ACCESS TRANSMISSION SERVICES, INC.,	)	
	)	
Complainant,	)	DOCKET NO. UT-971063
	)	
v.	)	COMMISSION DECISION
	)	AND FINAL ORDER DENYING
U S WEST COMMUNICATIONS, INC.,	)	PETITION TO REOPEN,
	)	MODIFYING INITIAL ORDER,
Respondent.	)	IN PART, AND AFFIRMING,
.....	)	IN PART

**SUMMARY**

1. **PROCEEDINGS:** On June 26, 1997, MCI metro Access Transmission Services, Inc. (MCI metro), filed a formal complaint against U S WEST Communications, Inc. (U S WEST) with the Washington Utilities and Transportation Commission (Commission) in this matter, alleging breaches of contract and violations of law resulting from U S WEST's failure to adequately forecast network growth and timely provision interconnection facilities. On July 16, 1997, U S WEST filed its answer to the complaint.

2. On July 30, 1997, a prehearing conference was conducted and Washington Utilities and Transportation Commission Staff (Commission Staff) entered its appearance. On August 15, 1997, U S WEST filed its Motion to Dismiss; on August 22, 1997, MCI metro and Commission Staff filed oppositions to the Motion to Dismiss; on August 27, 1997, the Commission heard oral arguments, and the Commission's October 2, 1997 Order denied the motion.[1]

3. On October 20, 1997, the Commission reconvened the prehearing conference, and a petition to intervene by TRACER was granted.

4. On February 13, 1998, MCI metro and Commission Staff filed opening testimony. On March 27, 1998, U S WEST filed reply testimony. On April 24, 1998, MCI metro and Commission Staff filed rebuttal testimony.

5. On June 2-5, 1998, evidentiary hearings were conducted before Administrative Law Judge Lawrence J. Berg.

6. On July 16, 1998, the parties filed opening briefs. On July 31, 1998, MCI metro, Commission Staff, and U S WEST filed reply briefs.

7. On September 25, 1998, the *Ninth Supplemental Order; Initial Order* was entered.

8. On October 20, 1998, MCImetro, U S WEST, and Commission Staff filed Petitions for Administrative Review. On October 30, 1998, each of those parties filed responses to the petitions.

9. On January 6, 1999, U S WEST filed a Petition for Reopening the Record for receipt of additional evidence pursuant to WAC 480-09-820(2). On January 13, 1999, MCImetro and Commission Staff filed responses opposing U S WEST's petition.

10. **COMMISSION:** The Commission denies U S WEST's Petition for Reopening the Record, affirms the Initial Order, in part, and modifies the Initial Order, in part. Chairwoman Levinson files a separate opinion concurring, in part, and dissenting, in part, with the majority.

11. **APPEARANCES:** Complainant, MCImetro is represented by Clyde MacIver, attorney, Seattle, WA, William Hunt, Denver, CO, and Deborah Ching, San Francisco, CA; respondent, U S WEST, by Lisa Anderl and Peter Butler, attorneys, Seattle, WA; Commission Staff by Shannon Smith, Assistant Attorney General, Olympia, WA; and TRACER by Arthur Butler and Joel Paisner, attorneys, Seattle, WA.

## MEMORANDUM

### I. BACKGROUND

12. In the instant Order, the Commission addresses the allegations in MCImetro's complaint against U S WEST filed June 26, 1997. The parties have interconnected equipment and facilities for the ordering and provisioning of local exchange services pursuant to three successive agreements since September 1995. MCImetro alleged violations in four main areas: 1) network capacity and provisioning of facilities; 2) production of quarterly forecasts and notices of facilities exhaust; 3) interconnection at U S WEST's access tandem; and 4) call blockage.

13. The instant Order discusses the complexities of forecasting and provisioning capacity, and the developing process of interconnection. The initial interconnection agreement between the parties predates the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, *codified at* 47 U.S.C. § 151 et seq. (1996) (Telecom Act or Act), and the Federal Communications Commission's First Report and Order (FCC Order).[2] The Telecom Act and the FCC Order established additional obligations between the parties. However, this Commission best summarized the essential obligation between MCImetro and U S WEST in its *Ninth Supplemental Order*

*Rejecting Tariff Filings, Washington Utilities and Transportation Commission v. U S West Communications, Inc.*, (Interconnection Case), Consolidated Docket Nos. UT-941464, 941465, 950146, and 950265, at 21 (March 13, 1996):

Our order requires that USWC and competing carriers treat each other as co-carriers.

The Commission does not underestimate the challenge of competing and cooperating at the same time; however, MCImetro is dependent upon U S WEST in order to provide local service to its own customers. The instant Order seeks to minimize that dependence by enabling MCImetro to exercise greater control of its operations and make planning decisions based upon the same network information as U S WEST has available to itself.

## **II. MCIMETRO'S COMPLAINT**

14. MCImetro's complaint alleges *inter alia* that U S WEST failed to provide adequate interconnection facilities to interconnect its telecommunications network with MCImetro's network. MCImetro asks the Commission: 1) to order U S WEST to immediately devote the resources and personnel necessary to insure that sufficient local interconnection facilities are in place and that orders are processed in a timely manner; 2) to order U S WEST to comply with its contractual obligations and provide forecasts and notices of major network projects; 3) to order U S WEST to provide sufficient capacity within its own network to eliminate call blockage; 4) to order U S WEST to provide a monthly review of traffic data; 5) to find that U S WEST has violated the public service laws, regulations, and orders of the Commission; 6) to find that U S WEST has subjected MCImetro to undue or unreasonable prejudice or disadvantage and failed to provide nondiscriminatory access to its network; and 7) to order U S WEST to provide monthly reports to the Commission showing how U S WEST is meeting its obligations to provide timely local interconnection services. Finally, MCImetro asks the Commission to assess damages and penalties against U S WEST for breaches of its agreements and violations of law.

## **III. INITIAL ORDER**

15. The Initial Order concluded that U S WEST: 1) breached its interconnection agreements by failing to reasonably forecast and provision facilities; 2) breached its agreements and violated state law by failing to provide MCImetro with notices of facilities exhaust; 3) violated state law by denying MCImetro inter-connection at its access tandem when facilities were unavailable at its local tandem; and 4) violated Commission regulation by causing call blocking on MCImetro's trunk group.

16. The Initial Order provided for specific remedies as requested by MCImetro, but concluded that penalties were not appropriate at this time.

#### **IV. PETITIONS FOR ADMINISTRATIVE REVIEW**

17. Petitions for review were filed by MCImetro, Commission Staff, and U S WEST.

##### **A. The MCImetro Petition for Review.**

18. MCImetro requests that the Commission: 1) revise the finding regarding the time frame for deployment of permanent number portability because it is incomplete; 2) revise the finding regarding MCImetro's success in the local market; 3) remove the confidential designation from challenged U S WEST documents; 4) find that the standard interval for provisioning facilities in place should always apply; 5) revise the finding that "major projects" are provisioned on an individual case basis; 6) reverse the finding that U S WEST policy statements in exhibits are consistent with the belief that existing network capacity could satisfy demand; 7) reverse findings and conclusions that U S WEST did not engage in willful or intentional misconduct; 8) modify specific relief granted to further protect MCImetro; and 9) assess penalties for violations of statutes, orders, and rules.

##### **B. The Commission Staff Petition for Review.**

19. Commission Staff requests that the Commission: 1) remove the confidential designation from challenged U S WEST documents; 2) find that U S WEST violated the Ninth Supplemental Order in the Commission's Interconnection Case; 3) find that U S WEST violated state law by failing to reasonably forecast and provision facilities; 4) reverse findings and conclusions that U S WEST did not engage in willful or intentional misconduct; and 5) assess penalties for violations of statutes, orders, and rules.

##### **C. The U S WEST Petition for Review.**

20. U S WEST requests that the Commission: 1) reverse the finding that planning documents submitted as evidence contain statements of corporate policy; 2) reverse findings that U S WEST acted unreasonably to forecast and provision facilities; 3) reverse findings that capacity issues relating to Internet growth, competitive local exchange carrier (CLEC) demand, and number portability were foreseeable; 4) find that capacity upgrades require a minimum of seven months and U S WEST timely initiated increases to capacity; 5) reverse findings that

U S WEST was contractually and legally obligated to provide notices of facilities exhaust under the major network projects provision in its agreements; 6) revise the finding that capacity problems at the local tandem have minimal impact on U S WEST; 7) reverse findings that U S WEST caused call blocking on MCI metro trunks; and 8) reverse or modify all conclusions that U S WEST breached its agreements or violated state law and Commission rules.

## V. STATEMENT OF JURISDICTION AND AUTHORITY

21. The Commission has jurisdiction over this complaint and U S WEST pursuant to RCW 80.01.040 and 80.04.110 which provides that when two or more public service corporations are engaged in competition in any locality in the state, either may make complaint against the other that its practices are unreasonable, unremunerative, discriminatory, illegal, unfair, or intending or tending to oppress the complainant. The Commission also has jurisdiction pursuant to RCW 80.36.186 and 80.36.300, and WAC 480-120-515.

## VI. SUMMARY OF STATE LAW AND POLICY

22. The Washington Legislature has made competition in telecommunications markets a matter of state policy. RCW 80.36.300. The Washington Supreme Court reiterated this policy in Electric Lightwave, Inc. v. Utilities & Transp. Comm'n, 123 Wn.2d 530, 869 P.2d 1045 (1994) (Electric Lightwave), where the court rejected the argument that exclusive franchise service areas in the telecommunications industry were the law in Washington.

23. The Commission regulates, in the public interest, the rates, services, facilities, and practices of public utility companies, including telecommunications companies. RCW 80.01.040. In doing so, the Commission must implement the state's policy favoring competition in telecommunications markets.

24. In keeping with its mandate to promote local exchange competition, the Commission entered into a proceeding to decide the "terms and conditions under which competitors for local exchange service will interconnect their networks in order to exchange traffic between their customers." *Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, In Part, Interconnection Case*, at 6 (Oct. 31, 1995). In that Order, the Commission explained how interconnection is necessary to ensure local exchange competition:

Technically and economically efficient interconnection of the incumbent LEC and new entrant ALEC [alternative local exchange company] networks is essential to the emergence of a competitive local exchange market. Denial of technically and economically efficient interconnection

arrangements creates a barrier to entry. The Commission is persuaded that ALECs should have considerable flexibility to configure their networks in a manner they deem suitable.

*Id.* at 45. In the Fourth Supplemental Order, the Commission directed U S WEST to file interconnection tariffs. *Id.* at 97-99. In addition, the Commission expressly rejected the contention that a company's obligation to interconnect is limited to the availability of facilities:

The Commission will not allow any carrier, regardless of the terms offered to its own customers, to condition its obligation to interconnect at meet points and to complete local calls delivered by originating carriers on the availability of facilities.

*Ninth Supplemental Order Rejecting Tariff Filings, Interconnection Case*, at 19 (March 13, 1996). This complaint involves the Commission's orders in the Interconnection Case as well as the statutes and rules governing telecommunications companies in the state of Washington.

## VII. SUMMARY OF FEDERAL LAW

25. In addition to state laws and policies requiring local exchange competition, Congress also has mandated local competition on a national level. On February 8, 1996, the Telecom Act became law. The purpose of the Act is to:

[P]rovide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.

H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996). As an incumbent local exchange carrier (ILEC), U S WEST is obligated by the Act *inter alia* to interconnect with competitive providers, such as MCImetro. 47 U.S.C. § 251(c)(2). U S WEST must interconnect its network with MCImetro "at any technically feasible point" and the interconnection provided by U S WEST must be "at least equal in quality" to the interconnection it provides to itself.

26. The Telecom Act provides that telecommunications companies will provide interconnection pursuant to agreements that are negotiated by the parties, arbitrated by state commissions, or both. 47 U.S.C. § 252(a) and (b). The agreements must be consistent with the Act and state law and policy. 47 U.S.C. § 252(e).

## VIII. INTERCONNECTION AGREEMENTS BETWEEN U S WEST AND MCIMETRO

**1. The September 1, 1995 Interconnection Agreement (Initial Agreement).**

27. The Initial Agreement was executed between MCImetro and U S WEST pending the outcome of the Interconnection Case. Exhibit 10. Under this agreement, U S WEST was to provide one T-1 trunk for termination of local traffic from U S WEST's local tandem switch to MCImetro's Class 5 switch. This agreement also provided that MCImetro could order additional tandem trunks as growth required.

28. Section 1.5 of the Initial Agreement states:

The parties will use their best efforts to cooperate and install, test and make available for use on a mutually agreeable schedule the services ordered from each other.

29. Section 11 of the Initial Agreement states that the parties agree to follow each other's ordering process for all services.

**2. The August 26, 1996 Interconnection Agreement (Interim Agreement).**

30. MCImetro and U S WEST entered into the Interim Agreement pending execution of an arbitrated agreement pursuant to the Telecom Act. Exhibit 11. The Interim Agreement superseded the Initial Agreement. The parties renewed their pledge to use their best efforts to cooperate and install services ordered. U S WEST agreed to provide facilities within the standard time interval for private line transport service as stated in its Service Interval Guide. The standard interval for high density facilities in place was five business days.

31. Among other things, this agreement provided that both parties would work toward the development of joint forecasting for traffic utilization over trunk groups. The quarterly forecasts required the parties to describe major network projects anticipated for the following six months. If one party's requirements exceeded forecasted quantities for forecasted locations, the facilities were to be provisioned as available, with the further agreement that the parties would use their best efforts to meet the unfilled requirements as quickly as possible. If MCImetro and U S WEST were unable to reconcile their forecasts, the trunk groups would be provisioned at the higher number.

32. This agreement also provided that U S WEST would "to the greatest commercially reasonable extent possible" make available additional trunking facilities at the Seattle and Tacoma tandems. In situations where capacity is exhausted at the tandems, the agreement proposed a direct end-office trunking (DEOT) plan to ensure call completion.

### **3. The August 20, 1997 Interconnection Agreement (Definitive Agreement).**

33. MCImetro and U S WEST entered into an interconnection agreement as the result of negotiation and arbitration pursuant to the Telecom Act. The Definitive Agreement, filed with and approved by the Commission, superseded the Interim Agreement and provided for forecasting and provisioning of trunk groups. Exhibit 12, Attachment 4. The term for provisioning local interconnection trunk groups was changed to be no longer than the standard interval for provisioning switched access service. The applicable standard interval for facilities in place depends on several variables in U S WEST's Service Interval Guide. The parties agreed that "major projects" are to be jointly planned and coordinated.

34. Attachment 4, Section 10.2.2, requires quarterly forecasts to include a description of major network projects anticipated in the succeeding six months that could affect the other party. Major network projects expressly include trunking or network rearrangements, shifts in anticipated traffic patterns, or other activities that reflect a significant increase or decrease in trunking demand for the following forecasting period. Major network project planning also includes issues of network capacity and forecasting.

35. U S WEST and MCImetro appealed the Commission's decision approving the Definitive Agreement to the United States District Court. The District Court granted, in part, and denied, in part, the parties' cross-motions for summary judgment.[3] The Commission, U S WEST, and jointly MCImetro and MCI Telecommunications Corp. have appealed the decision of the district court on different grounds.[4] The Definitive Agreement has not been stayed pending appeal.

## **IX. RESTRICTED ACCESS TO HIGHLY CONFIDENTIAL (HC) INFORMATION**

36. Several documents produced by U S WEST and admitted into evidence were designated HIGHLY CONFIDENTIAL.[5] Limited copies were made, access was restricted to specific individuals, and copies were returned to U S WEST at the close of the proceeding.

37. One copy of Exhibits HC-123, HC-124, HC-140, and HC-141 will be retained by the Commission in a separate, sealed, and clearly marked file. Any person seeking access to documents containing highly confidential information for any purpose must submit a written request, provide notice to U S WEST, and obtain approval from the Commission.

## **X. U S WEST's PETITION FOR REOPENING THE RECORD.**

38. U S WEST has compiled and seeks to present evidence of 1998 interconnection trunk utilization data for MCImetro and other CLECs. U S WEST contends that this evidence leads to the conclusion that MCImetro misforecast its need for interconnection trunks or purposefully ordered quantities in excess of its need. According to U S WEST, underutilization of scarce resources contributes to facilities exhaust and network congestion. U S WEST argues that MCImetro made trunk utilization an issue in this case by claiming that U S WEST caused call blocking on one of its trunk groups. U S WEST states that this information also is relevant to MCImetro's claims that it accurately forecasted its need for interconnection trunks.

39. MCImetro argues that U S WEST failed to submit trunk utilization data at the time of the hearing even though it had at least five months worth of data in June 1998. U S WEST states that these reports were generated on a monthly basis. MCImetro states that insofar as U S WEST had control over the data, the information was discoverable.

40. MCImetro argues that the issue before the Commission is whether U S WEST timely provisioned interconnection trunks ordered in 1995, 1996, and 1997, and not the utilization of trunks in 1998. Furthermore, MCImetro argues that capacity issues were raised during the hearing. MCImetro cites evidence in the record that it was required to forecast excess end-office trunks in 1997 for number portability based upon assumptions provided by U S WEST and prematurely initiated orders for end-office trunks in late 1996 because capacity at U S WEST's tandem was exhausted.

41. MCImetro argues that overall trunk utilization is not essential to reach a decision on whether MCImetro experienced call blockage on its network as a result of U S WEST's conduct. Trunk utilization is a question of how trunks are used *after* they are received by an interconnecting CLEC, and MCImetro's claims arise prior to the period during which U S WEST collected trunk utilization data.

42. Commission Staff's responds that there is no evidence that underutilization occurred at the same locations or during the same time frame that MCImetro was unable to obtain facilities and argues it is unclear whether underutilization data pertains to end-office or tandem trunks.

43. Commission Staff also argues that U S WEST has not shown good or sufficient cause for the receipt of this information. U S WEST cannot condition its obligation to provide interconnection on whether the CLEC is optimally utilizing its capacity at every location at all times.

44. WAC 480-09-820 states:

(2) Reopening. A petition for reopening may be filed with the commission by any party to a proceeding at any time after the close of the record and before entry of the final order.

(b) In contested proceedings, a petition may be granted to permit receipt of evidence which is essential to a decision and which was unavailable and not reasonably discoverable at the time of the hearing with due diligence, or for any other good and sufficient cause.

45. WAC 480-09-820(2)(b) establishes a two-prong test for reopening: the information is essential to a decision *and* was unavailable at the time of hearing. An exception is allowed for good and sufficient cause. U S WEST's petition is rejected on each of these points.

46. In this case, all potential violations of law under discussion occurred prior to U S WEST's compilation of trunk utilization data. Evidence supports MCImetro's claim that it prematurely ordered end-office facilities because of tandem exhaust. Subsequent to August 1997, every MCImetro order was for either end-office facilities or trunk augments, and MCImetro did not order additional tandem facilities.

47. U S WEST's trunk utilization data does not distinguish between end-office and tandem facilities; thus, U S WEST's comparison between CLECs is not relevant. Furthermore, U S WEST's petition does not establish the relevance between its trunk utilization data and MCImetro's facilities that were impacted by call blocking in 1997. The evidence offered by U S WEST is not essential to any decision under review in this case.

48. A substantial portion of the evidence which U S WEST now seeks to submit was available and reasonably discoverable at the time of the hearing, and U S WEST fails to explain how the data available at the time of hearing (January through May, 1998) was inadequate to support any arguments which it now makes.

49. U S WEST's Petition for Reopening the Record is denied.

## **XI. ISSUES PRESENTED UPON REVIEW.**

- A. Should the Finding Regarding the Time Frame for Deployment of Permanent Number Portability Be Revised?
- B. Should the Finding Regarding MCImetro's Success in the Local Market Be Revised?

- C. Should the Finding That Capacity Problems at the Local Tandem Have Minimal Impact on U S West Be Revised?
- D. Do Excerpts in Exhibits C-94, C-116, and C-117 Constitute Confidential Information?
- E. Do Exhibits C-94, C-116, and C-117 Contain Statements of Corporate Policy?
- F. What Is the Standard Interval for Providing Facilities Where They Are Not in Place?
- G. What Is the Standard Interval for "Major Projects?"
- H. Did U S WEST Reasonably Forecast and Provision Facilities?
- I. Did U S WEST Violate the Fourth and Ninth Supplemental Orders in the Interconnection Case?
- J. Did U S WEST Violate State Law By Failing to Reasonably Forecast and Provision Facilities?
- K. Did U S WEST's Failure to Provide Notices of Facilities Exhaust Breach its Agreements and Violate State Law?
- L. Did U S WEST's Failure to Exchange Traffic Through Its Access Tandem Violate State Law?
- M. Did U S WEST Violate State Regulations By Causing Call Blocking on MCImetro Trunks?
- N. Do Breaches of the Definitive Agreement Constitute Violations of the Commission Order Approving the Agreement?
- O. Should MCImetro's Request for Additional Relief Be Granted?
  - 1. Ordering Paragraph 1: Interconnection Orders Subject to Standard Intervals for Facilities in Place.
  - 2. Ordering Paragraph 2: Interconnection Orders Not Subject to Standard Intervals for Facilities in Place.

3. Ordering Paragraph 3: Changes to Firm Order Commitment Due Dates.
  4. Ordering Paragraph 4: Exchange of Quarterly Forecasts.
  5. Ordering Paragraph 5: Notices of Current or Forecasted Capacity Exhaust.
  6. Ordering Paragraph 6: Network Congestion Bypass.
  7. Ordering Paragraph 7: Network Exhaust Bypass.
  8. Ordering Paragraph 8: Monthly Traffic Data Reports.
- P. Should the Commission Award MCImetro Damages?
- Q. Does the Commission Have Discretion to Assess Penalties?
- R. Did U S WEST Engage in a Concerted Pattern of Willful and Intentional Misconduct?
- S. Should the Commission Assess Penalties Against U S WEST for Violations of Law?
1. U S WEST Failed to Provide MCImetro Notices of Current and Forecasted Facilities Exhaust; Violations of RCW 80.36.170 and RCW 80.36.186.
  2. U S WEST Failed to Route MCImetro Traffic Through its Access Tandem When Capacity Was Exhausted at its Local Tandem; Violation of RCW 80.36.200.
  3. U S WEST Increased Network Capacity Based upon its Own Needs but Not the Needs of MCImetro; Violations of RCW 80.36.170 and RCW 80.36.186.
  4. U S WEST Caused Call Blocking; Violation of WAC 480-120-515.
- T. Should the Commission Specify Prospective Penalties?

## **COMMISSION DISCUSSION AND DECISION**

**A. Should the Finding Regarding the Time Frame for Deployment of Permanent Number Portability Be Revised?**

50. MCImetro proposes language to correct a typographical error in the Initial Order, Finding of Fact (FOF) 55. FOF 55 cites the hearing transcript (TR) at page 753, and partially quotes the transcript. MCImetro's proposed language completes the quoted sentence:

Seattle was designated for deployment of permanent number portability in the first quarter of 1998. TR at 753.

51. The finding in the Initial Order was intended to coincide with testimony in the hearing transcript, and the Commission adopts MCImetro's proposed language in the instant Order.

**B. Should the Finding Regarding MCImetro's Success in the Local Market Be Revised?**

52. MCImetro requests the finding in the Initial Order that MCImetro's Northwest Territory was the top performing sales and service organization in 1997 be revised (FOF 21). MCImetro states that the Initial Order confuses testimony regarding the success of MCI Telecommunications Corporation combined services in its "NW Territory" with the success of MCImetro's local exchange services. The Commission agrees that FOF 21 misstates relevant testimony and it is omitted herein; however, MCImetro's recommended revisions are not supported by the record.

53. This correction to the Initial Order does not change the conclusion that U S WEST has not denied MCImetro entry into the local exchange market in violation of the Telecom Act. Delays caused by U S WEST form the basis for finding violations of state law as discussed in the instant Order; however, the Commission does not equate these findings of delay with denial of entry. This conclusion neither diminishes the serious nature of U S WEST's violations of state law nor detracts from the unprecedented and substantial requirements imposed on U S WEST to remedy those violations.

**C. Should the Finding That Capacity Problems at the Local Tandem Have Minimal Impact on U S WEST Be Revised?**

54. U S WEST requests the finding that "[c]apacity problems at the local tandem have a minimal impact on U S WEST" be revised (FOF 62). U S WEST argues

that it uses its local tandem switches for both overflow and routing purposes, and that there is no evidence in support of the finding.

55. U S WEST's petition acknowledges that "[i]n general, the tandem switch is used only for overflow traffic." The record also establishes that U S WEST has used its access tandem switch to transit local traffic originating from its central offices, thus avoiding congestion on its local network. In contrast, MCImetro is significantly dependent on U S WEST's local tandem switches for transit of local traffic and has been denied alternative arrangements via the U S WEST access tandem switch.

56. The Commission modifies its finding consistent with evidence that capacity problems at local tandem switches have a relatively minimal impact on U S WEST's local operations.

**D. Do Excerpts in Exhibits C-94, C-116, and C-117 Constitute Confidential Information?**

57. The Commission is committed to protecting commercial information received from a party when disclosure would result in an unfair competitive disadvantage. This commitment is consistent with the Commission's goal to promote effective competition in the local market. The Commission also is prepared to protect commercial information as "highly confidential" when circumstances justify additional safeguards, as it has done in this case.[6] However, the Commission is also committed to fulfilling its legal duty to make non-confidential information publicly accessible.

58. On May 12, 1998, the Fourth Supplemental Order in this proceeding denied MCImetro's challenge to the confidential designation of U S WEST's Common Funding Document - Project ID 62WD631 (later admitted as Exhibit C-94). The Commission subsequently denied interlocutory review, but provided for review of that decision with review of the Initial Order.[7] The Commission also ruled that all challenges to confidential designations in this case are governed by procedures established in the Commission's Third Supplemental Order entered on October 28, 1997 (Protective Order).

59. On August 27, 1998, MCImetro "applied" (per the language of the Protective Order) for a determination challenging the confidential designation of excerpts in two other documents: Common Funding Document - Project ID 62WD634 (Exh. C-116) and Common Funding Document - Project ID 62WD817 (Exh. C-117). MCImetro filed additional support for its application on September 2, 1998; U S WEST and Commission Staff answered on September 8, 1998. The Initial Order found that the challenged excerpts are relevant to planning decisions, based upon consideration of the documents in their entirety, and denied the challenges. Petitions for administrative

review filed by MCImetro and Commission Staff argue that excerpts in Exhibits C-94, C-116, and C-117 should not be protected as confidential information.

60. RCW 80.04.095 provides a process for the disclosure of commercial information filed with the Commission, including notice to the person(s) directly affected, and further provides the opportunity to petition for a court order protecting confidential information. Statutory protection extends to network configuration and design information. The statute also states that nothing in chapter 80.04 RCW shall prevent the use of protective orders by the Commission governing disclosure of proprietary or confidential information in contested proceedings. Information disclosed pursuant to protective orders in contested proceedings is different from other information filed with the Commission.

61. The Protective Order in this case stated: 1) the expectation that confidential information would include only numbers, customer names, and planning details, 2) the intention to minimize the amount of “confidential” information so as to maximize the amount of public information, and 3) the expectation that parties would redact confidential information from exhibits. Planning details receive broader protection under the Protective Order than the statutory protection for network configuration and design information.

62. Commission Staff argues that the Initial Order applied the wrong legal standard to determine whether information was entitled to protection and shifted the burden of proof to MCImetro. MCImetro argues that the decision does not follow the provisions of the Protective Order. In the Initial Order, the Administrative Law Judge (ALJ) engaged in a balancing test, consistent with a “preponderance of the evidence” standard. In this context, the ALJ found that the contested excerpts more “probably” constituted planning details than not. The finding that this decision is not clear-cut does not mandate disclosure, but the Commission also agrees with Staff that doubts regarding confidential designation do not mandate protection. The Commission conducts a similar balancing test on review and arrives at a different conclusion, in part. Statements of corporate policy do not constitute planning details.

63. The contested excerpt in Exhibit C-117 does not purport to be a statement of corporate policy and must be considered in a different light than the contested excerpts in Exhibits C-94 and C-116. Common Funding Documents state the nature and necessity for network projects, and provide milestones for completing the project. The excerpt in Exhibit C-117 is part of the section describing the nature of the project and is one of several details relating to current and forecasted trunking requirements.

64. Carriers interconnecting with U S WEST are not required to disclose the details they consider in the course of network planning, and public disclosure of U S

WEST's planning details would result in an unfair competitive disadvantage. The challenged excerpt in Exhibit C-117 is a planning detail and entitled to protection as confidential information. Commission Staff argues that the excerpt does not present any potential for an unfair competitive disadvantage because it is "stale." However, the Commission is unable to conclude that this information is so remote in time to be of no present competitive value based upon the record.

65. The contested excerpts in Exhibits C-94 and C-116 are nearly identical to each other, and consist of details relating to current and forecasted trunking requirements. However, these excerpts also contain two policy-related statements consisting of the third and fourth sentences. The remainder of the challenged excerpts describe the need for additional trunks and the limitations of the planned growth constituting planning details similar to the excerpt in Exhibit C-117. The policy-related statements differ substantively and are severable from these planning details.

66. The contested policy statements do not present any potential for an unfair competitive disadvantage because they do not disclose technical details. Furthermore, the policy statements are consistent with U S WEST's acknowledgment that it did not consolidate CLEC and general trunk forecasts prior to April 1997. The challenged policy-related statements in Exhibits C-94 and C-116 constitute public information.[8] However, the contested excerpts comprising planning details in Exhibits C-94 and C-116 are entitled to protection as confidential information. All other information in each exhibit remains confidential and subject to the Protective Order. The policy-related statements in Exhibits C-94 and C-116 shall continue to be protected for ten days to enable U S WEST to seek a stay pending Commission review, and thirty days to seek a stay pending judicial review of the instant Order.

67. The Commission finds that Exhibits C-94 and C-116 are consistent with U S WEST's belief that existing capacity could satisfy demands for interconnection. Those exhibits also document U S WEST's knowledge that its assumption about capacity was no longer tenable from a network engineering perspective at the specific facilities being upgraded.

68. The Commission also finds based upon the totality of U S WEST's conduct that these policy declarations do not demonstrate intentional misconduct as MCImetro argued in its opening brief.[9] U S WEST provisioned MCImetro's April 1996 order for tandem trunks substantially in excess of forecasted requirements for that period. Furthermore, MCImetro's complaints both precede and follow U S WEST's timely provision of tandem trunks from facilities in place in June 1996, even though that order also exceeded forecasted requirements.

69. As discussed in the instant Order, U S WEST's overall conduct resulted in violations of state law, but its provisioning of facilities does not support the

conclusion that the contested policy-related statements evidence intentional misconduct. U S WEST's concern that MCImetro intends to exploit a misleading interpretation of these policy-related statements, contrary to the Commission's conclusions, is not pertinent. The possibility that parties publicly may interpret evidence or disagree with the Commission is not a proper basis for protecting information as confidential.

**E. Do Exhibits C-94, C-116, and C-117 Contain Statements of Corporate Policy?**

70. U S WEST seeks modification of the finding in the Initial Order (FOF 15) which states:

Official statements of U S WEST corporate policy are not issued in common funding documents; nevertheless, statements of corporate policy in Exhibit C-94 (and Exhibit C-117) are credible and reliable.

U S WEST relies on discussion in the Initial Order that its witness Mr. Wiseman credibly testified that official statements of U S WEST corporate policy are not issued in Common Funding Documents. As discussed above, Exhibits C-94 and C-116 contain nearly identical language, and the Commission's review of this issue is expanded to include Exhibit C-116.[10]

71. Statements in Exhibits C-94 and C-116 are expressly referred to as corporate policies; however, U S WEST argues these policy-related statements are not credible and reliable. U S WEST places great emphasis on the finding that "official statements" of corporate policy are not "issued" in these kinds of documents, but fails to define its terms. The Commission considers the ordinary meaning of these words. Taken together, the Commission understands these words to mean that official declarations of corporate policy are issued in documents other than Common Funding Documents. However, this finding does not serve to invalidate references to corporate policy in all other business records.

72. Mr. Wiseman did not participate in the preparation of these Common Funding Documents, nor does he review Common Funding Documents in the normal course of his business duties. TR 759. Therefore, Mr. Wiseman does not appear qualified to testify on the inherent reliability of references to corporate policy in these documents. Mr. Wiseman's opinion whether Exhibits C-94 and C-116 reliably state corporate policy is given no greater weight than the plain words in those documents.

73. The Initial Order incorrectly characterized the challenged excerpt in Exhibit C-117 as a policy statement; however, it is a planning detail. The excerpts in

Exhibits C-94 and C-116 are consistent with U S WEST's provisioning of facilities, and the third and fourth excerpted sentences are credible and reliable statements of U S WEST corporate policy. U S WEST's request for modification of that finding is denied.

**F. What Is the Standard Interval for Providing Facilities Where They Are Not in Place?**

74. MCImetro argues that the Interim and Definitive Agreements provide for a standard provisioning interval that should always apply, even where facilities are not in place. The Initial Order described the interval where facilities are not in place to be "individual case basis" (ICB), but it did not discuss the differing positions of the parties on this issue.

75. The agreements specify provisioning intervals by referring to other specific services, and not a specific number of days. The August 1996 Interim Agreement provided that the standard interval for provisioning Local Interconnection Trunk Groups would be based on U S WEST's private line transport service.[11] The August 1997 Definitive Agreement changed the term to refer to U S WEST's switched access service.[12] Both terms require reference to U S WEST's Service Interval Guide which organizes all provisioning intervals into two categories, "facilities in place" and "facilities not in place." [13] In every instance where facilities are not in place, the provisioning interval is ICB.

76. MCImetro argues that it did not agree to ICB where facilities are not in place. U S WEST responds that its Service Interval Guide sets the standard where facilities are both in place and not in place. This disagreement highlights the shared responsibility of the parties to find reasonable solutions that make financial and technical sense, in furtherance of their mutual obligation under our Interconnection Case Orders to treat each other as "co-carriers." The Commission expects MCImetro and U S WEST to resolve disputes over interpretation of their agreements as they arise, and not to rely upon the authority of the Commission to exploit semantic loopholes or gaps in their agreements.

77. Both parties agree that U S WEST's Service Interval Guide states specific provisioning intervals for facilities in place. The agreements rely on the current Service Interval Guide to determine appropriate standard intervals. MCImetro reasonably did not anticipate the extent to which U S WEST facilities were not in place, but it is unreasonable to assume that standard intervals for facilities in place would apply in all circumstances. The interconnection agreements between the parties fail to specify provisioning terms where facilities are not in place. Both parties share responsibility for giving full effect to the terms of their agreement. As the parties progress toward renegotiation of the Definitive Agreement, they should make a concerted effort to develop terms and conditions which address new and ongoing provisioning problems,

and which give effect to our orders and state and federal law. In the meantime, the fact that the parties did not fully negotiate or arbitrate all necessary terms in the Definitive Agreement does not release either party from their commitment to make all reasonable efforts to cooperate and timely provision service orders.

78. Testimony by U S WEST witnesses that switch augmentations require seven months for implementation is contradicted by the confidential Common Funding Document exhibits. For the remainder of the effective term of the Definitive Agreement, the reasonable time for U S WEST to establish facilities in place is no longer than six months from the date that MCImetro forecasts requirements. Subsequent to establishing facilities in place, U S WEST must provision MCImetro's orders in accordance with its Service Interval Guide and the Definitive Agreement. U S WEST must continue to provision facilities as soon as they become available.

79. U S WEST is not permitted to tack on additional time presently allocated to the production of quarterly trunk forecasts. Common Funding Documents to increase capacity based on U S WEST's needs were initiated as-needed, and not on a quarterly basis. U S WEST did not timely initiate increases to capacity based upon the consolidated forecasting process as evidenced by the length of time augments were pending between April 1997 and their in-service dates, as documented in Exhibit C-132. The Commission does not intend to micromanage this process; however, it is apparent that network projects based upon quarterly assessments of forecasted requirements are not responsive to a competitive local market.

80. The immediate demand for interconnection facilities has consistently outstripped supply, and there is little or no financial risk imposed on U S WEST in the short term. Furthermore, it is reasonable to expect that over- and under-forecasting by CLECs and U S WEST will offset each other in the short term. The parties need to cooperatively develop a long-term plan that provides MCImetro with reasonable assurances that facilities will be in place when it submits orders, and provides U S WEST with reasonable assurances that it will receive fair and just compensation for network investment to meet MCImetro's requirements. The Commission believes that the parties have not exhausted all opportunities to negotiate a mutually beneficial arrangement, and is prepared to work with the parties to resolve these contractual issues if mediation or additional arbitration is requested.

#### **G. What Is the Standard Interval for "Major Projects?"**

81. MCImetro requests review of the finding that "major projects" are provisioned on an individual case basis under the Definitive Agreement. MCImetro argues that Attachment 4, Section 8.4.4, only mandates that implementation of "major projects" shall be jointly planned and coordinated. U S WEST argues that "joint planning and coordination" is tantamount to creating an ICB delivery date.

82. There is insufficient evidence in the record to determine whether the ICB process includes joint planning and coordination. A narrow interpretation of Section 8.4.4 serves the best interests of the parties and the Initial Order is modified to coincide with the language of that provision. MCImetro service orders comprising "major projects" require that both parties exercise their best efforts to jointly plan and coordinate implementation. The Definitive Agreement provides for dispute resolution if the parties are unable to reasonably agree on a joint plan, including the Commission's expedited interconnection dispute resolution process.

#### **H. Did U S WEST Reasonably Forecast and Provision Facilities?**

83. U S WEST petitions for administrative review of findings that U S WEST failed to reasonably forecast and provision facilities. As in any industry, forecasting demand is a critical function in the telecommunications industry. However, forecasts will rarely be exact:

The art of forecasting has always required the inclusion of unknown factors, because forecasting is an attempt at predicting the future. Some factors are considered to be somewhat of an unknown quantity because they may not be fully quantifiable. However, these factors are relevant and are known to have an impact on the final results.

Commission Staff witness Griffith, Exhibit T-108 at 8, ll. 7-13.

84. U S WEST accurately represents that its forecasting process is similar to that of MCImetro. However, the conclusion that U S WEST acted unreasonably is not merely a matter of methodology; it is based upon the totality of circumstances. U S WEST historically augments its network capacity prior to exhausting facilities. A certain amount of capacity is reserved to meet interconnection needs during the process to engineer, furnish, and install new facilities.

85. This existing capacity should have been sufficient to meet MCImetro's relatively small percentage of DS1s in both the Seattle and Tacoma areas. TR 830-836, Exhibits HC-124, HC-141. U S WEST's projected loss of market share for 1996 and 1997 should have been sufficient to absorb MCImetro's forecasts, as well as the total CLEC demand for DS1s at the end of 1997. Exhibits HC-124, HC-140. U S WEST's belief that it could satisfy MCImetro's demand out of existing capacity would have been reasonable if no other demands were made on its reserve network capacity. However, there were other demands and the reasonableness of U S WEST's forecasts must be considered in light of the necessity to take these other factors into account.

86. In spite of its agreements and the inherent uncertainty in forecasting, U S WEST unilaterally chose not to consolidate MCImetro's forecasts into its planning process prior to April 1997 and failed to disclose this decision. Testimony by U S WEST witness Wiseman ascribes the decision to provision CLEC orders out of existing capacity to internal bureaucratic inertia as much as to the belief that existing capacity was sufficient to meet demand. TR at 779-780. At the inception of MCImetro's local interconnection, a consolidated forecast should have been a simple matter of adding the projected requirements to capacity at the local tandem switch. However, the requirement that new processes be developed to accept and consolidate forecasts is progressively necessary as more interconnection points are established. The development of this process is evident from the way that forecast formats changed in a relatively short period of time. Exhibits C-46, C-48, C-53, C-55.

87. U S WEST's argument that it could not fully implement processes and procedures to consolidate forecasts until after the FCC Order in August 1996 and Commission arbitration decisions in 1997 is unsupported by the record and conflicts with its obligations under the Interim and Definitive Agreements. Prior to consolidation, U S WEST only considered MCImetro's forecasts to the extent that it later realized its planning process was inadequate to meet demand; however, this general approach did not fulfill its obligations. U S WEST's failure to communicate its practices to MCImetro is equally as egregious. U S WEST failed to disclose that its system did not accept CLEC forecasts at the same time that it required MCImetro to submit forecasts as a precondition to provisioning facilities. Consequently, MCImetro had a reasonable expectation that its forecasts were being relied upon and that network capacity existed to meet its requirements.

88. U S WEST states that MCImetro's initial predictions about its anticipated demand did not contain sufficient information to constitute a forecast; however, MCImetro agreed to follow U S WEST's ordering process for all services in the September 1995 agreement. MCImetro was unable to follow an ordering process which did not exist. MCImetro began utilizing U S WEST's forecasting format in June 1996; however, U S WEST did not consolidate the forecasting process until ten months later. U S WEST's claim that the unavailability of facilities was caused by MCImetro's submission of orders in excess of its forecasts is not supported by the record.

89. The fact that MCImetro ordered facilities ahead of schedule in April and June 1996 is negated by U S WEST's failure to consolidate forecasts. U S WEST was unable to provision MCImetro's tandem trunking order in September 1996 (in excess of its forecast), but by year's end MCImetro had installed fewer trunks than forecasted because of the lack of capacity. Exhibits C-53, C-74, C-75. U S WEST argues that it initiated unprecedented increases in capacity to meet the demands of CLEC interconnection, Internet usage, and number portability; however, the vast

majority of capacity increases were not initiated until after CLEC forecasts were consolidated in April 1997. Exhibit C-126.

90. U S WEST's argument that facilities demand caused by Internet traffic growth was unforeseeable is not credible. Commission Staff witness Griffith (a former U S WEST engineering manager) credibly testified that U S WEST Advanced Technologies, a subsidiary of U S WEST, was reporting Internet growth rates of 10 percent a month as early as five years ago. Griffith, Exhibit T-108 at 8. Mr. Griffith stated that minimal research would have provided U S WEST with sufficient information to estimate Internet growth on the part of all providers and respond to that growth in its network planning. U S WEST competed for Internet traffic and Internet service providers to directly connect to U S WEST's voice network. Exhibit T-110 at 7. U S WEST's assertion that growth in Internet traffic is not a predictor of increased traffic on the voice network is not credible because it was familiar with the reliance of Internet service providers on the voice network for local access by subscribers. U S WEST also argues that MCImetro's Internet traffic was responsible for capacity exhaust; however, U S WEST relies on data that is not relevant in the April 1997 time frame. Exhibit C-19.

91. U S WEST's description of its network design and utilization of tandem switching explains why it did not engineer additional tandem capacity for its own needs; however, U S WEST's repeated claim that it could not have reasonably anticipated CLEC demand for interconnection at tandem switches ignores a fundamental principle of market entry -- interconnect with the maximum number of network users at the most cost effective price. U S WEST was aware of potential competition at least as early as 1994 when the state Supreme Court issued its decision in Electric Lightwave. In October 1995, U S WEST was directed by the Commission's *Fourth Supplemental Order* in the Interconnection Case to interconnect with CLECs.

92. Interconnection at the tandem is consistent with the Commission's decision in the Interconnection Case and the Telecom Act. This Commission has held that CLECs should be allowed flexibility in interconnecting with ILECs. In adopting rules under the Telecom Act, the FCC also determined that CLECs must be able to interconnect at points in the incumbent's network that are convenient and efficient for the CLEC. FCC Order at ¶209.

93. U S WEST knew since September 1995 that MCImetro would initially interconnect at the Seattle tandem. Exhibit 10. MCImetro's requirements for additional interconnection facilities in two subsequent agreements emphasized tandem interconnection. Exhibits 11 and 12. Requests to interconnect at the tandem or other locations specified in the agreements could not have been a surprise to U S WEST, since MCImetro provided U S WEST with forecasts of its anticipated needs. Furthermore, there is no credible evidence that CLEC interconnection has placed a significant capacity strain on U S WEST's network. MCImetro's requirements were

proportionately small, yet U S WEST was unable to reasonably forecast and provision to meet those needs.

\_\_\_\_\_ 94. U S WEST also argues that facilities demand caused by number portability caused delays. U S WEST began planning for permanent number portability (PNP) in July 1996, increasing its "signaling-system-7" links for the PNP database later that year, and began deployment of its equipment in April 1997. TR 753-55. Facilities exhaust delayed provisioning of MCImetro service orders in March and August 1996, prior to the demands caused by PNP. Finally, U S WEST argues that vendor delays resulting from number portability slowed the provisioning of forecasted and planned capacity. This argument fails because there is no evidence in the record to determine when or where expansion was delayed. U S WEST witness Wiseman testified that installation crews can only install so much equipment in a day, and number portability projects took precedence over growth projects. Exhibit T-110 at 18. However, as stated by U S WEST, the issue is foreseeability -- whether it be the need for increased capacity or trained personnel.

95. U S WEST argues that the cumulative impact of the Internet, CLEC interconnection, and number portability impaired its ability to forecast and provision MCImetro's service orders in accordance with standard intervals for existing facilities. Each of these factors increased demand and reduced the margin of error in accurately forecasting capacity at a time when U S WEST had an obligation to provide facilities to MCImetro. The record supports the conclusion that U S WEST unreasonably attempted to satisfy facilities demand for CLEC interconnection, increased Internet usage, and number portability out of the same excess capacity that it had historically reserved to accommodate in-house service orders while network upgrades were in progress. U S WEST forecasted its network requirements without prudent and reasonable regard for the extent to which MCImetro depended upon its processes.

96. U S WEST breached Section 1.5 of the Initial Agreement by failing to use its best efforts to cooperate and provide services. U S WEST's failure to reasonably forecast demand and to provide facilities in response to MCImetro's service requests also breached Sections 2.3 and 3.9(b) of the Interim Agreement, and Attachment 4, Section 8.4.2, and Part A, Section C, of the Definitive Agreement.

**I. Did U S WEST Violate the Fourth and Ninth Supplemental Orders in the Interconnection Case?**

97. Commission Staff and MCImetro argue that U S WEST conditioned interconnection on the availability of facilities in violation of the Ninth Supplemental Order in the Interconnection Case.[14] MCImetro also argues that U S WEST's interconnection delays violated the Fourth Supplemental Order.[15]

98. The Interconnection Case consolidated U S WEST tariff revisions for local interconnection with formal complaints. The Fourth Supplemental Order rejected the U S WEST tariff filings and granted the complaints, in part. Most importantly, the Order provided that new local service entrants should be recognized as co-carriers and treated accordingly. In addition to other relief, the Commission directed U S WEST to refile tariffs consistent with the terms of the Order. On March 13, 1996, the Commission entered its Ninth Supplemental Order after considering responses to U S WEST's revised tariff sheets, concluding that U S WEST was unlikely to file an acceptable tariff for local interconnection unless the Commission was prescriptive in its Order. The Commission proceeded to specify the content of the tariff as necessary.

99. The Commission's Ninth Supplemental Order emphasized the need for interconnecting companies to engage in negotiations consistent with the Telecom Act. Both the Telecom Act and the Ninth Supplemental Order acknowledge that details such as specific locations for interconnection, deadlines, and performance penalties require negotiation between carriers, and that a contract is a reasonable and appropriate outcome. Consequently, the Commission ordered the tariffing of terms and conditions which were general in nature, and provided that further disagreement over details should be handled through arbitration consistent with the Telecom Act. The principles which were established in the Interconnection Case are fundamental to the establishment of effective local competition, but the details of how those principles should be implemented were not prescribed.

100. The Ninth Supplemental Order rejected U S WEST's proposals to apply standard intervals from its Service Interval Guide to interconnection service. The Commission ordered that deadlines be a matter for negotiation, not a matter for one party to dictate to another. MCImetro and U S WEST proceeded to negotiate terms for service intervals which were incorporated into their written agreements. Insofar as the parties agreed to a method for determining applicable standard intervals based upon U S WEST's Service Interval Guide, U S WEST's reliance on intervals for facilities not in place does not violate the Ninth Supplemental Order as argued by MCImetro.

101. Commission Staff and MCImetro argue that U S WEST may not condition its obligation to interconnect with MCImetro subject to the availability of facilities in violation of the Ninth Supplemental Order. The record in this case chronicles numerous provisioning delays caused by U S WEST's conduct. In the instant Order, we find that U S WEST's unreasonable conduct constitutes violations of its agreements and state law; however, U S WEST continued to add capacity to its network and provision facilities as they became available. While U S WEST failed to adequately forecast and provision facilities, it did not condition its obligation to interconnect subject to the availability of facilities as prescribed in the Ninth Supplemental Order.

**J. Did U S WEST Violate State Law By Failing to Reasonably Forecast and Provision Facilities?**

102. Commission Staff also argues that U S WEST violated RCW 80.36.170 and 80.36.186 by failing to reasonably provision facilities to MCI metro. Commission Staff specifically refers to the fact that U S WEST continued to increase capacity based upon its own needs, but failed to do the same for CLECs. We find that U S WEST increased capacity based solely on its own needs on three separate occasions prior to consolidating forecasts in mid-April 1997, in violation of RCW 80.36.170 and 80.36.186. U S WEST also failed to reasonably increase capacity based solely on MCI metro's needs on at least one occasion in violation of RCW 80.36.170.

103. In March 1996, MCI metro ordered nine one-way local trunks (DS-1s) from U S WEST's Seattle-east local tandem switch (STTLWA0355T) to MCI metro's Seattle switch. Ianotta, T-40 at 4. MCI metro also submitted a March 1996 trunk forecast, which it updated in April 1996. Exhibits C-45 and C-46. These forecasts projected cumulative monthly requirements for 1996. Provisioning was delayed because capacity was exhausted at the tandem, but a previously scheduled facilities augment was already underway. MCI metro increased its order to 24 one-way tandem trunks. T-40 at 6. The trunks were installed in mid-May 1996. T-40 at 8. The increased trunk order exceeded MCI metro's cumulative forecast for August 1996. The increased trunk order should have placed U S WEST on notice that tandem capacity constraint was an issue.

104. In June 1996 MCI metro ordered and U S WEST provisioned additional tandem trunks. However, U S WEST failed to initiate an augment to the tandem in response to the order in spite of the fact that MCI metro further exceeded its forecasts. U S WEST also neglected to inform MCI metro of any capacity constraints caused by MCI metro's orders or forecasted exhaust. In August 1996, MCI metro informed U S WEST that it planned to order additional trunks in mid-September 1996. T-40 at 9. At that time, U S WEST informed MCI metro that tandem capacity was exhausted and no augment was pending. U S WEST's failure to reasonably increase capacity based solely on MCI metro's forecasted requirements subjected MCI metro to an undue competitive disadvantage in violation of RCW 80.36.170.

105. U S WEST also planned and increased capacity where MCI metro had forecasted requirements, but failed to specifically provide for MCI metro's needs. On June 20, 1996, MCI metro submitted an updated forecast utilizing a format required by U S WEST. Exhibit C-48. The forecast projected service requirements for call volumes at U S WEST end-offices for August, October, and December 1996, including the Seattle Main central office (STTLWA06). MCI metro's forecast also specified U S WEST's Seattle-east local tandem as the desired tandem switch for interconnection. Nevertheless, U S WEST initiated an augment to the Seattle Main central office on or

about June 23, 1996, that did not include trunks based upon MCImetro's forecast. Exhibit C-117. Subsequently, when MCImetro proposed direct end-office trunking at five Seattle end-offices (including STTLWA06) as an alternative to tandem exhaust in November 1996, end-office capacity also was exhausted. T-40 at 13.

106. U S WEST later initiated augments to the Seattle-east and the Seattle Main tandems in January 1997, but again did not consolidate MCImetro's forecasts. Exhibits C-94 and C-116. Each instance where U S WEST increased capacity based solely upon its own requirements constituted a violation of RCW 80.36.186. Each instance where U S WEST failed to increase capacity to specifically provide for MCImetro's requirements constituted a violation of RCW 80.36.170. MCImetro was subjected to an undue disadvantage and U S WEST was provided an unreasonable preference, regardless of U S WEST's intent.

107. U S WEST also violated RCW 80.36.170 and 80.36.186 by delaying production of a consolidated forecast for ten months after MCImetro submitted its June 20, 1996, forecast utilizing U S WEST's required format. MCImetro modified its forecasting processes at the request of U S WEST in order to facilitate production of a consolidated forecast. U S WEST's neglect to timely produce a consolidated forecast further assured that its requirements would be met, but provided little or no assurances to MCImetro.

**K. Did U S WEST's Failure to Provide Notices of Facilities Exhaust Breach its Agreements and Violate State Law?**

108. The Interim Agreement required U S WEST to provide MCImetro with quarterly forecasts, including notices of upcoming major network projects. The Initial Order concluded that projects to alleviate facilities exhaust constitute major network projects. U S WEST petitions that it could not have known that such an interpretation would be applied, prior to the Initial Order. The Commission disagrees.

109. Section 3.4(c) of the Interim Agreement did not define "major network projects;" however, the requirement to provide notices appeared in the "facilities forecasting" section. Major network projects implicitly impact facilities forecasting. It is readily apparent that U S WEST could not efficiently nor effectively manage its own network without foreknowledge of facilities exhaust, and U S WEST need only place itself in the position of a "co-carrier" to realize that projects to alleviate current or forecasted exhaust are major considerations in network planning and forecasting facilities.

110. Appendix B, Section 3.3(a), required the parties to agree on a trunking plan if a U S WEST tandem to which MCImetro was interconnected was unable to, or was forecasted to be unable to, support additional traffic for any period of time. U

S WEST failed to notify MCImetro of facilities exhaust at the Tacoma tandem (where MCImetro was interconnected) prior to June 1997 when additional trunks were ordered. Furthermore, Section 2.5 of the Interim Agreement requires U S WEST to use its best efforts to cooperate and install, test, and make available services ordered by MCImetro. U S WEST's failure to notify MCImetro of facilities exhaust is inconsistent with its pledge.

111. The requirement to provide notices was made more explicit in the August 1997 Definitive Agreement which states that major network project planning includes issues of network capacity. Exhibit 12, Attachment 4, Section 10.2.2.[16] U S WEST has repeatedly failed to produce quarterly reports, including notices of forecasted exhaust. Exhibits C-121 and C-122. U S WEST's argument that it had no reason to believe that major network projects include notices of facilities exhaust is not credible, particularly in light of express terms in the Definitive Agreement.

112. U S WEST also withheld notice of the permanent number portability project as a major network project.[17] U S WEST concedes that the planning process for this project began in 1996 prior to the release of the FCC's PNP Order that established the time schedule for implementation. TR 754. Seattle was designated for deployment of permanent number portability in the first quarter of 1998, subsequent to the effective date of the Definitive Agreement. TR at 753. MCImetro's request for facilities to the tandem or end-offices where this work was being performed was subject to delay until the PNP project was completed. U S WEST remained silent in the face of a contractual duty to inform MCImetro of the constraints the project would place on capacity. MCImetro may have had foreknowledge of U S WEST's mandate to implement permanent number portability, but it had no way of knowing its impact on network capacity.

113. U S WEST's failure to provide notices of major network projects or capacity exhaust constitutes a breach of Sections 2.5, 3.4(c), and Appendix B - Section 3.3(a), of the Interim Agreement, and Attachment 4, Sections 10.2, 10.2.2, 10.4.1, Part A, Section 29.1 and Part A, Section B, of the Definitive Agreement.

114. U S WEST's failure to provide notice of current or forecasted exhaust also was discriminatory because it allowed U S WEST to make network plans based upon information that is withheld from MCImetro. This enabled U S WEST to develop its business plan and marketing strategy around the availability of network capacity, while MCImetro was required to adjust its business plans and marketing strategy in mid-stream.

115. RCW 80.36.170 expressly prohibits U S WEST from subjecting MCImetro "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Further, RCW 80.36.186 prohibits U S WEST from making or granting

any undue or unreasonable preference or advantage to itself. U S WEST's practices subjected MCImetro to undue disadvantage because it provided notice of the availability of facilities only after MCImetro submitted a service order. U S WEST granted an unreasonable preference to itself by making planning decisions based upon foreknowledge of the availability of facilities.

116. The Commission finds that quarterly notices of current or pending facilities exhaust do not adequately remedy the unreasonable preference and undue disadvantage which occurs as the result of unequal access to relevant information. Accordingly, U S WEST must provide MCImetro access to the same information regarding current or forecasted exhaust at tandem and end-office facilities that U S WEST relies upon to make strategic network planning decisions, immediately as it becomes known.

**L. Did U S WEST's Failure to Exchange Traffic Through Its Access Tandem Violate State Law?**

117. U S WEST requests that the Commission modify the conclusion that it violated state law by failing to interconnect MCImetro at its access tandem when facilities were unavailable at the local tandem. U S WEST previously argued in post-hearing briefs that it relied upon this Commission's approval of an interconnection agreement between U S WEST and TCG Seattle to conclude that this was an interconnection detail subject to negotiation and arbitration, and not a legal duty. That agreement includes a negotiated provision for access tandem routing when facilities are unavailable at the local tandem.[18] U S WEST's agreements with MCImetro do not include similar terms, and U S WEST denied MCImetro requests to terminate local traffic at the access tandem on several occasions.

118. U S WEST operates two separate networks. The first network is the access tandem network from which U S WEST provides interconnection services to interexchange (long distance) carriers such as MCI Telecommunications. U S WEST's local tandem network is used to provide local calling services and is smaller than the access tandem network. Exhibit T-1 at 16. The local tandem network is engineered to exchange traffic through direct end-office trunking (DEOT).

119. For a new entrant, interconnection at the local tandem switch provides greater access to end users at the lowest cost because it connects to all end-offices serving the local calling area. U S WEST's network architecture segregates local and access traffic at different tandem switches by its own design. U S WEST states that interconnection at the access tandem switch for the exchange of local traffic is not consistent with prudent network management and planning. Exhibit C-9. Nevertheless, the access tandem switch is every bit a part of U S WEST's overall network as the local tandem switch.

120. U S WEST interconnects other carriers such as wireless providers and Internet service providers to the local tandem network, in addition to CLECs. These U S WEST networking decisions contribute to the demand for trunking at the local tandem switch. The local tandem switch is not as critical to U S WEST's transit of local traffic because U S WEST has implemented extensive direct end-office trunking. Thus, capacity problems at local tandem switches have a relatively minor impact on U S WEST's local operations.

121. Under the Telecom Act, U S WEST has a legal obligation to interconnect with MCImetro "at any technically feasible point." 47 U.S.C. sec. 251 (c)(2); FCC Order ¶209. U S WEST admits that interconnection at its access tandem is technically feasible, that it has exchanged local traffic through its access tandem switch when the lack of facilities prevented interconnection at its local tandem switch for another CLEC, and that it has sent traffic from U S WEST customers to MCImetro through the access tandem switch (one-way transit). The access tandem network provides a technically feasible alternative for interconnection when the lack of facilities deters interconnection to the local tandem network.

122. The mere fact that an interconnection agreement between U S WEST and one CLEC expressly provides for the conditional exchange of traffic through its access tandem network does not absolve U S WEST from its legal duty to other CLECs. Interconnection at tandem switches is crucial to the implementation of local competition. U S WEST has developed network traffic standards that dictate when local tandem trunking should be replaced by direct end-office trunking. However, when capacity is exhausted at the local tandem switch, the only current option for CLECs is to interconnect at end-offices. Network standards should determine when the implementation of direct end-office trunking is necessary, not the availability of facilities.

123. Furthermore, the fact that U S WEST does not normally route local traffic through its access tandem is overshadowed by the fact that it has engineered its network with this capability, and has routinely done so with its own traffic when necessary. U S WEST may not delay interconnection to its network on non-technical criteria such as "prudent planning." U S WEST violated RCW 80.36.200 by unreasonably delaying the transmission and delivery of MCImetro's messages and failing to route local traffic through its access tandem when capacity was exhausted at its local tandem.

**M. Did U S WEST Violate State Regulations By Causing Call Blocking on MCImetro Trunks?**

124. U S WEST requests review of findings that it caused call blocking on MCImetro's local interconnection trunk groups. WAC 480-120-515 establishes network performance standards applicable to local exchange companies and provides that local

trunk facilities shall experience no more than 1.0% blocking of service due to network congestion. U S WEST acknowledges that Exhibit HC-123 documents excessive blocking but claims that there is no information on the record to establish when or over what period of time this blocking occurred. Thus, U S WEST argues that it is unable to determine the cause of the blocking or to assign fault.

125. Exhibit HC-123 incorporates call blocking statistical data collected by U S WEST on MCImetro trunks over an 18-day period in 1997. Those trunk groups reflect the traffic originating from U S WEST callers to the MCImetro network since U S WEST solely has the ability to monitor outbound calls. U S WEST produced the call blocking data in response to a discovery request seeking all records, reports, or summaries detailing network traffic statistics flowing from the local tandem where MCImetro was interconnected. U S WEST did not produce any narrative or investigative summaries in response to MCImetro's discovery request.

126. U S WEST may not plead ignorance when confronted with its own studies and statistical data or disavow legal responsibility when it does not follow-up on potential violations of regulations over which it has exclusive knowledge and control. The Commission will not ignore U S WEST's call blocking data on the basis that it is unable to retroactively determine the cause of call blocking based upon its own records . The record supports the conclusion that U S WEST violated WAC 480-120-515 by causing call blocking.

**N. Do Breaches of the Definitive Agreement Constitute Violations of the Commission Order Approving the Agreement?**

127. MCImetro argues that the Definitive Agreement was approved by order of the Commission; thus, it has the effect of a Commission order.[19] MCImetro then argues that U S WEST's breaches of the Definitive Agreement constitute per se violations of a Commission order.

128. The interconnection agreement between MCImetro and U S WEST was the combined product of negotiation and arbitration. The arbitration was conducted pursuant to the Commission's Interpretive and Policy Statement implementing the Commission's obligations under the Telecom Act (Interpretive Statement).[20] The Interpretive Statement provided that an interconnection agreement must be submitted to the Commission after the issuance of an Arbitrator's Report for approval under Section 252(e) of the Telecom Act, and the parties must identify which portions were negotiated and which were arbitrated.

129. As part of the approval process, Section 252(e) states different grounds for rejecting portions of an agreement. The bases for rejecting those portions of an agreement which are negotiated are more narrow than for those which are arbitrated.

This is consistent with an emphasis on the resolution of disputes by the parties involved, and a de-emphasis on regulatory intervention.

130. The Commission may only reject any portion of an agreement adopted by negotiation if it finds discrimination against a telecommunications carrier not a party to the agreement, or implementation is not consistent with the public interest, convenience, and necessity. By comparison, the Commission may reject any portion of an agreement adopted by arbitration that does not meet the numerous obligations of carriers pursuant to Section 251 of the Telecom Act, including regulations prescribed by the FCC pursuant to that section.

131. The Commission retains authority to review any breach of an interconnection agreement approved by the Commission in determining whether to find violations of law, regulation or Commission Order. In the instant Order, all claims are addressed on grounds other than violation of the Order approving the interconnection agreement. No findings on this issue are necessary; thus, the issue is reserved for decision in a future proceeding.

**O. Should MCImetro's Request for Additional Relief Be Granted?**

132. MCImetro proposes expanding the relief granted in the Initial Order to further assure that undue disadvantages or unreasonable preferences do not recur, and to monitor compliance. U S WEST generally objects to the request for additional relief, and specifically responds to four of MCImetro's proposals. The Commission considers each proposal separately and in the sequence which they were presented in the Initial Order.

**1. Ordering Paragraph 1: Interconnection Orders Subject to Standard Intervals for Facilities in Place.**

133. MCImetro proposes that U S WEST produce a quarterly report showing each service order, date of receipt, firm order commitment due date, completion date, the applicable service interval, and the specified interval for installation. MCImetro also proposes that service orders which have not been installed be listed in the report. The proposed tracking report would benefit both parties. U S WEST needs to comprehensively assess its performance and manage pending orders. Insofar as the production of this report makes good sense for U S WEST, it should also produce the report to MCImetro. Additionally, the report will facilitate consensus on key service order milestones, as well as increase the reliability of the provisioning process. MCImetro's additional request for relief is granted.

**2. Ordering Paragraph 2: Interconnection Orders Not Subject to Standard Intervals for Facilities in Place.**

134. MCImetro proposes that U S WEST produce a similar quarterly report explaining why the standard interval for facilities in place is not applicable to any service orders. For the same reasons stated above regarding Ordering Paragraph 1, MCImetro's additional request for relief is granted.

**3. Ordering Paragraph 3: Changes to Firm Order Commitment Due Dates.**

135. MCImetro proposes that U S WEST produce a report that discloses the date that firm order commitments are sent to MCImetro and explaining missed due dates. The "firm order commitment sent date" is relevant to Ordering Paragraphs 1 and 2, and will be incorporated into those paragraphs. Numerous disputes regarding the cause of missed due dates were presented in this case and little or no specific documentation was admitted into evidence. On this issue we emphasize the importance of U S WEST delivering interconnection services on the relied upon due date. U S WEST must provide MCImetro with written notice explaining any change to a firm order commitment due date as soon as the need to reschedule is known, in addition to the relief previously ordered.

**4. Ordering Paragraph 4: Exchange of Quarterly Forecasts.**

136. MCImetro proposes additional language requiring U S WEST to provide a schedule for the exchange of quarterly forecasts over the remaining term of the Definitive Agreement to insure that its forecasts are incorporated into the U S WEST planning process in a timely manner. U S WEST has stressed the importance of receiving MCImetro forecasts in an appropriate form and timely manner in order to be consolidated into its planning process. It is reasonable that U S WEST produce a schedule that establishes deadlines for the timely exchange of quarterly forecasts. MCImetro's additional request for relief is granted.

**5. Ordering Paragraph 5: Notices of Current or Forecasted Capacity Exhaust.**

137. The Initial Order requires U S WEST to provide MCImetro with information regarding current or forecasted capacity exhaust at any facility where MCImetro is interconnected or has forecasted requirements on an ongoing basis. MCImetro requests that this duty be expanded to include all tandems and end-offices. MCImetro argues that this information is essential to network planning, and would indicate to MCImetro whether it should avoid certain facilities in certain locations as part of its network planning. Furthermore, MCImetro states that all exhaust information is

available to U S WEST for its network planning purposes. U S WEST responds that MCI metro only needs information regarding capacity exhaust as provided for in the Initial Order, and there is no rationale for providing exhaust data for every end-office in the state.

138. MCI metro is entitled to compete with U S WEST, not just *when* network capacity is available, but *where* network capacity is available. To achieve that end, MCI metro is entitled to interconnect at any U S WEST tandem or end-office in the state, and must have nondiscriminatory access to all information relating to the feasibility of interconnection. MCI metro's request for modification is granted.

#### **6. Ordering Paragraph 6: Network Congestion Bypass.**

139. MCI metro requests that U S WEST's obligation to route traffic through its access tandem when network congestion occurs be expanded to include local end-offices as well as the local tandem. MCI metro argues that network congestion occurs in end-offices as well as tandem switches, and that the potential for being denied interconnection to U S WEST's network supports modification. U S WEST responds that MCI metro's complaint centered on the routing of traffic through the access tandem when congestion occurs at the local tandem, and argues that MCI metro has not established any basis for expanding the scope of the ordered relief.

140. The record establishes that MCI metro has begun a migration from tandem interconnection to direct end-office trunking. The Definitive Agreement also requires MCI metro to install and retain direct end-office trunking where local traffic exceeds a specified volume. Furthermore, U S WEST does not dispute that network congestion may occur within an end-office switch. MCI metro's reliance on direct end-office trunking deserves the same assurances that it can transit U S WEST's network when congestion occurs as when it occurs in central offices. Moreover, MCI metro deserves the same assurances that U S WEST gives itself; therefore, the request for modification is granted.

#### **7. Ordering Paragraph 7: Network Exhaust Bypass.**

141. MCI metro requests that U S WEST's obligation to route traffic through its access tandem when capacity is exhausted be expanded to include local end-offices as well as the local tandem. MCI metro argues that its entry into the local market was frustrated when a lack of capacity at the tandem was compounded by exhaust in specific end-offices. U S WEST relies on arguments presented in opposition to modification of the relief discussed in the previous paragraph.

142. The record reflects that MCImetro experienced direct end-office trunking delays due to network exhaust at the same time that capacity was exhausted at U S WEST's local tandem. MCImetro's request for modification is granted.

**8. Ordering Paragraph 8: Monthly Traffic Data Reports.**

143. The Initial Order requires U S WEST to provide a monthly report of traffic data at all facilities where MCImetro interconnects or forecasts requirements. MCImetro requests that the requirement be expanded to provide traffic data at all U S WEST facilities. MCImetro argues that traffic data for other facilities may suggest more efficient ways for MCImetro to configure its network. MCImetro also requests that U S WEST be required to provide a one-time report on traffic trends for all facilities over the past year as a point of reference for network planning purposes. U S WEST disagrees that there is any rationale to justify reports of network-wide traffic data, and argues that the content or necessity for a one-time retrospective report is unclear.

144. The Commission agrees that monthly reports of network-wide traffic data are justified for the same reasons discussed in regard to the modification discussed in paragraph 5, above. MCImetro's request for monthly reports of network-wide traffic data is granted. However, the record does not support the need for a historical reference in order to make strategic network planning decisions, and MCImetro's request for a one-time report on traffic trends is denied.

**P. Should the Commission Award MCImetro Damages?**

145. The Initial Order denied MCImetro's request that the Commission assess damages against U S WEST. The Order held that the Commission does not have jurisdiction to award monetary damages. Sharad M. Bhatnagar v. U S WEST Communications, Docket No. UT-900603, Second Supplemental Order (June 1991).

146. Petitions for review do not raise this issue, and the decision in the Initial Order is affirmed.

**Q. Does the Commission Have Discretion to Assess Penalties?**

147. The Initial Order imposed significant conditions on U S WEST based upon breaches of agreements and violations of law, but concluded that penalties are not appropriate at this time. Commission Staff and MCImetro argue that RCW 80.04.380 and prior orders require the Commission to assess penalties. U S WEST argues that RCW 80.04.380 merely provides that violators of statutes, rules, or Orders shall *be subject to*, not *be assessed*, a penalty.

148. MCImetro erroneously cites U S WEST Communications, Inc. v. Washington Utilities & Transportation Commission, 134 Wn.2d 74, 117 (1997), in support of its argument. The issue in that case was whether consideration of service quality in determining the appropriate rate of return constituted a penalty. U S WEST argued that the Commission's only authority to respond to inadequate service is to assess penalties pursuant to RCW 80.04.380. U S WEST does not dispute that the Commission has authority to assess penalties in this case; the issue is whether the Commission has *discretion* to assess penalties.

149. The Commission has discretion to choose between two penalty statutes when violations occur, RCW 80.04.380 and RCW 80.04.405.[21] The former states that a company *shall be subject to* a penalty not to exceed \$1,000 per violation per day without mitigation; the latter states that a company *shall incur* a penalty of \$100 per violation per day subject to mitigation. The operative language in RCW 80.04.380 differs from RCW 80.04.405, insofar as "shall be subject to" a penalty not to exceed \$1,000 is distinguishable from "shall incur" a penalty of \$100.

150. RCW 80.04.405 specifies procedures whereby the Commission may mitigate penalties, in part or in whole, at its discretion. In contrast, RCW 80.04.380 grants the Commission discretion whether to subject a party to a penalty without opportunity to mitigate. Discretion whether to assess penalties under RCW 80.04.380 serves the public interest by retaining all powers expressly granted to the Commission by law.[22] Furthermore, these statutes are consistent with each other, and the Commission may find that violations are subject to a penalty under both statutes.

#### **R. Did U S WEST Engage in a Concerted Pattern of Willful and Intentional Misconduct?**

151. Commission Staff and MCImetro argue that the ALJ conditioned the imposition of penalties upon a finding of willful and intentional misconduct. U S WEST agrees that a showing of intent is not required as a precondition to assessing penalties for violations of law, but argues that findings related to willful and intentional misconduct are relevant to the issue. U S WEST also argues that the issue of intentional misconduct was fairly raised by MCImetro's allegations.

152. MCImetro's opening brief argued that "the record reveals a pattern of 'willful and intentional misconduct' on the part of U S WEST through its repeated breaches of the various interconnection agreements." [23] Furthermore, MCImetro witness Beach testified that U S WEST's provisioning practices demonstrate "absolute contempt" for its legal obligations. Exhibit T-1 at 16-17. These arguments suggest that U S WEST acted with the specific intent to harm MCImetro. MCImetro petitions that all references to the issue of misconduct in the Initial Order be deleted. A party has

discretion to make any argument in support of its claims, but once made, it cannot quash responsive discussion.

153. The Commission disagrees with the Commission Staff and MCImetro characterization that the Initial Order conditioned the imposition of penalties upon the failure to find willful and intentional misconduct. We agree with the parties that a showing of intent is not required to establish a violation of law, regulation, or Commission Order. Once a violation is found, the Commission may consider whether conduct was knowing or intentional in assessing and mitigating penalties. Here, the Commission concludes that U S WEST has not engaged in a concerted pattern of willful and intentional *misconduct* as argued by MCImetro.

**S. Should the Commission Assess Penalties Against U S WEST for Violations of Law?**

154. The assessment of penalties for violations of law is meant to be corrective, not retributive. The purpose is to secure compliance by incenting reasonable and appropriate conduct by the offending party. U S WEST is found to have committed violations of state law and Commission regulations. In deciding whether to assess penalties against U S WEST, the Commission considers the challenge of forecasting and provisioning facilities in a multi-provider environment, and the ongoing evolution of interconnection processes. The record in this case reflects the fundamental complexity in structuring a cooperative enterprise between competing entities.

155. The extent to which U S WEST is ordered to share information about its network with competitors is precedent setting. A majority of breaches and violations were either caused or exacerbated by the disparity of access to critical networking information. On that basis, the Commission seeks to minimize MCImetro's dependence upon U S WEST and orders U S WEST to provide all specific relief requested by MCImetro. Beach, T-1 at 18-19.

156. The Commission seeks to compensate for local tandem and end-office facilities exhaust by ordering U S WEST to utilize its access tandem for the transit of local traffic on an interim basis, as further requested by MCImetro. The instant Order also grants the additional non-penalty relief requested by MCImetro in its petition for administrative review.

157. Commission Staff argues that we should not wait for additional violations of state law or Commission Orders before imposing penalties. MCImetro argues that penalties will have the effect of preventing recurrences and will encourage widespread compliance. U S WEST disagrees that penalties are necessary for compliance and points to its improved performance as an indication that it has implemented changes to fulfill its contractual and legal duty.

158. The Commission reviews several criteria relevant to each violation of state law and regulation by U S WEST, including but not limited to, whether 1) the offending conduct was associated with new requirements or issues of first impression, 2) the offending party should have known its conduct constituted a violation, 3), the offending conduct was knowing or intentional, 4) the offending conduct was gross or malicious, 5) repeated violations occurred, 6) the Commission previously had found violations, 7) the offending conduct improved, and 8) remedial steps were undertaken.

**1. U S WEST Failed to Provide MCImetro Notices of Current and Forecasted Facilities Exhaust; Violations of RCW 80.36.170 and RCW 80.36.186.**

159. MCImetro argues that penalties should be calculated according to the number of days between submitting an order and the date MCImetro supposedly was informed of facilities exhaust. Alternatively, MCImetro proposes that penalties be calculated based upon the number of service orders delayed and the number of days that completion of expansions was unreasonably delayed. MCImetro's calculation of per diem penalties do not address the underlying nature of these violations, although they do generate potentially millions of dollars in penalties. U S WEST's failure to provide notices of facilities exhaust does not cause delays to occur, but it does cause competitive disparity.

160. Commission Staff calculates daily penalties based on MCImetro's attempt to increase its competitive presence in the Tacoma local market. The August 1996 agreement provided for the exchange of quarterly forecast updates, including a description of major network projects. MCImetro also produced a forecast in August 1996 for Tacoma. Exhibit C-34. MCImetro's forecast estimated it would need facilities in November 1996, and additional facilities in March and July 1997. In early 1997, MCImetro ordered and was provisioned trunks consistent with the estimate for November.

161. MCImetro began marketing services in Tacoma in April 1997. MCImetro also produced an updated forecast which slightly increased its estimated needs for May, June, and July 1997. At a meeting with U S WEST on May 1, 1997, to discuss the most recent forecast, MCImetro informed U S WEST that it should expect orders in Tacoma. An engineering job to increase capacity at the tandem was pending; however, U S WEST did not inform MCImetro of pending exhaust until 43 days later, after MCImetro ordered service and capacity was exhausted.

162. It is unclear whether facilities would have been available if U S WEST had disclosed the status of capacity on May 1, 1997; however, at a minimum, MCImetro would have been able to make an informed decision regarding its sales and marketing plan. While daily penalties may seem appropriate under these circumstances,

MCImetro would have received advance notice if U S WEST had complied with its contractual obligations by providing complete quarterly reports.

163. The instant Order extends U S WEST's obligation beyond providing quarterly reports. The requirement that U S WEST provide MCImetro with all information regarding current or forecasted exhaust at any facility, and that U S WEST provide a monthly review of all traffic data at all facilities, will ensure that MCImetro is subjected to no further undue disadvantage arising out of disparate access to essential network information. The imposition of penalties for prior violations will not secure any greater compliance than these requirements.

**2. U S WEST Failed to Route MCImetro Traffic Through its Access Tandem When Capacity Was Exhausted at its Local Tandem; Violation of RCW 80.36.200.**

164. MCImetro argues that penalties should be assessed for every day of delay for each interconnection trunking order that could have been installed at U S WEST's access tandem. Based upon the maximum penalty of \$1,000 per day for each trunk, MCImetro calculates that the penalty should be \$13,585,000.

165. Commission Staff again calculates penalties in the context of MCImetro's Tacoma service orders, and argues that U S WEST should have allowed interconnection through its access tandem from the date that MCImetro placed its order until the date that the order was completed, 159 days later. Commission Staff calculates each day as a separate violation and recommends penalties in the amount of \$159,000.

166. The Commission recognizes that there will be some confusion over where to draw the line between interconnection details subject to contractual negotiation and legal obligations at the outset of local competition. However, U S WEST's interpretation of its interconnection agreement with TCG Seattle and conclusion that it did not have a legal duty to open up its access tandem network is unacceptably narrow, and conflicts with U S WEST's pledge to use its best efforts to cooperate with MCImetro. The instant Order requires U S WEST to open up its access tandem network as necessary when other facilities are unavailable. Full compliance with this requirement should prevent violations from recurring; accordingly, the Commission does not assess a penalty.

167. The Commission notes that U S WEST accepted TCG's order for a trunk group to its access tandem in order to provide local ISDN calls, yet MCImetro was forced to downgrade its trunk orders in April 1996 because U S WEST's Seattle-east tandem was not "B8ZS ready" (a specific quality of service to provide ISDN). Exhibits C-8 and T-40 at 6-7. The discussion in the instant Order has focused on instances where facilities are unavailable due to capacity exhaust. However, U S WEST is forewarned

that it should err on the side of facilitating interconnection, rather than refusing interconnection, on a going forward basis.

**3. U S WEST Increased Network Capacity Based upon its Own Needs but Not the Needs of MCImetro; Violations of RCW 80.36.170 and RCW 80.36.186.**

168. MCImetro calculates penalties based upon total number of days of interconnection delay caused by facilities exhaust. MCImetro's calculations are based upon the presumption that the standard interval for facilities in place is applicable where facilities are not in place. The Commission rejects that presumption. Furthermore, MCImetro's calculations of delay include days related to its January 1997 order for direct end-office trunking. Testimony that MCImetro was forced to accept U S WEST's provisioning as a "major project" is contradicted by Exhibit C-49 and lacks credibility. Consequently, MCImetro's calculations are inaccurate.

169. Commission Staff argues that violations of these statutes support penalties in the amount of at least \$2,000. This approach more appropriately regards each violation of the statutes as a single offense. These violations of law are based upon specific instances where U S WEST increased (or should have increased) capacity in its network based upon forecasts, and MCImetro subsequently requested facilities at the same location.

170. U S WEST increased capacity where MCImetro had forecasted requirements, but failed to specifically provide for MCImetro's needs, on at least three occasions. Exhibits C-94, C-116, C-117. Each occasion constitutes a separate violation of RCW 80.36.170 and 80.36.186. U S WEST failed to reasonably increase capacity based solely upon MCImetro's forecasted requirements on at least one occasion (June 1996) constituting a violation of RCW 80.36.170.

171. U S WEST also violated RCW 80.36.170 and 80.36.186 by delaying production of a consolidated forecast for ten months after MCImetro submitted its June 20, 1996 forecast utilizing U S WEST's required format. In mid-April 1997, U S WEST implemented new processes to consolidate internal and CLEC forecasts for interconnection and switching facilities. The Commission concludes that U S WEST unreasonably delayed the implementation of consolidated forecasting, but we also find that U S WEST implemented a process that fairly accounts for all projected requirements. The instant Order requires U S WEST to reasonably initiate network upgrades and to provide alternative transit in the event that facilities exhaust occurs. The Commission does not assess monetary penalties for U S WEST's failure to

reasonably forecast and provision facilities; however, ongoing violations will be interpreted as a refusal to comply with state law and Commission Orders.

#### **4. U S WEST Caused Call Blocking; Violation of WAC 480-120-515.**

172. Both Commission Staff and MCImetro recommend that U S WEST be penalized in the amount of at least \$18,000 for its violation of WAC 480-120-515. Call blocking occurred on MCImetro trunk groups for a minimum of 18 days in 1997. Interconnecting carriers have minimal control over, and no ability to monitor, call blocking that occurs on U S WEST's network.

173. Network congestion is a major source of consumer complaints and a high priority issue for the Commission. This is a problem area that directly impacts all consumers, not just customers of MCImetro. Pursuant to the Commission's Tenth Supplemental Order in U S WEST's most recent rate case,[24] U S WEST agreed to continue to provide weekly reports of interoffice trunk groups with call blocking greater than 0.5% to the Commission, as it had done for most of 1997.[25] These trunk groups reports do not include call blocking data for trunk groups interconnecting with CLECs.

174. As evidenced in this case, call blocking violations are particularly difficult to establish and enforce because relevant information is controlled by the offending party. The instant Order further expands the reporting requirement ordered in Docket No. UT-970766 and requires U S WEST to file weekly reports with the Commission disclosing call blocking data greater than 0.5% on all trunk groups interconnecting with CLECs.

175. U S WEST network congestion is an ongoing problem. The effectiveness of reporting requirements to secure compliance is uncertain. The evidence in this record discloses one specific eighteen-day period of substandard performance. If it is later determined that measurable call blocking exists on CLEC trunk groups, or otherwise constitutes an impediment to local exchange service competition, the Commission will initiate expedited review and resolution of the problem, including consideration of monetary penalties.

#### **T. Should the Commission Specify Prospective Penalties?**

176. MCImetro petitions for the extraordinary relief that prospective penalties be established for future violations of law, regulations, or Commission Orders. The Commission reiterates discussion in the Interconnection Case's *Ninth Supplemental Order* that performance penalties are details that should be negotiated between the

parties and provided for in future interconnection agreements. The Commission will continue to determine whether specific acts constitute violations of law, regulations, or our Orders based upon the record presented and will assess penalties when appropriate.

### CONCLUSION

177. Interconnection agreements between incumbent and competitive local exchange carriers were negotiated and arbitrated without the benefit of an established market or standard practices. While competition is progressing in select markets, large scale local exchange market competition has yet to develop. The Commission believes that the best interests of the parties will be served by express agreements governing their respective rights and obligations, and reduced reliance on statutory and regulatory requirements in order to obtain specific performance. The Commission expects the parties to develop greater specificity in future agreements to prevent disputes from arising and to assist the Commission when they do.

178. It is essential that all interconnecting parties focus on structuring their relationships as co-carriers in a way that will facilitate the widespread availability of innovative technology and services, and attract capital investment through the development of effective competition. One way to accelerate progress toward this goal is to concentrate on developing pricing structures that reward accurate forecasting and efficient performance. This Commission has initiated a major undertaking to determine the appropriate costing methodology and pricing for unbundled network elements in furtherance of local exchange market competition,[26] but the successful conclusion of that proceeding alone will not bring stability to the industry.

179. Unless the parties develop appropriate market mechanisms to ensure that forecasted requirements are available when ordered and network infrastructure investment matches demand, these problems are certain to repeat. The Commission is reluctant to interfere with the development of market solutions to these problems by the telecommunications industry; however, the possibility of nondiscriminatory terms and conditions for the reservation of facilities should be explored.

180. The complexity of this case is evident from the fact that MCImetro required four months to conduct discovery and file opening testimony. While this case has been pending, the Commission has adopted rules for expedited interconnection dispute resolution. These rules are intended to enable parties to bring disputes to the Commission as they arise and obtain resolution within 30 to 90 days. While procedural delays are often described as harmful to CLECs seeking market entry, the real harm is to consumers. Parties are encouraged to use this process before their claims become aggravated over the course of time.

181. The Commission will not be reluctant to impose substantial monetary penalties to secure compliance in the event that the specific remedies provided for in this Order prove ineffectual. Furthermore, our decision regarding penalties in this case does not foreclose the imposition of substantial penalties as a measure of first resort in the future.

182. Having discussed above in detail both the oral and documentary evidence concerning all material matters, and having stated findings and conclusions in each numbered paragraph, the Commission now augments those findings and conclusions with the following general statements on the evidence of record. Those portions of the preceding detailed findings and conclusions pertaining to the ultimate decisions of the Commission are here incorporated by this reference.

### **FINDINGS OF FACT**

183. The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, accounts, securities, and transfers of public service companies, including telecommunications companies.

184. U S WEST Communications, Inc. (U S WEST) and MCImetro Access Transmission Services, Inc. (MCImetro) are each engaged in the business of furnishing telecommunications service within the state of Washington as a public service company.

185. U S WEST was, until recently, the exclusive provider of switched local exchange service in its respective Washington exchanges, and currently is the dominant incumbent provider of switched local services within its respective Washington exchanges.

186. MCImetro presently provides limited switched local exchange service in certain of the exchanges of U S WEST, in competition with that incumbent provider.

187. To provide switched local exchange service, MCImetro and other competitive local exchange companies (CLECs) must interconnect with U S WEST's switched networks.

188. The provision of interconnection between two local exchange networks for the purpose of terminating local traffic is an essential service which is not available from any other provider.

189. On June 24, 1997, MCImetro filed at the Commission a complaint against U S WEST alleging, among other things, that U S WEST failed to provide adequate interconnection facilities to accommodate the interconnection of the two

parties' telecommunications networks. MCImetro also alleged that U S WEST subjected it to undue prejudice and disadvantage.

190. The Commission has jurisdiction over the parties and the subject matter of this case.

191. Technically and economically efficient interconnection of ILEC and new entrant CLEC networks is essential to the development of a competitive local exchange market. Denial of technically and economically efficient interconnection arrangements creates a barrier to entry.

192. Interconnection between MCImetro and U S WEST is necessary to exchange calls between networks. Without interconnection, MCImetro customers cannot call or receive calls from U S WEST customers. In addition, if sufficient capacity does not exist in a party's network or the facilities that connect the networks, telephone calls may be blocked, which means callers will receive a fast busy signal when placing a call. U S WEST is responsible for providing and maintaining the interconnection facilities on its side of the meet point and the network capacity requested by MCImetro.

193. MCImetro and U S WEST entered into three interconnection agreements for the State of Washington. The first interconnection agreement was the Interim Interconnection and Compensation Agreement, effective September 1, 1995 (Initial Agreement).

194. The second interconnection agreement was the Stipulation and Agreement for Interim Interconnection, effective August 26, 1996 (Interim Agreement).

195. The third interconnection agreement was the Agreement for Local Wireline Network Interconnection and Service Resale, effective August 20, 1997 (Definitive Agreement). The parties entered into this agreement after arbitration initiated by MCImetro pursuant to the Telecommunications Act of 1996 (Telecom Act), Docket No. UT-960310. The Definitive Agreement was approved by Commission Order Approving Interconnection Agreement entered August 18, 1997.

196. Exhibits C-94, C-116, and C-117 are network planning documents to increase capacity at U S WEST facilities. Exhibit C-94 was prepared in late 1996. Exhibit C-116 was prepared in early 1997. Exhibit C-117 was prepared in mid-1996. MCImetro and Commission Staff challenge the designation of excerpted language in those exhibits as confidential information.

197. The challenged excerpt in Exhibit C-117 constitutes a planning detail.

198. The third and fourth sentences of the challenged excerpts in Exhibit C-94 and C-116 are policy-related statements that do not constitute planning details. The remainder of the challenged excerpts constitute planning details.

199. Official statements of U S WEST corporate policy are not issued in common funding documents; nevertheless, statements of corporate policy in Exhibit C-94 and Exh. C-116 are credible and reliable.

200. The policy statements in Exh. C-94 and C-116 are consistent with U S WEST's initial, but unreasonable, belief that existing capacity could satisfy CLEC demand for interconnection facilities.

201. MCImetro and U S WEST used similar approaches to estimate initial demand for interconnection facilities. Due to the lack of historical data, MCImetro based its estimate on its own marketing sales projections and U S WEST based its estimate on loss of market share projections.

202. U S WEST required MCImetro to submit trunking forecasts as a prerequisite to placing orders beginning in April 1996. MCImetro began submitting forecasts utilizing U S WEST's prescribed format on June 20, 1996.

203. U S WEST changed its processes to produce a consolidated forecast, including MCImetro's requirements, in mid-April 1997.

204. Forecasting demand is important in the telecommunications industry. However, forecasts, by their nature, will rarely be exact.

205. U S WEST failed to disclose that its processes did not accept CLEC forecasts at the same time that it required MCImetro to submit forecasts as a precondition to provisioning facilities.

206. U S WEST did not rely upon MCImetro's forecasts to plan network projects prior to mid-April 1997, and failed to reasonably disclose its processes.

207. MCImetro reasonably relied that U S WEST's network planning and availability of facilities would be based upon its forecasts and would be provisioned in a timely manner. U S WEST's recurring inability to provision MCImetro's orders from existing capacity should have called its processes into question and resulted in consolidated forecasting prior to mid-April 1997.

208. U S WEST's argument that MCImetro's forecasting practices were responsible for the unavailability of facilities is without merit because U S WEST did not rely on those forecasts in any meaningful way prior to mid-April 1997.

209. U S WEST historically augments its network capacity prior to exhausting facilities. A certain amount of capacity is reserved to meet interconnection needs during the process to engineer, furnish, and install new facilities.

210. This existing capacity should have been sufficient to meet MCImetro's relatively small percentage of DS1s in both the Seattle and Tacoma areas. U S WEST's projected loss of market share for 1996 and 1997 should have been sufficient to absorb MCImetro's forecasts as well as total CLEC DS1s at the end of 1997.

211. The rapid growth of the Internet has been known for years. Minimal research would have provided U S WEST with sufficient information to estimate the rate of Internet growth on the part of all providers and respond to that growth in its network planning. U S WEST Advanced Technologies had referred to the growth of the Internet at rates of ten percent per month at least five years ago.

212. U S WEST's claim that it was caught off guard by the growth of the Internet is neither reasonable nor credible.

213. MCImetro's requirements for additional interconnection facilities in the interconnection agreements emphasized tandem interconnection.

214. MCImetro's requests to interconnect at the tandem or other locations specified in the agreements should not have been a surprise to U S WEST. U S WEST's suggestion that it should not have anticipated interconnection at the tandem is not credible.

215. There is no credible evidence that actual CLEC interconnection has placed a significant capacity strain on U S WEST's network.

216. U S WEST began planning for permanent number portability (PNP) in July 1996, increasing its "signaling-system-7" links for the PNP database later that year, and began deployment of its equipment in April 1997.

217. The requirements to deploy number portability were foreseeable and did not impair U S WEST's ability to forecast capacity to meet MCImetro's service orders.

218. The reasonableness of U S WEST's forecasts must take all foreseeable factors into account. While the actual demand caused by the Internet, CLEC interconnection, and PNP may have been difficult to predict, they were foreseeable.

219. It was unreasonable for U S WEST to forecast that it could meet all foreseeable demand for facilities (including MCImetro) through excess capacity.

220. MCImetro interconnected to U S WEST's Seattle tandem in September 1995, and acquired additional capacity in May and June 1996.

221. On April 15, 1996, MCImetro prepared and transmitted a trunk forecast for 1996 and 1997.

222. On August 19, 1996, MCImetro informed U S WEST that it required facilities at the U S WEST Seattle tandem in mid-September. U S WEST responded that Seattle tandem capacity was exhausted and that it was unable to provide service.

223. The Seattle tandem capacity exhaust was caused by U S WEST's failure to reasonably forecast demand for facilities.

224. MCImetro provided a forecast dated April 24, 1997, to U S WEST.

225. U S WEST Common Funding Documents demonstrate an ability to increase network capacity in six months or less.

226. U S WEST initiated numerous network engineering jobs to increase network capacity which were impacted by MCImetro's April 1997 forecast. The vast majority of those engineering jobs were scheduled to be in service nine months or later from the date of MCImetro's forecast.

227. U S WEST did not timely initiate increases to capacity based upon the consolidated forecasting process.

228. U S WEST failed to communicate information regarding the exhaust of capacity at facilities impacted by MCImetro's forecast.

229. During the effective dates of the Interim and Definitive Agreements, U S WEST failed to complete numerous service orders on their requested or scheduled due dates.

230. U S WEST could not efficiently or effectively plan and manage its own network without foreknowledge of facilities exhaust.

231. U S WEST did not discuss capacity issues with MCImetro until an implementation planning meeting conducted prior to accepting a service order. The only time MCImetro received notice of facilities exhaust and a lack of interconnection facilities was when it submitted service orders.

232. The scope of "major network projects" includes facilities exhaust because that information is essential in order for MCImetro to make appropriate arrangements to minimize the impact on its business and customers.

233. MCImetro does not have access to U S WEST's network capacity monitoring systems, and is totally dependent upon U S WEST to provide notice when facilities exhaust is forecasted or occurs.

234. U S WEST was obligated to notify MCImetro of known or forecasted facilities exhaust, but did not provide any notices prior to January 1998.

235. The planning work for permanent number portability started in 1996. Seattle was designated for deployment of permanent number portability in the first quarter of 1998; however actual deployment of the equipment began in April 1997. TR at 753-754.

236. U S WEST was obligated to notify MCImetro of the impact of its permanent number portability project on network capacity.

237. U S WEST gave the permanent number portability project priority over other network augmentation projects including MCImetro's requests for interconnection facilities.

238. MCImetro may have had foreknowledge of U S WEST's mandate to implement permanent number portability, but it did not know, nor could it have known, its impact upon network capacity.

239. U S WEST's processes subjected MCImetro to undue disadvantage because it provided notice of the availability of facilities only after MCImetro submitted a service order.

240. U S WEST granted itself an unreasonable preference by making strategic networking decisions based upon foreknowledge of the availability of facilities.

241. U S WEST increased capacity based solely on its own needs on three separate occasions prior to consolidating forecasts in mid-April 1997. U S WEST also failed to reasonably increase capacity based solely on MCImetro's needs on at least one occasion.

242. U S WEST operates two separate networks. The first network is the access tandem network from which U S WEST provides interconnection services to interexchange (long distance) carriers such as MCI Telecommunications (access network). The second network is its local tandem network (local network). The local

tandem network is used to provide local calling services and is smaller than the access tandem network. U S WEST's local tandem network is engineered to exchange its traffic through direct end-office trunking.

243. For a new entrant, interconnection at the local tandem switch provides greater access to U S WEST customers. U S WEST has direct end-office trunking between each of its end-offices and uses the local tandem switch for overflow.

244. Capacity problems at local tandem switches have a relatively minimal impact on U S WEST.

245. Interconnection at U S WEST's access tandem switch is technically feasible, U S WEST has exchanged traffic through its access tandem switch when the lack of facilities prevented interconnection at a local tandem switch for TCG Seattle, and U S WEST has sent traffic from its customers to MCImetro through the access tandem switch (one-way transit).

246. The access tandem network provides a technically feasible alternative when facilities are unavailable on the local tandem network.

247. Tandem interconnection is crucial to the implementation of local competition.

248. MCImetro requested to terminate traffic through the access tandem network on several occasions when facilities were unavailable on the local tandem network, and U S WEST denied the request.

249. U S WEST has developed network traffic standards that dictate when local tandem trunking should be replaced by direct end-office trunking.

250. Network standards should determine when the implementation of direct end-office trunking is necessary, not the availability of facilities.

251. Call blocking occurred within U S WEST's network on a MCImetro trunk group for an 18-day period in 1997.

252. CLECs have minimal control over, and no ability to monitor, call blocking that occurs on U S WEST's network.

### **CONCLUSIONS OF LAW**

253. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and the parties.

254. U S WEST may have affected the pace of MCImetro's implementation of local service in this region, but it has not denied MCImetro entry into the local exchange market in violation of the Telecom Act.

255. MCImetro and U S WEST entered into three successive interconnection agreements. The Initial Agreement was effective from September 1, 1995. The Interim Agreement became effective on August 26, 1996. The Definitive Agreement became effective on August 20, 1997.

256. U S WEST breached Section 1.5 of the Initial Agreement by failing to use its "best efforts" to cooperate and install, and make available, services ordered by MCImetro. U S WEST failed to reasonably forecast and provision facilities. Furthermore, U S WEST failed to communicate notices of tandem exhaust and failed to inform MCImetro that it did not rely on its forecasts. This conduct falls short of "best efforts."

257. U S WEST breached Section 2.3 and 3.9(b) of the Interim Agreement, and Attachment 4, Section 8.4.2, and Part A, Section C of the Definitive Agreement. U S WEST failed to reasonably forecast facilities which resulted in a lack of network capacity. U S WEST also failed to provide facilities on MCImetro's requested due date and to complete service orders on their scheduled due date.

258. U S WEST has a duty to reasonably forecast and provision facilities to meet MCImetro's requirements.

259. Each instance where U S WEST failed to increase capacity to specifically provide for MCImetro's requirements constituted a violation of RCW 80.36.170.

260. Each instance where U S WEST increased capacity based solely upon its own requirements constituted a violation of RCW 80.36.186.

261. U S WEST also violated RCW 80.36.170 and 80.36.186 by delaying production of a consolidated forecast for ten months after MCImetro submitted its forecast utilizing U S WEST's format on June 20, 1996. MCImetro was subjected to an undue disadvantage and U S WEST granted to itself an unreasonable preference, regardless of U S WEST's intent.

262. The local exchange market must be open in order to be competitive. In order to establish an open market, full and complete disclosure of incumbent network traffic data is necessary.

263. The scope of “major network projects” includes facilities exhaust under both the Interim and Definitive Agreements.

264. U S WEST breached Sections 2.5, 3.4(c), and Appendix B - Section 3.3(a), of the Interim Agreement, and Attachment 4, Sections 10.2, 10.2.2, 10.4.1, Part A, Section 29.1, and Part A, Section B, of the Definitive Agreement. U S WEST failed to provide MCImetro notices of major network projects or capacity exhaust.

265. U S WEST’s failure to provide MCImetro notices of current and forecasted facilities exhaust violated RCW 80.36.170 and RCW 80.36.186 by subjecting MCImetro to an undue disadvantage and granting to itself an unreasonable preference.

266. U S WEST’s denial of requests by MCImetro to interconnect and exchange local traffic through its access tandem when facilities were unavailable at the local tandem violated RCW 80.36.200 by delaying the delivery and transmission of MCImetro’s messages.

267. U S WEST violated WAC 480-120-515 by causing call blocking.

268. The Commission lacks jurisdiction to award monetary damages to MCImetro.

269. Upon finding a violation of state law, regulation, or Commission Order, the Commission retains full authority to assess a penalty at any level -- from zero to the full amount authorized -- that fits the circumstances of any given case and the process requirements under RCW 80.04.380.

## **ORDER**

### **THE COMMISSION ORDERS:**

270. U S WEST must devote the resources and personnel necessary to deliver existing interconnection facilities within the standard intervals for facilities in place provided for in U S WEST’s current Service Interval Guide or MCImetro’s requested due date, if later. U S WEST must provide to MCImetro on a quarterly basis a report showing each service order, date of receipt, firm order commitment due date, firm order commitment sent date, completion date, the applicable service interval, the specified interval for installation, and whether U S WEST has met the standard interval. Service orders which have not been installed must also be listed in the report.

271. U S WEST must use its best efforts to deliver interconnection facilities not subject to standard intervals for facilities in place as soon as possible. U S WEST must provide to MCImetro on a quarterly basis a report showing each service order, date of receipt, firm order commitment due date, firm order commitment sent date, completion date, and interval for installation, and state the reason standard intervals for facilities in place are not applicable to the service order. Service orders which have not been installed must also be listed in the report.

272. U S WEST must devote the resources and personnel necessary to deliver all interconnection facilities pursuant to MCImetro Access Service Requests by the due date established in the firm order commitment. U S WEST shall provide MCImetro with written notice explaining any change to a firm order commitment due date as soon as the need to reschedule is known.

273. U S WEST must provide MCImetro with forecasts and notice of major network projects in full compliance with the Definitive Agreement. Within 30 days of the entry of the instant Order, U S WEST must provide to MCImetro a schedule of the dates on which U S WEST and MCImetro will exchange the quarterly forecasts required by Section 10.2, Attachment 4, of the Definitive Agreement. The schedule must provide the dates through the term of the Definitive Agreement.

274. U S WEST must provide MCImetro access to the same information regarding current or forecasted exhaust at tandem and end-office facilities that U S WEST relies upon to make strategic network planning decisions, immediately as it becomes known.

275. U S WEST must provide sufficient capacity within its own network which guarantees that the blocking probabilities set forth in WAC 480-120-515 will not be exceeded. In the event that blockage occurs due to a lack of capacity at its local tandem or end-office where MCImetro seeks interconnection or to increase existing interconnection capacity, U S WEST shall route local traffic through its access tandem to whatever extent and for however long necessary in order to alleviate blockage.

276. U S WEST must allow MCImetro to route local traffic through its access tandem switch whenever facilities are unavailable at its local tandem switch or end-office where MCImetro seeks interconnection or to increase existing interconnection capacity. U S WEST must allow such interconnection to whatever extent and for however long necessary in order to alleviate the unavailability of facilities.

277. U S WEST must provide a monthly review of all traffic data at all facilities in order to enable MCImetro to make forecasting, ordering, and provisioning decisions based upon the same information as is available to U S WEST.

278. U S WEST must provide to the Commission a monthly report for a period of one year that shows time lines for the installation of local interconnection services used to connect MCImetro's customers to its network.

279. U S WEST must provide the Commission with weekly reports disclosing call blocking data greater than 0.5% on all trunk groups interconnecting with CLECs.

280. For the remainder of the effective term of the Definitive Agreement, U S WEST must establish facilities in place no longer than six months from the date that MCImetro forecasts requirements. Subsequent to establishing facilities in place, U S WEST must provision MCImetro's orders in accordance with its Service Interval Guide and the Definitive Agreement. U S WEST is not permitted to tack on additional time presently allocated to the production of quarterly trunk forecasts, and must continue to provision facilities as soon as they become available. Both parties shall exercise their best efforts to jointly plan and coordinate implementation of MCImetro service orders comprising "major projects."

281. The challenged policy-related statements in excerpts from Exhibits C-94 and C-116 (the third and fourth sentences) constitute public information. Other challenged excerpts in those exhibits constitute planning details and are entitled to protection as confidential information. The challenged excerpt in Exhibit C-117 is a planning detail and is entitled to protection as confidential information. All other information in each exhibit remains confidential and subject to the Commission's Protective Order entered in this case. The policy-related statements in Exhibits C-94 and C-116 shall continue to be protected for ten days to enable U S WEST to seek a stay pending Commission review, and thirty days to seek a stay pending judicial review of the instant Order.

282. All outstanding motions consistent with the instant Order are deemed granted, and all those inconsistent with this Order are deemed denied.

283. The Commission retains jurisdiction over the parties and subject matter to effectuate the terms of this Order.

DATED at Olympia, Washington and effective this        day of February 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

284. LEVINSON, CHAIR (Concurring in part and dissenting in part) -- This proceeding is exceptionally significant. The Commission faces for the first time an intercompany complaint related to the provision of service pursuant to an interconnection agreement the Commission approved under the Telecommunications Act of 1996. It is our first opportunity to define what is acceptable behavior for incumbent and competitive local exchange companies in this newly competitive environment. It is therefore critically important that the Commission "do it right."

285. I fully concur in, and subscribe to, the Commission decision except on two important points. I do not agree entirely with my colleagues regarding the nature of violations; and I do not agree with the Order's penalty assessment. With regard to these issues, I respectfully dissent.

286. The non-monetary measures we adopt in today's Order[27] are very important in their own right. They should not be regarded lightly. Nonetheless, I do not think they go far enough. The majority adopts a standard for penalties that may send an inaccurate message to incumbents and competitors alike about the importance we attach to the goal of competition and our dedication to achieving that goal.

287. Here we find a pattern of behavior by the incumbent that caused substantial hardship and substantial expense to at least one company actively pursuing business as a competitive local exchange company. In this instance, the imposition of non-monetary penalties simply does not suffice. I am concerned that by not imposing substantial monetary penalties the Commission establishes a precedent that may hamper its future ability to secure compliance with the laws it is charged to enforce. Companies may view this decision as a message that they will always be allowed a "free pass" for initial violations, regardless of the nature of those violations, with monetary penalties being imposed only if a second complaint is forthcoming.

288. The Telecom Act reserves to the Commission substantial responsibility to ensure Congress' central purpose—a fully competitive telecommunications marketplace—is achieved. Critical to success is Commission action to ensure the actual ability of carriers to interconnect with one another. In the short term, the Commission's response to individual complaints can determine an emerging competitor's success or failure in the marketplace. Over the longer term, our response to complaints may determine the success or failure of competition itself.

289. As we leave monopoly regulation's safe and familiar ground, we lose many tools upon which we traditionally have relied. I believe it is, therefore, all the more essential to the performance of our duties that we exercise forcefully the powers we do have, including the penalty power. I am confident that if we acted more decisively and assertively now, our action would have a deterrent value and foreclose behavior such as precipitated this case. The Commission's perceived reluctance to issue penalties in this case will not deter, and may even encourage such behavior. New circumstances require a new mind set and a new approach to our evolving regulatory duties.

290. It is not easy, even in the best circumstances, for a public agency to utilize its regulatory might swiftly and strongly. The Commission clearly failed to meet the swiftness test here, a subject I touch upon later. More importantly, I believe the Commission fails here to meet its obligation to be forceful.

291. The Commission should and must enforce the law for every industry it regulates; it is the Commission's inherent responsibility to do so. Granted, the Commission works in a difficult environment. As a public agency, the Commission has a myriad of observers and a multitude of critics—and this is as it should be, for we are here to protect the public interest. And, as with all public agencies engaged in the business of regulation, the Commission must at times walk on a thin line high above the ground. In carrying out its responsibility, the Commission constantly risks incurring the wrath of those who assert our exercise of statutory duties is government run amok or unwarranted regulatory intrusion into the marketplace. Thus, with any hard decision taken, we may face criticism and the efforts of adversely affected or interested parties who may initiate action to limit our future authority. So be it. Consumers and competitors alike depend on the Commission to ensure fairness and responsiveness. The Commission must live up to its obligations and take whatever actions are required to accomplish its mission, especially those hardest to undertake.

292. Before I leave this topic, I want to emphasize again the broad significance that attaches to this decision, and to future resolutions to interconnection agreement complaint actions that will follow the precedent established here. This is not

merely a contract dispute. Interconnection agreements are one of a handful of key aspects of telecommunications policy, along with pricing and universal service, that will determine the choices our state's consumers will have for years to come. Interconnection agreements are central, essential elements for the development of competition. Unlike dry cleaners or grocery stores, competitors in the telecommunications industry cannot simply sprout up to offer alternatives. Telecommunications providers must be able to connect to any home or business that wishes to use their service. It is the interconnection agreement with the incumbent company that allows a competitor to enter the market without having to build entirely new, unnecessarily redundant facilities. An interconnection agreement that is fairly and fully implemented by both parties is what makes competition feasible.

### **STANDARDS FOR PENALTY APPLICATION**

293. The small number of cases in which the Commission has spoken of the policies underlying penalties,[28] as well as the language of the decisions, demonstrate that the Commission's general penalty policy--a policy with which I agree--is to impose penalties not principally as "punishment." Instead, the Commission relies on penalties for their value as an incentive to the malefactor and others to comply with laws and regulations, and as a deterrent to future violations.

294. Historically, it appears the Commission has used sparingly its power to impose penalties. The Commission traditionally has chosen a conservative approach and worked with the regulated industries to spare them imposition of penalty assessments to the extent feasible. That approach certainly has its virtues, where it can achieve the corrective result. And it may well be the case that this approach was successful in a pervasively regulated environment. It should be reconsidered, however, given the new competitive paradigm the Commission must police under the Telecom Act.

295. I join my colleagues in the Order's statement of principles relating to the assessment of penalties.[29] I also believe the Commission can and should consider the harm an interconnection agreement violation causes to the public, to competition, to the Commission, or to a competitor. Finally, the Commission can and should consider the benefit a malfeasant company gains when it violates an interconnection agreement.

296. Although the Commission lacks authority to award damages to a company harmed by violation of an interconnection agreement, an appropriate penalty provides a similar incentive to avoid future violations. Among other things, a penalty proportionate to the gain a company seeks to receive by committing violations or

commensurate to the harm a violation may cause to competitors will deter future violations. Companies will be less tempted to violate the law, and have stronger incentives to comply, if violations are accompanied by the certainty of a penalty consistent with the seriousness of the offense.

297. When the Commission declines to assess adequate penalties, it loses the opportunities the penalties provide both as incentives and deterrents. The Commission also loses the opportunity to suspend penalties upon the condition of future compliance. It is one thing to say a respondent must comply in the future or face future penalties. It is entirely different if significant penalties are imposed and suspended with the prospect of likely automatic reimposition in the event future violations occur.

298. If penalties are not imposed and suspended the first time violations occur, their power to encourage compliance depends on the Commission or a competitor prosecuting a new action, based on new facts, and risks anew the arguments that it is too soon to apply penalties, that the particular violations weren't intended and should not be punished, and that precedent argues against the imposition of penalties except in circumstances that are more extreme than the violations that drew no penalties. As well, it means the Commission will be required to hear repeated complaint cases, each with its new procedural requirements. In the meanwhile the harm continues and the ultimate result remains unrealized, continuing to affect not only the competitor, but perhaps more importantly, the consumer.

299. By contrast, if the Commission imposes and suspends significant penalties upon the first infraction, their reimposition upon a future infraction is a simple matter easily and quickly accomplished. Suspended penalties increase the certainty of consequences for unacceptable behavior because questions involving the legality and the appropriateness of the application of the suspended penalty already are resolved and the only question before the Commission is the existence of a condition that ends the suspension. This approach provides a constant, certain, and powerful incentive to a company to not commit a future violation.

## **EVIDENTIARY REVIEW**

300. A necessary first step to determine penalties is to determine whether violations have occurred. The record in this matter is replete with examples of violations of state law and Commission orders. The Commission's Conclusions of Law Par. 254-267, based upon enumerated Findings of Fact and the Commission's narrative discussion, demonstrate without question the incumbent's egregious behavior. In the following discussion of violations, the emphasis is my own but the highlighted language is from our Order.

**Respondent's Behavior and the Determination of Violations.**

301. **Forecasting and providing facilities.** The question of forecasting is relevant to the penalty decision because forecasting relates to violations and whether penalties should be assessed, because the forecasting problems infused and affected other violations, and because the behavior is consistent with and reflective of the respondent's behavior in other areas.

302. The Order finds the respondent **unilaterally** chose to exclude the complainant's forecasts from its planning process, although including the forecasts at the at the outset would have been a simple matter and progressively necessary as other interconnection points are established over time, and that the respondent **failed to disclose** its action to the complainant. The Order finds respondent's defense that it could not implement forecasting processes until after a 1996 FCC order **unsupported by the record** and a **violation of the Agreements**. The Order finds the respondent's failure to use the CLEC forecasts that the respondent demanded and received from the complainant, and the respondent's not disclosing that failure **egregious behaviors**, which I think is an entirely accurate term.

303. The Order finds the respondent's defense that problems resulted from excessive orders **unsupported by the record**, and respondent's contention that complainant's problems resulted from unexpected Internet traffic **not credible and inconsistent with a report** prepared earlier by the respondent's own subsidiary. The Order characterizes the respondent's contention that it could not have reasonably anticipated CLEC demand for facilities **inconsistent with fundamental principles** and find **no credible evidence** to support its claim that complainant's facilities demands placed a significant capacity strain on respondent's system.

304. Respondent's attribution of problems to number portability issues is **inconsistent with the record**, and it supplied **no record evidence** at all to support its allegations of vendor delays. We find in the Order that U S WEST **unreasonably expected** to satisfy CLEC demand from a margin it knew to be too small for the purpose and we find in the Order that U S WEST actions in failing to consider the complainant's dependence upon the respondent's processes were **imprudent and unreasonable**.

305. **Increases in capacity.** The Order finds the respondent's actions violate RCW 80.36.170[30] and RCW 80.36.186,[31] which both forbid unreasonable preferences. The Order finds U S WEST gave unreasonable preferences to itself when it increased capacity solely for its own needs and failed to increase capacity to meet the complainant's needs.

306. The Order finds each instance of capacity increase for the respondent's own needs, and the respondent's failure to increase capacity to meet complainant's needs, violated both statutes. Our Order finds this behavior subjected the complainant to **an undue competitive disadvantage** and provided the respondent with **a competitive advantage**. Our Order finds respondent's delaying production of a consolidated forecast for ten months after complainant submitted its June 1996 forecast violated both statutes, and finds the respondent's failure to consolidate forecasts **assured that its requirements would be met** but provided no such assurance to the complainant.

307. **Failure to provide notice of "Facilities Exhaust"**. The Commission's Order finds the respondent's failure to notify the complainant of "facilities exhaust" violated both the parties' agreement and state law. The Commission finds **not credible** respondent's argument that it did not know it should notify the complainant when it was running out of facilities. We find this **discriminatory**, because it allowed U S WEST to **make its own network plans based on information that it withheld** from the complainant. Our Order finds these tactics violate both RCW 80.36.170 and RCW 80.36.186 because U S WEST was using the withheld information, unduly prejudicing the complainant, and unduly advantaging itself.

308. **Failure to exchange traffic through the U S WEST access tandem**. Our Order finds the respondent violated RCW 80.36.200[32] by **unreasonably delaying** the transmission and delivery of complainant's messages and failing to route local traffic through its available access tandem rather when capacity was exhausted at its local tandem.

309. **Call blocking**. Our Order finds evidence of call blocking, supports a determination of violations of WAC 480-120-515[33] and observes call blocking is a matter over which the respondent has exclusive knowledge and control.

#### **Pattern of Willful and Intentional Misconduct.**

310. The Order discusses whether the evidence demonstrates U S WEST engaged in a concerted pattern of willful and intentional misconduct, and declines to find that it did. I think any reasonable view of the evidence requires the opposite conclusion.

311. The evidence shows in instance after instance, in situation after situation, U S WEST failed to act consistently with its obligations under regulation, law, and agreement. Our Order finds the U S WEST defenses of many of its actions to be incredible, and its justifications without basis. The Commission finds U S WEST's actions imprudent, unreasonable, and without justification. This is a consistent pattern of behaviors that all operated to U S WEST's advantage, gave it undue preferences, and

subjected the complainant to an undue competitive disadvantage and improper discrimination.

312. It simply strains credibility that this pattern results from serendipity or U S WEST's simple inability to comply with recent laws and orders. I find it implausible that this behavior would have continued if it had operated to U S WEST's detriment or if the complainant had been an entity of comparable market power. U S WEST's behavior suggests it may be the company's corporate choice to operate its business in a way to impede the development of competition by both active and passive means.

313. It is equally impossible to regard this pattern as an isolated oversight by a violator who has a consistent record of enthusiastic compliance. Instead, it reflects a pattern of consistent actions by a company whose reluctance to comply with orders and regulations has drawn our repeated comment.[34] It also reflects a pattern of conduct that operated with the consistent effect of constraining a competitor from meeting the needs of its customers.

314. The Order disavows any implication of the initial Order that violations may be found or penalties assessed only in the event of a demonstrated pattern of willful and intentional misconduct, and I agree fully with the rejection of that observation. I remain concerned, however, that the Order fails to recognize what seems to be a clear pattern of misconduct and that it fails to find violations or assess penalties consistently with its observation that willful behavior is not a necessary element.

315. I also believe the violator's attitude toward the violations is properly an important element in the penalty assessment determination. If a well-operated company has a consistent record of compliance and the company's staff commits an isolated violation or series of violations, there may be little incentive value in imposing a penalty. On the other hand, this respondent has a long history of violations, and seems constitutionally incapable of avoiding violations. It is simply not credible that if the Company's top management expected and demanded compliance with law, the Company could not achieve compliance.

316. It is quite possible here that the long and short term economic advantage to the respondent in permitting violations to occur far outweighs the maximum penalty we could impose.[35] If so, the size of the penalty the Commission imposes will not have a measurable effect on compliance. Nevertheless, the mere possibility that this is true is not a valid argument against imposing penalties. If the Commission accepts that rationale, the Commission then sends a message that those who choose to ignore the law in favor of profit will not be penalized while those who endeavor to behave as they should will be penalized. In a world driven more and more

by economic incentives, the existence of a strong economic incentive for compliance is one of the best tools available to the Commission. It is a tool the Commission should not hesitate to use to the fullest extent possible in appropriate circumstances.

## **VIOLATIONS AND PENALTY ASSESSMENTS**

### **Findings of Violations.**

317. The Order seems reluctant to find continuing violations at least in part because of a concern that the size of penalties would thereby become unreasonably high. I suggest the finding of violations may be separated from the assessment of penalties. My colleagues and I agree that once a violation is found, under RCW 80.04.380 the Commission may set any level of penalty that is reasonable under the circumstances, from zero to the maximum amount of \$1000 per violation. It does not follow, therefore, that finding a continuing violation requires the assessment of any particular penalty amount, or that the potential number of penalties or penalty amount should become a bar to finding a violation occurred.

318. I also agree with my colleagues that the Commission has discretion to determine under RCW 80.04.380 whether or not to impose a penalty. The statute provides a continuing violation is subject to a continuing penalty--up to \$1000 per day for each day it continues. Whether to find a single or a continuing violation also is within the Commission's discretion.

319. I would propose a different standard from that used in the Order to determine the existence of a single or a continuing violation. The measure should be whether the malefactor gained a continuing benefit, or the would be benefactor suffered a continuing liability. The Order fails, for example, when it finds only a single violation if the respondent had provided the information *once* when first required to do so, premised upon the rationale that then the complainant would have had the information it needed. That analysis fails the test of reason because it ignores the continuing damages imposed by the violation and the continuing benefit of the violation to U S WEST. U S WEST should be found to have committed a violation each and every day it withheld the needed information.

320. To illustrate the proposed principle, the Commission requires regulated motor carriers to submit annual reports. The report information is significant and valuable, but the lack of a report causes no harm to other companies and little harm to the operations of the Commission and it confers no substantial benefit to the violator. A one-time penalty may be sufficient for that violation.

321. On the other hand, the respondent's failure to provide notices of "facilities exhaust" when required to do so harms the complainant every day violation continues. Each day's delay contributes to the undue competitive disadvantage and the improper discrimination the complainant suffers, and every day adds to the respondent's competitive advantage.

322. I therefore would find continuing violations subject to a penalty for each day the malefactor fails to cure the violation.

**Assessment of Penalties; Suspension.**

323. Once the number and nature of violations is determined, I think the Commission should review whether to impose a penalty under the reasonable standards that are discussed above and in the Order.

324. I do not calculate the actual number of violations, because doing so would have little purpose. I would offer an example of the approach to moving from the finding of a violation to the assessment of a penalty.

325. If the complainant demonstrates a respondent failed to provide a legally required, necessary forecast on day One, and did not provide it until 200 continuous days had passed, and if the failure harmed the complainant or advantaged the respondent during that entire period, I would support finding a continuing violation with each passing day. The maximum potential violation would be \$200,000 in this example, under RCW 80.04.380.

326. To determine the level of penalties to assess, I would consider the tests listed here and in the Order, including whether the Company has complied, the length of the period of violation, the reason why there now is compliance, the respondent's willingness to comply, the extent of harm and to whom, the extent of benefit to the violator, and the likelihood of recurrence in the future by this violator or others.

327. The result can be an immediate penalty, a combination of an immediate penalty and a suspended amount that would be due only upon failure to meet specified conditions, or a suspended amount only. In the above situation, considering different hypothetical fact situations, the result could be (a) zero penalty – willing compliance, accidental slip-up, demonstrated long term correction; (b) \$200,000 penalty, with \$100,000 suspended – serious offense and consequences, correction late and grudging; (c) \$200,000 penalty, with none suspended – very serious pattern of actions with very serious consequences, no or partial compliance, need for maximum certain

penalties to demonstrate Commission's views regarding need for compliance; or (d) any other combination of penalty and suspension, up to the maximum penalty.

328. Suspension of a portion of assessed penalties could be an effective tool in this proceeding. With the finding of a large number of violations, the Commission could impose a very substantial penalty, require the payment of a significant portion, and still suspend penalties in an amount large enough to attract the respondent's attention -- conditioned upon performance of the Order's directions to the respondent. Doing so would add incentives for compliance with the Order, and still leave room for a complaint and further sanctions if the Company's behavior warranted.

### **TIMING OF THE PROCESS**

329. It is unacceptable that a decision of this nature and this magnitude took the length of time it did to reach the status of final order. There are several significant reasons for the delay, including primarily the parties' requests for additional time to conduct discovery and the complexity of the underlying facts. The Commission has pursued a studied approach, as well, recognizing the significance of the decision, to be certain of its resolution of the matter. Still, the fact remains that while this case was pending, both the affected parties and the public were deprived not just of a decision, but of our direction to correct matters. The cost of the delay was significant, not just in financial terms but also in terms of the development of the ability to compete and of customers to have choices.

330. In the future, parties should pursue complaints such as this under WAC 480-09-530, governing interconnection agreement disputes. The Commission developed that process just for this reason--that is, the Commission recognized and sought to remedy the fact that traditional litigation allows parties too many opportunities to create delay, increasing the expense to all and leaving consumers and the Commission with few options. For the competitive marketplace to work, remedies must be available that can be brought to a swift and certain conclusion. It serves no one for the parties to engage in lengthy procedural wrangling and then complain about the slowness of regulatory decision-making.

### **CONCLUSION**

331. I reiterate that I join in all portions of the Order not addressed in this discussion.

332. I do believe, however, that the facts on this record demonstrate a clear example of a market that does not work. Intervention in this instance is not

regulating for the sake of regulation. It is our responsibility to make sure that the telecommunications markets under our jurisdiction actually work and to intervene, when markets don't work, with all of the emphasis that is needed to correct them. The facts of record show a situation that cries out for decisive and strong regulatory action.

333. I therefore would evaluate the determination of violations and the need for penalties differently from my colleagues. I would find continuing violations for each day the respondent failed to perform an action that was due and required. In calculating the needed penalty level, I would find extensive aggravating circumstances and few mitigating circumstances. I therefore would impose a substantial penalty, consistent with the number and seriousness of the violations.

Dated at Olympia, Washington this \_\_\_\_ day of February 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANNE LEVINSON, Chair

**NOTICE TO PARTIES: This is a final Order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this Order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).**

ENDNOTES:

[1] *Order Denying U S WEST Communications, Inc.'s Motion to Dismiss*, Docket No. UT-971063 (October 2, 1998).

[2] In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (August 8, 1996), Appendix B- Final Rules.

[3] Documents were designated as HIGHLY CONFIDENTIAL because of their proprietary nature and the heightened potential for competitive disadvantage if disclosure of information occurred.

[4] MCI Telecommunications Corp. et al. v. U S WEST Communications, Inc. et al., No. 98-35819, 98-35820, 98-35822 (9th Cir., filed August 27, 1998).

[5] Documents were designated as HIGHLY CONFIDENTIAL because of their proprietary nature and the heightened potential for competitive disadvantage if disclosure of information occurred.

[6] Exhibits HC-123, HC-124, HC-140, and HC-141.

[7] *Eighth Supplemental Order Granting, In Part, and Denying, In Part, Review of Fourth Supplemental Order*, Docket No. UT-971063 (July 23, 1998).

[8] See confidential Appendix A to MCImetro's Petition for Administrative Review.

[9] *Opening Brief of MCImetro Access Transmission Services, Inc.*, Docket No. UT-971063, p. 54, lines 13-14 (filed July 17, 1998).

[10] As discussed above, Exhibits C-94, C-116, and C-117 are referred to as Common Funding Documents in the network planning process.

[11] Exhibit 11, Section 3.9 (b).

[12] Exhibit 12, Attachment 4, Section 8.4.2(b).

[13] See Exhibit 100 (private line transport service) and Exhibit 101 (switched access service).

[14] *Ninth Supplemental Order Rejecting Tariff Filings, Washington Utilities and Transportation Commission v. US West Communications, Inc.*, (Interconnection Case), Consolidated Docket Nos. UT-941464, -941465, -950146, -950265, at 19 (March 13, 1996).

[15] *Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, In Part*, Interconnection Case, (Oct. 31, 1995).

[16] Exhibit 12, Attachment A, Section 10.2.2: "A description of major network projects anticipated for the following six (6) months that could affect the other party. Major network projects include trunking or network rearrangements, shifts in anticipated traffic patterns or other activities that are reflected by a significant increase or decrease in trunking demand for the following forecasting period. *This planning will include the issues of network capacity, forecasting and compensation calculation where appropriate.*" (Emphasis added).

[17] *See re Telephone Number Portability, First Report and Order*, Federal Communications Commission, CC Docket No. 95-116, Adopted June 27, 1996 (PNP Order).

[18] See *Interconnection Agreement* (December 16, 1996), and *Commission Order Approving Agreement*, In the Matter of the Petition for Arbitration of an Interconnection Agreement Between TCG Seattle and U S WEST Communications, Inc., Docket No. UT-960326 (February 7, 1997).

[19] *Commission Order Approving Interconnection Agreement*, In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MCImetro Access Services, Inc., and U S WEST Communications, Inc., Docket No. 960310 (August 18, 1997).

[20] *Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements under the Telecommunications Act of 1996*, Docket No. UT-960269 (June 28, 1996).

[21] RCW 80.04.380 states in relevant part: "Any public service company which shall violate or fail to comply with any provision of this title, or which fails, omits or neglects to obey, observe or comply with any order, rule, or any direction, demand or requirement of the commission, shall be subject to a penalty of not to exceed the sum of one thousand dollars for each and every offense. Every violation of any such order, direction or requirement of this title shall be a separate and distinct offense, and in case of a continuing violation every day's continuance thereof shall be and be deemed to be a separate and distinct offense."

RCW 80.04.405 states in relevant part: "In addition to all other penalties provided by law every public service company subject to the provisions of this title ... who violates ... any provision of this title or any order, rule, regulations or decision of the commission shall incur a penalty of one hundred dollars for every such violation. Each and every such violation shall be a separate and distinct offense and in case of a continuing violation every day's continuance shall be ... a separate and distinct violation. ... The Commission may, upon written application therefor, ... remit or mitigate any penalty provided for in this section ... ."

[22] Parties cite our decision in Monroe v. Puget Sound Power & Light Co., Cause No. U-85-70 (October 23, 1986), for the proposition that we must always assess penalties if we find violations to occur. Examining the language and the context of the decision, we reject it as authority for the proposition cited. It is clear in both of the statutes and we hold in this decision that upon finding a violation the Commission retains the full authority to assess or adjust a penalty at any level -- from zero to the full amount authorized -- that fits the circumstances of any given case and the process requirements of the pertinent statute.

[23] *Opening Brief of MCImetro Access Transmission Services, Inc.*, Docket No. UT-971063, p. 54, lines 11-12 (filed July 17, 1998).

[24] *Tenth Supplemental Order, Commission Decision and Order Rejecting Tariff Revisions; Requiring Refiling, Washington Utilities and Transportation Commission v. U S WEST Communications, Inc.*, Docket No. UT-970766 (January 16, 1998).

[25] *U S WEST's Petition for Reconsideration of Tenth Supplemental Order, Washington Utilities and Transportation Commission v. U S WEST Communications, Inc.*, Docket No. UT-970766 (January 27, 1998)

[26] In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale; [for U S WEST Communications, Inc.]; [for GTE Northwest Incorporated], Docket Nos. UT-960369;[-960370];[-960371].

[27] When I use the term "Order" in this opinion, without further citation, I am referring to the Commission Order in this Docket, above.

[28] See, in addition to the Monroe case cited by the Majority, Everett Airporter Services Enterprises, Inc. v. San Juan Airlines, Inc., d/b/a Shuttle Express, Docket No. TC-910789 (January 1993), Order M.V. No. 136510, In re Joe Sicilia, Inc., Docket No. H-4969 (September 1987), In re Destiny Telecom International, Inc., Docket No. UT-971163 (September 1997), and WUTC v. International Pacific, Inc., Docket No. UT-911482, Ninth Supp. Order (January, 1995).

[29] These criteria include, but are not limited to, whether 1) the offending conduct was associated with new requirements or issues of first impression, 2) the offending party should have known its conduct constituted a violation, 3) the offending conduct was knowing or intentional, 4) the offending conduct was gross or malicious, 4) repeated violations occurred, 5) the Commission previously had found violations, 6) the offending conduct improved, and 7) remedial steps were undertaken. The criteria are consistent with the Commission's decision in the Everett Airporter matter cited above, which held that a penalty assessment under RCW 81.04.380 should equate with the seriousness of the offense, offer a disincentive to future violations, and demonstrate the magnitude of the Commission's concern about open and repeated violations.

[30] RCW 80.36.170 Unreasonable preference prohibited. No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation, or locality, or subject any particular person, corporation, or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. \* \* \*

[31] RCW 80.36.186 Pricing of or access to noncompetitive services – Unreasonable preference or advantage prohibited. Notwithstanding any other provision of this chapter, no telecommunications company providing noncompetitive services shall, as to the pricing of or access to noncompetitive services, make or grant any undue or unreasonable preference or advantage to itself or to any other person providing telecommunications service, nor subject any telecommunications company to any undue or unreasonable prejudice or competitive disadvantage. \* \* \*

[32] RCW 80.36.200 Transmission of messages of other lines. Every telecommunications company operating in this state shall receive, transmit, and deliver, without discrimination or delay, the messages of any other telecommunications company.

[33] WAC 480-120-515 establishes network performance standards applicable to local exchange companies.

[34] See, e.g., Fifteenth Supplemental Order, WUTC v. U S West Communications, Inc., Docket No. UT-950200, pages 14-23 (April 1996) and, in Docket No. UT-970766 under the same caption, the Eleventh Supplemental Order (Pages 22-28, February 1998), the Twelfth Supplemental Order (February, 1998) and the Fourteenth Supplemental Order (March 1998).

[35] Other states, I believe, have observed that certain companies choose to accept penalties as a cost of doing business because it is less expensive to do so than to comply. To the extent that this is true, as a mere matter of economics it argues for making noncompliance as costly as is reasonable so that the relative costs of compliance are thereby lower.