Q. You have indicated that it might be more efficient for the Company to retain ownership of the fiber optic cable and perhaps some of the other assets, thereby allowing these facilities to be used for both video and other services. Are there any other potential problems with the proposed transfer?

A. Yes. The proposed transfer does not comport well with FCC rules concerning unbundling of US West's network. Further, I am concerned that an overly broad transfer of assets could set a dangerous precedent which would have additional adverse implications in future years.

Q. Can you elaborate on your first concern?

A. As I mentioned earlier, section 251 of the Federal Act requires US West and other incumbent LECs to unbundle their networks and offer use of various elements of those networks at cost-based rates nondiscriminatory rates. [47 U.S.C. § 251(c)(3)]. Section 251 also requires incumbent LECs to make their retail telecommunications services available at wholesale rates so they can be resold by new entrants. [47 U.S.C. § 251(c)(4)]. Section 251(c)(2) imposes interconnection obligations on incumbent LECs for purposes of transmitting and routing telephone exchange or exchange access traffic. Section 153(29) defines "network element" to include any "facility or equipment used in the provision of a telecommunications service" along with the "features, functions, and capabilities that are provided by means of such facility or equipment." The Act also defines "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public . . . ." [47 U.S.C. § 153(46)]. It defines "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." [47 U.S.C. § 153(43)].

Interestingly, the Company has not addressed the question of whether the assets it proposes to transfer are being used to provide telecommunication services, or whether it is obligated to unbundle any of these assets to make them available to competitors. The company claims the assets are not currently being used to provide "local exchange service". [LaFave

Direct, p. 3]. The Company also claims that the assets are not currently being used to provide "telephone services". [Application, p. 3]. Neither claim is sufficient to dispose of the question of whether it is obligated to make these assets available to competitors on an unbundled basis. Legally, there may be some uncertainty concerning whether it is currently obligated to offer unbundled access to some or all of these assets. In any event, if it is allowed to transfer assets to BSI, US West might argue that these assets have been moved out of reach of its competitors, and it will no longer be obligated to provide access to them on an unbundled basis.

However, many of these assets (e.g. copper and fiber cable) are of the same type which are used to provide local exchange service and other traditional telephone services. Arguably, US West is obligated to provide access to all of its network, including the portions which are used to provide video services. Accordingly, the transfer, as proposed, may not eliminate US West's unbundling obligations; rather, it may subject BSI to the federal unbundling, resale and interconnection requirements. To the extent some of the assets are subject to the federal unbundling requirements, the proposed transfer will complicate the regulatory situation, rather than simplifying it, as intended.

During the discovery process RUCO asked US West whether each category of assets to be transferred could provide various telecommunications services, including voice grade services. US West responded by explaining that its existing "VDSL architecture" does not currently provide these services. [Response to RUCO IR 03-09, subparts (c) and (d)]. Later, US West supplemented its response by explaining that with additional equipment and architecture rearrangements, the assets to be transferred could be used to provide a variety of different traditional telecommuncations services, including access to the Internet, data services, and both digital and analog voice grade services. In fact, US West is offering "always on" Internet service to its cable subscribers. [See, attachments provided in response to RUCO IR 03-29S1].

Many of the assets the Company is proposing to transfer are the same type of assets which US West and other incumbent LECs routinely use to provide both traditional and advanced telecommunications services. For example, the Company is proposing to transfer approximately *****Proprietary Proprietary***** miles of copper cable and approximately *****Proprietary Proprietary***** miles of fiber cable. [response to Staff IR 01-01]. The company is also proposing to transfer multiplexing equipment and other electronics that allow voice traffic and other digital information to be transferred over fiber optic cable. While the Company is currently using this equipment to send video signals, the same equipment can potentially be used to provide basic local exchange service and to provide a variety of other voice and data services pursuant to the Company's existing tariffs. [See, response to Staff IR 02-030].

Even if US West doesn't have any plans to use these assets to provide other telecommunications services, some of its competitors might want to gain access to them on an unbundled element basis. The mere fact that this cable and other network facilities are currently being used to provide broadband video service instead of basic local exchange service is not a sufficient basis for deciding whether these assets should be transferred to a subsidiary. Nor is this a sufficient basis for deciding whether competitors should be allowed to gain unbundled access to these network assets.

Q. Has the FCC addressed these issues?

A. Yes. Broadband services, including xDSL services, are classified as "advanced" telecommunications services. The FCC addressed the applicability of the Federal Act to "advanced services" in an order issued August 7, 1998. [*Memorandum Opinion and Order and Notice of Proposed Rule Making*, Docket No. 98-147, August 7, 1998]. This docket was initiated in part on February 25, 1998 when US WEST filed a petition with the FCC requesting that the FCC not apply section 251(c) to its high-speed data services. Other carriers also filed petitions concerning the deployment of advanced services and the applicability of the Federal Act to those services and the facilities used to provide them.

The FCC concluded that advanced services, (e.g., services provided over xDSL and packet switching technology) are telecommunications services.

> The Commission has repeatedly held that specific packet-switched services are "basic services," that is to say, pure transmission services. xDSL and packet switching are simply transmission technologies. To the extent that an advanced service does no more than transport information of the user's choosing between or among user-specified points, without change in the form or content of the information as sent and received, it is "telecommunications," as defined by the Act. Moreover, to the extent that such a service is offered for a fee directly to the public, it is a "telecommunications service." [Id., ¶ 35].

The FCC further concluded that advanced services offered by incumbent LECs are either "telephone exchange service" or "exchange access", noting that nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service.[Id., ¶ 40-41]. Consequently, the FCC rejected US WEST's contention that these terms refer only to local circuit-switched voice telephone service or close substitutes, and the provision of access to such services. [Id.].

Q. What is the significance of the FCC's conclusion that advanced services are "telecommunications" services?

A. The Federal Act requires LECs to unbundle and make available to CLECs all facilities and equipment used to provide telecommunications services, and to offer for resale all retail telecommunications services. Accordingly, the facilities and equipment used to provide xDSL and package switched services are subject to the Section 251 unbundling requirements, and the retail services provided over these facilities must be offered for resale at wholesale prices.

Q. What is the significance of the FCC's conclusion that advanced services are either "telephone exchange service" or "exchange access"?

A. As noted by the FCC, the Federal Act's interconnection obligations turn on whether the carrier is providing "telephone exchange service" or "exchange access". Since advanced services are "telephone exchange service" or "exchange access", the FCC declared that the interconnection obligations of sections 251(a) and 251(c)(2) apply to incumbents' packet-switched telecommunications networks and the telecommunications services offered over them. [Id., ¶ 48]. The FCC further rejected BellSouth's argument that Congress intended that section 251(c) not apply to new technology not yet deployed in 1996, noting that nothing in the statute or legislative history indicates that it was intended to apply only to existing technology. "Congress was well aware of the Internet and packet-switched services in 1996, and the statutory terms do not include any exemption for those services". [Id., ¶ 49].

Q. Has the FCC clarified when advanced services would be considered "telephone exchange service" and when they would be considered "exchange access"?

A. Yes. In its December 23, 1999 Order on Remand in Docket No. 98-147, the FCC concluded the following:

> We find that when xDSL-based advanced services both originate and terminate "within a telephone exchange," and provide subscribers with the capability of communicating with other subscribers in that same exchange, they are properly classified as "telephone exchange service." We also find that xDSL-based advanced services constitute "exchange access" when they provide subscribers with the ability to communicate across exchange boundaries. [¶ 3].

Q. So, under the Federal Act, US West may be required to unbundle the facilities at issue in this proceeding, notwithstanding the fact that they are used in providing broadband video services. Does that mean that, if those assets are transferred to BSI, this entity would be subject to the same unbundling requirements?

A. This remains an open question. In a Notice of Proposed Rulemaking, the FCC has tentatively concluded that transfers of facilities used to provide advanced services would subject the transferee to the Federal Act.

> In the Order above, we state that network elements used to provide advanced services must be unbundled pursuant to section 251(c)(3), subject to considerations of technical feasibility.... We tentatively conclude that, subject to any *de minimis* exception as discussed below, a wholesale transfer of such facilities would make an affiliate the assign of the incumbent LEC. [[*Memorandum Opinion and Order*, ¶ 106].

If the affiliate is the assign of the LEC, it is subject to the requirements of section 251(c). [Id., ¶ 104].

To the extent Section 251(c) applies to the assets being transferred to BSI, this Commission would be required to oversee BSI's compliance with these provisions. At least to that extent, BSI would be a regulated, rather than unregulated, affiliate. Rather than simplifying the regulatory situation, the proposed transfer could potentially complicate matters. CLECs would be required to separately rent network elements from and interconnect with both US West and BSI. This proliferation of regulated entities would be unnecessarily confusing and would impose an additional administrative and regulatory burden on competitors by forcing them to deal with two distinct firms (although both are owned and controlled by the same corporate entity).

To the extent the Commission is convinced a separation of the video operations is appropriate, it would be better to transfer a more limited set of assets, excluding those assets which should be available for rental as UNEs. This would maintain a clearer, more logical distinction between US West and BSI.

Q. When considering the applicability of the Federal Act to xDSL facilities and services, did the FCC specifically address the VDSL architecture at issue in this proceeding?

A. The FCC used the term "advanced services" to mean "wireline, broadband telecommunications services, such as services that rely on digital subscriber line technology (commonly referred to as xDSL) and packet-switched technology". [Id., ¶3]. The FCC pointed out that xDSL refers to the various types of DSL service, including VDSL (very-high speed digital subscriber line) service. [Id.]. The FCC did not specifically address VDSL facilities used to provide cable T.V. services, but it did speak generally about the xDSL technology. It is not clear whether the FCC will require unbundling of and interconnection to all of the different assets which are used by US West in providing its video service. However, many components of the video architecture, such as fiber cable, are the same type of network elements which were contemplated by the FCC in its decision.

The mere fact that VDSL is a new, more advanced technology is no basis for distinguishing it from traditional telephone services. To the contrary, the entire thrust of the FCC's decision is that advanced services are of growing importance, and that the federal unbundling requirements should apply to these important new technologies. In fact, there is considerable overlap between the VDSL technology and the ADSL technology which US West and other incumbent LECs use in providing other telecommunications services. For example, US West is providing its video customers with the option of connecting to the internet, using its VDSL technology. This service directly competes with the ADSL-based telecommunications services, as well as traditional dial-up modem based services. Adding this internet communications capability to the video architecture was a relatively simple matter, requiring the addition of a data router and a few other items.[See Response to RUCO 03-09, Confidential Attachment A]. This is but one example of the potential for substantial overlap between the services which BSI will be able to provide using the assets which have been identified for transfer and competing services which are provided by US West and competing local exchange carriers. If the intent of US West's proposal is to isolate the video operations from the remainder of US West's operations, the effect of the proposed asset transfers is different: it will create a confusing situation in which both BSI and US West Communications may be offering competing services using similar assets.

Q. Should the Commission be narrowly focused on the explicit requirements of the Federal Act, as interpreted by the FCC?

A. No. While the Commission should consider the direction provided by the FCC, it should take a broad view of the situation, to determine what resolution is most in the public interest. While there are aspects of the Company's request which are attractive, other aspects are quite troubling–particularly the proposed transfer of fiber cable and electronics which could potentially be very useful in providing other telecommunications services.

To the extent any of these assets have the potential to provide other telecommunication services these assets should be unbundled and made available to other carriers. The Commission should only authorize the transfer of assets which are not covered by the Federal Act's pro-competitive unbundling and resale requirements. Assets that should be available to competing carriers should remain with US West, even if they are currently only used to provide video services.