

Service Date: December 16, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER of the Application of	)	
U S WEST Communications, Inc. to	)	UTILITY DIVISION
Offer Single Line ISDN Service and	)	DOCKET NO. D96.7.121
Integrated Services Digital Network	)	
Primary Rate Service.	)	ORDER NO. 5940c

**ORDER ON MOTION TO COMPEL MCI TO PROVIDE  
RESPONSES TO U S WEST'S DATA REQUESTS**

**Introduction and Procedural Background**

1. U S WEST Communications, Inc. submitted data requests to MCI Telecommunications Corporation (MCI) on August 18, 1997. MCI responded to U S WEST's data requests on September 3, 1997. Many of MCI's responses included objections to U S WEST's requests as being outside the scope of this proceeding, irrelevant, unclear, burdensome, or not tied to a witness's testimony. Some of the data requests that MCI objected to were answered anyway; others simply stated objections or referenced other data responses which also were not answered.

2. MCI did not object to the data requests as required by Order No. 5940, the Procedural Order in this Docket. On September 12, 1997, U S WEST filed a Motion to Compel MCI to answer the data requests. U S WEST alleged that MCI is trying to make a mockery of the Commission's discovery process and attempting to avoid its discovery obligations by using

the limited knowledge of its witnesses as an excuse for not responding. U S WEST further alleged that MCI's responses were highly evasive and unresponsive.

3. On September 24, 1997, MCI responded to U S WEST's Motion asserting that U S WEST is attempting to make MCI's participation in this proceeding costly and time consuming by asking hundreds of data requests. MCI alleged that U S WEST has two discovery standards: one when it is asking the questions, and another when it is answering the questions. MCI further asserted that AT&T withdrew from this proceeding rather than continue to take U S WEST's abuse of the discovery process, after which time MCI devoted more resources and hired a costing expert to address consumer interests in this proceeding. MCI further stated that if the Commission "chooses to allow U S WEST to abuse the discovery process further by ordering MCI to respond to the data requests to which it objected, then the Commission can construe this response as MCI's notice that it withdraws from this proceeding and will take no further part in [it]."

4. On September 12, 1997, both MCI and U S WEST filed motions. MCI's motion asked for a continuance of the hearing date due to the unavailability of its costing witness on the scheduled hearing date; U S WEST's motion requested that the remainder of the Procedural Schedule be vacated because it could not prepare and file testimony until the discovery dispute had been resolved by the Commission. The Commission vacated the Procedural Schedule on October 2, 1997, stating that the hearing would be rescheduled after it acted on U S WEST's September 12, 1997 Motion to Compel.

5. In a work session on November 25, 1997, the Commission voted to grant U S WEST's motion in part, deny it in part and to strike certain of U S WEST's data requests.

**Findings of Fact and Commission Decision**

6. Order No. 5940 sets forth the procedure to be followed for objecting to data requests of a party in this proceeding. It provides that a party receiving data requests has three calendar days from receipt to file any objections to the requests and that failure to timely object will be a waiver of objections. The Procedural Order encourages parties to attempt to resolve all discovery disputes before filing objections and states that all discovery motions should contain a statement explaining the efforts taken to informally resolve the issue. In addition, it states that a discovery motion which does not include a statement explaining the efforts taken to resolve the issue informally is subject to denial without substantive consideration of the merits. Order No. 5940, ¶¶ 9-11.

7. Clearly, by failing to file its objections within the prescribed three days and failing to ask for an extension of the three-day period, MCI has not followed proper procedure in objecting to U S WEST's data requests. There is also no indication by either MCI or U S WEST that either party made any attempts to resolve the issues informally.

8. We stated in Order No. 5940b, issued on July 3, 1997:

4. The Commission's Procedural Order, along with the particular Montana Rules of Civil Procedure which have been adopted by the Commission, set the standard and procedures for discovery in this proceeding. If information requested by a party is not relevant or may properly be withheld for another reason, the Commission will make that determination following a proper objection made according to the Procedural Order and after allowing the party requesting the information to respond to the objection. (Emphasis added.)

Order 5940b specifically states that the Commission will determine whether information requested by a party is irrelevant or may be withheld for another reason following a proper objection and after allowing the requesting party to respond to the objection. It further states,

"In order to prevent this conduct from happening again, we conclude that a sanction is appropriate . . . and will, therefore, prohibit AT&T from supporting the relevance claims made in its answers to data requests or from opposing U S WEST's Motion to compel."

9. Apparently, MCI was not paying attention when the Commission previously addressed this same issue with respect to AT&T's responses to U S WEST's data requests. However, unlike AT&T, MCI has not compounded its failure to properly object by attempting to place a burden on U S WEST that is not required without a proper objection. Further, it has answered many of the data requests despite its objection to them.

10. MCI's concern that U S WEST's data requests are designed to be burdensome and costly rather than to obtain relevant information is an issue that properly should have been addressed in an objection filed before MCI expended additional time and resources responding to the data requests. Nevertheless, MCI's assertion raises serious questions about U S WEST's behavior which, if true, should not be tolerated by the Commission. Such behavior might discourage other parties from participating in Commission proceedings and prevent valuable contributions from being made because the cost is too high or participation is otherwise too burdensome.

11. U S WEST's burden in this case is to demonstrate that its proposed ISDN rates are just, reasonable and nondiscriminatory. It is questionable whether many of U S WEST's data requests to MCI (and previously to AT&T) are relevant to satisfying its burden. No conclusive evidence has been presented that U S WEST is attempting to burden intervenors to the point of withdrawal, but U S WEST has asked more than three times the number of data requests as all the intervenors combined.

12. The discovery process in this case has been fraught with problems. The move toward efficient pricing and the public interest seems to have become stalled in an endless series of procedural disputes. AT&T withdrew after the Commission ordered it to respond to all data requests; MCI has threatened to withdraw from the case if the Commission orders responses to data requests to which it objected. The Commission is concerned with how this case has degenerated, but will not let itself be held hostage to such threats, especially given MCI's failure to follow the procedural process that has been specified in two prior Commission orders in this Docket.

13. Aside from the possible obduracy on the part of both parties, and MCI's failure to heed the warning in Order 5940b, there is good reason to set this pattern of discovery abuse aside and address the merits of the objections. The public interest is not well served by making it difficult for parties to participate, or, as in this Docket, requiring needless discovery which might lead to a request from a party to withdraw.

14. MCI has the ability to offer a different perspective on complex telecommunications costing and pricing issues, which is important to fully develop the record in this case. Following AT&T's withdrawal, MCI became more actively involved, hiring its own consultant to provide testimony, since it could no longer rely on AT&T's witness to provide testimony. As MCI is the only remaining active intervenor, the loss of this intervenor will detrimentally affect the record and may affect the ultimate outcome of the case. There has been much work and expense by all active parties in this docket, despite the numerous discovery motions which have created additional burdens for the Commission, staff, and the parties.

15. Technically, MCI's failure to object should be considered a waiver of any objections to the data requests. One of the sanctions for unexcused failure by a party to answer data requests listed in ¶13 of the Procedural Order in this Docket is "action staying further proceedings until the request is satisfied." This is essentially what has already been done by vacating the remainder of the procedural schedule pursuant to U S WEST's motion.

16. Discovery should be commensurate in cost and volume with the needs of the case, the resources available to the parties and the importance of the issues to which the discovery relates. Data requests are burdensome if they are unreasonably cumulative, repetitive, or duplicative. They should be limited to materials that are not in the possession of the requesting party and which the party expects will be useful in the preparation of the case. Unduly broad requests and questions not specifically related to the proceeding should not be allowed. Further, information that is obtainable from a source that is more convenient, less burdensome or less expensive than from another party should be secured from the other source.

17. We conclude that the public interest is not served well by compelling MCI to answer clearly irrelevant data requests, especially if they are designed to solicit information useful to a competitor. If it is questionable whether the request is designed to solicit information that may lead to admissible evidence, the motion to compel should be granted as to that particular request, with the advantage given to U S WEST. Abuse of the discovery process, however, should not be condoned and where U S WEST's data requests seem burdensome and clearly irrelevant, the effect of granting another motion to compel data responses may result in perpetuating discovery problems. By considering each of U S WEST's objections individually

in this manner, we intend to clarify that this Commission will not tolerate abuse of the discovery process.

18. With this in mind, we grant U S WEST's motion in part as to those data requests that are reasonable, and *sua sponte* strike some of U S WEST's data requests based on the concerns identified above.

a. We strike the following data requests:

USWC 81: USWC 81 asks for all price squeeze and cross-subsidy analyses performed by MCI at the time of AT&T's Tariff 12 filing, asks the witness to identify any records in MCI's possession and all supporting work papers, any records from AT&T that any and all MCI personnel are aware of related to AT&T's Tariff 12 filing, and to describe the document, the creator of the document and the context in which MCI received or viewed the documents from AT&T. MCI's response states that MCI did not raise AT&T's Tariff 12 filing in this proceeding and merely responded to U S WEST when it introduced Tariff 12 in its rebuttal testimony of witness Jenson. Although MCI objects to the request as being outside the scope of this proceeding and unduly burdensome make-work, the witness did respond that she was not aware of any documents regarding any analyses performed by MCI at the time of AT&T's Tariff 12 filing. She further stated that any documents filed by AT&T for its Tariff 12 filing are public documents available to U S WEST. We strike this data request because it is irrelevant.

USWC 82: U S WEST asks MCI's witness Bennett to describe MCI's means of provisioning toll service at the time of AT&T's Tariff 12 filing and the percentages of toll traffic served by resale from AT&T, from providers other than AT&T, from purchase of unbundled elements from AT&T, from purchase of unbundled elements from providers other than AT&T, provided by MCI's facilities, and from facilities leased from an MCI affiliate. U S WEST asks for specific Montana and U S WEST region data, and if unavailable, for comparisons of Montana data to national data. If this is not available for the time of AT&T's Tariff 12 filing, it asks for current data. MCI's response objects to the request as being outside the scope of this proceeding and an unduly burdensome make-work request, stating that MCI's toll provisioning is not the subject of this proceeding, MCI did not raise the issue of AT&T's Tariff 12 in this proceeding, and MCI responded to U S WEST when it introduced Tariff 12 in its rebuttal testimony of Jenson. We strike this data request because it is irrelevant.

USWC 92: U S WEST asks MCI's witness to identify any and all locations throughout the United States and the United Kingdom where MCI or any of its affiliates currently provided PRI or BRI ISDN service and to provide a copy of all tariff or contract rates for the services as provided by MCI and a copy of the cost support relied upon by MCI for those

services. MCI did not answer this at all, objecting that MCI's services are not the issue of this proceeding. We strike this data request because it is overly burdensome and irrelevant.

USWC 98: MCI's witness clearly stated in its response what clarification was necessary. However, her testimony does not appear to discuss the two different usage services referenced in U S WEST's data request. We strike this data request because it references descriptions that are not in the witness's testimony.

- b. We grant the motion to compel and sustain U S WEST's objections regarding the data requests identified below.

For data requests numbered 85(ii), 86, 98, 101(b) and 110(iii), MCI's responses stated that it needs clarification to answer the questions. U S WEST contends this response is evasive, non-responsive, and is not made in good faith. Further, U S WEST asserts that if MCI truly wanted clarification, it would have asked for it prior to submitting the data response. MCI could have asked U S WEST for clarification prior to answering the questions. However, U S WEST could have provided the clarification so MCI could answer the questions without filing a motion to compel responses. Neither party has apparently attempted to resolve these problems informally. Where MCI has specifically stated the clarification that is necessary, U S WEST should provide clarification within five business days; where MCI has not indicated such, it should seek and obtain clarification within five business days. Appropriate responses should then be provided to U S WEST's data requests within five days of receiving clarification. If no clarification is provided, we will construe such as a withdrawal of the data request.

USWC 85(ii): MCI's witness clearly stated what clarification was necessary. U S WEST should provide the clarification requested.

USWC 86: U S WEST asked for MCI's most current version of its "pricing manual." MCI stated it is unsure what U S WEST is referencing, but if it is its current price lists, these are on file with the Commission and are public information. If this is not responsive, then U S WEST should provide clarification to MCI. However, if U S WEST is in fact asking for the

price lists, it has that information available from another source and should get it there. In that case, the request is stricken.

USWC 94: U S WEST asked MCI's witness to explain (i) why a premise modem is required for a single-line ISDN service line or primary rate interface; (ii) what a multiplexer hosted ISDN line is in relationship to single line ISDN service; (iii) what a modem pool multiplexer is and why it is required for single line ISDN; (iv) what an ethernet router is and why it is required for single line ISDN service; and (v) why an ISDN line requires a dedicated, conditioned line. MCI's objection to this request is that Ms. Bennett did not address any of these technical issues in her testimony and submitted an article as a rebuttal to U S WEST's witness's claim that DSL services are viable alternatives either now or in the near future. MCI also states that U S WEST already knows the answers to the above technical questions. U S WEST may know the answers or have an opinion, but that is not sufficient reason for denying U S WEST's motion to compel a response to this data request. The witness should answer these questions.

USWC 96: U S WEST asks for additional information about the article referred to in USWC 94 and asks whether Ms. Bennett agrees with the article and if she suspects Montana may be different because of its rural characteristics. MCI states the witness did not address technical issues, has no opinion on, and has made no assertions to these data. This is unresponsive to the request. Although we are uncertain what evidentiary support her answer can provide, U S WEST is merely asking for her opinion.

USWC 99: U S WEST asked if MCI still concurs in the joint statements and definitions related to cross-subsidy and predatory pricing supported by Dr. Nina Cornell in Colorado, and, if not, to explain when MCI's position changed and why. MCI objected to this request as being extremely vague as Dr. Cornell has been involved in many Colorado proceedings, and to answer the question properly, requested U S WEST to provide a copy of the exact statements and definitions to which this data request refers. U S WEST should provide the requested clarification.

USWC 105: U S WEST asked Mr. Solomon to describe how MCI would have U S WEST assign shared cost to services if not in the manner set forth in U S WEST's April 1997 studies, and to compare and contrast this method to the method supported in the Hatfield analysis by MCI in multiple jurisdictions including Arizona where Mr. Solomon also testified. It also asked him if he supports statements by Hatfield model users that in the long run all costs are variable, and, if not, to identify and describe any and all costs that he believes do not vary in the long run. MCI objected on grounds that the Hatfield Proxy Cost Model is not an issue in this proceeding and has not been addressed by Mr. Solomon in his testimony and did not answer the data request. Although Mr. Solomon has criticized U S WEST's method of allocating costs, he has not provided testimony on what he believes is the correct method of allocating costs. He has an obligation to do this and should answer the question when clarified by U S WEST without reference to the Hatfield Model.

USWC 110(i): U S WEST asked if Mr. Solomon disagrees that the Hatfield Model sponsored by MCI in a number of arbitration dockets also assumes "the same geographic locations of routes and switching locations are the same as those available to the firm today." If he disagrees, U S WEST asks him to explain the basis for his disagreement. MCI objects that the Hatfield proxy cost model is not an issue in this proceeding and has not been addressed in this proceeding, nor has Mr. Solomon represented MCI in any MCI arbitration docket. Mr. Solomon should answer this request after U S WEST has reworded it to be a generic question without reference to the Hatfield Model.

USWC 110(iii): MCI states that it is unsure what U S WEST is requesting and asks for clarification of the request. U S WEST should provide the clarification requested.

USWC 116: U S WEST asks Mr. Solomon to provide and describe any and all work papers related to the April 1997 ISDN study requested by MCI that suggests that U S WEST's assignment of shared costs is not appropriate and to be specific about any disagreements. If he disagrees, U S WEST asks him to describe how his disagreement impacts the final cost results. If he disagrees with the method used to assign the costs, U S WEST asks him to compare and contrast the assignment assumptions in the cost studies to MCI's recently supported Hatfield model assignment of shared and common costs. MCI objects that it can find no connection to the cited testimony and this request. Notwithstanding the objection, it refers U S WEST to the response to USWC-105 above, which is another objection that the Hatfield Model is not an issue in this proceeding and Mr. Solomon has not addressed it in his testimony. No response to the question has been provided. Mr. Solomon should answer the question after clarification by U S WEST to remove references to the Hatfield Model.

USWC 122: U S WEST asks what information Mr. Solomon needs to understand U S WEST's assignment of shared costs within U S WEST's study that MCI has asked for but that U S WEST has not provided, whether he has reviewed U S WEST's Cost Manual and if not why not, and whether MCI cost representatives have been provided a U S WEST Cost Manual as part of the data requests in other dockets in Montana and in all U S WEST states. MCI responds that it is vague and overly broad as there have been innumerable proceedings with an extremely large number of participants and witnesses. MCI believes U S WEST should have any information already concerning to whom it has provided its cost model. Mr. Solomon should answer the data request.

USWC 144: U S WEST asks MCI to provide complete copies of the ISDN tariffs related to the rate comparisons included in Mr. Solomon's testimony for the states of Tennessee, California, and Iowa. It further asks for a copy of the Commission order in Tennessee that authorized those rates, and if the rates do not include the access line, also provide a copy of the basic exchange line rates for those services. MCI objects that this request is an unduly burdensome make-work request. MCI states that it does not have the requested documents, which are public documents available from the Commissions in those states. We grant the

motion for rates only; complete tariffs are unnecessary. The remainder of the data request is stricken.

USWC 149(c), (d), (e): U S WEST asks in (c) if Mr. Solomon or MCI classifies ISDN used for "work-at-home" a residential line or a business line; in (d) if MCI, as a matter of TELRIC based costing policy, supports a cost differential for residence and business services, and if so to describe how the costs should be different and reconcile the position to MCI's advocacy in Wyoming and Utah proceedings; and in (e) if MCI, as a matter of pricing policy, supports a rate differential for residence and business services, and if yes, to explain how that rate differential should be translated to ISDN service and to reconcile this position to MCI's Hatfield related pricing advocacy in Wyoming and Utah proceedings. MCI objects that Mr. Solomon did not address (c) in his testimony; in (d) and (e), the Wyoming and Utah cases cited are outside the scope of this proceeding and MCI has not addressed this issue in its testimony; and additionally in (e) that the Hatfield cost proxy model has not been raised as an issue in this proceeding. The request is relevant and should be answered, with the exception of the reference to the Hatfield model.

- c. U S WEST's Motion to Compel is denied with respect to the following data requests, which have been answered sufficiently.

USWC 97: U S WEST asks if MCI disputes that Microsoft developed Windows '95 and to explain Ms. Bennett's understanding of the corporate relationship between Intel and Microsoft. MCI objected that this is irrelevant to this proceeding, but answered the question anyway. The answer is sufficient. The question is irrelevant.

USWC 89: U S WEST asks MCI's witness to identify if MCI has filed for interconnection (including resale) with BellSouth, PacBell and Ameritech in areas where there is 98% ISDN availability, almost 90%, and almost 90% for these customers respectively, and to explain if MCI has filed for such in all U S WEST states. If it has not, U S WEST asks it to explain why it has filed in some jurisdictions and not in others. MCI objects to this as being irrelevant to the issues in this proceeding, and that it asks for MCI's business plans which are privileged and confidential information outside the scope of this proceeding. Notwithstanding the objection, MCI answered that it had filed for interconnection with these BOCs, that it has not filed for such in all U S WEST states and lists the states it has filed in, it describes circumstances in other states and the status of interconnection agreements and formal actions it has taken against U S WEST, and given its reasons for not filing in all states. MCI has answered the data request sufficiently. To the extent MCI's response is insufficient in U S WEST's view, the remainder is stricken as it is irrelevant to this proceeding.

USWC 100: U S WEST asked if Ms. Bennett believes that, as a matter of pricing policy, high volume users of a service should be subsidized by low volume users of a service, and to explain why or why not. MCI's objection to this is that Ms. Bennett is not MCI's pricing witness and the question should be directed to Mr. Solomon, its costing and pricing witness. Despite the objection, MCI answered the question adequately.

USWC 101(b): Although MCI's witness stated it is not clear what U S WEST referred to in its question about cost drivers for computers, he nevertheless answered the question in relation to general factors. The data request has been answered sufficiently.

USWC 111: MCI's witness speculated in his testimony that "in fact, it may not even be possible to order a POTS line in the future." U S WEST asked MCI to "provide the factual basis for this unusual assertion." In response to USWC-111, MCI explained that the statement in testimony says that the possibility exists that POTS will not be available as we know it today, because the definition of POTS has evolved over the years and the witness sees no reason why this evolution should suddenly cease. U S WEST calls this a "textbook example of evasion" and accuses MCI's witness of providing an evasive, non-responsive, and rather bizarre answer to avoid having to provide a truthful response. USWC seems to argue that because the witness did not give it the specific answer it expected, that the answer was evasive. The answer is responsive as it explains the witness's speculation. If U S WEST wants to attack the responses of a witness, it should be done in cross-examination to reflect on credibility of the witness.

USWC 112: MCI's witness testified that, "As the network and technology evolved it became more expensive to offer touchtone as an optional service than to just roll the cost into the basic rate." U S WEST then asked the witness to describe the life cycle of costs for touchtone, to describe the life cycle of price for touchtone based on the witness's knowledge, to explain the length of the life cycle for costs and price for touchtone, and to describe and relate that to the life cycle of costs and prices for other custom calling features. MCI's witness responded, but did not describe in detail as requested. U S WEST claims it is a grossly insufficient answer and the witness should be compelled to provide a truthful and responsive answer. The Commission will not compel a more responsive answer. The question is irrelevant to this proceeding, overbroad and burdensome, and the witness has answered sufficiently.

USWC 113: This question relates to the witness's statement that ISDN could in the future be ordered by such a large majority of the customer base that it could be rolled into the customer base as with TouchTone. U S WEST claims that the answer given by MCI's witness is incredible and directly contradicts his written testimony. This is more appropriately addressed in cross-examination. The witness answered responsively.

USWC 119: U S WEST asks Mr. Solomon to identify and describe what items U S WEST did not include as a direct cost and what items were considered common costs when U S WEST calculated LRIC costs in New Mexico. MCI responded that Mr. Solomon had made no mention of common costs on the referenced page, the question is overly broad as U S WEST has failed to refer to a specific service, Mr. Solomon was never involved in a U S WEST docket where seven percent was not added to the incremental cost to develop a price floor, to the best of his knowledge U S WEST never delineated what costs were common in New Mexico and that is why seven percent has always been used. Mr. Solomon further stated that it was not until the 1996 Act passed that the magnitude of common costs became an issue. This data request has been answered sufficiently and U S WEST has this information.

USWC 135: Again, U S WEST is questioning the response given by the witness, claiming it is incredible because MCI has provided no factual basis for the opinion. This is appropriately handled in cross-examination. The answer is sufficiently responsive.

USWC 150: U S WEST asks for a clarification of MCI's advocacy--if MCI is proposing a separate rate for residential ISDN lines as compared to business ISDN lines-- and if so, to explain how U S WEST is to make the determination for "work-at-home" applications. MCI objects because this issue is not an issue addressed in MCI's testimony. However, MCI did answer the request, stating that it did not recommend any rate differentials. The data request is adequately answered.

THEREFORE, based upon the foregoing, IT IS ORDERED that

- 1) U S WEST's Motion to Compel is granted in part with respect to data requests numbered USWC 85(ii); 86; 94; 96; 99; 105; 110(i) and (iii); 116; 122; 144; 149(c), (d) and (e)-- provided that U S WEST provides the necessary clarification and revisions as explained herein;
- 2) U S WEST's data requests numbered USWC 81, 82, 92, and 98 are hereby stricken; and
- 3) U S WEST's Motion to Compel is denied with respect to data requests numbered USWC 89, 97, 100, 101(b), 111, 112, 113, 119, 135 and 150.

U S WEST is further ORDERED to provide to MCI the required clarification within five business days of receipt of this Order and MCI is ORDERED to provide data responses within five business days thereafter. The remainder of the Procedural Schedule will be rescheduled after MCI has provided the required responses to U S WEST's data requests.

DONE AND DATED this 10th day of December, 1997, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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DAVE FISHER, Chairman

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NANCY MCCAFFREE, Vice Chair

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BOB ANDERSON, Commissioner

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DANNY OBERG, Commissioner

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BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision.  
A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.