BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ADVANCED TELCOM GROUP, INC.,	)	
	)	Docket No. UT-993003
Petitioner,	)	
	)	ATG's BRIEF ON ADDITIONAL
v.	)	ISSUES
	)	
U S WEST COMMUNICATIONS, INC.,	)	
	)	
Respondent.	)	
	)	

Pursuant to the Second Supplemental Order; Prehearing Conference Order; Further Proceedings, Advanced TelCom Group, Inc. ("ATG"), provides the following brief on additional issues specified by the Administrative Law Judge ("ALJ").

DISCUSSION

The issues on which the ALJ requested additional briefing, taken as a whole, appear to reflect concerns with reconciling the Telecommunications Act of 1996 ("Act"), the implementing rules and orders of the Federal Communications Commission ("FCC"), and the Commission's recently adopted Interpretive and Policy Statement in Docket No. UT-990355. Any conflict can and should be avoided, however, by recognizing that "the primary purpose of section 252(i) [is to] prevent[] discrimination." *In re Implementation of the Local Competition Provisions of the Act*, CC Docket No. 96-98, FCC 96-325, First Report and Order ¶ 1315 (Aug. 8, 1999) ("*Local Competition Order*"). U S WEST Communications, Inc. ("U S WEST") currently provides reciprocal compensation to a host of competitors pursuant to the rates, terms, and conditions

developed in Docket No. UT-960323 ("MFS/U S WEST Agreement"). ATG has requested those same rates, terms, and conditions. The nondiscrimination principles of both federal and state law require that ATG be permitted to adopt those rates, terms, and conditions, either directly from the MFS/U S WEST Agreement, or indirectly from another Commission-approved agreement that is based, in whole or in part, on the MFS/U S WEST Agreement.

A. ATG's Section 252(i) Request Is Fully Consistent With the Act, FCC Rule 809, and the Commission's Interpretive and Policy Statement.

ATG's Petition is simple and straightforward. ATG has requested to adopt the reciprocal compensation provisions of the MFS/U S WEST Agreement to replace the existing provisions in ATG's current interconnection agreement with U S WEST. The MFS/U S WEST Agreement is currently in full force and effect and governs the interconnection terms and conditions between U S WEST and MFS, as well as between U S WEST and a variety of other carriers that have adopted that agreement, in whole or in part, including but not limited to ELI, GST, Televerse, and NEXTLINK. ATG merely seeks the same terms and conditions that U S WEST currently provides to these other carriers, consistent with the nondiscrimination requirements of federal and Washington law.

U S WEST, however, has attempted to use the Commission's Interpretive and Policy Statement to sanction its discriminatory refusal to provide ATG with these reciprocal compensation terms and conditions. Indeed, U S WEST was prepared to grant ATG's request until the Commission circulated a draft of its Interpretive and Policy Statement. *See* Thomas Aff., Ex. B; U S WEST Answer at 2-3. U S WEST purports to rely on two principles in the

Interpretive and Policy Statement to support its position: (1) Principle 6, which provides, in part, that "[a] requesting carrier may not receive arrangements from any agreement after the expiration date"; and (2) Principle 7, which Commission staff interprets to provide that carriers with existing agreements may only adopt arrangements from subsequently approved agreements and only within a nine month period. ATG's request is fully consistent with a proper application of the Commission's Interpretive and Policy Statement in light of the Act and FCC Rule 809.

The Commission's Interpretive and Policy Statement is a nonbinding indication of the Commission's current opinion on general implementation of Section 252(i), which is intended to provide guidance in resolving individual disputes. The Commission thus has recognized that while some general principles can be established, the Commission must independently evaluate the circumstances presented in each case. Such circumstances here include the undisputed facts that ATG opted into the Covad Agreement at a time when FCC Rule 809 was stayed; U S WEST refused to allow any carrier to opt into less than an entire agreement until June 10, 1999, when the Eighth Circuit lifted that stay; and U S WEST refused to provide just the reciprocal compensation provisions in the MFS/U S WEST Agreement until after the Commission decision on NEXTLINK's complaint on September 9, 1999. Neither Principle 6 nor Principle 7 precludes ATG's request under the circumstances presented in this case.

Principle 6 is simply inapplicable. The MFS/U S WEST Agreement has no expiration date and, as a matter of fact, has not yet expired. By its terms, that agreement remains effective until replaced by another agreement, and neither MFS nor U S WEST has filed a replacement

agreement with the Commission for approval or initiated any arbitration proceedings to develop another agreement. By claiming that the MFS/U S WEST Agreement has "expired" but nevertheless remains effective indefinitely, U S WEST seeks authority to discriminate among competitors by refusing to provide some carriers with the terms and conditions it currently is providing to others. The Commission's Interpretive and Policy Statement cannot be construed to sanction such overt discrimination consistent with the Act and FCC Rule 809.

Even if the Commission were to accept – and ignore the discriminatory impact of – U S WEST's legerdemain that an agreement can expire but remain in full force and effect indefinitely, the Interpretive and Policy Statement does not deal with the issue of a carrier's request for an interconnection arrangement that the Commission has required as a matter of law or policy. There are only two substantive differences between the reciprocal traffic exchange provisions in the MFS/U S WEST Agreement and the existing agreement between ATG and U S WEST: (1) the MFS Agreement requires reciprocal compensation for traffic bound for Internet Service Providers; and (2) the MFS Agreement provides that the competitor's switch be treated as a tandem. The Commission has consistently resolved these issues on legal and policy grounds as they were resolved in the MFS Agreement. *See, e.g., NEXTLINK v. U S WEST*, Docket No. UT-990340, Commission Order at 13-16 (Sept. 9, 1999); *In re Pricing Proceeding*, Docket Nos. UT-960369, *et al.*, Seventeenth Supp. Order at 18 (Aug. 30, 1999); *In re ELI-GTE Arbitration*, Docket No. UT-980370, Order Approving Negotiated and Arbitrated Agreement (May 12, 1999). Particularly when U S WEST continues to pay reciprocal compensation for ISP-bound traffic at

tandem interconnection rates to other carriers, ATG should be entitled to the same Commission-mandated rates, terms, and conditions without filing and pursuing its own arbitration to obtain a pre-ordained result.

Principle 7 in the Interpretive and Policy Statement is based on the premise that a carrier with a currently effective agreement had the opportunity to choose provisions from other existing agreements during negotiations and thus needs only the opportunity to obtain provisions from agreements that did not exist before its agreement was executed. That premise is inapplicable to ATG. When ATG was seeking an interconnection agreement with U S WEST in November 1998, U S WEST refused to allow ATG to adopt anything less than an entire existing agreement. U S WEST did not alter its position until compelled to do so by the Eighth Circuit's reinstatement of FCC Rule 809 on June 10, 1999. The Commission has previously concluded under indistinguishable circumstances that, as an equitable matter, a carrier is entitled to adopt provisions of a pre-existing agreement – specifically, the reciprocal compensation provisions of the MFS/U S WEST Agreement. *NEXTLINK v. U S WEST*, Docket No. UT-990340, Commission Order at 20-23 (Sept. 9, 1999). That same conclusion is appropriate here.

The remaining issues on which the ALJ has requested additional comment concern whether a requesting carrier may adopt provisions from a Commission-approved agreement that is an adoption of another agreement. Such issues only arise if the Commission determines that the MFS/U S WEST Agreement is expired and not otherwise directly available to ATG. Even under those circumstances, the Commission need not resolve broad public policy or legal issues

in this proceeding, any more than it was willing to decide such issues in the NEXTLINK Petition proceeding in Docket No. UT-990340. *See id*. at 23. The Commission has approved every agreement between U S WEST and another carrier based on the MFS/U S WEST Agreement, without objection or challenge to the Commission's authority to do so. The Act and FCC Rule 809, therefore, expressly authorize ATG to adopt the reciprocal compensation arrangement from the MFS/U S WEST Agreement, either directly from that agreement or from any of the Commission-approved agreements based, in whole or in part, on the MFS/U S WEST agreement. The Commission thus need not, and should not, attempt to resolve broad policy issues that are not presented in this case in order to provide ATG with the nondiscriminatory treatment it has requested.

B. Proper Resolution of Each of the Issues Posed by the ALJ Supports ATG's Section 252(i) Request.

The previous discussion generally addressed the additional issues raised by the ALJ as they relate to ATG's Petition. The following discussion addresses each of the issues individually, as requested in the Prehearing Conference Order.

What impact does the FCC's Order in Global NAPs/BA-NJ, CC Docket No. 99-154, FCC 99-199, footnote 25, have on interconnection agreements previously approved by the Commission?

The FCC provided some guidance on "opt-ins" under Section 252(i) and FCC Rule 809 in the Global NAPs decision in the course of denying a request for preemption of arbitration proceedings before the New Jersey commission. Footnotes 24 and 25 largely amplify the FCC's discussion of federal law in paragraphs 1309-23 of the *Local Competition Order*, and all

Commission-approved interconnection agreements are subject to the requirements in that order, as well as the Act and FCC rules. The emphasis in both the Global NAPs decision and the *Local Competition Order* is on ensuring that requesting carriers be able to exercise their opt-in rights on an expedited basis, which the Commission has committed to do in its Interpretive and Policy Statement. The Global NAPs decision thus does not directly impact this case.

The issue as framed by the ALJ, however, appears to focus on the FCC's reference in the Global NAPs decision to adopting the original expiration date when opting into an existing agreement. The FCC's discussion of this issue does not impact ATG's request to adopt the reciprocal compensation provisions of the MFS/U S WEST Agreement. Even if the Global NAPs decision could be interpreted to establish a requirement that a carrier adopting only a portion of an existing agreement must also include the expiration date of the entire agreement, the MFS/U S WEST Agreement does not include an expiration date, as discussed more fully below. If necessary, moreover, ATG is willing to accept that agreement's requirement that its terms and conditions remain effective until replaced. ATG's request, therefore, is consistent with applicable federal law, including any reasonable interpretation of the FCC's Global NAPs decision.

Does the MFS/U S WEST agreement unambiguously establish a termination date?

The MFS/U S WEST Agreement does not unambiguously establish a termination date. To the contrary, the plain language unambiguously provides that the agreement remains in effect after two and one half years unless and until it is replaced by another agreement:

> The Agreement shall be effective for a period of 2 1/2 years, and thereafter the Agreement shall continue in force and effect *unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties*. The Parties agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective.

MFS/U S WEST Agreement, Art. XXIV, § V (emphasis added). U S WEST ignores the plain language of the agreement and contends that this section was intended to reflect termination of the agreement after 2 ½ years with continuation after termination to allow for negotiation of a replacement. Had the parties intended such a provision, however, they would not have expressly stated that the agreement remains effective "*unless*" replaced by another agreement, and they would not have avoided *any* reference to termination of the agreement. Indeed, the second sentence of Section V requires the commencement of negotiations for a replacement "no later than two years after this Agreement becomes effective," not "at least six months prior to this Agreement's termination." U S WEST cannot credibly claim that the agreement expired when the language and the parties' implementation of the agreement unambiguously demonstrates that it is still in full force and effect.

Even under U S WEST's interpretation, however, the MFS/U S WEST Agreement has not expired as a matter of both law and fact. Not only does the contract language provide for the agreement's continued effectiveness, but U S WEST represented to the FCC, following the Supreme Court's decision in January, that U S WEST would honor existing interconnection agreements through the end of this year to enable the FCC to conduct remand proceedings. U S WEST thus effectively extended the term of the MFS/U S WEST Agreement to at least

December 31, 1999. U S WEST, moreover, has not even submitted for Commission approval, much less implemented, any agreement to replace the MFS/U S WEST Agreement, leaving the agreement in full force and effect for every carrier that adopted it. That agreement's terms, therefore, should continue to be available to other carriers pursuant to 47 U.S.C. § 252(i).

Does the Commission's section 252(i) Interpretive and Policy Statement apply to agreements previously approved by the Commission?

The Commission's Interpretive and Policy Statement represents "the current opinion held by the Commission regarding Section 252(i) of the Act" and is not "binding on the Commission or parties who may come before it in formal proceedings." Docket No. UT-990355, Interpretive and Policy Statement ¶ 10. The Interpretive and Policy Statement, as nonbinding Commission opinion, thus is applicable to all agreements the Commission has approved.

The key to proper application of the principles established in that Statement, however, is consideration of all circumstances presented. The Statement, for example, does not reference agreements approved by the Commission while FCC Rule 809 was unenforceable, nor does it address requests to adopt contract provisions that are the result of Commission policy or legal determinations. ATG has requested the reciprocal compensation provisions of the MFS/U S WEST Agreement, even though that agreement predates ATG's agreement. ATG, however, did not have an opportunity to adopt portions of an existing agreement until well after it entered into its agreement with U S WEST. In addition, the provisions ATG seeks to adopt require U S WEST to pay reciprocal compensation for traffic bound for Internet Service Providers, which the Commission has repeatedly ordered as a matter of law and policy. The Commission's

Interpretive and Policy Statement, therefore, is generally applicable to all interconnection agreements, but by its own terms, is subject to adjustment as circumstances warrant, as is the case here.

On what date was 47 C.F.R. 51.809 reinstated?

The FCC's Rule 809 was formally reinstated by the Eighth Circuit on remand from the Supreme Court's decision on June 10, 1999. The effect of the Supreme Court's decision, however, was to verify that Rule 809 was never invalid. *See, e.g., Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993) (when the Supreme Court decides an issue of federal law, "that rule is the controlling interpretation of federal law, and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule"). As a technical legal matter, the effectiveness of Rule 809 remained stayed until the Eighth Circuit's action on remand, but the Supreme Court's decision reinvigorated the Rule not just as of the date of the Supreme Court's decision but as of the rule's promulgation by the FCC.

The ALJ's specification of this issue is an apparent attempt to establish a date by which carriers with existing interconnection agreements were able to adopt provisions from other agreements, and from which a "reasonable time" for doing so began to run. No such date is necessary or even relevant (as discussed in the following section), but if it were, the date should be June 10, 1999. That date is not only the date of the Eighth Circuit's decision but the date on which U S WEST recognized its legal obligation to comply with Rule 809. Prior to that date,

U S WEST refused to permit carriers to adopt anything less than an entire agreement. *See, e.g.*, Docket No. UT-990340, USWC Answer to NEXTLINK Petition at 10 (May 12, 1999) (taking the position that "Rule 809 is not effective yet," even though it had been upheld by the Supreme Court). ATG and other carriers cannot be required to have exercised their full opt-in rights at a time when U S WEST continued to refuse to acknowledge those rights.

Is a State requirement that parties adopting agreements prior to reinstatement of FCC Rule 51.809 be entitled to request arrangements from previously approved agreements for a reasonable period of time not inconsistent, and if not, what would be a reasonable period of time?

A State requirement that carriers with existing agreements be entitled to request arrangements from previously approved agreements for a reasonable period of time is fully consistent with – indeed, required by – Section 252(i) and FCC Rule 809. Neither the Act nor the FCC Rules restrict the existing interconnection arrangements available for adoption. The Commission, however, has proposed to restrict such arrangements to those in subsequently approved agreements for carriers with existing agreements. Interpretive and Policy Statement Principle 7. ATG joined with other parties in urging the Commission reject Principle 7 as inconsistent with federal law. Docket No. UT-990355, Supplemental Comments of ATG, *et al*. (Nov. 10, 1999). The Act and the FCC unambiguously require U S WEST to "make available without unreasonable delay to *any* requesting telecommunications carrier *any* individual interconnection, service, or network element arrangement contained in *any* agreement to which it is a party that is approved by a state commission." 47 C.F.R. § 51.809 (emphasis added).

Even if the Commission adheres to Principle 7, ATG should be permitted to adopt the

reciprocal compensation provisions of the MFS/U S WEST Agreement. U S WEST did not make arrangements from interconnection agreements (as opposed to entire agreements) available to requesting carriers until after June 10, 1999, and specifically did not make the reciprocal compensation provisions of the MFS/U S WEST Agreement available (albeit only briefly) until after the September 9, 1999 Commission decision in *NEXTLINK v. USWC*, Docket No. UT-990340. *See* Thomas Aff., Ex. B. ATG requested those provisions one month after the NEXTLINK decision and four months after the Eighth Circuit's decision lifting the stay on the effectiveness of FCC Rule 809. Thomas Aff., Ex. A. By any measure, ATG's request came within a reasonable period of time.

Is a State requirement that section 252(i) requests be submitted to the Commission for approval under section 261(c) not inconsistent with the Telecom Act or FCC regulations?

No party to an interconnection agreement resulting from the exercise of Section 252(i) has challenged or objected to the Commission's requirement that such agreements be submitted to the Commission for approval under the Act, including U S WEST and carriers – such as ELI, GST, and Televerse – that have opted into the MFS/U S WEST Agreement. Accordingly, the Commission's authority to adopt such a requirement or to approve those agreements is not at issue in this case. The Commission approved the MFS/U S WEST Agreement and each of the agreements between U S WEST and other carriers that is based on that agreement. Whether viewed as adopting the reciprocal compensation provisions from the MFS/U S WEST Agreement directly or from a Commission-approved agreement between U S WEST and a carrier that

adopted all or a portion of the MFS/U S WEST Agreement, therefore, ATG's request fully complies with federal law and Commission policy and practice.

Is a State requirement that arrangements approved pursuant to section 252(i) be made available to other carriers not inconsistent with the Telecom Act or FCC regulations?

Both the Act and the FCC require U S WEST to make available to requesting carriers *any* arrangement from *any* Commission-approved interconnection agreement. 47 U.S.C. § 252(i); 47 C.F.R. § 51.809. ATG has requested the reciprocal compensation provisions from the MFS/U S WEST Agreement, either directly or as those provisions have been incorporated into an agreement with a carrier other than MFS. The Commission has approved each of these agreements pursuant to Section 252. Accordingly, ATG has requested an arrangement from a currently effective, Commission-approved agreement, and that request is fully consistent with the Act and FCC regulations. Resolution of ATG's petition thus does not require a more global inquiry into the Commission's authority, and exploration of such issues should be conducted in the pending Section 252(i) rulemaking or other generic proceeding.

CONCLUSION

ATG requested the reciprocal compensation provisions from the currently effective MFS/U S WEST Agreement within a reasonable time after U S WEST made them available separately from the entire agreement. ATG's request is consistent with the Act, FCC Rule 809, and the nondiscrimination principles of the Commission's Interpretive and Policy Statement. Accordingly, the Commission should require U S WEST to comply with that request.

DATED this 17th day of December, 1999.

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