In the Matter of the Petition of AT&T Wireless Services, Inc. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b)

DOCKET NO. P-421/EM-97-371

Minnesota Public Utilities Commission

1997 Minn. PUC LEXIS 118

July 30, 1997

PANEL: [*1] Edward A. Garvey, Chair; Joel Jacobs, Commissioner; Marshall Johnson, Commissioner; Don Storm, Commissioner

OPINION: ORDER RESOLVING ARBITRATION ISSUES

PROCEDURAL HISTORY

On October 3, 1996, AT&T Wireless Services, Inc. (AWS) served U S WEST Communications, Inc. (USWC) with a request to negotiate under the Telecommunications Act of 1996, *47 U.S.C. § 251.* The parties failed to reach an agreement on the issues subject to negotiation.

On March 7, 1997, AWS petitioned the Commission for arbitration of all unresolved issues pursuant to the Act.

On April 17, 1997, the Commission issued its ORDER GRANTING PETITION, ESTABLISHING PROCEDURES FOR ARBITRATION. This Order referred the arbitration between AWS and USWC to the Office of Administrative Hearings (OAH) for a contested case hearing before an Administrative Law Judge (ALJ). The Commission's Order limited party intervention in the proceeding to the Minnesota Department of Public Service (the Department) and the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG) OAG/RUD. The Department and the RUD/OAG subsequently intervened in the proceeding.

The arbitration hearing began on May 6, 1997 [*2] and continued on May 7, 1997. The arbitration record closed on May 23, 1997, when reply briefs were received.

On June 6, 1997, the ALJ issued the Arbitration Decision in this matter. AWS and USWC filed exceptions on June 11, 1997.

On June 30, 1997, the Commission heard oral argument by the parties and on July 2, 1997, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

I. Preliminary Matters

A. Administrative Notice

Minn. Stat. § 14.60, subd. 4 provides:

> Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified in writing either before or during hearing, or by reference in preliminary reports or otherwise, or by oral statement in the record, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence in the hearing record.

Pursuant to this statute, the Commission will take administrative notice of the stayed rules in Appendix B of the FCC [*3] order, as well as the related explanatory paragraphs in the *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98*. The Commission has given notice at the hearing on this matter that it intends to do this and has given parties an opportunity to respond in oral argument. Certain portions of the order have already been made a part of the record of the arbitration.

As a result of its action in taking administrative notice of the items noted, the FCC methodologies have become part of the record in this matter and the Commission considers them as it would other evidence in the case.

B. Clarifying the Effect of the Stay

The Commission has no legal obligation to apply the methodologies, proxies or other directives contained in the stayed portions of the FCC's order. However, most of the FCC order has not been stayed and the Commission may not disregard these portions on the basis that it finds them illegal or unconstitutional.

The Commission, unlike a court, does not have the authority to declare a statute unconstitutional on its face. *Neeland v. Clearwater Hospital, 257 N. W. 2d 366, 368 (Minn.* [*4] *1977).* Likewise, the Commission does not have the authority to declare a federal rule invalid. The federal courts of appeals have exclusive jurisdiction

> . . .to enjoin, set aside, suspend (in whole or part) or to determine the validity of...all final orders of the Federal Communications Commission made reviewable by section 402 (a) of title 47.

28 U.S.C. § 2342 (1).

While the Commission has challenged the statutory authority of the FCC to regulate the pricing of intrastate telephone services, it has done so properly by intervening in a lawsuit before a federal court of appeals, not by declaring portions of the rule invalid.

C. Burden of Proof

In its April 17, 1997, ORDER GRANTING PETITION, ESTABLISHING PROCEDURES FOR ARBITRATION in this matter, the Commission determined that USWC has the burden of proof in these proceedings. The Commission stated:

> The burden of proof with respect to all issues of material fact shall be on U S WEST. The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute.

[*5]
The Commission's decision is consistent with the FCC's August 8, 1996 Order in CC Docket No. 96-98 in which the FCC specifically established a proof standard of clear and convincing evidence applicable to local exchange companies (LECs) who would deny an entrant's request for a method of achieving interconnection or access to unbundled elements.

The explicit placement of the burden of proof on U S WEST by the Commission and the FCC acknowledges that USWC and other LECs have a monopoly, not only over the local exchange network but also over information about the network that is needed to make major decisions in this proceeding.

D. Agreements Subject to Modification, Commission Approval

The agreements arbitrated in this proceeding may need to be modified in the future for several reasons. First, the parties may continue to negotiate as the states make their decisions. Second, some decisions may have to be made on an interim basis subject to later amendment in future proceedings. These future FCC and Commission decisions, including rulemakings, may need to be incorporated in these agreements. Indeed, the FCC Rules indicate that a party violates the duty under the Act to negotiate [*6] in good faith if it refuses

> . . . to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules.

47 CFR § 51.301 (c)(3).

Therefore, the Commission hereby clarifies that the agreements it approves in this Order are subject to modification by negotiation or by future Commission direction. Any future modifications or amendments should be brought to the Commission for approval.

E. Timeframe for Reconsideration and Final Contract Language

Minn. Rules, Part 7829.3000, subp. 1 establishes a 20 day timeframe for filing petitions for reconsideration. The Commission believes that a shorter timeframe is desirable in this case to act efficiently to promote the goals of the Federal Telecommunications Act. In considering whether a variance to allow parties to file a petition for rehearing or reconsideration within 10 days of the issuance of the Order is appropriate, the Commission notes that it may vary its rules pursuant to Minn. Rules, Part. 7829.3200 when:

. enforcement of the rule would impose an excessive burden upon the applicant or others affected by the [*7] rule;

. granting the variance would not adversely affect the public interest; and

. granting the variance would not conflict with standards imposed by law.

Applying these standards, the Commission finds that granting such a variance is warranted and will do so. First, varying the time frame for petitions for reconsideration from twenty days to ten will not impose an excessive burden upon the parties to this proceeding as it provides parties sufficient time to prepare their petitions and allows adequate time for the Commission to carefully and thoughtfully analyze the petitions for reconsideration. It will also allow the Commission to act efficiently to promote the goals of the Federal Act. Second, varying the time frame for the filing of petitions for reconsideration will not adversely affect the public interest, but instead will allow an orderly, efficient processing of this matter. Third, granting the variance would not conflict with standards imposed by law.

The Commission notes that it is not changing the 10 day time period allowed for answers to petitions for reconsideration. Minn. Rules, Part. 7829.3200, subp. 4.

Since the Commission desires to coordinate consideration [*8] of the final contract language with its review of the petitions for reconsideration, this Order will give the parties 30 days from the issuance of this Order to file final contract language. Interested parties and participants will have 10 days to file comments on the submitted final contract language.

II. Disputed Issues: Analysis and Action

A. Bill & Keep

Under *47 U.S.C. § 251*(b)(5), each LEC has the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. "Bill & Keep" is a compensation agreement where two interconnected carriers terminate each others traffic without billing each other. This method reduces the use of resources devoted to measuring traffic and billing.

1. AWS

AWS proposed that the companies be allowed to "bill & keep" in this case because, it argued, the amount of compensation to be exchanged between parties will be "equivalent". AWS explained that

although the **traffic** between AWS and USWC is substantially unbalanced, AWS' higher costs to terminate traffic (more than 4 times USWC's cost) mean that in net, the dollar value of the compensation owed each other may be in balance.

AWS asserted [*9] that USWC has not presented any evidence regarding its own costs or AWS' costs, while AWS has provided evidence to indicate that its costs are substantially higher that the costs of USWC. AWS stated that it is prepared to waive full cost recovery to gain the advantages of "bill & keep".

2. USWC

USWC argued that the Commission should reject "bill & keep" as a compensation mechanism for transport, termination, and transit. USWC stated that the FCC concluded that bill & keep could be imposed by a state only if traffic is roughly balanced in two directions, is expected to remain so, and neither carrier has rebutted the presumption of symmetrical rates. USWC stated that traffic flows between it and AWS will rarely, if ever, reflect a stable pattern of balanced traffic because AWS will choose to serve particular types of customers and will target non-random groups, while USWC must serve all comers. USWC noted that in many of its existing agreements with CMRS providers the traffic is significantly unbalanced, e.g. land-to-mobile traffic is typically less than 25 percent of total traffic.

3. The Department

The Department recommended that "bill & keep" be rejected as a compensation [*10] mechanism for transport and termination. The Department rejected AWS' and USWC's cost studies as unreliable. The Department noted that AWS' evidence was extremely sketchy and USWC's cost studies were seriously flawed. Furthermore, the Department argued that the record is unclear as to what degree traffic between the parties is out of balance. Given the uncertainty regarding actual costs and actual traffic flows, the Department did not believe there is enough evidence to find that "bill & keep" will fully compensate both parties.

4. The ALJ

The ALJ did not explicitly address the issue of "bill & keep" but did make an explicit recommendation regarding the prices to be implemented in this proceeding. It appears that the ALJ's decision to recommend prices implies that it is not recommending "bill & keep".

5. Analysis and Action

Under *47 U.S.C. § 252*(d)(2)(A) reciprocal compensation is not just and reasonable unless it

> . . . provides for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and [*11] conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

Given the uncertainty regarding actual costs and actual traffic flows, the Commission does not believe there is enough evidence in this record to find "bill & keep" will compensate both parties. Therefore, the Commission finds that "bill & keep" is not an appropriate compensation mechanism for transport, termination, and transit.

B. Interim Prices

All parties and the ALJ agreed that permanent rates for exchange of traffic should not be set in this proceeding and should be set in the Commission's generic cost docket (P-442, 5321, 3167, 466, 421/CI-96-1540). At issue here is what interim rates will be established that will be subject to a true-up when permanent rates are set in the generic cost docket.

1. AWS

AWS sponsored proposed interim rates based on its modification of a USWC cost study, making adjustments to the cost of capital and depreciation rates. AWS proposed the following interim rates based on the cost study it submitted in this proceeding:

Type 2B (end office termination)	$ .0025 per minute of use
Type 2A (tandem switching and transport)	$ .0020 per minute of use
Transit (tandem switching and transport)	$ .0020 per minute of use

[*12]

2. USWC

USWC proposed two alternatives for interim prices:

1. The rates set in the March 1, 1994, agreement between the parties:

Type 2B (end office termination)	$ .0206 per minute of use
Type 2A (tandem switching and transport)	$ .0245 per minute of use
Transit (tandem switching and transport)	$ .0245 per minute of use

or

2. The interim rates set in the U S WEST Consolidated Arbitration docket:

Type 2B (end office termination)	$ .00260 per minute of use
Type 2A (tandem switching and transport)	$ .00556 per minute of use
Transit (tandem switching and transport)	$ .00556 per minute of use

3. The Department

The Department stated that neither party has submitted sufficient information to determine permanent rates for transport and termination. According to the Department, USWC has not supported the use of any cost study including the study it provided to AWS at AWS' request.

The Department noted that the cost study relied on by AWS on this subject is not based on TELRIC principles and was rejected in the Consolidated Arbitration. The Department further stated that AWS' modification of the USWC cost study is not sufficient to make that study [*13] appropriate.

The Department recommended that the Commission adopt the interim rates determined in the Consolidated Arbitration docket at this time and establish permanent rates with the guidance of the USWC's Generic Cost docket. The Department further recommended that the interim rates which would prevail at the conclusion of this proceeding, through to the conclusion of the Generic Cost docket, should be subject to true-up as was ordered in the Consolidated Arbitration.

4. The ALJ

The ALJ stated that it is appropriate to adopt as interim rates in this proceeding the interim rates for transport and termination ordered by the Commission in the Consolidated Arbitration Proceeding. The interim rates should prevail from the conclusion of this proceeding to the conclusion of the generic cost docket. The interim rates should be subject to true-up based on the permanent rates established in the Generic Cost proceeding.

5. Commission Action

Section 252(b)(4)(A) of the Act states:

> The State commission shall limit its consideration of any petition under paragraph (1) [Arbitration.] ... to the issues set forth in the petition and in the response, if any, filed under paragraph [*14] (3).

Since the cost studies supporting the rates set in the USWC Consolidated Proceeding are not part of the record in this proceeding, they may not be relied on as the best evidence available. Those rates were based on Hatfield 2.2.2 which is not part of the record evidence.

The contract rates in the March 1994 contract between USWC and AWS were approved by the Commission in 1994. However, these rates were not cost-based and were approved under a different regulatory structure. As such, they are unsuitable for adoption as interim rates in this case.

As between USWC's cost study as is and its cost study as modified by AWS, the Commission finds that USWC's unmodified cost study is preferable because the Commission has approved the 13-year depreciation life used in that study. Hence, the Commission finds that the best evidence in the record is USWC's unmodified cost study.

The resulting rates are:

End Office Termination:	.001994
Tandem & Transport:	.001114
End Office Termination and Tandem & Transport:	.003108
Transit:	.001114

These rates do not include an amount of depreciation reserve deficiency (.00130), as originally requested by USWC. USWC subsequently withdrew [*15] its request to recover the depreciation reserve deficiency in the rates set in this Order, stating that the depreciation reserve deficiency should be established for all ILECS in a separate study. In these circumstances, the Commission finds that the absence of an amount of depreciation reserve deficiency in the rates established in this Order do not render such rates unreasonable. In so finding, the Commission is not determining that the rates ultimately adopted as a result of the generic cost proceeding will or will not contain an amount of depreciation reserve deficiency. The Commission notes, however, that depreciation reserve deficiencies have never been approved by this Commission.

C. Compensation to AWS From Third Party Carrier

The parties could not agree on what termination charges would be owed to AWS by third party carriers for calls originating with a third party carrier, transiting U S WEST's network, and terminating on AWS' network. Nor could the parties agree on USWC's role in facilitating the collection of these charges by AWS in the interim period when AWS has not developed agreements with third party carriers.

1. AWS

AWS argued that until it can arrange [*16] agreements with third party carriers, USWC should not bill or collect termination charges for carriers using its facilities for transited traffic unless those carriers have a reciprocal arrangement themselves. According to AWS, third party carriers and AWS should originate and terminate their own traffic, vis-a-vis each other, on a "bill & keep" basis.

2. USWC

USWC asserted that it is not responsible for the monetary arrangement between originating and terminating carriers. USWC argued that it is not required to negotiate transiting arrangements and to bill for them on behalf of AWS and that AWS' relationships with third party carriers have nothing to do with this proceeding between USWC and AWS.

3. The Department and the ALJ

Neither the Department nor the ALJ commented on this issue.

4. Commission Action

The Commission finds that it is consistent with the Act that USWC be required to make its recording and billing services available to AWS to facilitate AWS' collection of termination charges owed it by third party carriers. Of course, if AWS does use USWC's recording and billing services it must compensate USWC at a reasonable rate.

D. Compensation for Traffic [*17] **Terminated at AWS' MSCs**

The parties could not agree whether AWS should be compensated for its Mobile Switching Center (MSC) at the same rate USWC is compensated for its tandem switch or at the lower, end office rate.

1. AWS

AWS argued that it should be compensated at the higher tandem switch rate for use of its MSCs. AWS stated that its MSC can and does terminate calls to any physical location to which USWC's tandem can terminate calls and performs functions remarkably similar to a USWC tandem switch.

AWS referred to the Commission's decision in the Consolidated Arbitration where the Commission stated that competing local exchange company (CLEC) switches perform the same function as the incumbent's tandems in that they both route and carry the calls of the other carrier's subscribers. AWS argued that there is no demonstrable difference between a CLEC switch, AWS' MSC, and USWC's tandem.

2. USWC

U S WEST's position is that AWS' switched network does not perform a tandem switching function and, therefore, does not qualify for higher tandem switching rates. USWC argued that AWS' switch functions as an end office switch, that AWS provides only a single switching function, [*18] and that AWS does not incur the costs that USWC does in performing two switching functions.

USWC also rejected AWS' argument that USWC should pay tandem rates, as opposed to end office rates, simply because AWS claims to have higher costs. The key factor, according to USWC, is that AWS' MSC does not perform a tandem function, that even though AWS may employ an IS41 Tandem switch, that equipment is not used to perform a tandem switching function.

3. The Department

The Department supported the position taken by AWS, that AWS's MSCs should receive compensation at the tandem switch rate. Citing the FCC Order at Paragraph 1090, Department stated that state commissions are directed to consider the functionality and the geographic area to be served by a competitor's switch in comparison to the LEC's switch. The Department noted that AWS' MSC switches appear to function in both end office and tandem capacities, that AWS' cell site control switch and cell sites work together to perform end office functions. Additionally, the Department noted that AWS' MSCs perform transit functions by routing calls to other wireless carriers.

4. The ALJ

The ALJ noted that Paragraph 1090 of the [*19] FCC's First Order directs that states consider the functionality and geographic area to be served by a competitor's switch in comparison to the LEC's switch. The ALJ found that AWS' MSC switches appear to function in both end office and tandem capacities, that AWS' cell site control switch and cell sites work together to perform end office type functions, and that AWS' MSCs perform transit functions by routing calls to other wireless carriers to complete the roaming calls of its customers. The ALJ further noted that by virtue of the MSCs' technical capabilities and interconnections with other networks and AWS's roaming agreements with other wireless carriers, AWS subscribers can place and receive calls for out-[state] Minnesota. The ALJ concluded, therefore, that AWS' MSCs are comparable to USWC's tandem switches and, as such, warrant compensation at USWC's tandem rate for USWC traffic terminated at AWS's MSC.

The ALJ expressed surprise that several other State Commissions have determined that a wireless network does not qualify to be compensated at the tandem rate, in light of the quantum of proof imposed on a LEC on this type of issue and the Act's focus on competition and accommodation [*20] to new technologies. In any event, the ALJ noted, the Minnesota Commission addressed this issue as it relates to Minnesota competing local exchange carriers who do not have wireless networks in the Consolidated Arbitration Proceeding Order. See Order, pages 70-72. In that Order, the Commission stated that it was inappropriate to focus on "certain technical and functional differences between U S WEST's tandems and typical CLEC switches". The ALJ stated he was unpersuaded that the technical differences between AWS's MSC warrants treating AWS's MSC like a USWC end office and concluded that USWC failed to prove that the difference justifies different compensation in rates.

5. Commission Analysis and Action

Paragraph 1090 of the FCC's Order states, in part:

> States shall also consider whether new technologies (e.g. fiber ring or wireless networks) **perform** functions similar to those performed by an incumbent LEC's tandem switch and thus, **whether some or all calls** terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area [*21] comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate. (emphasis added.)

The Commission has considered the functionality and geographic factors cited by the FCC and concludes that some but not all of the calls terminating on AWS' network should be priced at the same rate USWC is compensated for its tandem switch.

All the parties and the ALJ acknowledged that AWS' MSC switches function in end office capacities for some calls and in tandem capacities for others. The Commission finds that actual performance of the switch on a given call, rather that the capacity to perform with respect to that call is the critical question. n1 The Commission finds, therefore, that it would be appropriate to compensate AWS at the higher tandem rate for calls that require its switch to perform tandem switching functions and to be compensated at the lower end office rate for calls that simply require end office function.

> n1 If the FCC paragraph meant that all calls terminated on a switch that had the capacity to perform tandem switch functions should be compensated at the tandem switch rate, the FCC's reference to the Commission determining whether "some or all" of the calls should be so compensated would have no meaning. To give meaning to the "some or all" language, actual performance of the switch on an given call, rather than abstract capacity to perform, is the key to the rate at which the terminating switch function should be compensated on such a call.

[*22]
The Commission will direct USWC to work out, in conjunction with AWS, an appropriate means to identify the functions actually performed with respect to the USWC calls terminated at AWS's MSC and to compensate AWS accordingly.

E. Access Charges for Intra-MTA n2 Roaming Calls

n2 MTA refers to the Major Trading Area, which is the geographical area considered by the FCC to be the local calling area of a CMRS provider, such as AWS. Roaming areas are much smaller geographic areas defined either by the signal reach of a cell site or by marketing practices which may aggregate several cell sites into a single roaming area for billing purposes. As such, a CMRS subscriber may make a call within the MTA, that is subject to roaming charges, and that crosses a state boundary.

The Major Trading Area (MTA) is the geographical area considered by the FCC to be the local calling area of a CMRS provider, such as AWS. The MTA relevant to AWS in this proceeding covers a large area: almost all of Minnesota, all of North Dakota, over [*23] half of South Dakota, a significant portion of Wisconsin, and a small portion of Iowa. The parties could not agree on the compensation for calls that 1) originate and terminate within the MTA and 2) cross state boundaries.

1. ASW

AWS asserted that the MTA is the appropriate definition of its local service area and, as such, calls originating and terminating within the MTA should be subject to transport and termination charges, not interstate or intrastate access charges.

2. USWC

USWC argued that intra-MTA traffic that transits interstate facilities is subject to interstate access charges and that AWS should be responsible for identifying such traffic. USWC argued that it charged AWS access charges under the 1994 pre-existing agreement and, therefore, it is entitled to continue to collect those charges. USWC claimed that under the pre-existing agreement access charges were not differentiated, but were included in a single "blended rate" that included toll charges. USWC asserted that it is unnecessary to find that access charges were explicitly delineated under the pre-existing contract in order to find that the current payment of charges by AWS is appropriate.

3. The [*24] **Department**

The Department cited Paragraph 1043 of the FCC Order to show that the FCC seeks to maintain the status quo ante with respect to access charge payments for interstate roaming traffic. The Department argued that USWC has not met its burden of proof on this issue, i.e. that it has not provided evidence that it has been collecting interstate access from AWS in the past under the parties' 1994

agreement. Therefore, the Department argued, USWC is not entitled to collect interstate access charges with respect to intra-MTA roaming calls.

4. The ALJ

The ALJ recommended that USWC not be allowed to assess AWS interstate access charges for intra-MTA roaming. The ALJ noted that Paragraph 1043 of the FCC's First Order specifically refers to interstate roaming traffic, and states in part:

> ...the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS can continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.

Based on this language, the ALJ concluded that the FCC is seeking to maintain [*25] the status quo ante with respect to access charge payments for interstate roaming traffic. The ALJ found that USWC has failed to prove that AWS' originating intra-MTA roaming traffic was subject to access charges prior to the FCC's First Order and therefore was not entitled to apply such charges to such traffic now.

5. The Commission's Analysis and Action

In the Commission's view, the FCC Order (Paragraph 1043) seeks to maintain the status quo ante regarding intra-MTA roaming charges. The Commission finds that USWC has failed to prove that such traffic was subject to interstate access charges prior to the FCC's Order. Therefore, the Commission concludes that USWC must not assess AWS interstate or intrastate access charges for intra-MTA roaming traffic.

F. Compensation for Terminating Paging Calls

The parties could not agree whether AWS was entitled to receive compensation from USWC for terminating paging calls originating in USWC's service area.

1. AWS

AWS argued that it is entitled to be compensated for the termination of paging traffic originated by USWC, and that AWS need not compensate USWC for facilities used to deliver such calls because USWC is the originator [*26] of such calls. Regarding USWC's claim that AWS has the duty to provide reciprocal compensation, AWS references Paragraph 1008 of the Order which states, in part:

> Accordingly, LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, ...

AWS also cited Paragraph 1092 of the Order which states, in part:

> Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers' networks ...

2. USWC

USWC argued that AWS is not entitled to receive compensation from USWC for terminating paging calls originating in USWC's service area. USWC acknowledged that the duty to provide reciprocal compensation for transport and termination arises under § 251(b)(5) but argued that reciprocal compensation is inappropriate for AWS' paging services because paging services are one-way communication, i.e. no [*27] calls originate on AWS' facilities to be terminated by USWC.

3. The Department

The Department agreed with AWS. The Department contended that it has seen no legal authority offered in this proceeding to permit the ALJ to depart in this instance from the general rule that each party pays for calls originating on their own network (Initial Brief, pp. 16-17). Referencing the FCC First Report and Order, Paragraphs 1008, 1042, and 1092, the Department argued that (i) paging providers are considered to be telecommunications carriers, (ii) LECs are prohibited from charging paging providers for calls originating on other carrier's networks, and (iii) parties that terminate page calls must be compensated by the company upon whose network the page call originated.

4. The ALJ

The ALJ recommended that AWS not be required to pay for the termination of any USWC originated calls through direct termination charges. The ALJ found that AWS is allowed to charge for the termination of USWC originated paging calls based on the outcome of the FCC's future review of this issue that is provided under the FCC Order.

5. Commission Analysis and Action

Paging providers are defined in the FCC [*28] Order as "telecommunications carriers," and under the Act, all telecommunications carriers are entitled to reciprocal compensation from incumbent LECs. *(47 U.S.C. § 251*(b)(5)). The FCC Order states the rule clearly:

> Accordingly, LECs are obligated, pursuant to section 251(b)(5) and the corresponding pricing standards of section 252(d)(2), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, ... (FCC Order, P 1008)

The FCC has reiterated this rule as follows,

> Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, ... (FCC Order, P 1092).

The Commission finds no exclusion in the Act or the FCC Order that would prevent application of the clear rule that AWS should be compensated by USWC for terminating paging calls originating in USWC's service area.

G. Dedicated Paging Facilities

The parties could not agree whether AWS should be required to pay for facilities required to connect AWS' dedicated paging facilities to USWC's network.

1. AWS

With respect [*29] to charges for paging facilities, AWS relied on paragraphs 1092 and 1042 which state, respectively, in part as follows:

> Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers' networks ...

and

> We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

AWS argued that by trying to impose facilities charges on AWS, as it has done in the past, USWC is trying to circumvent this rule.

2. USWC

USWC proposed that AWS should be required to pay for facilities required to connect AWS' dedicated paging facilities to USWC's network. USWC noted that Southwestern Bell requested clarification from the FCC regarding its rules for interconnection between LECs and paging carriers and that on May [*30] 22, 1997, the FCC established a pleading cycle to receive comments on Southwestern Bell's request. USWC asked that any Commission decision should be designed to accommodate later action by the FCC.

3. The Department

The Department stated that no legal authority has been offered in this proceeding that would justify permitting the ALJ to depart from the general rule that each party pays for calls originating on their own network. The Department argued that USWC benefits from the facilities used to transport paging traffic because those facilities permit USWC's customers to place paging calls. Additionally, the Department noted that paging calls that originate from USWC customers generate return calls to USWC's network for which USWC is compensated for termination.

4. The ALJ

The ALJ recommended that the AWS should not be required to pay USWC for any usage of facilities associated with the delivery of paging services. The ALJ noted that the FCC expressly prohibits the imposition of charges as they had been applied in the past, stating at Paragraph 1042 of its Order:

> We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently [*31] impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge. (FCC Order, Paragraph 1042) (emphasis added).

The ALJ cited Paragraph 1042 of the FCC Order and stated that the requirement that paging providers be compensated for the termination of LEC-originated traffic similarly requires that they not be charged for the facilities used to deliver such traffic. Consequently, the ALJ reasoned, the facilities used for the delivery of such traffic must also be paid for by USWC.

5. The Commission's Analysis and Action

The FCC Order Paragraph 1042 quoted above clearly states that incumbent LECs must provide traffic to the CMRS provider without charge. FCC Rule § 51.703 (stay lifted) states:

> A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.

As a result, the Commission finds that AWS is not required to compensate U S WEST for the facilities used to deliver [*32] paging traffic to AWS' paging network.

H. Effective Date for Reciprocal Compensation

The parties agree that reciprocal compensation is required by FCC rules, but disagreed as to the date when reciprocal compensation should begin.

1. AWS

AWS argued that the effective date for reciprocal compensation should be October 3, 1996, the date when AWS submitted its request for interconnection to USWC.

2. USWC

USWC argued for a November 1, 1996 effective date because that was the day the 8th Circuit Court lifted the stay of the FCC rules.

3. The Department

The Department argued that the effective date should be October 3, 1996. The Department argued that in lifting the stay, the Court determined that incumbent LECs, such as USWC, were not entitled to protection from FCC rule 51.717. Consequently, the Department reasoned, USWC should not receive a benefit that the Eighth Circuit has determined the Company is not entitled to have.

4. The ALJ

The ALJ recommended an October 3, 1996 effective date. The ALJ reasoned that an order of an administrative agency, such as the FCC, that is initially stayed and then allowed to go into effect is effective as of its initial issuance [*33] date. The ALJ noted although the Eighth Circuit Court of Appeals temporarily stayed the effectiveness of FCC Rule 51.717(b), the Court lifted the stay on November 1. Thus, the Rule went into effect permitting reciprocal compensation from the original submission of an interconnection request. In this case, the ALJ found, lifting of the temporary stay rendered the Rule effective on October 3, the day AWS submitted its request for interconnection.

The ALJ stated that if AWS does not receive reciprocal compensation from the original effective date of the FCC Order, AWS will be denied the benefit which it had been unjustly restricted from receiving due to the erroneous entry of a stay.

5. Commission Action

The Commission is persuaded by the arguments presented by AWS, the Department and the ALJ and finds that the effective date for beginning reciprocal compensation is October 3, 1996.

I. Rates Pending Order

The parties disagreed over the level of reciprocal compensation rates should apply between the commencement of reciprocal compensation until an Order is issued in this proceeding.

1. AWS

AWS argued that the March 1994 contract expired on December 31, 1996, so the [*34] contract rates set by that contract cannot be used for reciprocal compensation. AWS stated that the Amendment (Exhibit 14) provides for a true-up for the remaining months of 1996 after the 1994 contract expires and the Interim Agreement (Exhibit 13) provides for a true-up for the period beginning January 1, 1997, to the "results" of this arbitration.

2. USWC

USWC argued that the March 1994 contract contained an "evergreen clause" which provided that after December 31, 1996, the contract would remain in effect on a month by month basis until written notice was given by one of the parties. USWC claimed that the Exhibits relied on by AWS clearly indicate that the parties contemplated that the March 1994 contract would remain in effect until the resolution of the dispute through negotiation and/or arbitration. USWC characterized the good faith lump sum payments (provided for in the Amendment and the Interim Agreement) as an expedient to allow the parties to continue their business relationship without interruption of service.

3. The Department

The Department took no position on whether the subsequent agreements between the parties have supplanted the March 1994 agreement but [*35] noted that the 1994 rates should prevail unless the Commission determines that the amendment and interim agreements are binding.

4. The ALJ

The ALJ found that the record did not conclusively establish whether that agreement was terminated on December 31, 1996 or continued in effect after this date. To determine the intention of the parties, the ALJ applied that parole evidence rule and considered the language contained in the pertinent agreements, Exhibits 13, 14 and 15. Upon review of these exhibits, the ALJ concluded that the 1994 contractual relationship between the parties continued and that the parties intended to clarify compensation issues.

According to the ALJ, Exhibits 13, 14 and 15 show that AWS and USWC had substantial, dynamic disagreements over their compensation relationship and that these parties intended to change their compensation relationship. The ALJ found that USWC has failed to prove that the parties intended to continue the 1994 compensation rates after December 31, 1996. The ALJ indicated that the parties should honor the agreements identified in Exhibits 13, 14 and 15, but noted that the exhibits focus primarily on true-ups and do not clearly state [*36] what rates apply.

5. The Commission's Analysis and Action

The question whether the parties modified the March 1994 contract is a red herring in this proceeding that the Commission will not pursue. Whether the contract terminated or not is not relevant to the Commission's decision in this proceeding. Any changes to this agreement, subsequent to AWS' request for renegotiation, are a contractual dispute between two private parties and not a matter that need concern the Commission.

FCC Rules § 51.717 set the initial reciprocal compensation rate at that rate prevailing in the preexisting agreement until the state commission approves a different rate. The parties agree as to the rates set by their March 1994 contract and the Commission has not approved any rate agreement other than the going-forward rates set in this Order. See above at Section B on pages 6-9. The rates in existence at the beginning of reciprocal compensation were set by Commission approved tariff. No other rates have been approved by this Commission since then. Whatever the parties arranged between themselves subsequently does not alter the fact that the Commission has approved no other rates than those in the [*37] March 1994 contract.

Accordingly, the Commission will make no decision regarding the status of the parties' interim agreements (Exhibits 13, 14, and 15) and direct the parties to seek resolution of their dispute on this issue in another forum. The rates which shall prevail from the commencement of reciprocal compensation until an arbitration order is issued in this proceeding are the rates set by the parties March 1994 agreement. No true-up is warranted.

J. Pick and Choose Option

1. AWS

AWS claimed that USWC must make available to AWS any rates, terms, and conditions that have been approved in agreements between USWC and other telecommunications carriers. AWS cited Federal Act Section 251(i) as obligating USWC to make available any interconnection, service, or network element provided under an agreement approved under Section 252 to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

AWS argued that the Federal Act and FCC Rules support the interpretation that individual provisions of publicly filed interconnection agreements can be selected by a requesting carrier.

2. USWC

[*38]
USWC argued that the Commission should reject AWS' recommended pick and choose provision in this case. USWC noted that the FCC Rules and Orders allowing a pick and choose provision were stayed by the Eighth Circuit Court of Appeals. USWC further noted that in staying the rule, the Court stated that such a provision would operate to undercut any agreements that were negotiated or arbitrated. USWC also noted that the Minnesota Commission has rejected the pick and choose rule in the Consolidated Arbitration Proceeding, Docket Nos. P-421/M-96-729, 855, 909.

3. The Department

The Department analyzed the Federal Act, FCC Rules and Orders, and the Commission's earlier decision in the Consolidated Arbitration Proceeding. The Department noted that the FCC's rules which would have permitted AWS to "pick and choose" terms from other agreements, has been stayed in Federal Court. The Department further noted that in its earlier ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT in Docket Nos. P-421/M-96-729, 855, 909, the Commission directed that the following language be added to the Agreement:

> The Parties agree that the provisions of Section 252(i) of the Act shall [*39] apply, including final state and federal interpretive regulations in effect from time to time.

The Department recommended that this language also be required in the agreement between AWS and USWC because of the unsettled nature of the law.

4. The ALJ

According to the ALJ, the applicable law is Section 252(i) of the Act which provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The ALJ noted that in *47 C.F.R. § 51.809*, the FCC interpreted Section 252(i) to require local exchange carriers to make available

> ...any individual interconnections, service or network element arrangement contained in any agreement to which it is a party that is approved by a State Commission pursuant to section 252 of the Act, upon the same rates, terms and conditions as those provided in the agreement.

However, the ALJ also noted that on October 15, 1996, the Eighth Circuit Court of Appeals stayed *47 C.F.R. § 51.809*, the so-called "pick [*40] and choose" rule at issue. Accordingly, the ALJ recommended that the parties include in their agreement a recognition that the law on this issue is unsettled, as was ordered in the Commission's March 17, 1997 Order after reconsideration in the Consolidated Arbitration Proceeding.

5. Commission Action

For the reasons articulated above by the Department and the ALJ, the Commission finds it appropriate to direct the parties to include in their agreement language adopted by the Commission in the consolidated arbitration that recognizes the unsettled state of the law on the application of section 252(i). n3 The specific language is:

> The parties agree that the provisions of section 252(i) of the Act shall apply, including final state and federal interpretive regulations in effect from time to time.

n3 In making their recommendations, both the Department and the ALJ noted that the Eight Circuit Court of Appeals had stayed *47 C.F.R. § 51.809*, the so-called "pick and choose" rule. The fact that subsequently the Eighth Circuit Court of Appeals has issued a final order striking down the "pick and choose" rule (July 18, 1997) strengthens their recommendations and the further demonstrates the reasonableness of the Commission's decision on this issue.

[*41]

K. Points of Interconnection

The parties could not agree on which of them should determine the points of interconnection.

1. AWS

AWS argued that it is entitled to interconnection at whatever point it believes is technically feasible subject to the same reasonable space and equipment limitations that are imposed on other LECs and incumbent LECs. AWS also claimed that it entitled to physical collocation for remote switching units (RSUs) and digital loop carriers (DLCs) or virtual collocation. AWS cited Federal Act Sections 251(c)(2) and (6), FCC Rule 51.305, and FCC Order, Paragraphs 212 and 573, in support of its positions.

AWS also argued that USWC is not entitled to select points of interconnection. AWS stated that the burden was on USWC to demonstrate with clear and convincing evidence that a requested point of interconnection is not technically feasible and alleged that USWC has not demonstrated any infeasible interconnection in this proceeding.

2. USWC

USWC stated that it would offer the choice of virtual collocation, physical collocation, or mid-span meet arrangements as the points of interconnection if they are technically feasible. Additional points of interconnection [*42] must be requested via the bona fide request process.

3. The Department

The Department supported AWS' right to determine where to interconnect subject to interconnection points being technically feasible for USWC. The Department cited the Commission's decision in its ORDER RESOLVING ARBITRATION ISSUES issued December 2, 1996 in the Consolidated Arbitration Case. In that Order, the Department noted, the Commission required USWC to allow interconnection at any technically feasible point on its network requested by the CLEC.

4. The ALJ

The ALJ agreed with the Department that the Commission/ should adopt language similar to what it adopted in the Consolidated Arbitration Order, providing that AWS should be entitled to interconnect its network with USWC at any point that is technically feasible subject to space and equipment limitations.

5. Commission Action

The Federal Act and FCC rules are clear. AWS has the right to interconnect and USWC will be required to allow interconnection at any technically feasible point on the network that AWS requests.

L. One-Mile Distance Mid-Span Meet Point

1. USWC

USWC proposed that a limit be placed on the length of facilities [*43] that USWC must construct to establish a mid-span meet point arrangement. USWC stated that a reasonable standard would be to limit USWC's construction obligation to no more than one mile of facilities and no more than one-half the distance of jointly provided facilities. USWC also recommended that direct trunks

should be established when traffic between USWC and AWS exceeds 512 CCS. USWC explained that the reason for this recommendation is to ensure an efficient mix of direct trunk transport and tandem switching.

2. AWS

AWS objected to USWC's proposal, arguing that the Federal Act and FCC Order allow AWS to select any technically feasible method of interconnection and access to unbundled network elements with no limitation on distance.

AWS noted that USWC's proposed one mile limitation for meet points is contrary to what USWC agreed to in the consolidated arbitration proceeding and argued that USWC should not be permitted to discriminate against AWS in this proceeding by arbitrarily imposing a distance limitation which shifts the costs of interconnection to AWS.

AWS proposed that the companies negotiate meet points and each party should be responsible for costs to construct [*44] facilities to the meet points.

3. The Department

The Department cited the Commission's ORDER RESOLVING ARBITRATION ISSUES issued December 2, 1996 in which the Commission noted that USWC agreed to negotiate mid-span meet points of interconnection without any preset distance limitation. The Department recommended a similar determination in this proceeding that no distance limit be set.

4. The ALJ

The ALJ recommended the same treatment in this docket as the Commission adopted in the Consolidated Arbitration Proceeding, i.e. to not limit the distance for meet points.

5. Commission Action

The Commission finds that the Federal Act and FCC Order allow AWS to select any technically feasible method of interconnection and access to unbundled network elements with no limitation on distance. Accordingly, the Commission will not accept USWC's proposal and will adopt AWS' no limit midspan meet point recommendation.

M. Collocation of AWS' RSUs and DLCs

1. AWS

AWS sought authority to collocate remote switching units (RSUs) and digital loop carrier systems (DLCs) at USWC premises. AWS argued that USWC's opposition to collocation of any equipment that is not "transmission [*45] equipment" is contrary to FCC and Minnesota Commission decisions. AWS acknowledged that the FCC stated that it would not immediately require an ILEC to permit collocation of switching equipment. However, AWS stated that the FCC also left it to State Commission's to determine whether particular equipment is used for interconnection or access to unbundled elements and noted that the Minnesota Commission determined in the Consolidated Arbitration Proceeding that collocation of RSUs and DLCs equipment is required.

Furthermore, according to AWS, USWC witness Londgren agreed to allow collocation of RSUs and DLCs consistent with the Commission's limitations determined in the consolidated arbitration proceeding.

2. USWC

In its Brief, USWC withdrew its objection to collocating RSUs based on the Commission's decision in the Consolidated Arbitration Proceeding. USWC acknowledged that the Commission has adopted AWS' position on collocating in other arbitration proceedings but noted that those decisions have been appealed. Pending the results of the appeal, USWC agreed to collocate RSUs in its end offices.

3. The Department

The Department noted that the Federal Act and FCC Rules [*46] had been interpreted by the Commission in its decision in the Consolidated Arbitration Proceeding. The Department stated that there was no reason to change or modify the Commission's earlier decision to allow collocation of RSUs and DLCs.

4. The ALJ

The ALJ stated that the Commission has explicitly ordered that U S WEST permit RSUs and DLCs to be collocated. Consolidated Arbitration Order at 16. The Commission found that collocated equipment need not be exclusively used for interconnection or access to unbundled network elements. According to the ALJ, AWS should be entitled to physical collocation of equipment necessary for interconnection or access to unbundled network elements, including RSUs and DLCs.

5. Commission Action

Consistent with its reasoning and action in the Consolidated Arbitration Order, the Commission will allow the collocation of RSUs and DLCs on USWC's premises. It is understood that, as stated in the Consolidated Arbitration Order, RSUs are not to be used to avoid toll access charges by USWC.

N. Definition of "Collocated Premises"

1. USWC

USWC argued that the definition of "collocated premises" should be restricted to USWC's central offices [*47] and tandems, in which event requests for collocating on premises other than tandem and end office switching facilities would not be automatically granted but would be based on a bona fide request process.

2. AWS

AWS disagreed with USWC's proposed definition of "collocated premises." AWS argued that the Federal Act, Section 251(c)(6) obligates ILECs to provide nondiscriminatory access to collocated space at its "premises." AWS contended that the FCC has determined that premises include a broad range of facilities including central offices, wire centers, tandem offices, structures owned or leased, and any other structures which house network facilities and public rights-of-way. AWS asserted that USWC's proposed restriction contradicts the FCC's determination that collocation can only be lim-

ited if the ILEC demonstrates that a particular location is technically infeasible. AWS noted that USWC has not presented any evidence of infeasibleness of locations at which AWS seeks collocation.

AWS urged that its contract language should be adopted since (according to AWS) it is consistent with FCC Rules and the Minnesota Commission decisions in the Consolidated Arbitration Proceeding. [*48]

3. The Department

The Department stated that the Commission adopted the FCC's position that collocation must be permitted at LEC central offices, serving wire centers, and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities. The Department stated that there is no reason to modify or change the Commission's decision on collocation in this proceeding.

4. The ALJ

The ALJ recommended the same treatment in this docket as the Commission adopted in the Consolidated Arbitration Proceeding. According to the ALJ, "collocated premises" should be broadly interpreted to include all buildings and other structures that contain network facilities.

5. Commission Action

Consistent with its reasoning and action in the Consolidated Arbitration Order, the Commission will not restrict the definition of "collocated premises" to central offices and tandems as urged by USWC.

O. Determination of Exhausted Space

1. USWC

USWC proposed to condition physical and virtual collocation on space availability. The only party to address USWC's proposal was AWS.

2. AWS

AWS noted that the FCC and the Minnesota [*49] Commission mandated that space for collocation be allocated on a first-come, first-served basis. FCC Order P 585; Consolidated Order, p. 17. AWS stated that while the FCC permitted ILECs to retain a "limited amount of floor space for defined future uses," ILECs were not permitted to reserve space for future use on terms more favorable than those applicable to other telecommunications carriers seeking space for their own use. FCC Order PP 585, 602, 604.

AWS asserted that to the extent USWC proposed to reserve space for its own use that exceeds the limitations imposed by the FCC its proposal must be rejected. AWS stated that if USWC denies AWS collocation space due to space exhaustion, the Commission should require USWC to provide detailed floor plans and explain the uses of its space and steps taken to avoid space exhaustion.

3. Commission Action

Consistent with its reasoning and action in the Consolidated Arbitration Order (page 17), the Commission will require USWC to explain and demonstrate the uses of its space if it denies AWS access due to space exhaustion.

P. Nondiscriminatory Access to Unbundled Network Elements

1. AWS

AWS asserted that USWC is required by [*50] the Federal Act, Section 251(c)(3) to provide nondiscriminatory access to unbundled network elements at any technically feasible point. According to AWS, USWC must negotiate in good faith for any special unbundling required for a wireless application.

AWS noted that FCC Rule 51.319 lists the following network elements that U S WEST must make accessible: local loop, network interface devices, local and tandem switches, interoffice transmission facilities, signaling networks, call-related databases, operational support systems functions, and operator services/directory assistance facilities. AWS noted that the FCC also stated that State Commissions could require the unbundling of additional network elements. (FCC Order, P 366).

AWS recommended that the Commission require USWC to negotiate and make available other unbundled elements that are necessary for wireless applications.

2. USWC

USWC asserted that it complies with all FCC requirements for providing unbundled network elements and that there is no dispute on this issue. USWC, in accordance with FCC rules, will negotiate with other carriers to make additional network elements available. USWC stated that AWS has not identified [*51] any specific additional network elements which it seeks to unbundle.

3. The Department

The Department noted that the FCC requires that an ILEC must make available at least seven network elements and allows state commissions to require further elements to be unbundled. The Department supported AWS' request that the Commission require the parties to negotiate for additional unbundled network elements rather than a requirement that AWS follow the bona fide request process suggested by USWC.

4. The ALJ

According to the ALJ, *47 U.S.C. § 251*(c)(3) requires an incumbent LEC to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point. The FCC's rule requires the ILEC to unbundle the following elements: network interface device, local loop, switching capability, interoffice transmission facilities, signaling networks, call-related data bases, operational support systems, and operator services and directory assistance. *47 C.F.R. § 51.319.*

The ALJ found that USWC's proposed bona fide request (BFR) process for each unbundled element is inconsistent with the FCC rules and should not be allowed. The ALJ stated that USWC is required [*52] to provide nondiscriminatory access to unbundled network elements at any technically

feasible point. A network element is considered technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier. The ALJ stated that if AWS determines that another aspect of unbundling is required for a specific wireless application, USWC must negotiate with AWS in good faith for such application. Such an element must be provided unless USWC demonstrates it is not technically feasible.

5. Commission Analysis and Action

In the Consolidated Arbitration ORDER AFTER RECONSIDERATION, the Commission rejected USWC's request for a BFR process for each request for subloop access. The Commission stated:

> U S WEST's request for a BFR process for each request for subloop access reverses the thrust of the Act and the FCC rules and the burden of proof established in the Commission's own procedural order."
> (Reconsideration Order at 16).

The Commission finds that this reasoning should apply with equal force to this case. The Commission will require unbundling of additional elements on a case-by-case basis if it is technically feasible. [*53] *47 C.F.R. § 51.317*. Under the burden of proof established for this proceeding, USWC will have the burden of proving the unavailability of particular unbundled network elements. Absent such a showing, USWC must provide nondiscriminatory access to unbundled network elements, including specific wireless applications, through negotiation.

Q. Access to Operational Support Systems

Operational support systems (OSS) include a variety of computer databases and systems which support network operating services. The parties did not agree whether USWC should be required to develop and implement electronic interfaces for access to its operational support systems for ordering, provisioning and maintenance/repair functions.

1. AWS

AWS complained that USWC has denied its legal obligation to provide nondiscriminatory access to its support systems, arguing that its legal obligation under 251(c) is mutually exclusive. According to AWS, USWC has separate and independent duties to: (1) negotiate in good faith; (2) interconnect facilities and equipment; (3) provide nondiscriminatory access to network elements on an unbundled basis; (4) offer telecommunications services for resale at wholesale [*54] rates; and (5) provide physical and virtual collocation.

AWS argued that without greater specificity in an agreement, it will not be guaranteed the same access to information as is available to USWC. AWS' proposed Interconnection Agreement Section 3 contains terms for the provision of an interface for transferring and receiving Order Confirmation, Completion Notices, and other information. Section 5(c) contains AWS' proposal for the provision of maintenance/repair interface including the implementation of uniform industry standards being developed by the Order and Billing Forum.

2. USWC

USWC countered that AWS did not raise this issue in its petition and therefore the Arbitrator need not consider it. According to USWC, the Federal Act limits the Commission's consideration of issues to those that are raised in the petition and in the response. USWC stated that it has not received a proposal from AWS on electronic access and without knowing AWS' requirements, it cannot formulate a response. USWC stated that AWS and U S WEST have only had limited negotiation of system access and that it (USWC) is willing to continue negotiations on this issue.

USWC argued that neither the Federal [*55] Act nor the FCC Order requires unbundled access to OSS for interconnection. USWC stated that the requirements stated in FCC Rules P51.305 are extensive and detailed and do not include access to operational support systems. Because both of the interconnecting companies maintain all facilities required to service their end use customers, there is no need to access the other carrier's OSS. USWC stated that it will evaluate any request from AWS to determine if it is achievable, the timing and the cost.

3. The Department

The Department recommended granting AWS' request for real time, electronic interfaces (access) to USWC's OSS services: ordering, provisioning, and maintenance systems. The Department stated that FCC Rule Section 51.319(f) specifically requires LECs to unbundle and provide nondiscriminatory access to the network operations support systems functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions. The Department also noted that in the Consolidated Arbitration Proceeding, the Commission interpreted the FCC First Order and refused to restrict how a purchaser of unbundled network elements might use those unbundled elements.

4. [*56] The ALJ

The ALJ noted that USWC's operational support system is a network element. The ALJ reasoned that because USWC's operational support system is a network element, both the Act and FCC mandate access on a nondiscriminatory basis. To meet the Act's and the FCC's requirements, the ALJ stated, USWC must provide access to AWS at least equal in quality to that enjoyed by USWC. Because the record is void of any proposal by USWC to provide such parity, the ALJ concluded, it is reasonable to apply the electronic interfaces proposed by AWS.

5. Commission Action

The Commission finds that OSS is a network element. As required by the Act and FCC, therefore, the Commission will direct USWC to grant AWS access to these services on a nondiscriminatory basis. This decision is consistent with the Commission's refusal in the Consolidated Arbitration Proceeding to restrict how a purchaser of unbundled network elements might use those unbundled elements. It is also consistent with the Eighth Circuit Court of Appeals' July 18, 1997 order on petitions for review of the FCC's rules implementing the Telecommunications Act of 1996.

R. Remedies for Service Quality Violations

1. AWS

[*57] AWS recommended standards relating to network reliability, network interface specifications, error performance, operations, and administration of outages. AWS stated that its proposed service quality standards should be met by USWC and specific remedies imposed if not met.

2. USWC

USWC recommended that service quality standards be determined in a separate proceeding similar to how costs are being addressed. Although no current pending service quality case includes AWS, the standards determined in Docket No. 421/M-96-729,855,909-Merged could be applied to the U S WEST-AWS relationship.

Regarding performance credits, USWC objected to AWS' attempt to enforce penalties on USWC for not meeting AWS' requested performance standards. USWC asserted that penalties are illegal, unwarranted and unrelated to any harm that AWS may suffer. USWC argued that there is no evidence in the record that these penalties are appropriate nor does the Act or FCC rules permit them in the context of an arbitrated proceeding. USWC concluded that if AWS believes it is being illegally discriminated against it can seek remedies from the Commission, the FCC or the courts.

3. The Department

The Department [*58] stated the Federal Act requires that the quality of an unbundled element and the access to such unbundled element shall be at least equal in quality to that which the incumbent LEC provides to itself. The Department further noted that the FCC stated in its rules that if technically feasible the quality of an element and access to that element may "upon request, be superior in quality to that which the incumbent LEC provides to itself." The Department noted that competitors purchasing unbundled elements have a legitimate interest to ensure that their customers receive high quality service. Without specific service quality or performance standards a competitor may be unable to ensure the quality of service it expects. The Department stated that if USWC does not provide a sufficient level of service quality for its own customers, competitors should not be limited to that standard.

The Department noted that the Commission's service quality rules set broadly defined minimum standards. As such, they should not be the basis for setting service quality standards for competitors. The Department stated that AWS's proposal, including penalty provisions, reasonably addressed its needs as a [*59] competitor using USWC's network elements and services.

4. The ALJ

The ALJ noted the importance of service quality standards in the provision of wireless services. Over the years, the ALJ observed, AWS has experienced problems with USWC in terms of provisioning delays, service outages and blocking. The ALJ stated that AWS has drafted detailed quality and performance standards which relate directly to the functions of Network Reliability, Network Interface Specifications, Error Performance, Operations and Administration of Outages. The ALJ found that each of the proposed quality and performance standards is based on specific industry standards, reliability objectives and performance specifications.

By contrast, the ALJ found, USWC has failed to present evidence regarding its internal quality or performance standards to assure that its customers receive the quality of service to which they have

become accustomed. The ALJ concluded that the service quality standards and performance credits proposed by AWS should be approved.

5. Commission Action

The Commission will adopt the ALJ's recommendation and reasoning and require U S WEST to meet the service quality standards proposed [*60] by AWS and be liable for specific remedies if those standards are not met.

S. Access to Poles, Ducts, Conduits and Rights of Way

The parties agreed that USWC must provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way, but disagreed as to what extent USWC must accommodate AWS needs and whether USWC should be able to reserve 15 percent of capacity for maintenance and administrative purposes.

1. AWS

AWS argued that USWC must provide nondiscriminatory access to its poles, ducts, conduits, and rights-of-way in the same fashion and on the same rates, terms and conditions as it provides itself or other third party. According to AWS, this access must accommodate AWS' technological needs, including the use of alternative technologies such as micro-cell technology. U S WEST must take reasonable steps to provide access even to the extent of modifying its facilities to increase capacity. AWS stated that USWC should be allowed to reserve space only to the extent necessary for required maintenance and administrative purposes based on generally accepted engineering principles.

AWS objected to USWC's plan to reserve 15 percent spare capacity in its conduits and [*61] ducts for itself while denying access to facilities by AWS. AWS clarified that it does not object to USWC retaining a reasonable amount of necessary capacity for maintenance and administrative purposes. However, AWS asserted that a 15 percent reserve capacity was not supported in the record and should not be the standard authorized level of capacity reservation. AWS noted that the FCC, in its order at Paragraph 1170, does not allow an ILEC to favor itself by reserving capacity for some undefined future need. AWS noted that the Commission in the Consolidated Arbitration Proceeding (Consolidated Order, pp. 43-44) also recognized the need for USWC to reserve capacity for maintenance and administrative purposes according to generally accepted engineering principles.

AWS objected to USWC's claim that access requirements are reciprocal for AWS. AWS argued that this position is contrary to the FCC Order that determined that CMRS providers are not LECs for purposes of the Federal Act. Furthermore, AWS stated, the Commission in the Consolidated Arbitrated Proceeding did not place reciprocal obligations on carriers other than USWC and recommended that this position should be rejected in this [*62] proceeding also.

2. USWC

USWC stated that it will provide nondiscriminatory access to its poles, conduits, innerduct rights-of-way, on a first come, first served basis, as long as capacity exists. USWC acknowledged that the Federal Act Section 251(b)(4) obligates all local exchange carriers to provide access to competing

telecommunication providers but asserted that this would include AWS not just ILECs such as USWC. USWC argued that contract provisions must be reciprocal for both parties not just the incumbent. USWC claimed that it should not be required to construct or rearrange facilities for another carrier and should be allowed to keep 15 percent of available capacity for maintenance and repair purposes.

Regarding AWS's reference to its micro-cell devices, USWC testified that placing these devices on the tops of poles may cause network reliability concerns. USWC also objected to AWS seeking to place the burden on USWC to obtain authority for rights-of-way on behalf of AWS. USWC noted that it acquired its existing rights through specific permits, licenses, or easements from public and private parties. USWC argued that it has no authority, under Minnesota law, to extend [*63] its easement rights that it has acquired from some other party, to AWS. USWC suggested that AWS should seek authority from the granting authority directly for its own use.

3. The Department

The Department recommended following the decisions in the Consolidated Arbitrated Proceeding and require USWC to make reasonable efforts to accommodate access by AWS and provide that any disputes should be resolved by the Commission.

Regarding the 15 percent reserve capacity issue, the Department stated that USWC should be required to show that it is reserving capacity only for maintenance and administrative purposes in accordance with generally accepted engineering principles.

4. The ALJ

The ALJ noted that Section 251(b)(4) of the Act places the duty on USWC to

> afford access to poles, ducts, conduits, and rights of way . . . to competing providers of telecommunications on rates, terms, and conditions that are consistent with section 244.

Section 244(f)(1) requires utilities to provide "nondiscriminatory access to any pole, conduit, or right of way owned or controlled by it". The ALJ noted that this language is repeated in *47 C.F.R. § 1.1403* and that Paragraph 1163 of the [*64] FCC's First Order requires

> utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the parties seeking access.

The ALJ cited the Commission's Order in the Consolidated Arbitration Proceeding in which the Commission held that U S WEST could

> . . . maintain spare capacity only as reasonably necessary for maintenance and administrative purposes, based upon generally accepted engineering principles.

Consolidated Arbitration Order at 44.

The ALJ found that USWC failed to prove in this proceeding that generally accepted engineering principles require it to reserve 15 percent of the capacity of ducts and conduits for maintenance and administration. Therefore, the ALJ concluded, USWC must make reasonable efforts to accommodate access by AWS to U S WEST facilities in accordance with applicable law. Disputes over whether a reasonable accommodation has been made should be submitted to the Commission.

Regarding the rights of way dispute, the ALJ stated that AWS should be afforded nondiscriminatory access to USWC's rights [*65] of way and related facilities on the same terms and conditions which USWC provides to itself or a third party in accordance with section 251(b)(4) of the Act. According to the ALJ, such access must accommodate the different technological needs of AWS as a CMRS provider to the extent technically feasible.

5. Commission Action

Following the reasoning and recommendations of the ALJ and the Department and consistent with the Commission's Order in the Consolidated Arbitration Proceeding, the Commission will require USWC to make all reasonable efforts to provide access to its poles, ducts, conduits and rights-of-way.

T. Evaluation of Proposed Contracts

1. AWS

AWS argued that its agreement should be adopted because it is clear and complies with federal law covering all issues necessary for a procompetitive interconnection agreement. AWS asserted that USWC's agreement is ambiguous, internally inconsistent and incomplete. AWS also objected that USWC's agreement also defers too many issues for future negotiation.

2. USWC

USWC stated that its Type 2 template agreement should be adopted because it has been reviewed and approved by nine state commissions and complies with [*66] Sections 251 and 252(d) of the Federal Act. While AWS claims its proposed agreement is superior, USWC argued that a review of both agreements shows the topics are virtually identical and language of specific provisions governing general terms and conditions are similar. Where language is different, USWC stated, USWC's proposed agreement is fair while AWS' agreement tends to favor AWS.

USWC denied AWS' claims that USWC's agreement is repetitive, ambiguous, and internally consistent. USWC cited various examples where its language is more specific and effectively addresses the parties obligations according to law. USWC claimed that AWS' proposed agreement places a number of contractual obligations on USWC that is covered by existing law. To the extent that AWS' contract goes beyond what the law requires, USWC argued, it is improper and unfair.

3. The Department

The Department noted that the Commission has the authority to select either parties' contract in this arbitration but favored the AWS contract because, it stated, the USWC contract leaves issues open to be resolved in a separate agreement including collocation, unbundled elements and rates, and terms for ancillary services. [*67] The Department advised that USWC's approach left too many issues unresolved contrary to the intent of the arbitration process.

4. The ALJ

The ALJ recommended that AWS' proposed interconnection agreement should be adopted as the agreement of the parties except as otherwise modified or limited by the decisions in this arbitration.

The ALJ found that the Act requires that a party petitioning for arbitration is required to provide the State Commission with

> . . . all relevant documentation concerning (i) the unresolved issues; (ii) the position of each party with respect to those issues; and (iii) any other issue discussed and resolved by the parties.

47 U.S.C. § 252(b)(2)(A).

The ALJ noted that a State Commission is then empowered to impose appropriate conditions upon the parties to the agreement. *47 U.S.C. § 252*(b)(4)(C). The ALJ stated that the Act contemplates an actual contract emerging from the arbitration. *47 U.S.C. § 252*(e)(2)(B).

The ALJ found that the AWS contract more comprehensively addresses technical interconnection matters and contains general terms and conditions customarily contained in standard commercial agreements. The ALJ also found that the AWS [*68] contract more comprehensively addresses issues that, if not addressed, might delay or prevent the parties' achievement of an interconnection agreement.

By contrast, the ALJ noted, the USWC proposed contract deals with several crucial areas by setting them aside for resolution by a separate agreement. The ALJ noted that setting issues aside without the agreement of the parties could delay implementation and achievement of an interconnection agreement. The ALJ did not find the fact noted by USWC, that USWC's proposed contract has been selected as the template by other State Commissions persuasive. The ALJ noted that the Commission has rejected USWC's proposed contract in favor of AT&T's proposed contract language in the Consolidated Arbitration Proceeding. (Consolidated Arbitration Order at 7).

5. Commission Action

Contrary to USWC's claim that the Commission has no authority to choose one of the agreements, the Commission believes that it must choose, as it did in the Consolidated Arbitrated Proceeding, in

order to facilitate an orderly implementation of the arbitrated agreement. In the Consolidated Arbitration Order, the Commission stated at page 8:

> The Commission sees [*69] no impediment in the Act to incorporating provisions of that contract or any other into its final decision. Indeed, the Act contemplates actual contracts emerging from these arbitrations, providing for subsequent State commission review of "an **agreement** adopted by arbitration . . .. (emphasis added)." *47 U.S.C. § 252(e)(2)(B)*. In adopting specific contractual language, the Commission is merely imposing terms and conditions under authority of the Act. *See 47 U.S.C. § 252(b)(4)(C)*.

Having reviewed both proposed contracts and the arguments of the parties, the Commission finds that AWS' proposed interconnection agreement complies with federal law and more comprehensively addresses the contract issues.

For these reasons and others stated by the ALJ and the Department, the Commission finds that AWS' proposed contract offers the best alternative among the competing proposals submitted in this proceeding. Therefore, the Commission will adopt it as a template for an agreement between the parties, except as modified or limited by the decisions in this arbitration.

U. Arbitration Costs

Based on the 421 company code number portion of the docket number assigned [*70] to this proceeding, all costs of this arbitration would be borne by USWC. AWS was not assigned a company code number and that number had not been made part of the docket number because it was presumed, at the time that docket number was assigned, that the public agencies (the Commission, the Office of Administrative Hearings, and the Department) did not have the authority to bill AWS.

On May 12, 1997, USWC notified the Commission that it objected to bearing all costs associated with this docket and on June 2, 1997, the Commission requested interested parties file comments and reply comments.

Subsequently, AWS voluntarily agreed to share equally with USWC concerning the costs in this arbitration proceeding. AWS clarified, however, that it does not believe that the Commission has authority, under Minnesota statutes or the Act, to assess costs of this arbitration proceeding against AWS. AWS stated that its willingness to share the costs of the arbitration should not be construed in any way as subjecting AWS to future assessments under *Minn. Stat. § 237.295*.

The Commission acknowledges AWS' agreement to share equally the costs of this arbitration (P-412/EM-97-371) with USWC. These [*71] costs include the costs of the Department, the Office of Administrative Hearings, and the Commission. The Commission understands that AWS' willingness to share the costs of this arbitration does not necessarily imply that AWS is subject to future assessments under *Minn. Stat. § 237.295*. In light of AWS' agreement to share equally in the costs of this arbitration with USWC, it is not necessary for the Commission to determine in its Order whether it has the authority and obligation to assess costs against AWS.

ORDER

1. That the Commission take administrative notice of the FCC's *First Report and Order, In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98*, dated August 8, 1996.

2. The Commission decides the arbitrated issues as set forth in the body of this Order, including the following:

. that the agreement expressly provide for future modification; and

. that the agreement expressly state that any future modifications or amendments will be brought before the Commission for approval.

3. *Minn. Rules, Part 7829.3000*, subp. 1 is varied and the parties are directed to file any petitions for rehearing [*72] or reconsideration within 10 days of the issuance of the Order from this meeting.

4. If a party files for reconsideration, the party shall submit alternative contract language to implement its proposed resolution of the issue(s) that it wants the Commission to reconsider.

5. USWC and AWS shall submit a final contract, containing all the arbitrated and negotiated terms, to the Commission for review pursuant to *47 U.S.C. § 252*(e) no later than 30 days from the service date of the Commission Order in this proceeding. If a party objects to any language in the contract, the party must indicate the basis for that objection as part of the filing of the contract, and the party must submit proposed alternative contract language.

6. The contracting parties shall serve their contract on the service list provided by the Commission. The contract must be served on the date the contract is submitted to the Commission.

7. The parties, participants and interested persons shall have 10 days from the date the parties submit their contract to the Commission to file comments regarding the contract.

8. This Order shall become effective immediately.

BY ORDER [*73] OF THE COMMISSION

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewCommunications LawTelephone ServicesLocal Exchange CarriersRatesCommunications LawTelephone Services-Mobile Communications Services