[Service Date February 6, 2004]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST AND TCG SEATTLE With QWEST CORPORATION Pursuant to 47 U.S.C. Section 252(b)	)	DOCKET NO. UT-033035 ORDER NO. 05 FINAL ORDER AFFIRMING ARBITRATOR'S REPORT AND DECISION; APPROVING INTERCONNECTION AGREEMENT

Synopsis— *The Commission, ruling on AT&T's Petition for Review, affirms the Arbitrator's determinations that: (1) Qwest's proposed definition of "Tandem Office Switch" must be included in the parties' Interconnection Agreement; (2) Qwest's proposed definition of "Exchange Service" or "Extended Area Service (EAS)/Local Traffic" must be included in the parties' Interconnection Agreement; and (3) AT&T's proposed language that would apply relative use factors to private line transport services ("PLTS") obtained under Qwest's federal tariff is rejected.*

1 **PROCEEDINGS:** Docket No. UT-033035 concerns a petition filed by AT&T Communications Of The Pacific Northwest and TCG Seattle (collectively "AT&T") for arbitration pursuant to 47 U.S.C. §252(b)(1) of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56 (1996) ("Telecom Act"), of a proposed Interconnection Agreement between AT&T and Qwest Corporation ("Qwest"). Arbitrator Dennis J. Moss entered Order No. 04, his Arbitrator's Report, on December 1, 2003.

2 AT&T filed its Petition for Commission Review of Arbitrator's Report on January 9, 2004. Qwest filed its Response on January 20, 2004. The parties also filed a complete, signed Interconnection Agreement on January 20, 2004, which incorporated negotiated and arbitrated terms consistent with the Arbitrator's Report.

3 **APPEARANCES:** Letty S. D. Friesen, AT&T Law Department, Denver, Colorado, represented AT&T at the arbitration hearing and on review. Mary Rose Hughes, Perkins Coie LLP, Washington, D.C., represented Qwest at the arbitration hearing and on review.

4 **COMMISSION:** The Commission affirms the Arbitrator's Report and approves the parties' fully executed Interconnection Agreement that conforms to the requirements of that Report and this Order.

MEMORANDUM

5 We have considered the parties' arguments concerning the three issues AT&T raises by its Petition for Review. Our analyses, and decisions, based on these arguments and the record below, follow.

1) What definition of "Tandem Office Switch" should be included in the parties' Interconnection Agreement?[1]

6 Section 4.0 of the parties' Interconnection Agreement is the "Definitions" section. The parties could not agree to the definition of "Tandem Office Switches." Qwest argued that the following language should be included in the parties' Interconnection Agreement as part of the definition of Tandem Office Switches (disputed term underscored):

[1] This was identified as "Issue Three" in the parties' Disputed Issues List and was referred to as Issue Three at all stages of this arbitration.

> CLEC end office Switch(es) shall be considered Tandem Office Switch(es) for the purpose of determining reciprocal compensation rates to the extent such Switch(es) serves a comparable geographic area as Qwest's Tandem Office Switch.

AT&T initially argued that the phrase "is (are) capable of serving" should be substituted for the word "serves." This was the only language in controversy when this issue was presented to the Commission via AT&T's Petition. Insofar as this disputed language is concerned, the Arbitrator's Report adopts Qwest's proposed definition.

7 Later in the proceeding, AT&T proposed to add a sentence at the end of the definition of Tandem Office Switches, as follows:

> For purposes of this Agreement, AT&T's [TCG's] switches in the State are Tandem Office Switches.

In its Petition for Review, and at oral argument, AT&T focused on the questions raised by its proposal to add this final sentence that would effectively declare that all of AT&T's and TCG's switches in Washington meet the definition of Tandem Office Switches. Indeed, in its Petition for Review, AT&T does not ask the Commission to reverse the Arbitrator's decision as to the definition that should be included in the parties' Interconnection Agreement. Instead, AT&T's prayer for relief at the conclusion of its argument on this issue is the company's request "that the Commission find AT&T's switches serve a comparable geographic area [as that served by Qwest's tandem switches] and order Qwest to pay the tandem rate." *AT&T Petition at 6.*

8 The Arbitrator expressly rejected AT&T's proposal to add a new final sentence to the definition of Tandem Office Switches for two principal reasons, as follows:

> The issue was not properly queued up for decision by AT&T's Petition. Moreover, the agreed language of the definition includes the following sentence:
>
> > If the Parties have not already agreed that CLEC's switches meet the definition of Tandem Office Switches, a fact based consideration of geography, when approved by the Commission or mutually agreed to by the Parties, should be used to classify any Switch on a prospective basis.
>
> Adding the sentence AT&T proposed sometime after it filed its Petition would effectively override the agreed-upon language presented under the Petition. According to that language, if the parties cannot mutually agree to a measure or a test for geographic comparability after their interconnection agreement is in place, they will have to return to the Commission to have the question resolved for prospective application.

Arbitrator's Report at ¶ 24 (footnote omitted).[2]

9 Qwest's Response to AT&T's Petition argues that the question:

[2] We note that the agreed dispute resolution provisions in Section 5.18 of the parties' Interconnection Agreement allow for resort to the Commission to resolve such a dispute, but also provide alternative means of dispute resolution, including good faith negotiation.

> Whether AT&T's switches meet the definition of a 'Tandem Office Switch' should await adoption of that definition and, in accordance with other undisputed language in the parties' agreement, the performance of a fact based analysis of geography.

Qwest argues that once the Commission approves the parties' Interconnection Agreement with negotiated and arbitrated terms, the parties should have an opportunity to operate under the agreement and, if a dispute actually develops concerning whether a given AT&T switch meets the definition of Tandem Office Switch, then the parties can bring the specific, fact-based dispute to the Commission for resolution. Qwest argues that AT&T's request for relief under this issue asks the Commission "to issue advisory opinions or impose vague, overbroad language to address speculative future disputes that are not ripe and may never become ripe." *Qwest Response at 3.*

10 We agree with the Arbitrator's Report, and Qwest's argument, that it would be premature for the Commission to resolve the dispute over what definition of Tandem Office Switch should be included in the parties' Interconnection Agreement in a way that predetermines the applicability of that definition to all of AT&T's switches in Washington.[3] Following our approval here of the parties' negotiated and arbitrated Interconnection Agreement, a dispute may develop concerning whether one or more of AT&T's switches meets the definition we adopt. If that occurs, the parties' agreed dispute resolution procedures in Section

[3] The Commission recognizes that there is some evidence in the record that may be relevant to a determination of whether AT&T's switches meet the definition of Tandem Office Switches. In light of our determination of this issue, it would be premature to make any findings of fact based on that evidence. If the parties cannot agree to the status of one or more of AT&T's switches and we are called upon in the future to resolve a dispute concerning the classification of an AT&T switch as "a fact based consideration of geography," our ruling here should not be considered either a rejection or an endorsement of that evidence in terms of its probative value.

5.18 of their Interconnection Agreement provide options by which such an actual dispute can be resolved, including resort to the Commission.

11 The Commission affirms the Arbitrator's determination that the parties must adopt Qwest's proposed definition of Tandem Office Switch in their Interconnection Agreement.

2) What definition of "Exchange Service" or "Extended Area Service (EAS)/Local Traffic" should be included in the parties' Interconnection Agreement?[4]

12 The parties' proposed definitions are as follows:

Qwest	**AT&T**
"Exchange Service" or "Extended Area Service (EAS)/Local Traffic" means traffic that is originated and terminated within the same local calling area as determined for Qwest by the Commission.	"Exchange Service" or "Extended Area Service (EAS)/Local Traffic" means traffic that is originated and terminated within the same local calling area as determined by the calling and called NPA/NXXs.

Thus, Qwest advocates that the physical location of the originating and terminating callers must be in the same local calling area, as determined by the Commission, for the call to be Exchange Service or EAS/Local Traffic. AT&T, by contrast, would expand the definition to include any call in which the originating and terminating callers have the same NPA/NXX, regardless of their respective physical locations and regardless of the nature of the service offered.

[4] This was identified as "Issue Five" in the parties' Disputed Issues List and was referred to as Issue Five at all stages of this arbitration.

13 Although the parties' dispute nominally is over the definition that should be included in their Interconnection Agreement, the real dispute concerns what the alternative definitions may imply with respect to implementation on a prospective basis once the Interconnection Agreement is in place. The focus of AT&T's Petition, and its oral argument, was the company's concern that it be able to offer a service that will compete with Qwest's foreign exchange ("FX") services.

14 The Arbitrator acknowledged that Qwest's proposed definition can be read narrowly. It does not, by its terms, recognize exceptions that allow customers in one local calling area to have a local calling presence in another local calling area. The Arbitrator concluded:

> AT&T should be entitled to take advantage of the same exceptions to the typical relationship between NPA-NXX and a single local calling area as Qwest takes advantage of in offering FX and Internet access numbers.

On the other hand, the Arbitrator found:

> This cannot be accomplished, however, by simply adopting AT&T's proposed definition for Exchange Service or EAS/Local Traffic, because that definition is too sweeping in its potential effect and has potentially unacceptable consequences in terms of intercarrier compensation.

Balancing the potential effects of the proposed definitions—one of which may prove on implementation to be too narrow, the other of which could prove to be overly broad—the Arbitrator ruled in favor of Qwest's proposed definition.

15 We affirm the Arbitrator's decision. We agree with his conclusion that "AT&T's alternative simply goes too far—is too sweeping in its implications—to be adopted on the record in this proceeding." As the Arbitrator states, AT&T's proposed definition:

> implicates not only the specific services about which AT&T professes to be concerned, it also implicates other potential services that it would be better to consider on a case-by-case basis as one carrier or another seeks to implement new services.

Arbitrator's Report at ¶ 36. We note, however, the Arbitrator's discussion of his concerns that adopting Qwest's alternative leaves open the door to disputes if Qwest tries to use this definition to frustrate an effort by AT&T to offer services that are functionally equivalent, from a customer perspective, to Qwest's FX service and local-number-presence service for ISP bound traffic.

16 We approve of the Arbitrator's efforts to encourage the parties to avoid such potential disputes by further negotiation, if necessary, to ensure implementation of their Interconnection Agreement in a manner consistent with the pro-competitive principles discussed in the Arbitrator's Report. We emphasize that those principles are stated as dicta. They suggest options for implementation (*e.g.,* agreement to bill-and-keep compensation; FX functionality for inbound calls only), but they do not bind the parties to specific arrangements, nor do they bind us if we must ultimately resolve a dispute over implementation.

3) In addition to direct trunk transport and entrance facilities, should relative use factors be applied to private line transport services ("PLTS") that interexchange carriers purchase out of Qwest's tariffs?

17 This issue, raised by AT&T 's Petition for Review, is one part of a broader issue arbitrated below: Should a relative-use factor apply to interconnection facilities

that are used to carry traffic bound for the Internet?[5] The Arbitrator resolved the broad issue in AT&T's favor insofar as AT&T sought to apply relative use factors to direct trunk transport and entrance facilities. However, the Arbitrator rejected AT&T's argument that relative use factors should be applied to adjust what AT&T pays to Qwest for "other comparable facilit[ies] providing equivalent functionality." The other comparable facilities to which this phrase would apply in practice are private line transport services (PLTS) that AT&T leases from Qwest under a federal tariff.

18 The Arbitrator's decision rejects AT&T's proposal to include the "other comparable facilities" language to Sections 7.3.1.1.3.1 and 7.3.2.2.1 of the parties' Interconnection Agreement for two reasons, as follows:

> AT&T's proposed language that would apply relative use factors to "other comparable facilit[ies] providing equivalent functionality" potentially results in a sort of "blended rate" for PLTS circuits rejected by the FCC in its *Triennial Review Order*. In addition, AT&T's proposed language would encompass facilities-access purchased out of federal tariffs over which the Commission lacks jurisdiction.

Arbitrator's Report at ¶ 47.[6]

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[5] This was identified as "Issue Seventeen" in the parties' Disputed Issues List and was referred to as Issue Seventeen at all stages of this arbitration.

[6] The Arbitrator's Report cites: Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. Nos. 01-338, 96-98, 98-147, FCC 03-36 (rel. Aug. 21, 2003) ("*Triennial Review Order*") at ¶¶ 579-584; and 34th Supplemental Order; Order Regarding Qwest's Demonstration of Compliance with Commission Orders, *Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Dkt. Nos. UT-003022, UT-003040, ¶ 22 (May 2002).

19 AT&T argues that the Arbitrator's legal conclusions are erroneous because AT&T does "not propose to alter the tariffed cost of PLTS." *AT&T Petition at 11.* AT&T, however, does not dispute that it leases PLTS from Qwest under a federal tariff. Qwest argues, "Section 2.7 of Qwest Tariff F.C.C. No. 1 covers shared use of an interstate special access circuit." *Qwest Response at 23.* According to Qwest:

> This tariff provides for proportional charges for shared services, but *only for shared use of federally-tariffed services.* However, when PLTS is shared with local *exchange service*, this tariff provides *no apportionment* based on the use of the facility. The tariff prohibits any cost adjustment based upon the local use of the PLTS. Consequently, the tariff precludes apportioning the costs of the PLTS based upon relative use:
>
> > 2.7.1 PLTS with Local Exchange Service
> >
> > PLTS and Local Exchange Service may be provided on a Shared Use facility. *However, individual recurring and nonrecurring charges shall apply for each PLTS and Local Exchange Line. The Shared Use facility is not apportioned.*
>
> Thus, Qwest's Tariff F.C.C. No. 1 does not permit apportioning costs between PLTS and local exchange uses. Because it precludes apportioning, it precludes application of a relative use factor to reduce the tariffed rate.

Id. What AT&T proposes, however structured,[7] calls for apportionment and pro rata sharing of costs for PLTS obtained from Qwest under federal tariff. It is not within our power to make determinations in this arbitration that implicate, and appear to be contrary to, the requirements of a federal tariff that is under the Federal Communication Commission's exclusive jurisdiction. Thus, we affirm the Arbitrator's decision on this issue.

FINDINGS OF FACT

20 The Commission makes the following summary findings of fact, having discussed above the evidence concerning all material matters and having stated our more detailed findings of fact. Those portions of the preceding discussion pertaining to the Commission's ultimate findings in this matter are incorporated by this reference.

21 (1) The Washington Utilities and Transportation Commission ("Commission") is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities, and practices of telecommunications companies in the state.

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[7] It is unclear exactly how AT&T proposes to implement it proposal. The concept, however, is captured by Mr. Talbott's testimony for AT&T, as follows:

> Suppose AT&T has leased a DS-3 level facility from Qwest to a certain Qwest end office location. Further suppose that the size of the trunk group between the parties is 48 trunks (voice circuits) and that each party's relative use of the trunk group is 50%. Therefore, Qwest's relative use is equal to 24 trunks, or a DS-1 level of capacity. Since the DS-3 facility has a capacity of 28 DS-1 channels, Qwest would not bill AT&T for one twenty-eighth (1/28) of the cost of the DS-3 facility. Thus, AT&T would continue to pay Qwest for the pro rata billing for the 27 DS-1 channels that AT&T can use for its own purposes.

Exhibit No. 36 at 24:3-10 (Talbott Rebuttal Testimony) (footnote omitted).

22 (2) Qwest is engaged in the business of furnishing telecommunications services, including, but not limited to, basic local exchange service within the state of Washington, and is a local exchange carrier as defined in the Act.

23 (3) AT&T is a Competitive Local Exchange Carrier that furnishes telecommunications services to customers in Washington.

24 (4) On February 25, 2003, AT&T commenced negotiations with Qwest with the intention to achieve an Interconnection Agreement between AT&T and Qwest, and between AT&T's affiliate, TCG, and Qwest, both in the state of Washington. The parties could not resolve certain issues by negotiation and AT&T requested arbitration on August 12, 2003.

25 (5) The essential facts pertinent to the Arbitrator's Report and the Commission's consideration of "Issue Three" and "Issue Five," as presented on review, are not disputed.

26 (6) With respect to "Issue Seventeen," AT&T's proposal to apply relative use factors to PLTS obtained from Qwest under federal tariff would require apportionment and pro rata sharing of costs for PLTS, contrary to the terms of Qwest's federal tariff.

CONCLUSIONS OF LAW

27 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter and the parties to this proceeding.

28 (2) The Telecommunications Act of 1996 ("Act") authorizes the Commission to arbitrate and approve interconnection agreements between telecommunications carriers, pursuant to Section 252 of the Act. The

Commission is specifically authorized by state law to engage in that activity. *RCW 80.36.610*. This arbitration and approval process was conducted pursuant to and in compliance with 47 U.S.C. § 252 and RCW 80.36.610.

29 (3) AT&T's proposal to add language to the parties' Interconnection Agreement that would apply relative use factors to PLTS obtained from Qwest under federal tariff should be rejected because it is beyond the Commission's jurisdiction to require language that would effectively alter the rates, terms, or conditions of service as set forth in Qwest's federal tariff.

30 (4) The Commission should affirm the Arbitrator's Report and Decision with respect to each of the contested issues raised by AT&T's Petition for Review, as follows:

a) The parties must include Qwest's proposed definition of Tandem Office Switches in their Interconnection Agreement;

b) The parties must include Qwest's proposed definition of Exchange Service or EAS/Local Traffic in their Interconnection Agreement;

c) The parties must include the language set forth at paragraph 50 of the Arbitrator's Report and Decision for Sections 7.3.1.1.3.1 and 7.3.2.2.1 in their Interconnection Agreement.

31 (5) The Commission should affirm the Arbitrator's Report and Decision with respect to all issues not contested on review.

32 (6) The negotiated and arbitrated terms of the parties' Interconnection Agreement, as established by this Order, are consistent with the public interest and do not discriminate against any other telecommunications carrier.

33 (7) The arbitrated provisions of the parties' Interconnection Agreement meet the requirements of Section 251 of the Act, including the regulations prescribed by the FCC pursuant to Section 251, and the pricing standards set forth in Section 252(d) of the Act, or otherwise established by law.

34 (8) The laws and regulations of the state of Washington, and Commission orders shall govern the construction and interpretation of the parties' Interconnection Agreement. The parties' Interconnection Agreement is subject to the jurisdiction of the Commission and Washington courts.

ORDER

THE COMMISSION ORDERS:

35 (1) The Arbitrator's Report and Decision, which is Order No. 4 in this arbitration proceeding, entered on December 1, 2003, is affirmed with respect to the following issues contested on review:

a) The parties must include Qwest's proposed definition of Tandem Office Switches in their Interconnection Agreement;

b) The parties must include Qwest's proposed definition of Exchange Service or EAS/Local Traffic in their Interconnection Agreement;

c) The parties must include the language set forth at paragraph 50 of the Arbitrator's Report and Decision for Sections 7.3.1.1.3.1 and 7.3.2.2.1 in their Interconnection Agreement.

36 (2) The Arbitrator's Report and Decision is affirmed with respect to all remaining arbitrated issues that were not contested on review.

37 (3) The parties' negotiated and arbitrated Interconnection Agreement, filed on January 20, 2004, including all negotiated terms and arbitrated terms that are consistent with the Arbitrator's Report and Decision, as affirmed in this Order, is approved.

DATED at Olympia, Washington and effective this 6th day of February, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.