

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ADVANCED TELCOM GROUP, INC.,)	DOCKET NO. UT-993003
)	
Petitioner,)	
)	COMMISSION ORDER ADOPTING
v.)	RECOMMENDED DECISION,
)	IN PART, AND MODIFYING
U S WEST COMMUNICATIONS, INC.,)	RECOMMENDED DECISION,
)	IN PART
Respondent.)	
)	
.)	

BACKGROUND

Procedural History

1. This matter comes before the Commission on review of a Recommended Decision under WAC 480-09-530. In this proceeding, Advanced TelCom Group, Inc. (ATG) filed a petition for enforcement of its interconnection agreement (ATG Agreement) with U S WEST Communications, Inc. (U S WEST).¹ U S WEST rejected ATG's request that U S WEST make available the reciprocal compensation arrangement from another carrier's agreement. The Commission has jurisdiction over the petition and the parties pursuant to 47 U.S.C. §§ 251-252, RCW 80.36.610, and WAC 480-09-530. ATG is a competitive local exchange carrier (CLEC) and is authorized to provide switched and non-switched local exchange and long distance services in Washington. U S WEST is an incumbent local exchange company (ILEC), as defined in 47 U.S.C. § 251(h) and provides local exchange and other telecommunications services throughout the state of Washington.

2. The Commission approved the ATG Agreement pursuant to 47 U.S.C. § 252 of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56 (1996) (Telecom Act). The ATG Agreement is the result of ATG's request, pursuant to 47 U.S.C. § 252(i), to opt into (adopt all or a portion of) the interconnection agreement between Covad Communications Company and U S WEST (Covad Agreement), previously approved by the Commission on

¹ ATG and U S WEST are parties to an interconnection agreement approved by the Washington Utilities and Transportation Commission (Commission). *In the Matter of the Request for the Adoption of An Approved Interconnection Agreement Between Advanced Telecom Group, Inc. and U S WEST Communications, Inc.*, Docket No. UT-980390, Order Approving Adoption of Previously Approved Interconnection Agreement (December 9, 1998).

April 22, 1998.²

3. The Commission also approved an interconnection agreement between MFS Communications Company, Inc. (MFS) and U S WEST on January 8, 1997 (MFS Agreement).³ On October 14, 1999, ATG, requested that U S WEST make available the rates, terms, and conditions for reciprocal compensation for local traffic, including traffic bound for Internet service providers (ISPs) and treatment of ATG's switch as a tandem, contained in the MFS Agreement pursuant to Section 252(i) of the Telecom Act and 47 C.F.R. § 51.809.⁴ U S WEST proposed additional terms to the ATG request (which ATG accepted), but subsequently denied the request on grounds that it was inconsistent with draft interpretive and policy statement guidelines under consideration by the Commission.

4. On November 3, 1999, ATG filed with the Commission and served on U S WEST, a *Petition for Enforcement of Interconnection Agreement* pursuant to WAC 480-09-530 (Petition). On November 10, 1999, U S WEST answered ATG's Petition. On December 1, 1999, the Commission convened a prehearing conference to review disputed issues and to determine whether to schedule further proceedings. On December 6, 1999, the Second Supplemental Order was entered and the parties were directed to file additional pleadings and submissions. ATG and U S WEST filed briefs on December 17, 1999.

5. On January 14, 2000, the presiding officer entered the Third Supplemental Order resolving issues (Recommended Decision). The Recommended Decision also provided notice that a special public meeting for hearing oral argument and comments of the parties be convened, after which the Commission could adopt, modify, or reject all or part of the Recommended Decision. On January 20, 2000, the Commission requested that Commission Staff prepare a written memorandum in lieu of a presentation at the hearing. ATG and U S WEST both filed comments seeking review of the Recommended Decision on January 21, 2000.

6. Commission Staff presented written recommendations and the parties made oral arguments regarding the Recommended Decision at a special open public meeting on January 31, 2000.

² *In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Covad Communications Company and U S WEST Communications, Inc.*, Docket No. UT-980312, Order Approving Fully Negotiated Interconnection Agreement (April 22, 1998).

³ *In the Matter of the Petition for Arbitration of An Interconnection Agreement Between MFS Communications Company, Inc., and U S WEST Communications, Inc.*, Docket No. UT-960323, Order Approving Negotiated and Arbitrated Interconnection Agreement (January 8, 1997).

⁴ Specifically, ATG requested that the following terms from the MFS Agreement be treated as an individual interconnection arrangement: Article V, Section D and Appendix A, Local Call termination rates and associated terms. The MFS arrangement would replace the existing provisions of the ATG Agreement in Section 5.4.1 and Appendix A, Local Call Termination rates and associated terms.

Appearances

7. Gregory Kopta, attorney, appeared on behalf of ATG, and Lisa Anderl, attorney, appeared on behalf of U S WEST.

ATG's Petition

8. ATG petitions for enforcement of its agreement with U S WEST, alleges that U S WEST's denial of its request that the reciprocal compensation arrangement from the MFS Agreement be made available is discriminatory, and alleges that U S WEST has engaged in bad faith negotiations in violation of 47 U.S.C. § 251(c)(1).

WAC 480-09-530

9. WAC 480-09-530 establishes an expedited process to enable a telecommunications carrier that is a party to an interconnection agreement with another telecommunications carrier to petition for enforcement of the agreement.

10. In any proceeding to enforce the provisions of an interconnection agreement, the presiding officer has broad discretion to conduct the proceeding in a manner that best suits the nature of the petition. The enforcement proceeding concludes when the presiding officer has sufficient information to resolve the issues. The presiding officer must serve a recommended decision on the parties within seventy-five days of the date the petition was filed, or twenty-one days after the last session or submission, whichever is later.

11. The recommended decision is subject to Commission approval, after it hears the arguments of the parties regarding the recommended decision within ten days after it is served, or as soon thereafter as the Commissioners' schedules permit. The parties may submit written comments, and the Commission has discretion to request a presentation from Commission Staff. The Commission serves a final order on the petition for enforcement within ninety days of the date the petition was filed, or fifteen days after the review hearing, whichever is later.

The Recommended Decision

12. The Recommended Decision makes the following rulings: (1) the MFS Agreement remains in full force and effect; (2) the goals of the Telecom Act promoting competition and the nondiscriminatory treatment of carriers favor U S WEST making the MFS reciprocal compensation arrangement available to ATG; (3) U S WEST fails to establish that terms comprising the MFS arrangement are unfair or unreasonable under federal regulations; (4) in light of the totality of the circumstances surrounding ATG's initial request for approval of an interconnection agreement, the reinstatement of FCC Rule 51.809, and ATG's timely petition for enforcement, ATG is entitled to receive the reciprocal compensation arrangement from the MFS Agreement pursuant to §252(i); (5) the term requiring the parties to initiate negotiations on a new agreement in the MFS Agreement is not legitimately related to the reciprocal compensation

arrangement requested by ATG; (6) the most just and reasonable termination date to associate with the MFS arrangement is that it expires either (a) 90 days after a new agreement between U S WEST and MFS becomes effective, or (b) contemporaneously with other terms in the ATG Agreement, whichever event occurs first; and , (7) U S WEST did not breach a duty to negotiate in good faith with ATG.

ATG's Request for Review

13. ATG generally supports the Recommended Decision with one requested modification. ATG argues that the term defining the expiration date established by the Recommended Decision creates considerable and unnecessary uncertainty in the contractual and operational relationship between ATG and U S WEST, and ATG recommends that the reciprocal compensation arrangement remain effective as long as the current ATG Agreement remains effective.

U S WEST's Request for Review

14. U S WEST supports the conclusion that it did not breach a duty to negotiate in good faith with ATG, but requests that the Commission reverse the decision that it must make the reciprocal compensation arrangement contained in the MFS Agreement available because the MFS Agreement has expired. Alternatively, U S WEST argues that the Recommended Decision should be modified to provide that the MFS arrangement terminates either (a) 90 days after notice from U S WEST that its original agreement with MFS will no longer be in effect, or (b) contemporaneously with the other terms in the ATG Agreement, whichever event occurs first.

Commission Staff's Recommendations

15. Commission Staff recommends that the Commission adopt the Recommended Decision with one modification. Commission Staff recommends that the following modified language be adopted governing the effective term of the MFS reciprocal compensation arrangement: "either 1) the arrangement expires 90 days after a request for approval of a new agreement between MFS and U S WEST is filed with the Commission, or 2) the arrangement expires on the expiration date of the ATG Agreement (May 1, 2001), whichever event occurs first."

Summary of Commission Order

16. The Commission affirms and adopts the Recommended Decision's finding that U S WEST must make the reciprocal compensation arrangement from the interconnection agreement between MFS and U S WEST available to ATG. However, the Commission modifies the Recommended Decision to provide that the arrangement expires either (a) 90 days after a request for approval of a new agreement between MFS and U S WEST is filed with the Commission, or (b) on the expiration date of the ATG Agreement (May 1, 2001), whichever event occurs first.

17. Further, the Commission requires that U S WEST must provide ATG with written notice on the filing of a request for approval of a new agreement between MFS and U S WEST with the Commission, whether the agreement be negotiated, arbitrated, or adopted under Section 252(i).

18. The Commission also affirms and adopts the Recommended Decision's finding that U S WEST did not breach a duty to negotiate in good faith with ATG.

MEMORANDUM

I. Relevant Proceedings

A. The Commission's Generic Cost and Pricing Proceeding

19. As part of its effort to fully implement the Telecom Act, the Commission entered an Order on October 23, 1996, initiating a generic proceeding to review costing and pricing issues for interconnection, unbundled network elements, transport and termination, and resale. The Commission stated that rates adopted in the pending arbitration proceedings being conducted pursuant to the Telecom Act would be interim rates, pending completion of the generic proceeding. That proceeding is underway.⁵ Accordingly, the prices approved in every interconnection agreement are interim rates and are subject to the Commission's decisions in the Generic Case.

B. FCC Proceedings Implementing the Telecommunications Act of 1996

20. On August 8, 1996, the Federal Communications Commission (FCC) issued its First Report and Order (Local Competition Order), including Appendix B - Final Rules (FCC

⁵ *In the Matter of the Pricing Proceeding For Interconnection, Unbundled Elements, Transport and Termination, and Resale*, UT-960369 (general), UT-960370 (U S WEST), UT-960371(GTE); Order Instituting Investigations; Order of Consolidation; and Notice of Prehearing Conference, November 21, 1996 (Generic Case). On April 16, 1998, the Commission entered an interlocutory order determining costs in Phase I of the Generic Case. The Commission held hearings in October and December 1998 to set permanent prices. On August 30, 1999, the Commission entered an Order determining prices in Phase II of the proceeding (17th Supplemental Order). Phase III of the Generic Case and other proceedings have been commenced to further investigate the cost and pricing of collocation, to consider deaveraged loop pricing proposals for different geographic zones, and to consider all other unresolved cost and pricing issues deferred by the Commission in the 17th Supplemental Order.

Rules).⁶ On October 15, 1996, the U. S. Court of Appeals, Eighth Circuit stayed operation of the FCC Rules relating to pricing of interconnection and the "pick-and-choose" provisions.⁷

21. On July 18, 1997, the Eighth Circuit entered an order vacating several of the FCC Rules.⁸ On October 14, 1997, the Court entered an order on rehearing vacating additional FCC Rules. The Eighth Circuit decisions were thereafter appealed to the U. S. Supreme Court. On January 25, 1999, the Supreme Court ruled that the FCC Rules, with the exception of 47 C.F.R. §51.319, are consistent with the Telecom Act.⁹ On June 10, 1999, the Eighth Circuit entered an order reinstating 47 C.F.R. 51.809 (the "pick and choose" rule).¹⁰

22. The FCC concluded that Section 252(i) entitles all parties with interconnection agreements to exercise rights to pick and choose regardless of whether they included pick and choose clauses in their agreements.¹¹

C. The Commission's Duty Under the Telecommunications Act of 1996

23. The primary goals of the Telecom Act are the nondiscriminatory treatment of carriers and the promotion of competition.¹² The Telecom Act contemplates that competitive entry into local telephone markets will be accomplished through interconnection agreements between ILECs and CLECs, which will set forth the particular terms and conditions necessary for the ILECs to fulfill their duties under the Act. 47 U.S.C. § 251(c)(1). Each interconnection agreement must be submitted to the Commission for approval, regardless of whether the agreement was negotiated or arbitrated, in whole or in part. 47 U.S.C. § 252(d).

24. Section 252(i) of the Telecom Act permits third parties to obtain access to any individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under Section 252.¹³ The FCC ordered that requesting carriers are entitled to obtain their statutory rights on an expedited basis, and left

⁶ *In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd. 15499, First Report and Order (August 8, 1996), Appendix B- Final Rules.

⁷ *Iowa Utilities Bd. v. Federal Communications Comm'n*, 109 F.3d 418 (8th Cir. 1996).

⁸ *Iowa Utilities Bd. v. Federal Communications Comm'n*, 120 F.3d 753 (8th Cir. 1997).

⁹ *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

¹⁰ *Iowa Utilities Bd. v. Federal Communications Comm'n*, ___ F.3d ___ (8th Cir. June 10, 1999).

¹¹ Local Competition Order, 11 FCC Rcd at 16139-40, ¶ 1316.

¹² Local Competition Order, 11 FCC Rcd at 16139, ¶ 1315.

¹³ Local Competition Order, 11 FCC Rcd at 16139, ¶ 1314.

to state commissions in the first instance the details of implementing expedited procedures for making arrangements available.¹⁴ The Commission must fulfill its statutory obligation under Section 252 of the Telecom Act to resolve the disputes presented by ATG and U S WEST in this proceeding, consistent with RCW 80.36.610. The decision that a minute-of-use reciprocal compensation mechanism is appropriate on an interim basis pending completion of the FCC's rulemaking may later have to be revised to comply with subsequent federal law.

D. The Commission's Section 252(i) Interpretive and Policy Statement

25. On June 15, 1999, several parties filed a joint petition requesting that the Commission issue a declaratory order or an interpretive and policy statement regarding implementation of the pick and choose rule. The petitioners alleged that their efforts to pick and choose provisions from existing interconnection agreements had demonstrated uncertainty as to the implementation of the pick and choose rule.

26. On June 29, 1999, the Commission served a notice that interested persons could file comments regarding implementation of the pick and choose rule in Docket No. UT-990355. On October 15, 1999, the Commission issued further notice to file supplemental comments regarding a draft interpretive and policy statement. On November 30, 1999, the Commission issued an Interpretive and Policy Statement consisting of ten guiding principles to implement Section 252(i) of the Telecom Act and the FCC's pick and choose rule (Section 252(i) Policy Statement).¹⁵

27. Several principles of the Section 252(i) Policy Statement are relevant to this proceeding. Principle 6 states that an ILEC is not required to make an individual arrangement available to a requesting carrier after the source agreement has expired. Principle 8 states that after an individual arrangement is made available, it expires on the same date as the source agreement. Principle 10 states that an ILEC bears the burden of proving that certain terms and conditions are legitimately related to any requested individual arrangement.

II. ISSUES, DISCUSSION, AND DECISIONS

A. Should U S WEST Make the Reciprocal Compensation Arrangement Contained in Its Interconnection Agreement with MFS Available to ATG?

28. The Recommended Decision found that U S WEST should make the reciprocal compensation arrangement contained in its interconnection agreement with MFS available to ATG, and established a termination date for the arrangement. ATG supports the decision that the MFS reciprocal compensation arrangement should be made available, but

¹⁴ Local Competition Order, 11 FCC Rcd at 161341, ¶ 1321.

¹⁵ *In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996*, Interpretive and Policy Statement, Docket No. UT-990355 (November 30, 1999).

petitions for review of the decision establishing the termination date. U S WEST petitions for review of the underlying decision, but alternatively also seeks review of the decision establishing the termination date. The Commission affirms and adopts the decision that U S WEST must make the MFS reciprocal compensation arrangement available to ATG, but modifies the decision establishing the termination date of the arrangement.

1. ATG's Position

29. ATG requests that the Commission require U S WEST to make the reciprocal compensation arrangement for the termination of local and ISP-bound traffic from the MFS Agreement available, and argues that U S WEST currently provides reciprocal compensation to numerous other parties based on those same rates, terms, and conditions. Therefore, ATG concludes that nondiscrimination principles require that ATG be permitted to adopt those rates, terms, and conditions, either directly from the MFS Agreement, or indirectly from another Commission-approved agreement that is based, in whole or in part, on the MFS Agreement.

30. ATG argues that the requirement in the MFS Agreement that the parties commence negotiations on a new agreement no later than two years after its effective date is not legitimately related to ATG's request that the MFS reciprocal compensation arrangement be made available.

31. ATG also argues that the same equitable considerations that the Commission recently weighed in support of a similar request between NEXTLINK and U S WEST (NEXTLINK case) apply in this case,¹⁶ and that its request is consistent with the Commission's Section 252(i) Interpretive and Policy Statement.

32. ATG argues that unless the MFS arrangement is made available for the same term as its current agreement, ATG will not have sufficient time to secure an alternative arrangement. ATG also argues that 90 days' notice does not provide sufficient time for it to fully exercise its rights to arbitrate disputes under Section 252(b).

2. U S WEST's Position

33. U S WEST argues that it has not engaged in discriminatory conduct because it has treated all carriers in accordance with the law at all times. If the result has been different treatment for different carriers it is because the law has changed, and it is not the result of discriminatory conduct. U S WEST argues that ATG's request is inconsistent with the

¹⁶ *NEXTLINK Washington, Inc. and U S WEST Communications, Inc.*, Docket No. UT-990340, Commission Order Adopting Recommended Decision, In Part, and Modifying Recommended Decision, In Part (September 9, 1999). In the NEXTLINK case, the Commission weighed the fact that NEXTLINK adopted its agreement while the FCC's pick and choose rule was stayed, that U S WEST did not allow requesting carriers to pick and choose arrangements while the stay was in effect, and that NEXTLINK promptly submitted its request to pick and choose the MFS arrangement after the Supreme Court overturned the stay.

Commission's Section 252(i) Policy Statement because the MFS Agreement has expired; therefore, ATG does not have the right to adopt the reciprocal compensation language of the MFS Agreement under Section 252(i).

34. U S WEST also argues that the MFS reciprocal compensation arrangement includes the requirement that the parties commence negotiations on a new agreement no later than two years after its effective date. According to U S WEST, the two-year date has expired, ATG would be in default immediately upon approval of its request, and the request should therefore be denied.

35. Alternatively, U S WEST argues that ATG should not be allowed to benefit from the MFS arrangement subsequent to the effective date of a new agreement between MFS and U S WEST. Therefore, U S WEST proposes that it provide ATG with 90 days' advance written notice when the MFS Agreement will no longer be in effect.

3. Discussion and Decision

36. As mentioned above, the Commission recently issued a policy statement consisting of ten guiding principles as it fulfills its regulatory obligation to implement Section 252(i) of the Telecom Act and the FCC's pick and choose rule. Principle 6 of the Commission's Section 252(i) Policy Statement addresses the period of time during which arrangements must be made available:

The "reasonable period of time" during which arrangements in any interconnection agreement (including entire agreements) must be made available for pick and choose by a requesting carrier extends until the expiration date of that agreement. A requesting carrier may not receive arrangements from any agreement after the expiration date.

Section 252(i) Policy Statement, at page 4, ¶ 18.

37. Thus, under this guideline, the MFS reciprocal compensation arrangement need not be made available to ATG if the MFS Agreement has expired. This issue also arose in a recent FCC case (Global NAPS-New Jersey Order).¹⁷ In the Global NAPS-New Jersey Order, the FCC referred to a dispute arising under Section 252(i) regarding the expiration date of the agreement being adopted:

. . . [A] carrier opting-into an existing agreement takes all of the terms and conditions of that agreement (or the [requested] portions of that agreement), including its original expiration date. It appears from the

¹⁷ *In the Matter of Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, CC Docket No. 99-154, 14 FCC Rcd 12530 (1999).

record that one of the disputes between the parties was over the termination date of the agreement being opted-into. This dispute underscores the importance of contractual terms that unambiguously establish a termination date.

Global NAPS-New Jersey Order at 12534, footnote 25. While the FCC's discussions may be dictum, its relevance is clear. A similar dispute arises in this case, and the provisions of the MFS Agreement fail to establish an unambiguous termination date. The MFS Agreement does not include a definitive expiration date, and individual arrangements in that agreement must be made available to requesting carriers.

38. The MFS Agreement states:

This Agreement shall be effective for a period of 2 ½ years, and thereafter the Agreement shall continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective.

MFS Agreement, Section XXXIV.V, at page 87.

39. ATG argues that the MFS Agreement is ambiguous because it both provides that the agreement is effective for a period of 2 ½ years subsequent to its approval, *and* that it remains effective unless and until a new agreement, addressing all of the terms of the initial agreement, is approved by the Commission. Although a 2 ½ year term can be readily determined, the effective date of a new agreement cannot be determined unless a new agreement is submitted for approval. ATG persuasively argues that the effective term of the MFS Agreement is ambiguous. The ambiguity in Section XXXIV.V cannot be resolved on the basis of language in the MFS Agreement alone.

40. The term “expire” is defined as “to come to an end,” and “terminate” is defined as “to come to an end in time.”¹⁸ Although Section XXXIV.Q (entitled “Survival”) states that the parties’ obligations shall survive the termination or expiration of the agreement, there are no other terms that expressly provide for the termination or expiration of rights under the MFS Agreement. The only terms that could possibly result in the termination of MFS’s rights under the agreement are stated in Section XXXIV.JJ (entitled “Default”). That section provides that U S WEST may seek legal and/or regulatory relief if MFS fails to meet its obligations under the agreement. However, Section XXXIV.V merely obligates the parties to commence negotiations. The parties are not obligated to enter into a new agreement, and there are no express provisions that allow U S WEST to terminate the initial agreement if a new agreement does not timely become effective.

¹⁸ Webster’s Collegiate Dictionary, Tenth Edition, pp. 409 and 1216 (1996).

41. Section XXXIV.V in the MFS Agreement stands in marked contrast to contract language that appears in recently negotiated U S WEST interconnection agreements. For example, the Commission recently approved a negotiated amendment to the original agreement between U S WEST and NEXTLINK.¹⁹ The amendment states that the agreement will expire on August 15, 2000, and sets forth express conditions which must be met in order for the Agreement to remain in effect past that date and not terminate.

42. Another example is the interconnection agreement between U S WEST and Digital Communications, Inc. (Digital Agreement).²⁰ Section XXXIV.V of the Digital Agreement provides that the agreement shall terminate on December 15, 2000. If Digital fails to extend the effective period of the agreement past that date by meeting certain specific conditions, the agreement expressly provides that it terminates and Digital must take service under tariffs that are generally available to all carriers until a new agreement is effective between the parties.

43. The MFS Agreement was the first interconnection agreement approved by the Commission pursuant to the Telecom Act, and the contractual language of the "Term of Agreement" section in U S WEST agreements has changed considerably since then, including the addition of express terms for termination. The change in standard contract language provides a frame of reference for resolving the ambiguity in the MFS Agreement. The absence of any terms in the MFS Agreement that provide for the termination or expiration of rights prior to a new agreement conflicts with the purported 2 ½ year effective period.

44. U S WEST argues that the intent of the parties to the MFS Agreement was to ensure continuity of service arrangements during negotiations between the parties for a successor agreement. This purported intent is not evident on the face of the MFS Agreement, and the conduct of the parties is inconsistent with that argument.

45. If U S WEST and MFS acted in strict compliance with their agreement, they would have initiated negotiations on a successor agreement no later than January 8, 1999. However, neither U S WEST nor MFS have requested that the Commission approve a new agreement, addressing all of the terms of the initial agreement, subsequent to that date. The inference that the parties continue after more than a year to negotiate in good faith is unsupported in the record and is not credible.

¹⁹ *In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between NEXTLINK Washington, Inc., and U S WEST Communications, Inc.*, Docket No. UT-960356, Order Approving Negotiated Amended Agreement for Interconnection and Resale of Services (November 16, 1999).

²⁰ *In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Digital Communications, Inc. and U S WEST Communications, Inc.*, Docket No. UT-993006, Order Approving Negotiated Agreement for Interconnection and Resale of Services (November 30, 1999).

46. Under the Telecom Act, parties are required to negotiate for 135-160 days prior to petitioning the Commission to arbitrate open issues. This requirement establishes a reasonable time period for the parties to conclude negotiations and identify issues that cannot be resolved without additional process. The conduct of U S WEST and MFS leads to the conclusion that the initial agreement was intended to be effective for an indefinite period of time unless and until a new agreement becomes effective.

47. Furthermore, on July 12, 1999 (five days after their agreement supposedly expired), U S WEST and MFS jointly requested that the Commission approve an amendment to their initial agreement, adding a new section regarding cageless physical collocation (MFS Amendment No. 1).²¹ The terms of the MFS Agreement were not modified in any other way. The MFS Amendment No. 1 states:

The [initial] Agreement remains in full force and effect.

MFS Amendment No. 1, Section VII.F.6, at page 10.

48. On December 13, 1999, U S WEST and MFS again jointly requested that the Commission approve an amendment to their initial agreement (MFS Amendment No. 2).²² Amendment No. 2 deletes Section VI.I.2(b) in its entirety and inserts a new Section VI.I.6 modifying U S WEST's obligation to provide MFS with network traffic reports. The MFS Amendment No. 2 states:

Except as modified herein, the provisions of the [initial] Agreement shall remain in full force and effect.

MFS Amendment No. 2, at page 2, ¶ 4. U S WEST's argument that the MFS Agreement expired on or about July 8, 1999, is contradicted by amendments to the initial agreement. U S WEST cannot credibly argue that its agreement with MFS expired in the face of its subsequent agreed amendment stating that the initial agreement remains in full force and effect.

49. The provision in the MFS Agreement that, "[t]he parties agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective," does not evidence an intent that the agreement expire on July 8, 1999. U S WEST interprets Section XXXIV.V as if it obligated the parties to commence negotiations *no later than six*

²¹ *In the Matter of the Petition for Arbitration of An Interconnection Agreement Between MFS Communications Company, Inc., and U S WEST Communications, Inc.*, Docket No. UT-960323, Amendment No. 1 to the Interconnection Agreement Between MCI Worldcom Communications, Inc. f/k/a MFS Intelenet, Inc. and U S WEST Communications, Inc. for the State of Washington (filed July 12, 1999).

²² *In the Matter of the Petition for Arbitration of An Interconnection Agreement Between MFS Communications Company, Inc., and U S WEST Communications, Inc.*, Docket No. UT-960323, Amendment No. 2 to the Interconnection Agreement Between U S WEST Communications, Inc. and MCI Worldcom Communications, Inc. f/k/a MFS Intelenet, Inc. for the State of Washington (filed December 13, 1999).

months prior to its expiration; however, that interpretation is inconsistent with the plain language of the agreement, and goes to the heart of the issue. The agreement between the parties that negotiations commence on a specific date does not implicate the date on which the agreement expires.

50. We again note that the goals of the Telecom Act are to deter discriminatory treatment of carriers and to promote competition.²³ These goals favor making the MFS reciprocal compensation arrangement available to ATG and other requesting carriers. The MFS reciprocal compensation arrangement is currently effective between numerous CLECs and U S WEST pursuant to requests that the MFS Agreement be made available in its entirety. Furthermore, U S WEST fails to provide evidence that terms comprising the MFS arrangement are unfair or unreasonable under 47 C.F.R. § 51.809(b).

51. ATG requests that U S WEST make available the same reciprocal compensation arrangement that the Commission ordered U S WEST to provide in the NEXTLINK case. In that case, an agreement between U S WEST and NEXTLINK provided that either party could seek an alternate reciprocal compensation plan if terminating traffic was sufficiently out of balance. NEXTLINK requested that the terms in Article V, § D, Appendix A - Local Call Termination rates, and associated terms from the MFS Agreement be made available as an arrangement. The Commission upheld NEXTLINK's request based on its claim for contractual relief. However, the Commission also concluded that NEXTLINK was entitled to the MFS reciprocal compensation arrangement under Section 252(i) based on equitable considerations. Those same equitable considerations exist in this case: ATG adopted an interconnection agreement in its entirety while the pick and choose rule was stayed; U S WEST did not allow requesting carriers to pick and choose at that time; and ATG timely submitted its request to U S WEST after the FCC's pick and choose rule was reinstated.

52. To review relevant chronology, the Eighth Circuit Court of Appeals stayed operation of the FCC's pick-and-choose rule in October 1996. The MFS and COVAD Agreements were approved by the Commission on January 8, 1997, and April 22, 1998, respectively. Subsequent to the stay of Rule 51.809, U S WEST did not make pick-and-choose available, and the Commission, swayed by the Eighth Circuit Court stay, declined to support pick-and-choose as a matter of state policy.²⁴ In November 1998, ATG sought to enter the local market, and along with U S WEST jointly requested approval of an interconnection agreement based on the COVAD Agreement. The Commission approved the ATG Agreement on December 9, 1998.

²³ Local Competition Order, 11 FCC Rcd at 16139, ¶ 1315. Also see 47 U.S.C. § 251(c)(2)(D).

²⁴ See *In the Matter of the Petition for Arbitration of An Interconnection Agreement Between TCG SEATTLE and U S WEST Communications, Inc.*, Docket No. UT-960326, comments of Chairman Nelson, Commissioner Hemstad, and Commissioner Gillis, Transcript Volume 3, page 484-490 (January 13, 1997).

53. On January 25, 1999, the U.S. Supreme Court held that the FCC's pick-and-choose rule is consistent with the Telecom Act. On June 10, 1999, the Eighth Circuit Court formally reinstated FCC Rule 51.809. On October 14, 1999, ATG notified U S WEST of its request that the MFS reciprocal compensation arrangement be made available, and on November 3, 1999, ATG filed its petition in the instant proceeding. Under the narrow facts of this case, ATG presented its request to U S WEST and acted to enforce its rights under Rule 51.809 within a reasonable period of time.

54. In light of the totality of the circumstances surrounding ATG's initial request for approval of an interconnection agreement, the reinstatement of FCC Rule 51.809, and ATG's timely petition for enforcement, ATG is entitled to receive the reciprocal compensation arrangement from the MFS Agreement pursuant to §252(i).

55. The Commission's Section 252(i) Policy Statement, Principle 10, places on ILECs the burden of proving that certain terms and conditions are legitimately related to requested arrangements. We reject U S WEST's argument that the term requiring the parties to initiate negotiations on a new agreement is inseparable from the expiration date in the MFS Agreement. The requirement that negotiations be conducted is severable from the expiration date of the agreement because termination of the agreement does not depend on negotiations being conducted.

56. The lack of a definite termination date in the MFS Agreement raises the issue of when the arrangement requested by ATG should expire. Principle 8 of the Commission's Section 252(i) Policy Statement addresses the time period during which an arrangement must be made available:

An interconnection agreement or arrangement made available pursuant to Section 252(i) must be made available for the specific time period during which it is provided under the interconnection agreement from which it was selected. For example, if the interconnection arrangement was included in an agreement that expired on December 31, 2000, it must be made available to other carriers only until December 31, 2000.

Section 252(i) Policy Statement, at page 4, ¶ 20.

57. An interpretive and policy statement is not a Commission order; nor is it binding on the Commission or parties who may come before it in formal proceedings.²⁵ The general purpose of the Commission's Section 252(i) Policy Statement is to establish guidelines for carriers making requests and to inform the telecommunications industry of how the Commission plans to implement the requirements of Section 252(i) and the FCC's pick and choose rule. The Policy Statement adopts principles limiting the period during which an interconnection agreement

²⁵ RCW 34.05.230 states that agency interpretive and policy statements are advisory only.

and/or arrangement must be made available for pick and choose. The purpose of limiting the availability of interconnection arrangements to the time period during which they are available is to ensure equitable and nondiscriminatory treatment of all carriers. In this case, the strict application of Principle 8 would not be fair or reasonable.

58. It would be inequitable to ATG to associate an effective term with the MFS arrangement that would be subject to expiration upon the approval of a new agreement between MFS and U S WEST.²⁶ In that case, ATG likely would receive insufficient notice that it must plan an alternative arrangement. Likewise, it would be inequitable to U S WEST if ATG received the MFS arrangement for an indefinite term or for any longer than necessary to provide ATG with sufficient notice.

59. The Commission finds that 90 days advance notice is a reasonable and sufficient period of time for ATG to plan an alternative arrangement. ATG chose to obtain interconnection rights pursuant to Section 252(i) rather than arbitration under Section 252(b). Consequently, ATG is not entitled to the same term it might otherwise have obtained for arrangements in its agreement. ATG may obtain an alternative arrangement through negotiation, arbitration, or subsequent exercise of its rights under Section 252(i).

60. The Commission rejects U S WEST's proposed modification because U S WEST may not be able to provide advance written notice 90 days before a new agreement becomes effective in all instances.²⁷

61. Commission Staff's recommendation ensures that U S WEST does not give notice to ATG before all relevant negotiations with MFS are concluded, and the recommendation provides ATG a reasonable and sufficient opportunity to replace the arrangement before it expires.

62. The most just and reasonable termination date to associate with the MFS arrangement is that it expires either (a) 90 days after a request for approval of a new agreement between MFS and U S WEST is filed with the Commission, or (b) on the expiration date of the ATG Agreement (May 1, 2001), whichever event occurs first.

63. This alternative provision establishes a definite date on which the reciprocal compensation arrangement will expire. U S WEST must provide ATG with written notice on the filing of a request for approval of a new agreement between MFS and U S WEST with the Commission, whether it be negotiated, arbitrated, or adopted under Section 252(i).

²⁶ Upon the approval of a new agreement, the current agreement expires and U S WEST will no longer be required to make arrangements available from it.

²⁷ For instance, voluntary negotiated agreements generally are reviewed and approved by the Commission under Section 252(e) within thirty days after a request for approval is filed.

B. Did U S WEST Breach a Duty to Negotiate in Good Faith with ATG?

64. Neither party petitioned for review of the Recommended Decision's finding on this issue. Accordingly, the Commission affirms and adopts the finding that U S WEST did not breach a duty to negotiate in good faith with ATG

1. ATG's Position

65. After ATG agreed to all additional terms proposed by U S WEST in response to ATG's request to make the MFS reciprocal compensation arrangement available, U S WEST notified ATG that its request was denied. ATG argues that U S WEST's denial of its request subsequent to ATG's acceptance of U S WEST's additional terms constitutes bad faith negotiation in violation of Section 251(c)(1) of the Telecom Act.

2. U S WEST's Position

66. U S WEST argues that it changed its position and denied ATG's request only after reviewing the Commission's draft Section 252(i) Policy Statement, served on October 15, 1999. U S WEST explained its new-found basis for denying ATG's request in correspondence dated October 29, 1999. U S WEST argues that there is no bad faith associated with its attempt to protect its rights under what it believes to be a change in the law or interpretation of the law.

3. Discussion and Decision

67. ATG requests that U S WEST make available the reciprocal compensation arrangement from the MFS Agreement pursuant to Section 252(i). The Commission's Section 252(i) Policy Statement and its orders in the NEXTLINK case make clear that carriers are not required to engage in negotiations as a precondition to exercising rights under Section 252(i). Since there is no duty to negotiate, there can be no violation of Section 251(c)(1).

68. Even if a requirement to negotiate in good faith exists, U S WEST did not breach its duty. Negotiations between the parties occurred contemporaneously with the service of the Commission's draft Section 252(i) Policy Statement. U S WEST notified ATG of its change in position based on its review of the draft Policy Statement within a reasonable time after being served. A *bona fide* dispute exists between the parties regarding the effective term of the MFS Agreement based upon the draft Section 252(i) Policy Statement principles that were served and subsequently adopted by the Commission. Under these circumstances, ATG's claim that U S WEST acted in bad faith is unfounded.

III. OTHER MATTERS

69. In all other respects, the Commission affirms and adopts the Recommended Decision.

70. Having considered the Recommended Decision and comments filed by the parties, the entire record herein, and all written and oral comments made to the Washington Utilities and Transportation Commission, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

71. Having discussed in detail the evidence concerning all material matters and having stated our findings of fact and conclusions of law in the text of the Order, the Commission now makes the following summary of those comprehensive determinations. Those portions of the preceding detailed findings and conclusions pertaining to the Commission's ultimate findings and conclusions in this matter are incorporated by this reference.

72. The Washington Utilities and Transportation 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.

73. The Washington Utilities and Transportation Commission is designated by the Telecommunications Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to Sections 251 and 252 of the Telecom Act. The Commission is specifically authorized by state law to engage in that activity. RCW 80.36.610.

74. U S WEST Communications, Inc. (U S WEST), 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 Telecom Act.

75. Advanced TelCom Group, Inc. (ATG), is a telecommunications carrier as defined in the Telecom Act, and is operating within the state of Washington, and provides basic local exchange services within the U S WEST service area.

76. The Commission previously approved a negotiated interconnection agreement (Agreement) between the parties pursuant to 47 U.S.C. § 252 of the Telecom Act on April 22, 1998.

77. The Agreement provides that if the parties modify or amend their approved agreement pursuant to rights established in the agreement or by statute, the modified or revised agreement is deemed to be a new agreement and must be submitted to the Commission for approval, prior to taking effect.

78. In October 1999, ATG requested that U S WEST make available the reciprocal compensation arrangement in the MFS Agreement under Section 252(i).

79. U S WEST rejected ATG's request.

80. On November 3, 1999, ATG filed a petition for expedited enforcement of its interconnection agreement with U S WEST under WAC 480-09-530.

81. Evidentiary proceedings concluded on December 17, 1999. On January 14, 2000, a Recommended Decision was issued resolving disputed issues.

82. On January 21, 2000, the parties each filed comments seeking review of the Recommended Decision, and requested approval of and modifications to the Recommended Decision. Commission Staff and the parties addressed the Recommended Decision at an open meeting on January 31, 2000.

83. Negotiations between the parties occurred contemporaneously with the service of the Commission's draft Section 252(i) Interpretive and Policy Statement.

84. The MFS Agreement remains in full force and effect unless and until a new agreement, addressing all of the terms of the current agreement, becomes effective between the parties.

85. Ninety days' advance notice that a request for approval of a new agreement between MFS and U S WEST has been filed with the Commission is a reasonable and sufficient period of time for ATG to plan an alternative reciprocal compensation arrangement.

86. The most just and reasonable termination date to associate with the MFS arrangement is that it expires either (a) 90 days after a request for approval of a new agreement between MFS and U S WEST is filed with the Commission, or (b) on the expiration date of the ATG Agreement (May 1, 2001), whichever event occurs first.

CONCLUSIONS OF LAW

87. The Commission has jurisdiction over the subject matter and parties to this proceeding.

88. Pursuant to Section 252(i) of the Telecom Act, a local exchange carrier must 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 on the same terms and conditions as those provided in the agreement.

89. The FCC leaves to state commissions in the first instance the details of the procedures for making arrangements available to requesting carriers under §252(i) on an expedited basis.

90. Section 252(i) of the Telecom Act provides that U S WEST must make available to ATG the reciprocal compensation arrangement that is contained in the MFS Agreement.

91. Carriers are not required to engage in substantive negotiations when a request is made under Section 252(i). Good-faith negotiations of a request under §252(i) require only that a CLEC formally notify the ILEC that it is requesting a specific arrangement.

ORDER

THE COMMISSION ORDERS:

92. The Commission approves ATG's request that U S WEST make available to ATG the reciprocal compensation arrangement in the MFS Agreement under Section 252(i) of the Telecom Act. The arrangement is effective between U S WEST and ATG on the date this Order is entered.

93. The termination date of the MFS arrangement is that it expires either (a) 90 days after a request for approval of a new agreement between MFS and U S WEST is filed with the Commission, or (b) on the expiration date of the ATG Agreement (May 1, 2001), whichever event occurs first.

94. U S WEST must provide ATG with written notice of the filing of a request for approval of a new agreement between MFS and U S WEST with the Commission, whether the agreement be negotiated, arbitrated, or adopted under Section 252(i), no later than the date the request for approval is filed.

95. The reciprocal compensation arrangement that the Commission approves in this Order is subject to further order of this Commission. The arrangement may be affected by orders in Docket No. UT-960369 or proceedings following that docket, or FCC proceedings to determine reciprocal compensation for ISP-bound traffic.

96. Within seven days of service of this Order the parties must execute and file a revised interconnection agreement incorporating the reciprocal compensation arrangement approved in this Order.

97. In the event that the parties further revise, modify, or amend the agreement approved herein, the revised, modified, or amended agreement shall be deemed a new negotiated agreement under the Telecommunications Act and the parties must submit it to the Commission

for approval, pursuant to 47 U.S.C. § § 252(e)(1) and relevant provisions of state law, before the agreement may take effect.

DATED at Olympia, Washington, and effective this day of February 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner