BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between	)	DOCKET NO. UT-960347
SPRINT COMMUNICATIONS COMPANY L.P. and U S WEST COMMUNICATIONS, INC.	)	ARBITRATOR=S REPORT AND DECISION
Pursuant to 47 USC ' Section 252.	)	

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I. INTRODUCTION

A. Procedural History

On April 15, 1996, Sprint Communications Company L.P. ("Sprint") requested negotiations with U S WEST Communications, Inc. ("USWC") for interconnection under the terms of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, codified at 47 USC ' 151 et seq. (the "1996 Act" or "the Act")

On September 20, 1996, Sprint timely filed with the Commission and served on USWC a request for arbitration pursuant to 47 USC ' 252(b)(1). The matter was designated Docket No. UT-960347. On October 10, 1996, the Commission entered an Order on Arbitration Procedure appointing the undersigned as arbitrator and establishing certain procedural requirements. USWC timely filed its response to the petition.

AFinal offer@ arbitration was adopted for this arbitration pursuant to the Arbitrator=s Second Procedural Order. In preparing the arbitration report in this matter, the arbitrator will select between the parties= last proposals as to each unresolved issue, selecting the proposal which is most consistent with the requirements of state and federal law and Commission policy. The arbitrator will choose either an entire proposal, or choose between parties= proposals on an issue-by-issue basis. In the event that neither proposal is consistent with law or Commission policy, the arbitrator will render a determination in keeping with those requirements.

A hearing was held before the arbitrator on December 12, 1996, in the Commission's main hearing room in Olympia, Washington. Sprint was represented by Richard L. Goldberg, attorney. USWC was represented by Lisa Anderl, attorney. Following the hearing, the parties filed final briefs and "last best offers" on January 3, 1996.

B. Eighth Circuit Order and the FCC Rules

As the parties are aware, the FCC rules[1] implementing the local competition provisions of the Act have been appealed and those rules relating to costing and pricing have been stayed by the United States Court of Appeals for the Eighth Circuit.[2] The provisions of the FCC order and rules not subject to stay are adhered to in this report.

II. RESOLUTION OF DISPUTED ISSUES

Issue No. 1: "Most Favored Nations" (MFN) Provision

Sprint Position

Sprint takes the position that the language of 47 USC ' 252(I) is clear in requiring that any component of an interconnection agreement be made available to other carriers. Sprint argues that, notwithstanding the Eighth Circuit stay, the Commission is free to adopt an interpretation of the statute consistent with Sprint's position.

USWC Position

USWC disagrees with Sprint's reading of the Act. USWC takes the position that Sprint's (and the FCC's) "pick and choose" interpretation is plainly inconsistent with the Act and undermines the entire negotiation process. It urges the Commission to adhere to the Eighth Circuit stay on this issue. Among other things, USWC points out that the FCC has expanded MFN beyond terms and conditions to include rates, although section 252(I) does not expressly reference rates.

Contract Provision(s)

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[1] *In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (August 8, 1996), Appendix B-Final Rules.

[2] *Iowa Utilities Board et al. v. FCC*, No. 96-3321, Order Granting Stay Pending Judicial Review (8th Cir. Oct. 15, 1996). The order also stays the AMFN@ rule. *See also,* Order Lifting Stay in Part (November 1, 1996)(stay lifted for 47 CFR '' 51.701, 51.703, and 51.717).

Section 33.2

Arbitrator's Decision

The arbitrator adopts the USWC position.

Discussion

The "pick and choose" interpretation advocated by Sprint, as noted, has been adopted in the FCC rules 47 CFR ' 51.809(a) and stayed by the Eighth Circuit. The arbitrator will adhere to the Eighth Circuit order. While the rule is stayed, section 252(I) itself applies to the agreement, however. USWC's proposed contract language acknowledges the application of the provision and of any state and federal interpretations in effect from time to time. The language is reasonable.

Issue No. 2: Interim Number Portability (INP); Sharing of Access Revenues

Sprint Position

Sprint advocates that terminating access revenues should be assessed pursuant to meet-point billing arrangements consistent with the FCC Number Portability Order.[3] Sprint urges that, to the extent USWC's entrance facilities, serving wire center, and access tandem switching are involved in transporting the call to the meet point, USWC should receive access charges and share transport charges with Sprint. To the extent Sprint is providing transport from the meet point, local switching and a line to the end user, Sprint should receive the local switching, residual interconnection charge (RIC), and carrier common line charge, and share transport charges with USWC.

USWC Position

USWC has filed an action in the United States Court of Federal Claims to challenge the Number Portability Order. USWC argues that the FCC Number Portability Order and the Sprint position result in an unconstitutional taking of USWC's property because it requires USWC to provide services and incur costs for which it will not be compensated.

USWC also argues that its charges for Remote Call Forwarding only recover routing and look-up charges and not switching and transport. For interexchange calling, USWC assesses four charges to the IXC: local transport, local switching, interconnection, and carrier common line charges. While acknowledging that the FCC has mandated a different result, USWC argues that it should be allowed to retain the local switching and

[3] *In the Matter of Telephone Number Portability*, First Report and Order, CC Docket No. 95-116, FCC 96-286 (released July 2, 1996)(FCC Number Portability Order) & 140.

local transport charges from IXCs with regard to ported calls. As a compromise, USWC proposes to forward carrier common line charges to Sprint.

Contract Provision(s)

Section 8.1.8

Arbitrator=s Decision

The arbitrator adopts the Sprint position.

Discussion

The FCC Number Portability order addresses the appropriate treatment of terminating access charges in the interim number portability context. While the FCC generally approves the model of meet-point billing arrangements between neighboring incumbent LECs, it requires incumbent LECs and competitors to share in the access revenues received for a ported call.

The FCC order states:

> A[W]e direct forwarding carriers and terminating carriers to assess on IXCs charges for terminating access through meet-point billing arrangements....It is up to the carriers whether they each issue a bill for access to one ported call, or whether one of them issues a bill to the IXCs covering all of the transferred calls and shares the correct portion of the revenues with the other carriers involved.@ *Id.*

Sprint=s contract language is reasonable, based upon the functions and facilities provided by the carrier for call forwarding or termination. This result takes into account the fact that USWC receives compensation for INP costs by means of the Remote Call Forwarding charges agreed to by the parties in this negotiation.

Issue No. 3: Resale Restrictions

In the Arbitrator's Third Procedural Order the parties were directed to clarify whether their resale dispute includes the cross-class selling issue, or extends to the type of services which must be resold. USWC reports in its final brief that the parties have agreed on which services are available for resale and that the voice mail issue is not present in this proceeding.

USWC Position

USWC proposes that its services should be resold only for their "intended or disclosed use" and only to the same class of customers eligible to purchase the service from USWC.

USWC expresses a particular concern with the resale of Centrex service to other than business customers. USWC argues that Centrex was designed for a campus environment in the business market, not for resale to the residential market. USWC sees a potential adverse impact on at least three revenue streams: switched access charges, toll revenue, and features. USWC also argues that Centrex resale in the residential market would be inconsistent with Washington's average pricing philosophy. Finally, USWC notes that the Commission approved a restriction on resale of Centrex in a recent order.

Sprint Position

Sprint would agree to contract provisions which explicitly reject the resale of residential services to business customers and of lifeline services to eligible users. It objects to USWC's position as unreasonable.

Contract Provision(s)

Section 29.2.5

Arbitrator's Decision

The arbitrator adopts the USWC position, subject to the discussion below.

Discussion

Section 251(c)(4)(B) prohibits unreasonable limitations or conditions on resale. As noted above, the FCC has concluded generally that Aresale restrictions are presumptively unreasonable.@ *FCC Interconnection Order*, & 939. Incumbent LECs can rebut the presumption by showing that the restriction is narrowly tailored. *Id.* The FCC identified only two restrictions it found reasonable: (1) restrictions on resale of short-term promotions; and (2) restrictions on cross-class selling of residential and Lifeline service. *Id.*, & 950, 962. *See also*, 47 CFR ' 51.613 (not subject to stay).

The difficulty with USWC=s general position is that it appears to permit imposition of restrictions beyond those identified by the FCC.[4] As a practical matter,

[4]Although USWC=s proposed contract language can arguably read to be consistent with the Act, the position argued by USWC at hearing and in the briefs makes clear that USWC would interpret the language

however, USWC=s concern with resale of business services to the residential class of subscribers is limited to Centrex. Tr. 63-64 (Moran). USWC indicated that it could accept a restriction tailored to Centrex only. Tr. 64 (Moran).

USWC argues that the Eighteenth Supplemental Order in Docket UT-950200 authorized imposition of a requirement that Centrex be sold within class.[5] The Eighteenth Supplemental Order was restating, however, not changing the Fifteenth Supplemental Order in the docket, which had allowed USWC to include a general tariff provision restricting resale out of class. Fifteenth Supplemental Order, Docket No. UT-950200, p. 123. This resale restriction is not specific to Centrex.

Sprint should not be allowed to resell in a way which is prohibited by the USWC tariff. However, based on the hearing testimony, it appears that Centrex resale would not necessarily be subject to the Aout of class@ restriction in any event. USWC acknowledged that Centrex is not classified by tariff as a business service. Tr. 59-60 (Moran). USWC also conceded that if an apartment owner requested Centrex to serve multiple units in an apartment, USWC=s tariff would require them to provide the service. Tr. 61-62 (Moran). Further, USWC stated that if the Commission approves withdrawal of Centrex service with grandfathering of existing customers, USWC would not object to Sprint taking over the Centrex service on a resale basis. Tr. 63 (Moran). Application of the general restriction to the Centrex situation should be interpreted in this light.

Issue No. 4: "Finished Service" Unbundling

USWC Position

USWC opposes what it terms "sham unbundling," by which means Sprint could purchase unbundled network elements in a manner and form that would enable it to recombine the elements into a "finished service" for resale without providing any of its own facilities. USWC argues that this approach is contrary to the intent of the 1996 Act and would destroy the competitive balance. USWC also expresses a concern that new entrants could purchase the elements necessary to provide access and thereby avoid the payment of access charges to USWC.[6]

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as permitting broader restrictions than those allowed under the FCC order.

[5] *Washington Utilities and Transportation Commission v. U S WEST Communications, Inc.*, Docket No. 950200, Eighteenth Supplemental Order, December 26, 1996, p. 8. *Amended and clarified*, Nineteenth Supplemental Order, December 30, 1996 (modifications not relevant here).

[6] The FCC may have addressed this problem in a subsequent Order on Reconsideration in the local competition rules docket. CC Docket No. 96-98, Order On Reconsideration, FCC 96-394 (September 27, 1996).

USWC acknowledges that the FCC has interpreted the Act to preclude such limitations. In support of its position, USWC cites an amicus brief filed by four Congressmen in the Eighth Circuit appeal. Post-hearing Brief of USWC, p. 17.

Sprint Position

Sprint opposes the adoption of any restrictions on the combination of unbundled elements to provide new service as contrary to the 1996 Act.

Contract Provision(s)

30.1.2

Arbitrator's Decision

The arbitrator adopts the position of Sprint.

Discussion

The 1996 Act states, in pertinent part, that it is:

> AThe duty [of the incumbent LEC] to provide, to any requesting telecommunications carrier *for the provision of a telecommunications service*...access to network elements on an unbundled basis[.] An incumbent local exchange carrier shall provide such unbundled network elements in a manner *that allows requesting carriers to combine such elements in order to provide such telecommunications service*.@ 47 USC ' 251(c)(3)(emphasis added).

The Act, on its face, therefore, appears to expressly permit the combination of elements by a requesting carrier for the purpose of providing a telecommunications service. As Sprint notes, the FCC takes this view, finding no basis to conclude from the Act=s language Aa limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements.@ *FCC Interconnection Order*, &328.[7] Consistent

[7] *See generally, FCC Interconnection Order*, && 329-341. The FCC rejects many of the arguments raised here by USWC, stating, for example:

> We disagree with the premise that no carrier would consider entering local markets under the terms of section 251(c)(4) [resale] if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections

with this interpretation, the FCC rules permit the combination of unbundled elements by requesting carriers to provide a telecommunications service. 47 CFR ' 51.315(a). This section of the FCC rules is not subject to the Eighth Circuit stay.

Issue No. 5: Performance Measures and Standards

Sprint Position

Sprint argues that the Act requires USWC to provide parity of service, that is, service at least equal in quality to that which it provides itself. Sprint considers specific, enforceable quality standards an essential component of any contract between an incumbent and new entrant. Standards provide a means to measure whether parity of service is being provided and a means to deter anticompetitive conduct by the incumbent.

Sprint believes the Commission should require USWC to provide Sprint with detailed specifications showing all of its existing service quality and performance standards.

Sprint points out that both parties' witnesses at the hearing recognized the need to continue working to develop performance quality measurements and the utility of having the Commission encourage this process. Sprint expressed its willingness to negotiate with USWC regarding compensation where additional measurements are necessary and additional costs are incurred.

During negotiations, Sprint proposed twenty-one specific performance measures. To date, USWC has agreed to twelve of these.

USWC Position

USWC acknowledges that it must provide Sprint with service equal in quality to that which it provides itself.

It is willing to adopt the twelve agreed quality measures. With respect to the nine disputed measures, USWC argues that Sprint should use the bona-fide request

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251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets[.]

Id., **&** 331.

process and pay for the additional cost. To the extent other competitive local exchange carriers want the measure, the additional costs would be shared.

USWC opposes the adoption of the AT&T/Pacific standards submitted in Sprint's final offer as Attachment 17, particularly because they contain liquidated damages provisions.

Contract Provision(s)

Section 31

Arbitrator's Decision

The arbitrator adopts the USWC position, subject to the discussion below.

Discussion

The 1996 Act requires incumbent LECs to provide interconnection Athat is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection.@ 47 USC ' 251(c)(2)(B). This non-discrimination requirement is echoed in the unbundling and resale provisions of the Act. 47 USC ' 251(c)(3) and (4).

The FCC Interconnection Order concludes that the Aequal in quality@ standard of section 251(c)(2) requires an incumbent LEC to provide service to a CLEC that is indistinguishable from that it provides itself. The FCC further concludes that this obligation is not limited to the level of quality perceived by end-users, pointing out that such a standard could provide opportunities for discriminatory practices harmful to competitors, though not perceived by end-users, such as in pricing and ordering. *FCC Interconnection Order*, & 224, 314. The FCC also declared the standard to be a minimum and Ato the extent a carrier requests interconnection of superior or lesser quality than an incumbent LEC currently provides, the incumbent LEC is obligated to provide the requested interconnection arrangement if technically feasible [.] as long as new entrants compensate incumbent LECs for the economic cost of the higher quality interconnection.@ *Id*. & 225, 314.

The FCC rules adopted pursuant to the order require the Aequal in quality@ standard. 47 CFR ' 51.311(a). In addition, however, the rules provide that, to the extent technically feasible, the quality of elements and access Ashall, upon request, be superior in quality to that which the incumbent LEC provides to itself.@ 47 CFR ' 51.311(c). If the incumbent fails to meet the requirement, it must prove to the state commission that it is not technically feasible to do so. *Id.*

The precise positions of the parties on this issue were somewhat unclear. This was the case, at least in part, because the proposed contract language did not appear, on either side, to incorporate all the positions set out in the briefs. It is unclear, for example, whether the agreed measures (12 of 21) are reflected in the drafts.

While many of Sprint's points are valid, I am unwilling to require USWC to adopt the standards in Attachment 17 as "parity" standards, nor am I prepared to incorporate the liquidated damage provisions it contains.[8]

The parties are agreed that USWC should provide parity and have agreed to twelve specific performance measures. These terms should be incorporated in the agreement language. The agreement should include a requirement that USWC must provide complete information to Sprint as to its existing standards so that the parties can more readily determine that parity is being offered. As to the remaining nine standards sought by Sprint, or the additional items in Attachment 17, I will accept the USWC testimony that these go beyond parity. These items should be negotiated in a bona-fide request process. The general issue of prices for superior levels of service can also be addressed in the generic proceeding.

III. IMPLEMENTATION SCHEDULE

Pursuant to 47 USC ' 252(c)(3), the arbitrator is to Aprovide a schedule for implementation of the terms and conditions by the parties to the agreement.@ In this case the parties did not submit specific alternative implementation schedules. Specific contract provisions, however, contain implementation timelines. The parties shall implement the agreement pursuant to the schedule provided for in the contract provisions, and in accordance with the 1996 Act, the applicable FCC rules, and the orders of this Commission.

In preparing a contract for submission to the Commission for approval, the parties may include an implementation schedule.

[8] At the hearing, Sprint stated it was not seeking an agreement providing for liquidated damages. Tr. 104-106.

IV. CONCLUSION

The foregoing resolution of the disputed issues in this matter meets the requirements of 47 USC ' 252(c).

The parties are directed to submit an agreement consistent with the terms of this report to the Commission for approval within 30 days, pursuant to the following requirements of the Interpretive and Policy Statement:[9]

Filing and Service of Agreements for Approval

1. An interconnection agreement shall be submitted to the Commission for approval under Section 252(e) within 30 days after the issuance of the Arbitrators= Report, in the case of arbitrated agreements, or, in the case of negotiated agreements, within 30 days after the execution of the agreement. The 30 day deadline may be extended by the Commission for good cause. The Commission does not interpret the nine month time line for arbitration under Section 252(b)(4)(C) as including the approval process.

2. Requests for approval shall be filed with the Secretary of the Commission in the manner provided for in WAC 480-09-120. In addition, the request for approval shall be served on all parties who have requested service (List available from the Commission Records Center. See Section II.A.2 of the Interpretive and Policy Statement) by delivery on the day of filing. The service rules of the Commission set forth in WAC 480-09-120 and 420 apply except as modified in this interpretive order or by the Commission or arbitrator. Unless filed jointly by all parties, the request for approval and any accompanying materials should be served on the other signatories by delivery on the day of filing.

3. A request for approval shall include the documentation set out in this paragraph. The materials can be filed jointly or separately by the parties to the agreement, but should all be filed by the 30 day deadline set out in paragraph 1 above.

Negotiated Agreements

[9] *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960269, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 (June 27, 1996)(AInterpretive and Policy Statement@)

a. A Arequest for approval@ in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party=s position as to whether the agreement should be adopted or modified, including a statement as to why the agreement does not discriminate against non-party carriers, is consistent with the public interest, convenience, and necessity, and is consistent with applicable state law requirements, including Commission interconnection orders.

b. A complete copy of the signed agreement, including any attachments or appendices.

c. A proposed form of order containing findings and conclusions.

Arbitrated Agreements

a. A Arequest for approval@ in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party=s position as to whether the agreement should be adopted or modified; and containing a separate explanation of the manner in which the agreement meets each of the applicable specific requirements of Sections 251 and 252, including the FCC regulations thereunder, and applicable state requirements, including Commission interconnection orders. The Arequest for approval@ brief may reference or incorporate previously filed briefs or memoranda. Copies should be attached to the extent necessary for the convenience of the Commission.

b. A complete copy of the signed agreement, including any attachments or appendices.

c. Complete and specific information to enable the Commission to make the determinations required by Section 252(d) regarding pricing standards, including but not limited to supporting information for (1) the cost basis for rates for interconnection and network elements and the profit component of the proposed rate. (2) transport and termination charges; and (3) wholesale prices.

d. A proposed form of order containing findings and conclusions.

Combination Agreements (Arbitrated/Negotiated)

a. Any agreement containing both arbitrated and negotiated provisions shall include the foregoing materials as appropriate, depending on whether a provision is negotiated or arbitrated. The memorandum should clearly identify which sections were negotiated and which arbitrated.

b. A proposed form of order is required, as above.

4. Any filing not containing the required materials will be rejected and must be refiled when complete. The statutory time lines will be deemed not to begin until a request has been properly filed.

Confidentiality

1. Requests for approval and accompanying documentation are subject to the Washington public disclosure law, including the availability of protective orders. The Commission interprets 47 USC ' 252(h) to require that the entire agreement approved by the Commission must be made available for public inspection and copying. For this reason, the Commission will ordinarily expect that proposed agreements submitted with a request for approval will not be entitled to confidential treatment.

2. If a party or parties wishes protection for appendices or other materials accompanying a request for approval, the party shall obtain a resolution of the confidentiality issues, including a request for a protective order and the necessary signatures (Exhibits A or B to standard protective order) prior to filing the request for approval itself with the Commission.

Approval Procedure

1. The request will be assigned to the Commission Staff for review and presentation of a recommendation at the Commission public meeting. The Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act. Staff who participated in the mediation process for the agreement will not be assigned to review the agreement.

2. Any person wishing to comment on the request for approval may do so by filing written comments with the Commission no later than 10 days after date of request for approval. Comments shall be served on all parties to the agreement under review. Parties to the agreement file written responses to comments within 7 days of service.

3. The request for approval will be considered at a public meeting of the Commission. Any person may appear at the public meeting to comment on the request for approval. The Commission may in its discretion set the matter for consideration at a special public meeting.

4. The Commission will enter an order, containing findings and conclusions, approving or rejecting the interconnection agreement within 30 days of request for approval in the case of arbitrated agreements, or within 90 days in the case of negotiated agreements. Agreements containing both arbitrated and negotiated provisions will be treated as arbitrated agreements subject to the 30 day approval deadline specified in the Act.

Fees and Costs

Each party shall be responsible for bearing its own fees and costs. Each party shall pay any fees imposed by Commission rule or statute.

DATED at Olympia, Washington and effective this 15th day of January 1997

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SIMON J. FFITCH
Arbitrator