

349
SERVICE DATE
APR 02 1998

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MCIMETRO ACCESS TRANSMISSION)	
SERVICES, INC.,)	
)	DOCKET NO. UT-971158
Complainant,)	
)	
v.)	ORDER DENYING PETITION
)	FOR RECONSIDERATION AND
U S WEST COMMUNICATIONS, INC.,)	GRANTING CLARIFICATION
)	OF ORDER GRANTING
Respondent.)	MOTION FOR SUMMARY
)	DETERMINATION
.....)	

MEMORANDUM

I. NATURE OF PROCEEDING AND PROCEDURAL HISTORY

On February 19, 1998, the Washington Utilities and Transportation Commission (Commission) served its Order Granting Motion for Summary Determination (Summary Determination) in this case. On March 2, 1998, MCI Metro Access Transmission Services, Inc. (MCI) filed its Petition for Reconsideration and/or Clarification of Order Granting Motion for Summary Determination (Petition).

On March 3, 1998, the Commission served its Notice Requesting Answers To Petition For Reconsideration and/or Clarification pursuant to WAC 480-09-810. On March 25, 1998, U S WEST Communications, Inc. (U S WEST) timely filed its Answer To MCI's Petition for Reconsideration.

II. ISSUES ON CLARIFICATION

The Commission's Summary Determination addresses four main issues relating to the contractual and statutory bases for MCI's claims.¹ The Summary Determination rejects *contractual claims* that MCI was entitled to engage in pre-market testing of services *prior* to the August 20, 1997 effective date of the interconnection agreement between the parties (Definitive Agreement) approved by

¹ These issues are stated in the Summary Determination, Section II: (1) do the agreements between the parties require U S WEST to provide pre-market testing prior to the effective date of the Definitive Agreement, as claimed by MCI; (2) should the Commission require U S WEST to provide pre-market testing prior to the effective date of the Definitive Agreement, as claimed by MCI; (3) has MCI sufficiently stated claims that U S WEST has failed to provide pre-market testing subsequent to the effective date of the Definitive Agreement; and (4) has MCI stated a claim which properly raises the issue whether the Commission has authority to require U S WEST to combine network elements. Summary Determination, p.2.

350

the Commission.² The Summary Determination also rejects *statutory claims* that MCI was entitled to engage in pre-market testing of services *prior* to the effective date of the Definitive Agreement. Finally, the Summary Determination states that MCI failed to sufficiently state *any claims* that U S WEST failed to provide pre-market testing of services *subsequent* to the effective date of the Definitive Agreement, including claims related to the combination of unbundled network elements (UNEs).

MCI requests that the Commission reconsider and/or clarify three issues relating to the Summary Determination:

- Whether statutory protections exist *prior* to the Definitive Agreement effective date;
- Whether the Definitive Agreement precludes statutory claims arising *prior* to its effective date; and
- Whether the Definitive Agreement precludes statutory claims arising *subsequent* to its effective date.

MCI's Petition repeats several arguments previously raised in its Response To Motion For Summary Determination.³ The Commission considered these arguments in the course of the Summary Determination and is not persuaded to change its decision. MCI's request for reconsideration is denied. The Commission recognizes, however, that the Summary Determination does not fully discuss these arguments, and will take this opportunity to clarify its Order.

A. Statutory protections existed prior to the Definitive Agreement effective date.

The Summary Determination states that the important statutory powers of the Commission "are not diminished by the Commission's policy that the respective rights and obligations of parties seeking interconnection of their networks should be controlled by a contract and that disagreements over the details of interconnection agreements be resolved through arbitration consistent with Section 252 of the Telecom Act."⁴ This Commission will continue to exercise its statutory powers consistent with the Telecommunications Act of 1996 (the Telecom Act), prior Commission Orders, and the public interest, convenience, and necessity.

² See *Commission Order Approving Interconnection Agreement*, In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MCImetro Access Services, Inc., and U S WEST Communications, Inc., Pursuant to 47 U.S.C. Section 252, Docket No. UT-960310 (August 18, 1997).

³ See *MCI's Response To Motion For Summary Determination*, filed December 8, 1997.

⁴ Summary Determination, p.7.

The formal complaint filed by MCI specifically relates to the alleged failure and refusal by U S WEST to test telecommunications services prior to MCI offering those services to the general public. MCI agrees that the Interim Agreement between the parties does not provide for the pre-market testing of services and that the Definitive Agreement established MCI's right to provide relevant products and services.⁵ However, MCI argues that the absence of contractual terms providing for testing in the Interim Agreement is not determinative whether it was entitled to obtain testing during that time period. MCI seeks a statutory remedy.

According to MCI, the right to request and obtain pre-market testing of proposed telecommunications services is independent from the right to actually provide those services. On that basis, MCI argues that the Commission should exercise its statutory powers to order pre-market testing prior to the effective date of the Definitive Agreement in spite of the fact that MCI was not entitled to offer those services at that time. The Commission rejects the argument that U S WEST should be compelled to provide pre-market testing of telecommunications services which they would not otherwise be required to provide unless U S WEST has previously done so on behalf of other CLECs. This would impose an undue burden and expense on U S WEST.

MCI also argues that U S WEST conducts unrestricted pre-market testing of its own services and it is discriminatory to deny MCI the same capability. It is not discriminatory that U S WEST requires MCI to enter into an interconnection agreement prior to providing pre-market testing of relevant services. The requirement that the parties enter into a contract governing the specific details of an interconnection agreement is consistent with the Telecom Act and prior Commission Orders. U S WEST is not required to divest itself of any operations pursuant to the Act; therefore, U S WEST is not required to enter into any similar contract or agreement with itself.

Prior to the effective date of a Commission approved interconnection agreement or tariff, any incumbent local exchange carrier (ILEC) providing pre-market testing of telecommunications services to a competing local exchange carrier (CLEC) must do so in a nondiscriminatory manner relative to any other CLEC. Subsequent to the effective date of a Commission approved interconnection agreement or tariff, an ILEC is required to provide pre-market testing to a CLEC in a nondiscriminatory manner relative to itself.

MCI's suggestion that the Commission's Summary Determination on pre-market testing is susceptible to a broader interpretation or application is rejected. While U S WEST's rejection of testing orders prior to the effective date of the Definitive Agreement may be contrary to the spirit of cooperation which this Commission continuously promotes, it does not violate any principle of law.

⁵ The Interim Agreement and Definitive Agreement are identified and discussed in the Summary Determination, pp. 3-4.

B. The Definitive Agreement does not preclude statutory claims arising prior to its effective date.

The MCI Complaint alleges that there is no need for a written agreement, a tariff, or local certification in order to establish its right to compel U S WEST to provide pre-market testing because such activity does not involve the actual provision of local service. This allegation is contradicted by MCI's conduct. MCI negotiated pre-market testing terms in the Definitive Agreement. It is reasonable to conclude that the parties intended those rights to become enforceable on the effective date of the Definitive Agreement, and not sooner.

The Commission's Summary Determination considers the significance of the Definitive Agreement and declines to independently invoke its statutory authority because it would frustrate the reasonable expectations of the parties. MCI's suggestion that the Commission's holding on this issue constitutes a deprivation of all statutory protections or remedies prior to the Definitive Agreement is rejected. The Commission's Summary Determination should be narrowly construed in accordance with MCI's Complaint.

C. The Commission's Summary Determination makes no findings or conclusions precluding any claims arising subsequent to the Definitive Agreement effective date.

The Commission's Summary Determination concludes that MCI failed to sufficiently present *any* claims arising subsequent to the effective date of the Definitive Agreement. Accordingly, the Summary Determination makes no findings or conclusions regarding the protections and remedies which exist subsequent to the approval of the Definitive Agreement between the parties. As stated above, the Commission will continue to exercise its statutory powers consistent with the Telecom Act, prior Commission Orders, and the public interest, convenience, and necessity. Therefore, a contract in effect at the time a complaint is filed is not necessarily the exclusive source of protections and remedies for parties.

MCI suggests that Conclusions of Law Nos. 2, 3, and 4 in the Summary Determination constitute a finding that a contract in effect at the time a complaint is filed is the exclusive source of protections and remedies.⁶ Conclusions of Law Nos.

⁶ Conclusions of Law Nos. 2, 3, and 4 state:

"2. The Interim Agreement which was negotiated by the parties controls causes of action which arose during the time period that it was effective.

3. The Definitive Agreement which was approved by the Commission controls causes of action which arose subsequent to its effective date.

4. The Commission should not order pre-market testing prior to the effective date of the Definitive Agreement as a matter of law." Summary Determination, p. 8.

2, 3, and 4 are structured parallel to the discussion of MCI's claims in the Summary Determination.⁷ The Summary Determination discusses: MCI's contract claims arising during the Interim Agreement; MCI's contract claims arising during the Definitive Agreement; and the statutory basis for MCI's claims.

Accordingly, the Commission will clarify that the Interim Agreement which was negotiated by the parties controls *contractual* causes of action which arose during the time period that it was effective. The Definitive Agreement which was approved by the Commission controls *contractual* causes of action which arose subsequent to its effective date. The Commission's Summary Determination regarding statutory causes of action for pre-market testing prior to the effective date of the Definitive Agreement needs no further clarification.

ORDER

THE COMMISSION ORDERS:

1. MCI's petition for reconsideration is denied.
2. Conclusion of Law No. 2 in the Commission's Order Granting Motion for Summary Determination is clarified as follows: "2. The Interim Agreement which was negotiated by the parties controls contractual causes of action which arose during the time period that it was effective."

⁷ See Sections VII.A. through C., Summary Determination, pp.5-7.

354

3. Conclusion of Law No. 3 in the Commission's Order Granting Motion for Summary Determination is clarified as follows: "3. The Definitive Agreement which was approved by the Commission controls contractual causes of action which arose subsequent to its effective date."

DATED at Olympia, Washington, and effective this 15th day of April 1998.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



ANNE LEVINSON, Chair



RICHARD HEMSTAD, Commissioner



WILLIAM R. GILLIS, Commissioner