

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into)
U S WEST Communications Inc's) Docket No. UT-970300
Compliance with Section 271 of the)
Telecommunications Act of 1996)
_____)

**COMMENTS OF TCG SEATTLE ON SPECIFIC ITEMS
IDENTIFIED IN COMMISSION'S DRAFT ORDER**

INTRODUCTION

Teleport Communications Group, Inc. (TCG) appreciates the opportunity to comment on the Commission's list of specific issues raised in the draft Order. TCG believes that several of the issues go to the heart of a Section 271 compliance filing -- how to determine when an interconnection agreement has been fully implemented. TCG raised these issues in its previous comments in this docket and expands further on those issues in these comments. However, TCG also recommended in its comments on the draft Order and Policy Statement that the Commission open a docket specific to determining US West's performance measures and OSS requirements to fully address US West's obligations under Section 271 of the Act. While parties' comments and discussion at the September 25, 1997 workshop will further define those obligations, TCG believes that the Commission will require more specific information before setting forth US West's performance measures and OSS requirements. TCG's initial list of performance measures focuses on the needs of facilities-based providers. Resale requirements will need to be identified and measures established before a comprehensive list of performance measures can be established.

DISCUSSION

A. Issue 1 – The phrase “is providing access and interconnection” -- what specific “actual and complete information about USWC’s provisioning such service to itself, to affiliates, and to interconnecting companies” will assist the Commission in making this determination?

TCG has actively addressed, on both the state and federal levels, the issue of performance measurements that can be used to determine whether an ILEC “is providing access and interconnection” to meet its obligations under the Act. The issue of performance is defined under Section 251(c)(2)(C); under that section, the ILEC has:

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network...that 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.

In order to meet this standard, the ILEC has to provide certain information about its provision of service to itself, its affiliates and its competitors.

This Commission has wisely recognized the need to explicitly quantify the information that must be provided by U S WEST. In an effort to assist the Commission, TCG has compiled a minimum list of performance measures, which is set forth as Attachment 1 to this pleading. While this illustrative list contains a discussion of appropriate performance measures, it is not definitive nor all-inclusive. Rather, it is a beginning point from which further performance measures should be developed, refined, and then continually updated.

In using these performance measures, several guidelines should be followed. First, reports must be made monthly, and analysis must cover a significant period of time -- not just one month -- to ensure that the results reflect the ILEC's systemic performance, not a fluke or a temporary "brute forced" result. In the monthly reporting of performance, the ILECs should report both current monthly results and a three-month moving average of performance.

The statutory language and the Commission's interpretation indicate that parity is a dynamic concept that the Commission cannot and should not attempt to pinpoint. Performance measures will change over time based on two factors: evolving technology and improvements in response to competitive pressures. Rigid measurement requirements would be contrary to the statute, because they would freeze in place ILEC practices and would require CLECs repeatedly to request rule changes merely to ensure enforcement of the statutory performance parity principle.

Moreover, the burden of developing the appropriate quantitative measures assuring "apples-to-apples" comparison rests with U S WEST. The company must not be permitted to escape its statutory duty based on its assertion that it does not perform a particular function for itself at all, and therefore no comparative performance measure is available. Rather, for these limited cases (if any), U S WEST must create internal performance measures that approximate the measures for the function the CLEC needs, and permits a direct "apples to apples" comparison. If it cannot do so, it is in violation of the Act.

The automated systems of U S WEST create the objective data needed to compare performance measures. For example, ILECs have automated data acquisition systems that count minutes and report on them in various ways. One output of the data acquisition systems (DAS) is Trunk Servicing Reports. The ILECs can use these reports and the database to show whether blocking of traffic to or from an ILEC end user to a CLEC exceeds the blocking rate of the ILEC's own traffic within the ILEC's own network. Other measures are available for reporting installation intervals on loops, reporting performance on failure rates and mean time to repair and other variables. (See appendix.)

When ILEC operational support systems (OSS) are fully operational to provide support to CLECs, performance measures can be a system byproduct. But it must be clear that access to OSS and the data collected from those systems are a means of achieving performance parity, not the end itself. It is the outcome of performance parity that is required by law and is important to competition, not the means by which the results are obtained.¹ Of course, an ILEC may choose to assemble its performance measures manually or electronically; but either way, it must provide performance parity.

TCG's list of performance measures has been created with an intent to measure those things which are critical to facilities-based competition. TCG recommends adoption of all of the performance measures set forth in Attachment 1, along with any others identified through the Commission's workshop process.

B. Issue 2 – The phrase “competing provider” -- what specific information will demonstrate “more than an insignificant level of competition, for the purposes of Section 271 to assure that the basic requirements for competition are in place and working cannot be met”?

The question presented by the Commission here is important in connection with a Section 271 analysis. It relates directly to the issue presented as number 5, i.e., how to determine the existence of a competitive market. For simplicity’s sake, TCG will address these two issues together.

The FCC recently addressed this issue very carefully in its order denying Ameritech’s application for Section 271 authority. Because the FCC provided such detail, TCG recommends careful consideration of the following language from the FCC’s order:

75. We determined in the *SBC Oklahoma Order* that "the use of the term 'competing provider[]' in section 271(c)(1)(A) suggests that there must be an actual commercial alternative to the BOC." We further concluded that "the existence of [a carrier's] effective local exchange tariff is not sufficient to satisfy section 271(c)(1)(A)." Rather, we determined that, at a minimum, a carrier must actually be in the market and operational (*i.e.*, accepting requests for service and providing such service for a fee), although we did not address whether a new entrant must meet additional criteria to be considered a "competing provider" under section 271(c)(1)(A). Specifically, we did not determine whether a competing LEC must attain a certain size or geographic scope.

1. We do not read section 271(c)(1)(A) to require any specified level of geographic penetration by a competing provider. The plain language of that provision does not mandate any such level, and therefore, does not support imposing a geographic scope requirement. Consistent with this interpretation, we note that the House Commerce Committee's Report indicated that "[t]he Committee expects the Commission to determine that a competitive alternative is operational and offering a competitive service *somewhere in the State* prior to granting a BOC's petition for entry into long distance."

2. We also do not read section 271(c)(1)(A) to require that a new entrant serve a specific market share in its service area to be considered a "competing provider." Consistent with this interpretation, we note that the Senate and House each rejected language that would have imposed such a requirement in section 271(c)(1)(A). Nevertheless, we recognize that there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a "competing provider."

3. In this Order, we need not and do not reach the question of whether a carrier that is serving a *de*

de minimis number of access lines is a "competing provider" under section 271(c)(1)(A). In this instance, Ameritech relies on three operational carriers, each of which is serving thousands of access lines in its service area. Because Brooks Fiber, MFS WorldCom, and TCG are each accepting requests for telephone exchange service and serving more than a *de minimis* number of end-users for a fee in their respective service areas, we find that each of these carriers is an actual commercial alternative to the BOC. We therefore agree with Ameritech that it is providing access and interconnection to Brooks Fiber, MFS WorldCom, and TCG, and that these carriers are "competing providers of telephone exchange service."

(In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, CC Docket 97-137, Memorandum Opinion and Order, released August 19, 1997, footnotes omitted.)

As can be seen, the FCC has adopted a middle ground in its efforts to define a "competing provider" and thus to determine whether or not a competitive market exists. While it chose not to impose a geographic penetration requirement, it did require (consistent with SBC Oklahoma order) that a carrier must be in the market and be operational. Moreover, the FCC did determine that a carrier cannot be serving so de minimis a share of the market as to preclude a determination that it is a "competing provider," though it declined to specify a particular market share level that would meet this analysis.

In the Ameritech Michigan decision, the FCC noted Ameritech's reference to the fact that the identified carriers "compete against Ameritech in Detroit and Grand Rapids -- the two most populous local markets in Michigan." (Memorandum Opinion and Order, ¶ 74. A similar analysis should be made in the State of Washington. As part of its analysis, the Commission should ask whether there are other carriers each accepting requests for telephone exchange service and serving more than a *de minimis* number of end-users for a fee in their respective service areas. It should also ask whether there are such carriers in the major metropolitan areas of the State (i.e, Seattle, Tacoma, Olympia and Spokane). These tests would be consistent with the FCC's determinations so far in the 271 context.

C. Issue 3 – Checklist compliance -- what specific information will demonstrate the full implementation of interconnection agreements, including a showing of nondiscriminatory treatment?

A complete report on the list of performance measures covering interconnection, access to UNEs and OSS that showed US West had provided each item to interconnecting carriers on parity with what US West provided itself, its affiliates and its customers is the single most critical factor in determining whether interconnection agreements have been fully implemented and in a nondiscriminatory manner. A report of performance measures would indicate compliance with most of the 14 items on the competitive checklist. Certain items, however, have additional criteria that must be satisfied as well.

Items (i) and (ii) could be satisfied with a showing of parity treatment with respect to performance measures. TCG's initial list of performance measures focuses on those items which are crucial to facilities-based competitors, so the Commission would need to include additional measures with respect to resale and the provisioning of other UNEs.

Item (iii) is also covered by the TCG performance measures list, but has the additional requirement that the rates for poles, conduits and rights-of-way must be "just and reasonable" and "in accordance with the requirements of Section 224," i.e., that the pole and conduit rates have been properly calculated in accordance with the federal formula.

Items (iv), (v), and (vi) are covered in the list of performance measures but it is also important that the Commission review the quantity of UNEs provisioned so that the Commission can clearly determine whether US West 1) is actually providing UNEs at all, and 2) is capable of providing those elements as sufficient volumes. While US West's performance may be nondiscriminatory when only small quantities are requested and provisioned, that may not be the case when larger volumes, such as can be expected when the market becomes more competitive, must be handled.

Item (vii) covering subitems I, II and III are also covered in the list of performance measures. To the extent US West's directory assistance database is different from its directory listing database, additional measurements regarding the directory assistance database must also be included.

There are performance measures covering Item (viii), however it is also important for the Commission to verify that CLCs NXXs and CLC information are listed in the US West's customer guide pages in the directories, in accordance with interconnection agreements and applicable Commission decisions.

The Commission should determine whether there have been any complaints against US West as Code Administrator prior to concluding that Item (ix) has been met.

Item (x) is covered under the list of performance measures.

Measure 18 in TCG's initial performance measures covers item (xi). Measure 18, Customer Affecting Coordinated Conversion Window, reports the percentage of time that US West (or GTE) accurately coordinates the disconnect and initiates the number referral message or interim number portability such that a customer's service is not interrupted when changing carriers. If the Commission finds that the appropriately high percentage level is met, then Item (xi) can be deemed met.

Items (xii), (xiii), and (xiv) can be considered met if interconnecting carriers have not registered complaints or disputes with the Commission regarding dialing parity information, reciprocal compensation arrangements or the ability to resell telecommunications services.

D. Issue 4 – Affiliate requirements -- what information must be provided to demonstrate compliance with the separate affiliate requirement of Section 272?

The affiliate transaction requirements of Section 272 present a complex web of obligations on the part of the ILEC. Subsections (b) and © set forth mandatory structural and transactional requirements and nondiscrimination safeguards. Subsection (e) imposes burdens on the fulfillment of requests for exchange service and exchange access and on the provision of such service and access. In each of these subsections, the Act requires that the ILEC either perform certain activities or provide various items in a nondiscriminatory manner.

In order for this Commission to determine if U S WEST is complying with these obligations, it must require that U S WEST provide data regarding each of the specific items described in subsections (b), (c) and (e). This includes, at a minimum, an explicit showing that separate affiliates have been established, that these affiliates maintain books, records and accounts separate from U S WEST, that the affiliates have separate officers, directors and employees from U S WEST, that the affiliates not maintain recourse credit for which there is recourse to U S WEST, and that all transactions between U S WEST and the affiliates is at arms'-length.

In addition, U S WEST must demonstrate, through documented records, that it is not discriminating in favor of its affiliates. This obligation requires U S WEST to provide records showing specifically that its provision or procurement of goods and service is identical as between it and its affiliates as between it and other competing carriers. U S WEST must also demonstrate to the Commission that it is offering the same terms and conditions and the same time intervals for the provision of service to other carriers as it offers to its affiliates.

With respect to the nondiscrimination requirements, the FCC, in its so-called Accounting Safeguards Order, defined how an ILEC must provide the appropriate information:

Section 272(b)(5) of the Communications Act provides that the BOC's section 272 affiliate "shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions

reduced to writing and available for public inspection." To satisfy the requirement that transactions between a BOC and its section 272 affiliate be "reduced to writing and available for public inspection," the *Accounting Safeguards Order* requires the section 272 affiliate, "at a minimum, to provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction on the Internet within 10 days of the transaction through the company's home page." In addition, this information concerning the transaction "must also be made available for public inspection at the principal place of business of the BOC." We further determined that "the description of the asset or service and the terms and conditions of the transaction should be sufficiently detailed to allow us to evaluate compliance with our accounting rules."

(Memorandum Opinion and Order, ¶ 363, footnotes omitted.) This is a beginning standard for this Commission to apply.

The FCC denied Ameritech's Michigan application in part because Ameritech had not provided for separate directors as between the corporate parent and its interLATA affiliate. (Memorandum Report and Order, ¶¶ 353-362.) In addition, the FCC denied the application because Ameritech failed to disclose publicly the rates for all of the transactions between Ameritech and [its affiliate] ACI and because it did not publicly disclose all of the transactions between Ameritech and ACI (Memorandum Report and Order, ¶¶ 367, 370-371.) All of these obligations set forth by the FCC, and not met by Ameritech, must be met by U S WEST in order for it to meet the requirements of Section 272.

Significantly, the FCC recognized in the Ameritech decision that Section 272 is a "predictive" section, in that it requires an evaluation of whether the ILEC is going to meet its obligations in the future. The FCC thus stated that it must look at "past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of section 272. (Memorandum Report and Order, ¶ 347.) TCG urges this Commission to do the same, examining not just U S WEST's current conduct but its past conduct as well, as a reliable predictor of how it may operate in the future.

E. Issue 5 – Existence of a competitive market -- what criteria or information - specific indicators and specific information -- should be used to make the determination?

The issue of determining the existence of a competitive market is addressed above in regard to Issue 3.

CONCLUSION

As is evident in TCG's comments on the Draft Order and Interim Policy Statement and in these comments, performance parity with respect to interconnection, UNEs and OSS functions is critical to the determination of whether US WEST has met its Section 271 obligations. This is clear because it is only through performance measures will the Commission, and the FCC, know whether interconnection agreements have been fully implemented.

DATED this 19th day of September.

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ATTACHMENT 1

¹ Since OSS is itself a UNE, the OSS ILECs make available to CLECs must also meet the parity test.