

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration)	DOCKET NO. UT-990300
of an Interconnection Agreement Between)	
)	
AIRTOUCH PAGING,)	ARBITRATOR' S REPORT
and U S WEST COMMUNICATIONS, INC.)	AND DECISION
)	
Pursuant to 47 USC Section 252.)	
.....)	

I. MEMORANDUM

A. Procedural History.

On July 28, 1998, AirTouch Paging (AirTouch), requested to negotiate an interconnection agreement (Agreement) with U S WEST Communications, Inc. (U S WEST). On January 4, 1999, ELI, timely filed a Petition for Arbitration with the Washington Utilities and Transportation Commission ("Commission")¹ pursuant to 47 USC § 252(b)(1) of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, *codified at* 47 U.S.C. § 151 et seq. (1996) (Telecom Act). The matter was designated Docket No. UT-990300.

The Commission entered an Order on Arbitration Procedure and Protective Order on January 13, 1999, and appointed an Arbitrator on January 21, 1999. U S WEST filed its response with the Commission on January 29, 1999.

On February 4, 1999, a prehearing conference was held to establish a procedural schedule. AirTouch's cost study and related testimony was filed on February 19, 1999. Both parties filed non-cost study related testimony on February 24, 1999. U S WEST filed cost study related reply testimony on March 8, 1999. Discovery was conducted, including the depositions of prospective witnesses.

Hearings were conducted on March 17 and 18, 1999, at the Commission's offices in Olympia, WA. Post-hearing briefs were filed on April 2, 1999.

B. Presentation of Issues.

The parties presented twelve unresolved issues falling into three broad categories, 1) basic entitlement to compensation issues, 2) economic issues, and 3) system configuration issues. Several issues designated by the parties required precursory determinations which are addressed as separate issues in the instant

¹ In this decision, the Washington Utilities and Transportation Commission is referred to as the Commission. The Federal Communications Commission is referred to as the FCC.

Arbitrator's Report and Decision (Report). The parties submitted an unresolved issues matrix which presented the issues sequentially according to corresponding sections in the Agreement. The Report follows a different sequence in presenting decisions.

1. What Constitutes "Local" and Non-Local" Traffic?
2. Is U S West Required to Pay for Transport Facilities to Deliver Local Traffic Originating on its Network to AirTouch?
3. Where Should the Parties Interconnect?
4. Where Should Rating Points Be Located?
5. Should Rating and Routing Points Be Separated?
6. What Is the Appropriate Grade of Service for Trunk Groups to Be Provided by U S West, Should AirTouch Co-determine All Aspects and Elements of Paging Connection Service Facilities?
7. Does Reciprocal Compensation Require Reciprocal Services?
8. Is AirTouch's Paging Terminal the Functional Equivalent of a Switch?
9. Is AirTouch Entitled to Reciprocal Compensation for Networking Costs Beyond its Paging Terminal?
10. What Reciprocal Compensation Rate Should Be Paid?
11. What Percentage of Traffic Is Subject to Reciprocal Compensation?
12. What is the effective Date of the Agreement?
13. Does Section 252(i) of the Telecom Act Allow AirTouch to "Pick-and-Choose" During the Term of the Agreement?

C. Resolution of Disputes and Contract Language Issue.

Prior to the start of the hearing the Arbitrator ordered that "final offer" arbitration would control dispute resolution on all issues except the determination of AirTouch's costs of terminating local traffic. In preparing the arbitration report in this matter, the Arbitrator was required to choose between the parties' last proposals as to each unresolved issue. The Arbitrator retained discretion to independently resolve issues if it was determined that neither parties' proposal was consistent with the requirements of state or federal law or regulations on an issue-by-issue basis.

As a general matter, this decision is limited to the disputed issues presented for arbitration. 47 U.S.C. § 252(b)(4). Each decision of the Arbitrator is subject to and qualified by the discussion of the issue. The Arbitrator reserves the discretion to either adopt or disregard proposed contract language in making decisions. However, adoption of one party's position generally implies that the parties should use that party's contract language incorporating the advocated position in preparing a final agreement. Contract language adopted remains subject to Commission approval. 47 U.S.C. § 252(e).

This Report is issued in compliance with the procedural requirements of the Telecom Act, and it resolves all issues which were submitted to the Commission for arbitration by the parties. The parties are directed to engage in good faith negotiations and resolve any precursory issues not expressly addressed, consistent with the Arbitrator's decisions. If the parties are unable to submit a complete interconnection agreement due to an unresolved issue they shall notify the Commission in writing prior to the time for filing the agreement. At the conclusion of this Report, the Arbitrator addresses the approval procedure to be followed in furtherance of the issuance of a Commission order approving an interconnection agreement between the parties.

D. The Eighth Circuit Order and the FCC Rules

On August 8, 1996, the FCC issued its First Report and Order (Local Competition Order), including Appendix B - Final Rules (FCC Rules).² On October 15, 1996, the U. S. Court of Appeals, Eighth Circuit stayed operation of the FCC Rules relating to pricing and the "pick and choose" provisions.³

On July 18, 1997, the Eighth Circuit issued an order vacating several of the FCC Rules. 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 issued a decision holding that the FCC Rules, with the exception of §51.319, are consistent with the Telecom Act.⁴

E. Standards for Arbitration

The Telecommunications Act states that in resolving by arbitration any open issues and imposing conditions upon the parties to the agreement, the state

² *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.

³ *Iowa Utilities Board et al. v. FCC*, No. 96-3321, Order Granting Stay Pending Judicial Review (8th Cir. Oct. 15, 1996).

⁴ *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

commission is to: (1) ensure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the FCC under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c).

F. AirTouch's Challenge to Confidential Information

During the course of the hearing AirTouch challenged the confidential designation of a portion of Exhibit C-27 relating to the obligation of U S WEST to pay termination compensation for traffic originating on and transiting its network.⁵ U S WEST stated that it remains opposed to consideration of challenges of portions of confidential documents and that the memorandum, in its entirety, is an internal strategy and planning document. U S WEST argued that the document was clearly marked confidential and made clear that it did not oppose the admissibility of the document.

Similar challenges were raised and upheld in MCImetro Access Transmission Service, Inc., v. U S WEST.⁶ U S WEST has petitioned for judicial review of that Commission decision.⁷ The Commission found that it must employ the statutory test in RCW 80.04.095 to determine whether challenged confidential information is entitled to protection. Records, or portions of records, constitute valuable commercial information (and must be afforded confidential protection) if their disclosure would result in private loss, including an unfair competitive disadvantage. Both the Protective Order and WAC 480-09-015 state that the burden of proof shall be on the party asserting confidentiality to show that challenged information is properly classified. Thus, the burden is on U S WEST to prove that the excerpts from Exhibit C-27 are entitled to protection.

The Arbitrator ruled from the bench finding that disclosure of the challenged portions of Exhibit C-27 would not result in either loss or unfair competitive disadvantage to U S WEST. The Arbitrator ordered that the information continue to be protected for ten days thereafter to enable U S WEST to seek Commission or judicial review of the determination, including a stay of the decision's effect pending further review.

II. RESOLUTION OF DISPUTED ISSUES

⁵ Exhibit C-27, page 5-14, third paragraph in the text block, and page 5-15, Figure 1.

⁶ MCImetro Access Transmission Services, Inc., v. U S WEST Communications, Inc., *Eleventh Supplemental Order Denying U S WEST's Petition for Reconsideration*, Docket No. UT-971063 (March 25, 1999).

⁷ U S WEST Communications, Inc., v. Washington Utilities and Transportation Commission, *Petition for Review*, Superior Court of the State of Washington for King County, No. 99-2-09202-3SEA (received by the Commission, April 16, 1999).

1. What Constitutes "Local" and Non-Local" Traffic? (Contract Section 3.16)**A. AirTouch Position**

AirTouch states that its proposal defining "Local Traffic" conforms exactly to the definition established by the FCC in 47 C.F.R. § 51.701(b)(2). AirTouch also proposes a definition of "Non-Local Traffic":

"Non-Local Traffic" means telecommunications traffic that originates in one Major Trading Area (MTA)⁸ and terminates in another MTA (i.e., interMTA traffic).⁹

B. U S WEST Position

U S WEST states that the real issue is not what should be defined as "local," but what traffic is subject to reciprocal compensation. U S WEST contends that AirTouch does not perform the function of call termination as defined in the Telecom Act; therefore, reciprocal compensation is not payable. Alternatively, U S WEST states that if terminating compensation is to be paid for traffic originating on U S WEST's network, such compensation should not be paid for traffic that is not local. U S WEST proposes the following definition of "Non-Local Traffic":

"Non-Local Traffic" is traffic that is interMTA, interLATA, or other traffic subject to switched access charges rather than reciprocal compensation.

C. Discussion

47 C.F.R. § 51.701 distinguishes between Local Exchange Carrier (LEC) to Commercial Mobile Radio Service (CMRS) providers (including paging providers) and LEC-to-non-CMRS providers. Regarding CMRS providers, FCC Rule 51.701(b)(2) states that "local telecommunications traffic" means telecommunications traffic that, at the beginning of the call, originates and terminates within the same MTA.

The competing definitions for Non-Local Traffic proposed by the parties differ over compensation for other traffic subject to switched access charges, specifically interLATA traffic. The FCC's rule implicitly acknowledges that CMRS subscribers are mobile and may not be located in the same LATA (much less the same

⁸ The parties agree that a MTA is a geographic area established in Rand McNally's Commercial Atlas and Marketing Guide, as modified and used by the FCC in defining CMRS license boundaries for CMRS providers for purposes of Sections 251 and 252 of the Telecom Act.

⁹ In comparison, Regional Bell Operating Companies (RBOCs) are restricted from providing interLocal Access and Transport Area (LATA) pursuant to section 271 of the Telecom Act. Other Incumbent Local Exchange Carriers (ILECs), such as GTE Northwest, are not so restricted.

local service area)¹⁰ as the calling party. 47 C.F.R. § 51.701(d) states that for purposes of Subpart H of the FCC's rules, termination includes delivery of such traffic to the called party's premises. Insofar as CMRS subscribers are mobile, the called party's premises can be anywhere within the MTA. Accordingly, a LEC may not impose switched access charges on CMRS traffic originating on its network on the basis that a message is ultimately delivered to the called party outside the LATA, so long as the called party is within the MTA. Stated another way, the termination of traffic by a CMRS provider and the subsequent delivery of a message to a paging service subscriber located interLATA, but also intraMTA, does not constitute one-call for purposes of determining whether switched access charges apply.

However, the location of the called party's premises is not determinative of where local traffic terminates. This Report finds that AirTouch's paging terminal is functionally equivalent to an end-office switch where local traffic terminates and that termination facilities do not extend beyond the paging terminal. Therefore, a call originating in one LATA and terminating in another is subject to switched access charges.

D. Decision

The definitions of "Local Traffic" and "Non-Local Traffic" require separate decisions. The language proposed by AirTouch defining "Local Traffic" is adopted as partial resolution of this issue. The position of U S WEST is adopted regarding the concept of "Non-Local Traffic;" however, its proposed language is not.

2. Is U S West Required to Pay for Transport Facilities to Deliver Local Traffic Originating on its Network to AirTouch?

A. AirTouch's Position

AirTouch argues that the prohibition on LEC charges on other telecommunications carriers stated in Section 51.703(b) of the FCC rules applies both to "traffic" and "facilities." This issue was addressed by the FCC in the Metzger Letter.¹¹ The issue was raised by a LEC which sought clarification on whether the prohibition on charges to paging carriers for local LEC-originated traffic extended to both usage-sensitive traffic charges and non-usage sensitive facility charges. The FCC's Common

¹⁰ A local calling area in Washington State is the geographic area defined by the extended area service (EAS) boundaries as determined by the Commission and defined in U S WEST's tariffs within which LEC customers may complete a landline call without incurring toll charges.

¹¹ Letter from Common Carrier Bureau Chief A. Richard Metzger, Jr. to Keith Davis, *et al*, DA-97-2726, CCB/CPB No. 97-24, released December 30, 1997. Exhibit J to Appendix A of AirTouch's Petition.

Carrier Bureau placed this request for clarification on public notice and solicited comments from all interested parties.¹²

AirTouch states that an extensive record was compiled as representatives of all affected classes of carriers, including U S WEST, commented on the pertinent CMRS-LEC interconnection rulings, the text of the applicable rules, governing precedents, and the underlying policy considerations. Ultimately, the Bureau found there to be no basis for permitting a LEC to assess charges to a paging carrier to recover costs for dedicated facilities used to deliver local traffic originating on its network on the paging service provider. Thus, AirTouch argues that the FCC confirmed the plain language of the *Local Competition Order* that local LEC-originated traffic must be delivered to paging service providers without charge.

B. U S WEST Position

U S WEST argues that the Metzger Letter is not binding law and its conclusion is wrong. According to U S WEST, the Metzger letter was neither subject to Administrative Procedure Act notice and comment procedures nor the result of a formal adjudication, and is merely a letter interpretation by a single FCC staff member. U S WEST claims that the Metzger Letter requested comments by an FCC press release and not by publication in the Federal Register (Ex. 1, Appendix Ex. J at 1 n. 1), and the absence of publication in the Federal Register or the Code of Federal Regulations is an indication that the letter interpretation is neither a substantive rule nor binding.

U S WEST states that the Metzger Letter does not purport to be other than an interim interpretation of FCC rules. U S WEST argues that Mr. Metzger offers his opinion as a staff member concluding that the issue is "subject to pending petitions for reconsideration" of the rules and "will be considered by the Commission further based on the record developed in response to those petitions." Ex. 1, Appendix Ex. J at 3. Thus, by its terms the interpretation is not intended to be definitive or final. Rather, the letter is in the nature of an advisory opinion or interpretative guidance offered to specific members of the regulated industry to apprise them on an interim basis of the current thinking on the issue.

Furthermore, U S WEST argues that the Metzger interpretation is inconsistent with the Telecom Act because it overlooks or ignores a LEC's duty to interconnect and its right to compensation for providing facilities arising under § 251(c)(2).

C. Discussion

¹² *Public Notice, Pleading Cycle Established for Comments on Request for Clarification of the Commission's Rules Regarding Interconnection Between LECs and Paging Carriers*, (CCB/CPD 97-24, DA-97-1071), released May 22, 1997.

At the time the Metzger Letter was issued, its author, A. Richard Metzger, Jr., was the Chief of the Common Carrier Bureau of the FCC. The rules and regulations of the FCC delegate broad authority to the Common Carrier Bureau Chief to “perform all functions of the Bureau.” 47 C.F.R. § 0.291. Those Bureau functions expressly include the development, recommendation and administration of policies and programs for the regulation of the services, facilities and practices of subject common carriers. 47 C.F.R. § 0.91. The FCC’s rules also empower the Bureau to act for the full FCC under delegated authority on a broad range of matters pertaining to the regulation and licensing of communications common carriers (47 C.F.R. § 0.91(a)), and to advise the public and industry groups on wireline common carrier regulation and related matters. 47 C.F.R. § 0.91(c). The Metzger Letter was issued after notice and extensive comment by interested parties including U S WEST and was a lawful exercise of authority delegated by the FCC to the Common Carrier Bureau Chief.

Section 1.102(b) of the FCC’s rules expressly provides that “Non-hearing or interlocutory actions taken pursuant to delegated authority shall, unless otherwise ordered by the designated authority, be effective upon release of the document containing the full text of such action . . .” Not only did U S WEST file comments in response to public notice, but it joined other parties in filing Applications for Review of the Metzger conclusion. Malone, Exhibit T-22 at 5. The filing of a petition for reconsideration or application for review of such an action does not automatically stay the effectiveness of the action; rather the Commission must exercise its discretion for a stay to issue. 47 C.F.R. §§ 1.102(b)(2) and (b)(3). In the case of the Metzger Letter, a stay was not issued and the FCC has taken no further action.

U S WEST’s argument that the Metzger Letter is not binding until further action is taken by the FCC is difficult to accept. The notion that FCC Commissioners are susceptible to inaction in the face of an erroneous Common Carrier Bureau decision of this import is suspect. However, assuming that the Metzger Letter is not binding on a procedural basis, it provides valuable guidance until such time as final action is undertaken. The rationale set forth in the Metzger Letter is persuasive.

U S WEST’s argument that the Metzger conclusion conflicts § 251(c)(2) of the Telecom Act is based upon its erroneous premise that AirTouch is the cost causer for traffic originating on U S WEST’s network. To borrow the lawn-watering analogy in U S WEST’s brief, U S WEST customers water their neighbor’s lawn because it increases the value of their own property, even though AirTouch bears the costs of landscaping and maintenance. If U S WEST did not provide the hose, its customers would not receive a benefit. U S WEST is not required to provide local service to its customers without compensation, but it also is not entitled to recover that expense from AirTouch.

The Loretto v. Teleprompter case¹³ cited by U S WEST is not on point. In Loretto, New York law compelled a landlord to grant cable companies access to the landlord's building for cable installation, and dictated that the cable company need only pay a nominal fee to the landlord. In the instant case, it is U S WEST customers that want access to the AirTouch network. U S WEST asserts that receipt of a benefit should not be confused with the incurring of a cost, but it is unwilling to apply the same standard to itself that it seeks to impose on others. The fact that paging subscribers want to be informed when U S WEST customers desire to personally communicate with them does not alter the essential fact that U S WEST customers originate the call.

U S WEST argues that call origination does not identify cost causation in this context. But however "muddled" the application of cost causation principles to paging provider traffic may appear, the consequences of rejecting call origination as the basis for cost causation is even murkier.

D. Decision

Under this combination of circumstances, U S WEST's claims regarding the Metzger Letter are rejected, and AirTouch's basic entitlement to relief from certain facility charges as specified in the Metzger Letter are affirmed.

3. Where Should the Parties Interconnect? (Contract Section 2.6.4)

A. AirTouch Position

Section 51.703(b) of the FCC rules provides that "[a] LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network". AirTouch argues that based upon that section and section 51.702(b)(2) (defining local telecommunications traffic), the obligation of a LEC to bear the costs of facilities used to deliver traffic to a CMRS carrier extends beyond the boundary of an EAS/ Local Calling Area on the wireline network. The statutory scheme contemplates that AirTouch be entitled to specify the points at which it seeks interconnection, and U S WEST is obligated to comply as long as it is "technically feasible" to satisfy the request.

AirTouch is presently interconnected with U S WEST in Washington; however, it does not have a point of connection (POC) in each EAS/local calling area nor does it interconnect to each local and toll tandem. The FCC's rules provide that:

Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities.

¹³ Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

47 C.F.R. Section 51.305(c). AirTouch states that it is unreasonable for U S WEST to require AirTouch to establish additional undesired points of connection when the existing arrangement is working. AirTouch argues that U S WEST seeks to minimize its costs to deliver traffic originating on its network by imposing additional costs on AirTouch to establish unnecessary facilities.

AirTouch's Last Best Offer proposes three interconnection arrangements. First of all, AirTouch seeks to grandfather the existing arrangements and define them as one form of efficient interconnection. AirTouch argues that U S WEST must bear the cost to deliver traffic originating on its network (including dedicated facilities) to any technically feasible POC within the MTA. Secondly, AirTouch proposes to establish a "Billing Demarcation Point" at the closer of the LATA boundary or 60 miles from the U S WEST end-office or tandem where the facility is connected. The Billing Demarcation Point also is characterized as a "virtual POC." Lastly, subject to the first two arrangements, AirTouch may designate additional POCs within the MTA and receive traffic from the U S WEST end-office or tandem where the facility is connected.

B. U S WEST Position

U S WEST contends that AirTouch should be required to establish more than one point of connection within each MTA or wireless local calling area. Rather than establishing points of connection based upon MTAs, AirTouch should be required to establish points of connection based upon the EAS/Local Calling Areas established by the Commission. This means, first, that AirTouch should be required to provide a physical point of presence within each LATA. Section 271 of the Telecom Act prohibits U S WEST and its affiliates from providing interLATA service, except as provided in Section 271, and there is no exception for "intraMTA" traffic.

Second, AirTouch must establish a point of connection within each EAS/Local Calling Area where it has NXXs (the first three numbers dialed when making a local call) assigned and within each EAS/Local Calling Area of the end-office housing the DID Outpulsing¹⁴ numbers associated with AirTouch's Type 1 Service. U S WEST states that existing points of connection are acceptable, but only if U S WEST does not have to backhaul traffic without compensation. Thus, if AirTouch uses foreign exchange facilities it must pay for those costs.

When AirTouch's terminal is located outside of the EAS/Local Calling Area, the connection in the EAS/Local Calling area may be established through a "hub/mux" arrangement. U S WEST will make available to AirTouch both private line services and hub/mux arrangements that will give it a presence in each local calling area, but AirTouch should be required to pay for any such facilities.

C. Discussion

¹⁴ DID Outpulsing is a U S WEST service.

AirTouch's proposal that a virtual point of connection be established to serve as a billing demarcation point violates section 271 of the Telecom Act. The AirTouch proposal is no different than if U S WEST were to propose such an arrangement with another carrier to hand off interLATA traffic as part of a joint marketing plan. Furthermore, there is no basis upon which to impose the cost of facilities for third party interLATA transport. AirTouch must establish at least one POC in each LATA for the termination of intraMTA traffic. Section 51.701(b)(2) defining local telecommunications traffic between a LEC and a CMRS provider does not dictate the designation of POCs. On this basis alone, AirTouch's proposal is contrary to federal law and regulations and must be rejected.

U S WEST takes liberty with semantics when it refers to its obligation to provide transport facilities necessary to terminate traffic originating on its network without charge to paging providers as "backhauling traffic without compensation." U S WEST may not impose its facilities costs to interconnect and deliver local traffic originating on its network upon a terminating paging provider. U S WEST's proposal that AirTouch unconditionally must pay for dedicated transport for facilities that extend beyond the EAS/Local calling Area is contrary to federal law and regulations and must also be rejected.

Neither proposal by the parties is acceptable; therefore, the Commission exercises independent judgment to resolve this disputed issue.

In Washington, T-1 facilities connect AirTouch's Seattle switch to U S WEST end-offices in Seattle and to U S WEST's local tandem in Seattle, toll tandem in Seattle, and main office in Seattle. Analog trunks connect AirTouch's Seattle switch to U S WEST end-offices in Bellingham, Port Angeles, Tacoma, Bremerton, and Auburn. Analog trunks also connect AirTouch's Yakima switch to U S WEST's end-offices in Yakima, Pasco, and Spokane. Bidmon, Exhibit T-2 at 18. Type-1 interconnection connects a CMRS network to a LEC end-office, and Type-2 interconnection connects a CMRS network to a LEC tandem. Bidmon, Exhibit T-2 at 11. Current interconnection arrangements between AirTouch and U S WEST are provided by both tariff and a Type-2 interconnection agreement. Bidmon, Exhibit T-2 at 20. AirTouch's existing POCs are located at AirTouch switches.

Although both proposals by the parties are contrary to law, in part, both proposals have merit, in part. When interconnected LECs exchange traffic both have an incentive to designate POCs where expenses incurred are in parity, often at a mid-span meet point. In the instant case the parties have failed to accomplish that task and the job now falls to the Commission. The FCC has not been forthcoming with national guidelines. While paging providers migrate towards two-way communications in order to compete with expanding cellular and PCS products and services, they remain, in large part, recipients, and not originators, of local telecommunications traffic.

In order to balance the respective interests and risks between the parties, it is necessary to find trade-offs between networking costs that will promote fair and

efficient interconnection. It is to be expected that a plan devised by the Commission will not be perfect, but will be reasonable.

D. Decision

In order to obtain blocks of local numbers (which paging providers so highly value), blocks of 100 numbers will be provided by U S WEST to AirTouch as available from the NXX codes assigned to a U S WEST end-office. AirTouch and U S WEST have agreed to continue a pre-Telecom Act arrangement whereby AirTouch orders and receives DID Outpulsing and DID Number Block Activation services until such time as U S WEST seeks Commission approval of TELRIC-based rates. U S WEST must continue to provide services on that basis during the term of the Agreement.

AirTouch may designate a POC anywhere within the LATA; however a billing demarcation point arrangement, as proposed by AirTouch, shall be established at sixty airline miles between the interconnection point on U S WEST's network and the intraLATA POC designated by AirTouch.

Alternatively, AirTouch may obtain assignments of NXX codes in full or partial blocks of 10,000 through the North American Numbering Plan Administrator (NANPA), but Paging Connection Service shall not extend beyond the boundaries of the geographic area of U S WEST's Wire Center/End-office/Tandem serving AirTouch's POC. U S WEST must pay for interconnection facilities between its Wire Center/End-office/Tandem and a POC within that boundary or else a billing demarcation arrangement should be implemented. AirTouch must balance the cumulative costs of DID services as it increases subscribers against the cost of establishing additional POCs and paying for the transport facilities between the POC and its paging terminal.

The present network design and resulting interconnection arrangements are technically feasible and efficient. AirTouch may designate new or additional POCs where it wants to receive traffic from U S WEST. The parties must cooperate and work together to maintain efficient interconnection during the term of the Agreement. Any related complaint shall be resolved according to dispute resolution procedures in the Agreement.

4. Where Should Rating Points Be Located? (Contract provision 3.23)

A. AirTouch Position

The routing point is the point through which traffic, in the interconnection sense, is routed to the AirTouch network. Bidmon, T-2 at 76. AirTouch proposes that the routing point must be in the same LATA as the associated NPA-NXX (area code plus the first three digits of a telephone number).

B. U S WEST Position

U S WEST proposes that the routing point must be in the same EAS/Local Calling Area as the associated rating point. Furthermore, AirTouch must designate one routing point within the same EAS/Local Calling Area as the associated rating point for each whole or partial NXX code assigned. U S WEST also proposes that AirTouch must establish a POC within the serving area of the U S WEST end-office where assigned DID numbers reside.

C. Discussion

U S WEST's proposal that AirTouch be required to establish a POC within the serving area of the U S WEST end-office where assigned DID numbers reside is contrary to the decision that AirTouch only be required to establish a POC in each LATA.

D. Decision

AirTouch's proposed language is adopted as part of this decision.

5. Should Rating and Routing Points Be Separated? (Contract Provision 5.4)

A. AirTouch Position

A rating center, also referred to as a rating point, is a geographic point on the wireline network which is used by the originating carrier to determine how to bill the call to its customer who originates the call. Bidmon, T-2 at 76. The routing point is the point through which traffic, in the interconnection sense, is routed to the AirTouch network. In areas where a number of rating points subtend the same tandem, AirTouch argues that it is more efficient to transport traffic via a common trunk group to the AirTouch paging terminal, rather than arranging separate facilities coming from each rating center (historically termed foreign exchange (FX) facilities). AirTouch also proposes that it be allowed to assign less than whole NPA-NXX codes to each Rate Center when it becomes technically and economically feasible to do so.

B. U S WEST Position

U S WEST opposes the separation of rating and routing outside the EAS/Local Calling Area. However, rate centers are designated by state commissions and filed in the state tariffs reflected in the Local Exchange Routing Guide (LERG). Toll free calling areas for landline customers correspond with rate center structures within U S WEST. Each rate center has a designated LATA tandem and possibly a local tandem, each with subtending offices. U S WEST proposes that AirTouch should select an end-office as a rate center for each NXX code that is within the serving area of the local and toll tandem to which AirTouch interconnects. AirTouch also should assign whole NPA-NXX codes to each rate center.

C. Discussion

U S WEST's proposal is premised upon the presumption that AirTouch is responsible for paying charges for facilities to transport local traffic originating on U S WEST's network; more trunks equal more revenue. However, in the context of U S WEST paying for the costs of transporting that traffic, it makes sense that U S WEST utilize shared transport facilities, as opposed to dedicated facilities, to transport telecommunications traffic to the POC.

D. Decision

AirTouch's proposed language is adopted as part of this decision.

6. What Is the Appropriate Grade of Service for Trunk Groups to Be Provided by U S West, Should AirTouch Co-determine All Aspects and Elements of Paging Connection Service Facilities? (Contract Provision 2.6.2)

A. AirTouch Position

AirTouch's proposes that Paging Connection Service facilities shall be engineered to the objective grade of service standard specific for intraLATA and Exchange Access trunk groups in BellCore Special Report SR-TAP-000191, "Trunk Traffic Engineering Concepts and Applications," Issue 2, December, 1989, p. 2-7, as the same may be modified from time to time by BellCore, or to the same grade of service U S WEST provides to its affiliates, whichever is better. AirTouch witness Bidmon states that the current BellCore standard that U S WEST must provide is a P.01 grade of service. Bidmon , Ex. T-2 at 71. "P.01" represents the percentage of blocking that occurs on a network, resulting in a fast busy signal to the calling party. Mr. Bidmon states that P.01 is the industry standard grade of service for paging interconnection as documented by BellCore.

AirTouch also relies upon network performance standards applicable to U S WEST established by WAC 480-120-515(2). AirTouch argues that it is not clear what grade of service would be engineered under U S WEST's proposed contract language which could lead to further disputes.

AirTouch requests that the parties co-determine all aspects and elements of Paging Connection Service facilities, including the reconfiguration of trunk groups. AirTouch describes Paging Connection Service facilities as shared use facilities because they will be used to carry both U S WEST traffic and third party traffic to the AirTouch network. While the parties disagree on the percentage of traffic that is properly deemed transit traffic, both sides agree that AirTouch will pay for the portion of the interconnection trunks used to carry third party traffic. AirTouch argues that it has a direct financial and engineering interest in assuring that interconnection facilities

properly sized so that calls from both U S WEST and other carriers are properly delivered to AirTouch without undue blocking.

B. U S WEST Position

U S WEST asserts that AirTouch's proposed language constitutes a demand for P.01 grade service at all times, requiring U S WEST to overbuild its facilities specifically for AirTouch to ensure that trunk blocking never exceeded one percent during the busiest hour of calling. U S WEST states that it does not provision trunks in this manner to other carriers, and no other interconnection agreement to which U S WEST is a party contains such a provision. Accordingly, AirTouch's demand for P.01 performance grade of service at all times is a request for superior quality interconnection that U S WEST is not required to provide.

U S WEST states that it engineers its trunk groups according to industry standards and generally meets the P.01 grade of service that AirTouch demands and applies the same engineering standards to all similar types of trunk groups and similarly situated carriers. U S WEST cannot and does not commit to any carrier to provide this grade of service at all times because there are numerous factors beyond U S WEST's control, including AirTouch's own ordering behavior, that affects trunk blocking. Furthermore, consistent with U S WEST's position and practices, Washington law only requires U S WEST to engineer its trunks to the P.01 standard, not guarantee performance at that level at all times.

U S WEST proposed contract language refers to negotiated terms in the Agreement regarding joint planning activities for the purpose of forecasting networking requirements; however, U S WEST reserves all decision making authority regarding the provision of Paging Connection Service facilities, including the reconfiguration of trunk groups.

C. Discussion

In Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), the Eighth Circuit held that the Act requires ILECs to provide requesting carriers with access to their "existing" networks only. Id. at 813. ILECs are not required to provide CLECs with "superior" quality interconnection or "superior" quality access to unbundled network elements. Id. at 812-13. Instead, with respect to interconnection, ILECs are only required to provide interconnection that is "equal in quality" to what the ILEC provides itself, its affiliates or other carriers. Id. No party appealed this holding and, accordingly, the Supreme Court's decision in AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999), has no effect on this aspect of the Eighth Circuit decision.

It is not apparent from the record or arguments that AirTouch demands any greater grade of service than that which is provided for in BellCore Special Report SR-TAP-000191 or WAC 480-120-515(2). Both of these references provide that a P.01

objective for engineering a trunk group does not necessarily mean 1% overall blocking. The service quality measurements stated in WAC 480-120-515(2) are the minimum acceptable quality of service under normal operating conditions. Furthermore, U S WEST acknowledges that the BellCore Special Report states engineering guidelines regarding the grades of service that U S WEST provides to CMRS carriers. Exhibit 18.

Insofar as AirTouch relies upon the same source document and WAC section as U S WEST to determine applicable service quality measurements, there should be no dispute between the parties regarding contract language on this sub-issue.

Regarding the second sub-issue raised by the parties, AirTouch's interest in assuring that interconnection facilities are properly sized to avoid undue call blocking is an interest shared by all telecommunications carriers and users. The Commission adopted WAC 480-120-515 providing for network performance standards in recognition of that widespread interest. The fact that U S WEST may be required to share facilities for the transport and termination of calls does not militate in favor of an additional requirement that all aspects and elements of those facilities be subject to mutual agreement between the parties. AirTouch's proposed language is an unnecessary means to accomplish the same objective as WAC 480-120-515.

D. Decision

U S WEST should provide Paging Connection Service facilities engineered to be consistent with the Eighth Circuit court decision, BellCore Special Report SR-TAP-000191, and WAC 480-120-515. U S WEST's proposed language regarding the determination of all aspects and elements of Paging Connection Service facilities, including the reconfiguration of trunk groups, should be incorporated into the Agreement.

7. Does Reciprocal Compensation Require Reciprocal Services?

A. AirTouch Position

One of U S WEST's objections to the payment of reciprocal compensation is that AirTouch is a one-way service provider and does not originate traffic; therefore, a compensation arrangement which requires the originating carrier to compensate the terminating carrier cannot be deemed "reciprocal" within the meaning of the Telecom Act. AirTouch contends that this argument has been duly considered and rejected by

the FCC,¹⁵ the Eighth Circuit, multiple state commissions, and the Commission itself.¹⁶ The FCC expressly ruled in its Local Competition Order, at ¶ 34, that “LECs are obligated . . . to enter into reciprocal compensation agreements with CMRS providers, including paging providers. . .” (Also see ¶1008). AirTouch argues that there is no legal basis to conclude that traffic must flow in both directions for the compensation obligation to apply.

B. U S WEST Position

AirTouch's claim to reciprocal compensation is based on section 251(b)(5) of the Telecom Act, which imposes upon local exchange carriers “[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” U S WEST relies upon a dictionary definition of the term “reciprocal,” and argues that the term means the mutual exchange of traffic. Thus, § 251(b)(5) does not give rise to a statutory duty to compensate carriers that do not perform “reciprocal” functions. Insofar as AirTouch's customers are physically unable to originate traffic that U S WEST could transport and terminate because of the inherent limitations of the AirTouch network, U S WEST argues that there is no possibility of a two-way exchange of traffic, and § 251(b)(5) does not apply.

U S WEST argues that unless AirTouch is required to pay for facilities to deliver traffic originating on U S WEST's network, there is nothing that would prevent it from over-ordering with impunity and expanding its system indefinitely by shifting costs to U S WEST and charging a lower price to its customers.

C. Discussion

In the AT&T Wireless/U S WEST arbitration,¹⁷ the Commission adopted relevant findings by the Arbitrator:

LECs are obligated to enter into reciprocal compensation arrangements with all CMRS providers, **including paging providers**, for the transport and termination of traffic on each other's networks pursuant to Section 251(b)(5) of the Act. FCC Order, ¶ 1008 In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call. Section 251[sic] (d)(2)(A)(1) of the Act

15 FCC Local Competition Order, ¶1088.

16 Washington AWS Arbitrator's Report and Decision at 31-34; Washington AWS First Supplemental Order at 2-3.

¹⁷ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Wireless Services, Inc. and U S WEST Communications, Inc. Pursuant to 47 U.S.C. Section 252*, Docket No. UT-960381, Arbitrator's Report and Decision (WUTC July 3, 1997) (AWS).

provides for “recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier.” The plain language of the Act includes paging providers, without regard to the character of the traffic flow.

AWS, Arbitrator’s Report and Decision at 32 (emphasis added). In a supplemental report, the Arbitrator held:

If the FCC intended that paging providers must originate traffic in order to take advantage of reciprocal compensation arrangements, then the FCC (being a somewhat sophisticated entity) would have explicitly provided for that condition. The USWC argument fails to adequately address the clear direction provided by the FCC in ¶¶ 1092-1093.

AWS, First Supplemental Order at 2. The Commission’s Order approving an interconnection agreement consistent with the Arbitrator’s decisions was upheld by the United States District Court on review.¹⁸

Testimony by U S WEST witness Taylor that the specific adverse consequences of this decision could include “economic inefficiency, wasteful overconsumption, unfair subsidization of pager customers, and perverse incentives to free-riding behavior by the paging service provider” is not persuasive. Taylor, Ex. T-49 at 14. When AirTouch chooses to interconnect via dedicated facilities it must purchase DID numbers in blocks of 100 from U S WEST, as opposed to obtaining assignments of NXX numbers at no charge in blocks of 10,000 from the NANPA. As the number of AirTouch subscribers increases in any one EAS local calling area there comes a point where the cumulative cost of DID number blocks will provide an economic incentive for AirTouch to establish a local POC and arrange to transport local traffic that is terminated on its network.

Even though the issue whether paging providers are entitled to reciprocal compensation because they do not originate traffic is settled in the state of Washington, it is worthwhile to endorse the well-reasoned findings of the California Public Utilities Commission (CPUC) in the Cook case as the decision on this issue.¹⁹

D. Decision

¹⁸ *U S WEST Communications, Inc., v. The Washington Utilities and Transportation Commission*, United States District Court, Western District of Washington at Seattle, Order on Motions for Summary Judgment, Case No. C97-5686BJR (August 31, 1998).

¹⁹ *In Re Cook Telecom, Inc.*, California Public Utilities Commission, Order Denying Application by Pacific Bell for Rehearing of Decision 97-05-095 (Decision 97-09-122, September 24, 1997).

Section 251(b)(5) of the Telecom Act requires that the compensation be reciprocal, not the services. The statute requires that no more than an arrangement be made to compensate termination by whichever party incurs termination costs. The statute does not compel the sending of messages for termination by one party, just as it does not require the use of termination services with a certain regularity. Unless a paging provider such as AirTouch is compensated for terminating calls originating on U S WEST's network, the inequities referred to in the FCC's Local Competition Order (at ¶¶ 1081, 1084, and 1093) could continue.

8. Is AirTouch's Paging Terminal the Functional Equivalent of a Switch?

A. AirTouch Position

AirTouch states that the FCC has already determined that paging carriers, along with all other CMRS providers, terminate traffic and concluded that paging networks comprise "equivalent facilities":

- Compensation is triggered by call termination. 47 U.S.C. § 251(b)(5).
- The FCC defined "termination as the use of switches or an "equivalent facility." Local Competition Order, ¶ 1040.
- The FCC was informed about the operations of paging carriers.
- Finally, with the FCC having provided a definition of "termination" in terms of use of an "equivalent facility," the FCC examined paging carrier's activities and concluded that "calls [are] terminated by paging carriers." Local Competition Order, ¶ 1092.

AirTouch argues that U S WEST made the identical "switch" argument in the AWS case and was rejected.

Furthermore, AirTouch states that the FCC broadly interprets "equivalent facilities," but even if it did not do so, AirTouch's equipment would satisfy a restrictive definition. AirTouch cites evidence in the record to support the conclusion that it switches telecommunications traffic. Glenayre, the manufacturer of the equipment utilized by AirTouch, refers to the GL3000XL mainframe in its product literature as a "switch." The equipment provides answer supervision, disconnect supervision, interrupt messages, telephone number assignment management, and ultimately switches the incoming call from a common trunk group to a dedicated communications device. Bidmon, Exhibit T-2 at 9. The Glenayre switch has the ability to make line-to-line connections, trunk-to-trunk connections and to originate communications, all of which have been identified by U S WEST as switching functions. Bidmon, Transcript (TR) 155. AirTouch's switch also has the ability to recognize special calling patterns for control characters, which U S WEST deemed important. Bidmon, TR 154.

AirTouch states that the functional similarity between the automated call forwarding and routing features of a message switch and AirTouch's paging switch are obvious, and claims that the Commission can resolve this issue in AirTouch's favor

based solely upon the testimony of U S WEST's own witnesses. In an effort to rebut AirTouch's claim that its network performs both tandem and end-office switching functions, U S WEST argues that:

The functions performed by the Glenayre paging terminal, as claimed by AirTouch, such as answer supervision, termination of the call, recording messages, including voice messages, and disconnecting the line, are functions associated with the end-office switch:

. . . any functions it [the Glenayre equipment] does perform are end-office switch type functions, . . .

Peters, Exhibit RT-47 at 6.

AirTouch states that the ultimate issue with respect to basic entitlement is not whether the Glenayre mainframe qualifies as a Class 4 switch, a Class 5 switch, an end-office switch or a tandem switch, but whether AirTouch operates a switch "or equivalent facility" as the FCC broadly uses that term. 47 CFR §§ 51.701(c) and (d). The FCC, in finding that paging carriers are entitled to compensation for transport and termination, necessarily and irrefutably concludes that paging carriers have "equivalent facilities."

B. U S WEST Position

U S WEST argues that AirTouch's equipment does not have the basic characteristics of either a tandem or an end-office switch, nor is it equivalent to a switch. Because AirTouch's network cannot originate calls to other networks, U S WEST claims that none of the equipment in the network performs switching functions.

U S WEST contends that the essential function of a switch is establishing real-time circuits between a calling party and a called party. Instead of making real-time connections as would be done in a switched network, AirTouch's paging terminal receives a paging call over U S WEST's facilities and records an alpha or numeric message, after which the calling party hangs up.

U S WEST also argues that the inability of AirTouch's equipment to provide dial tone is significant, and none of the equipment includes switch ports or their equivalent. Therefore, unlike the one-to-one relationship between a switch port and a telephone number that a circuit switch provides, there is no direct or indirect connection between the paging devices that AirTouch subscribers carry and a unique, designated part of the paging terminal. According to U S WEST witness Peters, AirTouch's Glenayre equipment is akin to transmission equipment, not a switch. It performs the functions of multiplexing equipment and has few of the attributes of a switch. Peters, TR 602-04.

C. Discussion

U S WEST is correct when it states that the Glenayre paging terminal is not the functional equivalent of a tandem switch because the remainder of AirTouch's network consists of transmission equipment that performs the functional equivalent of a loop. However, the Glenayre paging terminal provides a telecommunications service and performs a termination function, thus meeting the functional equivalent test for an end-office. There is no evidence in the record that supports the conclusion that the Glenayre switch performs differently than any other paging terminal. Therefore, the FCC must have intended that the Glenayre switch meet the functional equivalency test because of its unconditional conclusion that paging providers are entitled to compensation for the transport and termination of local traffic. This same conclusion was reached by the Commission in the AWS case.

Furthermore, as in the California Cook case, if AirTouch were not providing termination for telecommunications, the paging calls of U S WEST's customers would not succeed in reaching the paged customer. The Glenayre terminal receives, or terminates, calls that originate on U S WEST's network, and then transmits the calls from its paging terminal to the pager of the called party, just as an end-office switch terminates and then transmits a call to the telephone of the called party.

D. Decision

For purposes of basic entitlement to compensation for terminating traffic, AirTouch's Glenayre paging terminal is the functional equivalent of an end-office switch. Accordingly, AirTouch's proposed language regarding Issues 6, 10, and 12 is adopted as part of this decision.

9. Is AirTouch Entitled to Reciprocal Compensation for Networking Costs Beyond its Paging Terminal?

A. AirTouch Position

The compensation rate to be paid to AirTouch for transport and termination of traffic depends upon which of AirTouch's network elements perform transport and termination functions. AirTouch believes that it is entitled to compensation for the network elements from the interLATA trunks through the radio transmitters and the termination of traffic includes the facilities required to deliver the call to the customer's premises. When applied to paging carriers, the "customers' premises" is where the pager is located. Therefore, the termination of a page includes the network elements out through the radio transmitters. AirTouch considers its paging terminal and the Chicago International Teleport (CIT) facility to be the functional equivalents of a tandem and end-office switch, respectively.

AirTouch argues that an end-to-end communication path is established when a paging call is made. Bidmon, Exhibit T-2 at 13. While the message may be placed in storage for delivery sequence with other calls, this is not done unless and until the call is validated and the availability of the transmission path to the paging

customer's service is verified. In addition, storage of the calls is an automated call processing function, the sole purpose of which is to facilitate completion of the transmission, not to provide any enhanced service.

AirTouch contends that the FCC has recognized that automated call processing mechanisms used in connection with telecommunications services are viewed as "adjunct" functions that are not deemed to alter the character of the service.²⁰ According to AirTouch its paging network could be configured to establish a real-time, end-to-end connection between the calling party and the paging unit. However, this configuration would be much less efficient than using the sophisticated store and forward switching techniques that are now available. Bidmon, TR 152.

Furthermore, AirTouch looks to comparisons between paging networks (with regional hub and spoke networks that transmit paging calls from radio transmitters for regional or national coverage), LEC wireline networks (with their hierarchy of switches and transmission facilities), and with cellular carriers (with multiple cells and sophisticated systems for handing off calls from cell to cell.) FCC Local Competition Order, at ¶1092. AirTouch argues that the FCC intended to include the regional and national paging network (from interLATA trunks through regional and national radio transmitters) in the definition of transport and termination of traffic, in precisely the same manner that LEC wireline carriers recover the costs of their switches and transmission facilities and cellular carriers recover the cost of their cells and switching systems.

B. U S WEST Position

U S WEST contends that the AirTouch is not entitled compensation for the costs of its network components beyond the terminal, including the frame relay costs associated with routing the page to the CIT; the cost of the CIT itself, including the uplink of the page to the satellite distribution point; the cost of delivering the page to the RF sites; and the cost of the RF sites. U S WEST argues that these investments, which comprise a significant majority of AirTouch's network costs, are not properly included in the calculation of a rate for reciprocal compensation.

The need to exclude all costs beyond the terminal arises from the fact that a call that crosses U S WEST's network to AirTouch ends when the calling party hangs up. Thompson, Ex. RT-39 at 12; Peters, Ex. T-46 at 9. U S WEST states that while a paging call is fairly characterized as one transaction, it consists of two processes; the second process occurs entirely on AirTouch's side through the use of equipment that transmits the page. AirTouch's obligation to its paging subscribers begins when the calling party hangs up; U S WEST has no involvement and no responsibility for the traffic beyond that point.

²⁰ FCC NATA Centex Order, 101 FCC 2d 349 (1985), *recon.*, 3 FCC Rcd. 4385 (1988).

In response to AirTouch's claim that the paging terminal is the functional equivalent of a tandem switch, U S WEST states that AirTouch's paging terminal does not have the ability or the intelligence to route calls between end-office switches. Peters, Ex. RT-47 at 8. AirTouch's witness Bidmon recognizes that a tandem switch "connects directly to another" switch and "passes a call from one switch to another by connecting one trunk group to another." Bidmon, Ex. T-2 at 6. U S WEST argues that a call cannot "pass" between two switches unless circuits are connected and cites Newton's Telecom Dictionary, which defines a "connection" as "a path between telephones that allows the transmission of speech and other signals" and "an electrical continuity of circuit between two wires or two units." Newton's Telecom Dictionary at 186. Therefore, U S WEST concludes that AirTouch's paging terminal is not a tandem switch or its equivalent.

U S WEST also argues that AirTouch's CIT facility is not an end-office. An essential characteristic of an end-office switch is that any other carrier should be able to establish a direct trunk between its switch and the end-office. Peters, Ex. T-46 at 8. However, AirTouch's CIT is incapable of interconnecting with other switches on the public switched telephone network, as evidenced by the fact that AirTouch requires all traffic to go through its terminal instead of allowing it to go directly to the CIT.

U S WEST states that if the Arbitrator allows AirTouch any reciprocal compensation, the amount of the compensation should be limited to the costs of terminating a call at the paging terminal as an end-office.

C. Discussion

The FCC has made clear that any reciprocal compensation should be limited to switching costs. In paragraph 1057 of the Local Competition Order, the FCC stated:

We find that, once a call has been delivered to the incumbent LEC and end-office serving the called party, the "additional cost" to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching.

Notably, the FCC did not include the costs of "delivery" of a call in this provision.

Accordingly, in Cook, the California Public Utilities Commission, relying on paragraph 1057, ruled that Cook could recover only the costs associated with the terminal, not the costs of equipment beyond the terminal that serve the function of delivery:

For the purposes of setting rates under section 252(d)(2), only that portion of the forward-looking, economic costs of end-office

switching that is recovered on a usage-sensitive basis constitutes an "additional cost" to be recovered through termination charges.

Decision No. 97-09-123, Order Denying Rehearing of Decision 97-05-095, at 11, Petition of Cook Telecom, Inc. for Arbitration Pursuant to § 252(b) of the Telecommunications Act of the Rates, Terms and Conditions of Interconnection with Pacific Bell, Docket A. 97-02-003 (CA PUC Sept. 24, 1997) (quoting Local Competition Order ¶ 1057). The California Commission explained why paragraph 1057 permits recovery of only the costs associated with the terminal:

It is clear from this statement that the FCC did not intend, when referring to the "delivery" of calls in its definition, to have the costs of facilities beyond the end-office switch included in a termination rate. Therefore, since we have found a paging terminal to be a facility equivalent to an end-office switch in providing a call termination function, thus permitting Cook to seek compensation under Section 251(b)(5), it is just and reasonable to limit the costs considered for termination compensation to the paging terminal.

Id. (emphasis added).

This Commission reached a comparable result in the AWS case. In that case, AT&T Wireless contended that its network performed functions of tandem switches and inter-office functions. Nevertheless, the Arbitrator limited the reciprocal compensation to the end-office rate.²¹

Mr. Bidmon's testimony establishes that there is never an electrical connection between the circuit coming from the U S WEST network when the calling party places a call and a circuit on the AirTouch network. After U S WEST delivers a paging call to the AirTouch terminal, the calling party is disconnected from the paging terminal before any other functions are performed. When the calling party hangs up, the AirTouch subscriber for whom the paging call is intended does not yet know that he or she has been paged. Bidmon, TR at 238-39; Bidmon, Ex. T-2 at 13-14; Peters, Ex. RT-47 at 6. AirTouch's equipment, therefore, never connects circuits and cannot be a tandem switch or equivalent to one. The CIT facility functions like a router within the AirTouch network, and not an end-office switch. Correspondingly, AirTouch's paging terminal does not function like a tandem switch because it does not route calls between end-office switches. The AirTouch network side of the paging terminal is the functional equivalent of a wireless loop, with different components serving as feeder, distribution, and drop.

²¹ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Wireless Services, Inc. and U S WEST Communications, Inc. Pursuant to 47 U.S.C. Section 252*, Docket No. UT-960381, Arbitrator's Report and Decision at 29 (WUTC July 3, 1997) (AWS).

D. Decision

AirTouch's paging terminal is the functional equivalent of an end-office and reciprocal compensation is limited to the costs of terminating a call at the paging terminal. The transmission of a page from the terminal to the paging device of an AirTouch subscriber is entirely AirTouch's responsibility. As it has done historically, AirTouch should recover those costs from its paging subscribers.

10. What Reciprocal Compensation Rate Should Be Paid?

A. AirTouch Position

AirTouch believes that a paging network designed under appropriate TELRIC cost principles should not necessarily be a stand-alone paging system designed to serve only the state of Washington. If the stand alone design will not result in the lowest cost, most efficient, state of the art network design, then the stand alone design should not be used. Zepp, Exhibit T-12 at 273. More often, the lowest cost, most efficient, state of the art design is one that provides several services to multiple geographic areas. Zepp, Exhibit T-12, at 22-23.

AirTouch relies upon a cost study that was designed to comply with TELRIC requirements. AirTouch engineering personnel were directed to come up with an efficient, least cost, forward-looking paging network design to serve the state of Washington. In circumstances where it would be more efficient or less costly to alter the system design from the current system, the design for the TELRIC system was altered. For example, while AirTouch currently operates two Glenayre switches in the state of Washington, the system design for the TELRIC study utilizes only one Glenayre switch based upon a determination that it would be less expensive to carry traffic to a centralized switch location than to install a second costly switch. Bidmon, Exhibit T-2 at 28.

In designing its idealized system, AirTouch did not construct a "stand alone, Washington-only paging system" (i.e., a system designed to do paging only for customers located in Washington state, for which 100% of the costs were allocated to the paging element). Zepp, Exhibit T-12 at 22. AirTouch concluded that it would gain economies of scale by designing a system that supported all of the services AirTouch provides (e.g., including voice mail) to serve customers in Washington and Oregon as a single district.

Once the idealized system to serve the current subscriber base was defined, the AirTouch personnel utilized AirTouch's three year business plan to project subscriber growth, and then extrapolated this growth to year seven (the useful life of the core equipment). Bidmon, TR at 144-145. Finally, AirTouch personnel developed current cost information for the system components based upon manufacturer quotes and price lists. This information, along with data on the life of the assets, applicable tax rates, removal costs and related items were provided to AirTouch's economist/rate

expert, Dr. Thomas Zepp. Dr. Zepp utilized the information provided by AirTouch to determine a TELRIC-based cost per minute of use (MOU) for five components of the AirTouch paging system: (1) the InterLATA transport facilities to the AirTouch switch; (2) the Glenayre 3000XL mainframe switch; (3) the frame relay system used to transport traffic to the satellite distribution system; (4) the Chicago International Teleport ("CIT") satellite distribution system and (5) the radio frequency ("RF") transmitting system. Zepp, Exhibit T-12 at 28-32.

Dr. Zepp calculated the per MOU TELRIC costs for each component based upon determinations regarding the revenue requirements, the cost of money, the present value of monthly paging calls and the allocation of corporate and district general and administrative costs. The specific rates that AirTouch is seeking to be paid are reflected in confidential portions of the record evidence. AirTouch states that to the extent that the Commission finds any particular cost item in its cost study is inappropriate, such finding should also recognize that the network design and economic model employed by AirTouch nonetheless complies with TELRIC principles. As such, if the Commission finds a cost item to be improperly supported, AirTouch respectfully requests that the Commission ask AirTouch to re-run its TELRIC model with the values that the Commission finds appropriate.

B. U S WEST Position

U S WEST argues that AirTouch has not met its burden of proving its termination costs because the study is flawed in several material respects and lacks the supporting information. U S WEST states that the flaws in AirTouch's study are demonstrated by the results the study produces. Despite the FCC's expectation that the costs of paging providers are less than those of wireline carriers, the rate that AirTouch's cost study produces is a cost per minute that is over 1800% of the TELRIC reciprocal compensation rate the Commission has ordered and that is used by all other wireline and wireless carriers that interconnect with U S WEST in Washington. Thompson, Exhibit RT-39 at 11-12. Moreover, the rate the study produces for just the cost of termination on AirTouch's paging terminal is almost 700% of the amount the Commission found to be the forward-looking TELRIC local switching cost. Id. at 12. In addition, AirTouch's terminal cost is about 250% of the paging terminal cost the California commission found in Cook to be least-cost and forward-looking. Id.

U S WEST argues that AirTouch failed to explain and justify the investments and the related assumptions used to support the costs it is seeking to recover through its study. U S WEST faults AirTouch's failure to provide statistical support for growth rate calculations, allocation of costs between state jurisdictions, utilization rate calculations, and the allocation of costs between paging service and voice mail enhanced service. U S WEST also argues that AirTouch's cost study is methodologically flawed because it improperly includes the costs of facilities beyond the paging terminal, and improperly sizes its network and investments.

C. Discussion

The legal standard to be applied by the WUTC in establishing the rate AirTouch is to be paid for transporting and terminating U S WEST's traffic is set forth in 47 U.S.C. § 252(d)(2). The statutory pricing standard requires the approved rate to be "just and reasonable" which means that the rate must provide for the recovery of "costs associated with the transport and termination of calls that originate on the network facilities of the other carrier" (in this case U S WEST).

In the Local Competition Order, the FCC promulgated Section 51.711(c) of the rules indicating that a state commission shall establish the rates that a paging service provider may assess for transport and termination "based on the forward-looking costs that such licensees incur in providing such services." 47 C.F.R. Section 51.711(c). AirTouch and U S WEST agree that forward looking costs should be determined based upon a Total Element Long Run Incremental Cost ("TELRIC") study. Bidmon, Exhibit T-2 at 27; Zepp, Exhibit T-12 at 12; Reynolds, Exhibit T-20 at 5. The Commission has adopted TELRIC as the appropriate standard, and the parties' economist witnesses also endorse TELRIC. Zepp, Exhibit T-12 at 13; Thompson, Exhibit T-38 at 2-3.

While AirTouch's study complies with TELRIC principles as if it were an incumbent provider, its one-switch design does not properly account for U S WEST's existing wire centers. Consequently, interLATA facilities are factored into the study to transport traffic originating on U S WEST's network to the AirTouch paging terminal, even though U S WEST is prohibited from providing that facility. U S WEST cannot be required to sub-contract its obligation to deliver local traffic originating on its network to AirTouch.

U S WEST persuasively argues that AirTouch failed to explain and justify investments assumptions relating to a seven-year growth rate of approximately 140%. This figure appears in a so-called business plan that only projects out three years of the seven-year cost study and there is insufficient explanation how that growth rate was derived or disclosure of assumptions upon which it is based. This is not the kind of statistical data that can be substantiated entirely on the estimates of a technical operations expert such as Mr. Bidmon. AirTouch also relies on Mr. Bidmon's expertise to allocate costs between voice mail and paging services. While Mr. Bidmon may be able to make a ball park estimate based upon his experience, the conduct of a reliable cost study requires additional substance.

Furthermore, the business plan that Mr. Bidmon relied upon also shows that the growth assumption in the cost study includes projected growth in Oregon and Washington and it is not clear whether there is sufficient evidence in the record to determine the percentage of subscribers or the amount of investment in the study that relates to Oregon. Several of the specific improper investments included in the AirTouch study (i.e., agency software that allows retail stores to activate pagers when purchased) may be subject to correction by rerunning the AirTouch study, but overall

the study does not appear to be subject to correction without the introduction of new evidence.

U S WEST states that the Arbitrator should not award any reciprocal compensation to AirTouch based upon two independent reasons: 1) AirTouch does not terminate traffic; and 2) AirTouch has failed to prove its costs. U S WEST goes on to argue that if the Arbitrator finds that AirTouch terminates traffic and proves its costs, then the Arbitrator should disregard AirTouch's proof and substitute compensation based upon the local switching rate established in the pending generic cost proceeding (Docket No. UT-960369, et al.) as a reasonable ceiling proxy.²² U S WEST recognizes that AirTouch actually incurs costs when it performs switching and that the Commission has given thorough consideration to the rate developed in the cost proceeding.

The FCC's requirement that a paging provider seeking termination fees must prove its costs, and its conclusion that using LEC costs for terminating calls *may* not be a reasonable proxy, is based upon a lack of information in the FCC's record concerning paging providers' costs. Although the cost study provided by AirTouch is inadequate for purposes of establishing a firm rate, there is sufficient information in the record to conclude that the local switching rate established in the pending generic cost proceeding is a reasonable proxy for the actual costs incurred by AirTouch.

D. Decision

The local switching rate established in the pending generic cost proceeding shall serve as a proxy for the actual costs incurred by AirTouch until such time as FCC makes a further determination. Other than the adjustments described elsewhere in this Report, no additional downward adjustment is justified.

11. What Percentage of Traffic Is Subject to Reciprocal Compensation? (Appendix A - Section I)

A. AirTouch Position

AirTouch states that the percentages of Exempt and Compensable Traffic affect the economic terms of the parties' relationship in two respects: 1) AirTouch is willing to pay for interconnection facilities at U S WEST's tariff rates to the extent that the facilities are used to carry Exempt Traffic; and 2) AirTouch is entitled to be paid terminating compensation by U S WEST on all Compensable Traffic.

²² U S WEST also proposes a downward adjustment based upon the FCC's unsubstantiated expectation that the termination costs of paging providers are less than those of wireline carriers. U S WEST fails to provide additional substantiation or propose a basis for calculating such an adjustment.

AirTouch conducted a study in Seattle on AirTouch's separate trunk groups to U S WEST's local tandem and access (toll) tandem. AirTouch's study compared the volume of traffic delivered to AirTouch's switch from U S WEST's access tandem with the total volume on both the local and access tandem, and used this data to extrapolate the percentage of traffic that should be deemed Exempt Traffic. Exhibit C-7, p. 1-2. The local tandem is used to route intraLATA non-toll traffic where the number of end-office switches and the amount of traffic justifies it. The access tandem performs similar functions, except it routes intraLATA toll traffic between customers, and interLATA toll traffic between customers and long distance service providers. Peters, Exhibit T-46, at 26.

AirTouch's witness Bidmon estimates that the percentage of transit traffic terminated which did not originate on U S WEST's network at 7%. Mr. Bidmon stated that this percentage both overstates toll traffic (intraLATA toll calls also appear on the toll tandem) and understates traffic originating on local carriers other than U S WEST (the local tandem traffic information does not differentiate between traffic originating on various carriers' networks), but, on balance, the outcome reflects a good faith estimate. Bidmon, TR at 230.

AirTouch's study assumes that a considerable portion of the traffic delivered via the access tandem is "Exempt Traffic" either because the toll nature of the traffic is likely to mean that it is non-local, or the source of the traffic means that it is not U S WEST-originated. AirTouch also assumes that traffic delivered over the local tandem is very likely to be Compensable Traffic. AirTouch's study concluded that 93% of the tandem level traffic directed to AirTouch in Seattle came over the local tandem, and 7% came over the access tandem.

Mr. Bidmon also concluded that paging calls generally originate and terminate in the local service area where the pager number is assigned based upon his observation that there is a high correlation between the number of pagers in a local service area and the number of end-office and local tandem trunks that must be installed to serve those pagers. Bidmon, Exhibit T-2 at 62. AirTouch states that the overwhelming majority of calls to paging customers are made by family, friends, business colleagues, or local customers, meaning that they are local calls.

AirTouch argues that its Last Best Offer proposing that the percentage of Exempt Traffic should be 20% is most reasonable. AirTouch also states that it would accept the 20% figure as an interim rate, along with a Commission order that the parties devise a mutually agreeable methodology to generate actual paging-specific traffic data which would be substituted for the interim rate.

B. U S WEST Position

To estimate the percentage of transit traffic U S WEST conducted a four month study of two-way cellular and PCS traffic in Washington. Ex. 24 at 5; Ex. 25. According to U S WEST's study, 41.5% of traffic delivered to wireless carriers is transit

traffic that does not originate on U S WEST's network. Ex. 24 at 5; Malone, TR 385. U S WEST based its study of transit traffic on two-way wireless carriers rather than paging providers because most wireless carriers in Washington have chosen to interconnect with U S WEST using CroSS7 (SS7) links. U S WEST argues that two-way wireless carriers are an appropriate proxy for paging providers because cellular and PCS carriers, like paging providers, are CMRS providers. Furthermore, like paging providers, two-way wireless carriers are present in both urban and rural areas. Ex. 24 at 5. Accordingly, measurements of two-way wireless carrier transit traffic reflect state-wide calling patterns. Ex. 24 at 5-6; Malone, TR 401-02.

Although U S WEST's Washington transit traffic study supports a 41.5 percent transit traffic proxy for traffic delivered to AirTouch, in its Last Best Final Offer, U S WEST advocates a 33.8 percent transit traffic figure. U S WEST states that the 33.8 percent figure is based on a composite of transit traffic delivered to two-way wireless carriers across U S WEST's 14-state territory. U S WEST argues that its proposal is conservative given the 41.5 percent figure its Washington-specific study produced, the significant number of facilities-based CLECs in this state, and that 53 percent of the NXX codes in the local calling area of Washington are assigned to CLECs. Finally, U S WEST argues that its proposed transit traffic figure is very close to the 30 percent assumption AirTouch agreed to in its interconnection agreement with GTE. Malone, TR 385-86; Ex. 20 to Ex. 1 (AirTouch Petition).

C. Discussion

Each party contends that the other has the burden of proof to establish a reliable methodology and calculation of the percentage of traffic subject to reciprocal compensation. While this determination may have a direct impact on net compensation, it is separate from the determination of a compensation rate for AirTouch's costs to terminate traffic.

Both parties have an interest in the determination of an accurate estimate. As in many cases, the underlying issue appears to be which party pays for the costs of performing a reliable study. Both parties agree that accurate transit traffic data could be compiled if AirTouch used trunks with SS7 measuring capability; however, it is unreasonable for U S WEST to expect AirTouch to upgrade its network to SS7 comparability solely for the purpose of measuring exempt traffic. AirTouch contends that U S WEST has access to relevant information which it does not pass on to AirTouch, but there is no evidence in the record that U S WEST denied a related data request by AirTouch.

The issue of whether either party has the burden of proof to establish the percentage of transit traffic was not addressed in the AT&T Wireless case. AirTouch's argument that U S WEST must seek an exemption from its obligation to provide traffic originating on its network without charge is not persuasive because AirTouch acknowledges that it is not entitled to compensation for transit traffic. Unlike cost information which substantially is under the control of AirTouch, both parties have

access to information which is relevant to this issue, and both parties submitted evidence, in fact. Therefore, this issue will be resolved on the basis of which proposal is the most reasonable based upon the record.

Both studies performed by the parties are flawed. While U S WEST faults AirTouch for not incurring the costs of SS7, thus enabling accurate measurement of transit traffic, U S WEST prepared its study based upon cellular and PCS provider traffic, and not other paging providers. Either other paging provider data is unavailable or it is unfavorable to U S WEST. Mr. Bidmon credibly testified that cellular and paging provider traffic are significantly different in character. U S WEST offered that over 50% of the NXX codes in Washington are assigned to carriers other than U S WEST; however, U S WEST also admitted that NXX codes of new entrants generally show much lower fill rates than those assigned to established carriers such as U S WEST.

AirTouch admits that its figure for local calls does not distinguish between calls that originate on U S WEST's network and calls that originate on CLEC networks. Mr. Bidmon also testified that a typical pager customer could be a business that has a hundred or two hundred units in service. Bidmon, TR 161. The opinion that such a business predominantly would generate local traffic is unsubstantiated and not credible. Furthermore, the discrepancy between AirTouch's estimate of Exempt Traffic in the instant case cannot reasonably be reconciled with its GTE agreement on the basis that the 30% figure for non-local and non-GTE originated traffic was the product of give-and-take negotiations.

While these critiques are based upon the underlying studies performed by the parties, both submitted last best offers that differ substantially from their Washington State figures. Thus, some other basis for evaluating the comparable reasonableness of the two offers is sought. It is notable that the AirTouch-GTE Washington provision for 30% Exempt Traffic (for which it can be inferred that AirTouch agreed to in exchange for some other concession from GTE) is the highest figure cited in any negotiated or arbitrated agreement nationwide.

Accordingly, 30% is considered to be the maximum figure for the reasonable range of non-local and non-U S WEST originated traffic delivered to AirTouch. While U S WEST's estimate may be closer to the 30% figure than the AirTouch figure, it exceeds the reasonable range and is rejected. While the AirTouch 20% figure appears to be at the bottom of the reasonable, it is not unprecedented.

The AirTouch proposal that the parties devise a mutually agreeable methodology to generate actual paging-specific traffic data which would be substituted for the arbitrated rate makes sense; however, that is exactly what the parties were expected, but failed, to do during their 159 days of negotiation prior to the filing of AirTouch's petition for arbitration. Alternatively, if either party generates more reliable paging-specific data during the term of the Agreement, it may seek modification of the Exempt Traffic rate through the alternative dispute resolution process provided for in the Agreement.

D. Decision

Eighty percent (80%) of all traffic delivered by U S WEST to AirTouch under the Agreement shall be deemed "Compensable Traffic." Twenty percent (20%) of all traffic delivered by U S WEST to AirTouch under the Agreement shall be deemed "Exempt Traffic." If either party generates more reliable paging-specific data during the term of the Agreement, it may seek modification of the Exempt Traffic rate through the alternative dispute resolution process provided for in the Agreement.

AirTouch's proposed language for payment of the portion of U S WEST facilities used to deliver "Exempt Traffic" is adopted as part of this decision.

12. What is the effective Date of the Agreement? (Contract Provision 11.1.1)

A. AirTouch Position

On July 28, 1998, AirTouch formally requested to negotiate an interconnection agreement with U S WEST under 47 U.S.C. §252. The date of the request is pertinent to several procedural deadlines in the arbitration schedule. AirTouch seeks retroactive payment or credit for the interim transport and termination of local telecommunications traffic originating on U S WEST's network based upon the economic terms in the Agreement. AirTouch proposes that all other provisions of the Agreement be effective as of the date it is approved by the Commission.

AirTouch's position is based upon paging provider treatment as a Commercial Mobile Radio Service (CMRS). Paragraph 1042 of the *FCC's Local Competition Order* states:

As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

AirTouch argues that this ruling establishes authority for the Arbitrator to grant AirTouch relief from facilities charged as of July 28, 1998 (the date of the Section 252 negotiation request), if not earlier.

AirTouch also argues that its position is supported by 47 C.F.R. § 51.717. FCC Rule 51.717 provides that a CMRS provider is entitled to assess the same rates for the transport and termination of local telecommunications traffic upon an ILEC as the ILEC assessed pursuant to the pre-existing non-reciprocal arrangement, beginning on the date of a formal request to negotiate and continuing until a new agreement is approved by a state commission. AirTouch acknowledges that this rule does not directly apply to paging providers, but also claims that it establishes the principle that due compensation should be paid sooner rather than later to a requesting carrier.

AirTouch urges the Commission to apply this principle by providing for the payment of the terminating compensation rate based upon the record evidence, effective July 28, 1998.

B. U S WEST Position

U S WEST argues that Section 252 of the Telecom Act requires parties to submit interconnection agreements to the Commission for approval or rejection and that the Act does not contemplate an agreement becoming effective (and thereby enforceable), before the agreement has been fully negotiated and/or arbitrated, and approved by the Commission. U S WEST argues that a federal district court has held that an arbitrated, but unapproved, interconnection agreement does not create enforceable rights and obligations.²³ Accordingly, U S WEST argues that the Commission should not impose interconnection obligations retroactively to the date negotiations commenced and all terms to the agreement should become effective only upon approval by the Commission.

U S WEST argues that FCC Rule 717(b) offers no support for the argument that the terms of the arbitrated agreement should be retroactively applied. This Rule allows CMRS providers to utilize a LEC's pre-existing rate as a proxy for the CMRS provider's cost of transport and termination of traffic to a LEC prior to the negotiation or arbitration of a binding interconnection agreement. However, in this case there is no applicable pre-existing rate because U S WEST did not charge AirTouch for terminating local telecommunications traffic originated by AirTouch subscribers because there was none. Thus, Rule 717(b) does not apply by its own terms.

Finally, U S WEST argues that AirTouch's proposal ignores the FCC's recognition of the unique status of paging within the realm of CMRS providers. Unlike other CMRS providers, the FCC explicitly prohibits use of a LEC's cost of terminating traffic as a proxy for a paging provider's costs, and provides that if a paging provider seeks compensation for terminating traffic, it must affirmatively establish rates based upon the forward-looking economic costs of termination incurred. Any compensation to AirTouch must be prospective and dependent upon AirTouch's demonstration of its costs. Rule 717(b) applies only to those CMRS providers that may utilize the incumbent LEC's rates as a proxy, not paging providers.

C. Discussion

This dispute arises in the historical context of ILECs charging CMRS carriers, including paging providers, for terminating traffic that originates on the ILECs'

²³ *U S WEST Communications, Inc. v. Serna*, Docket No. CIV 97-0539 JC/WWD, 1998 U.S. Dist. LEXIS 13362 at *10 (March 2, 1998) ("U S WEST has no duty to perform the terms of an arbitrated agreement until such time that the Commission fully approves such agreement.").

networks.²⁴ Section 251(b)(5) of the Telecom Act obligates LECs to establish reciprocal compensation arrangements for the transport and termination of local traffic originated by or terminating to any telecommunications carrier, including paging providers.²⁵ The FCC concluded that transport and termination should be treated as two distinct functions for purposes of § 251(b)(5). Furthermore, the FCC concluded that § 251(b)(5) prohibits a LEC from imposing termination and other charges for LEC-originated traffic to a CMRS provider.²⁶

Based on this discussion the FCC adopted Rule 51.703(b) stating that a LEC may not assess charges on any other telecommunications carrier for local traffic that originates on the LEC's network. As discussed elsewhere in this Report, the FCC's Common Carrier Bureau subsequently was requested to clarify whether Rule 51.703(b) applied to transport as well as termination charges. The Bureau concluded that a LEC is not allowed to charge a paging provider for the cost of LEC transmission facilities that are used on a dedicated basis to deliver local traffic originating on the LEC's network.

U S WEST has charged AirTouch for dedicated facilities to transport local traffic originating on U S WEST's network to the point of interconnection at AirTouch's messaging switch since prior to the *Local Competition Order's* effective date. Bidmon, Exhibit T-2 at 20. These charges were imposed as a precondition to interconnection and are not the result of a negotiated agreement between the parties. Subsequent to passage of the Telecom Act, AirTouch ceased paying facilities charges to U S WEST. U S WEST imposes transport facility charges on AirTouch based upon its position that AirTouch's network is the cost causer and that conclusions in the Metzger letter are ill-advised and not binding. Neither position has merit. The Commission has previously determined that the network originating local telecommunications traffic causes costs for transport and termination, and the clarification by the FCC's Common Carrier Bureau was conducted pursuant to formal procedures and delegated authority. Even if not binding, the Bureau's conclusions are persuasive.

The FCC promulgated Rule 51.717 to retroactively provide symmetrical compensation for CMRS providers operating under agreements providing for non-reciprocal compensation for transport and termination of local telecommunications traffic. Rule 51.717(b) provides that the CMRS provider shall be entitled to assess upon the ILEC the same rates that the ILEC assessed upon the CMRS provider pursuant to the pre-existing arrangement. While AirTouch did not incur additional transport costs for traffic originating on its network (for which it would be entitled to assess a symmetrical rate for compensation), Rule 51.717 reinforces AirTouch's claim for a July 28, 1998, effective date to recoup or offset charges for which it has no obligation to pay.

²⁴ FCC Local Interconnection Order, ¶¶ 1080-1084.

²⁵ *Id.*, at ¶ 1041.

²⁶ *Id.*, at ¶ 1042.

The same cannot be said for AirTouch's request that economic terms for terminating compensation in its Agreement also be accorded retroactive effect. The principles of symmetrical reciprocal compensation do not apply to paging carriers, even though U S WEST has an obligation to pay reciprocal compensation for one-way paging traffic. The FCC decided that it had insufficient evidence in the record to conclude that LEC termination rates were an appropriate proxy for paging termination compensation rates. Paging providers are required to independently establish their costs as a basis for compensation. Thus, 51.717(b) does not provide for retroactive effect of paging provider local traffic termination rates.

The federal court case cited by U S WEST in support of its arguments is not on point. AT&T Communications of the Mountain States, Inc. (AT&T), and U S WEST arbitrated an interconnection agreement in the state of New Mexico. U S WEST alleged that decisions by the state commission violated its constitutional guarantees to due process and constituted unauthorized takings, and sought judicial review prior to the completion of the interconnection agreement approval process. The U.S. District Court found that U S WEST's constitutional claims were not ripe because U S WEST was under no duty to perform until such time that the commission finally approved an agreement. In the instant case, AirTouch seeks to enforce rights to compensation consistent with FCC rules subsequent to the completion of the approval process. 47 C.F.R. § 51.717 establishes the principle of affording parties retroactive relief as the result of non-reciprocal compensation of transportation costs. In the instant case, U S WEST is not required to perform a duty prior to Commission approval of an agreement.

Both parties make arguments which refer to the Commission's Order approving an interconnection agreement between AT&T Wireless Services, Inc. (AWS) and U S WEST, but that case is not germane to this issue. In the AWS case, the Commission did not make a decision regarding the scope and application of FCC Rule 51.717(b) because it found that a voluntarily agreement between the parties subsequent to the operative date of the FCC rules was controlling.

D. Decision

Neither AirTouch's nor U S WEST's proposal complies with federal law and regulations. The economic terms of the Agreement pertaining to U S WEST's obligation to pay for the cost of its transmission facilities that are used on a dedicated basis to deliver to AirTouch local telecommunications traffic originating on U S WEST's network, as set forth in Appendix A, shall be given effect as of July 28, 1998, the date of AirTouch's request for a renegotiated interconnection agreement pursuant to Sections 251 and 252 of the Telecom Act. The parties will use their best efforts to reach mutual agreement within 30 days after approval of the Agreement by the Commission regarding implementation of this decision. If the parties are unable to reach agreement, the matter shall be subject to the dispute resolution provisions in the Agreement. The effective date of all other terms shall be governed by entry of a Commission Order approving the Agreement.

13. Does Section 252(i) of the Telecom Act Allow AirTouch to "Pick-and-Choose" During the Term of the Agreement? (Contract Provision 13.29)

Section 252(i) of the Telecom Act requires a local exchange carrier to make available any interconnection, service or network element provided under an agreement approved under that section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. 47 U.S.C. § 252(i).

In AT&T v. Iowa Utilities Board, the Supreme Court upheld the FCC's "pick-and-choose" rule, 47 C.F.R. § 51.809, that implemented 47 U.S.C. § 252(i). The FCC rule requires an ILEC to make available to any requesting CLECs any individual interconnection, service, or network element arrangement contained in other approved interconnection agreements upon the same rates, terms, and conditions. 47 C.F.R. § 51.809(a). In addition, the FCC rule provides that the requirement does not apply if the ILEC proves that the cost of providing a particular interconnection, service, or element to another carrier would be greater or not technically feasible. Id. § 51.809(b). ILECs also must make individual interconnection, service, or network element arrangements available for a reasonable period of time after the agreement in which they appear is approved and available for public inspection. Id. § 51.809(c).

A. AirTouch Position

AirTouch asserts that it is entitled to exercise its rights under § 252(i) to opt into other interconnection agreements during the initial term of its interconnection agreement with U S WEST. In contrast, U S WEST witness Dr. Taylor expresses concern that AirTouch's proposed provision would undermine the integrity and enforceability of interconnection agreements. (Ex. T-49, Taylor at 19:5-23:26). U S WEST witness Malone testified that AirTouch's proposed provision would result in a "non-binding" agreement. (Ex. T-22, Malone at 18:11-18). Under this view, AirTouch would be required to relinquish its Section 252(i) rights until its agreement with U S WEST expired.

AirTouch refutes these contentions and argues that the FCC properly analogized § 252(i) rights to "most favored nation" (MFN) clauses in contracts. Such clauses entitle a party to nondiscriminatory treatment during the term of an agreement. Contracts with MFN clauses are not incomplete, nor unenforceable. AirTouch notes, however, that pick and choose rights are not unlimited, and acknowledges that 47 C.F.R. § 51.809 has placed certain limits on the exercise of such rights. AirTouch contends that U S WEST's concerns over the attendant risks are overstated.

B. U S WEST Position

U S WEST acknowledges that the Supreme Court upheld the FCC's "pick-and-choose" rule, 47 C.F.R. § 51.809. However, according to U S WEST that rule (and its application in particular circumstances) is far from clear. For example, the FCC rule

permits CLECs to adopt interconnection and unbundled element "arrangements" from other approved interconnection agreements. 47 C.F.R. § 51.809(a). U S WEST argues that the rule does not define an "arrangement". Additionally, ILECs must only offer previously-approved interconnection or unbundled element "arrangements" for a "reasonable period of time" after the agreement is approved. *Id.* § 51.809(c); however, the FCC does not define what is a "reasonable" period of time.

U S WEST argues that the application and interpretation of 47 C.F.R. § 51.809 is both unclear and intensely fact-specific. Dr. Taylor testified that AirTouch's proposed pick-and-choose language risks imposing significant and undesirable economic costs. Taylor, Exhibit T-49 at 21-23; Taylor, Exhibit RT-51 at 12-13. Whether AirTouch can adopt provisions of another agreement depends upon the terms and conditions, language and arrangement in that other agreement. U S WEST argues that because Rule 809 is complex and its application is fact-specific, the Arbitrator should simply insert the statutory language from 47 U.S.C. § 252(i) in the Agreement. U S WEST agrees that AirTouch does not waive any § 252(i) rights by entering into this interconnection agreement.

U S WEST also argues that any other decision is premature at this time. When AirTouch seeks to adopt an "arrangement" from another agreement, the Commission can address the factual questions that such a request presents under the Act and Rule 809. The Arbitrator, through a pick-and-choose clause, should not attempt to give anticipatory rulings without an actual controversy.

C. Discussion

The issue whether AirTouch is legally entitled to invoke § 252(i) rights during the term of an existing interconnection agreement is an actual controversy in this arbitration, even though AirTouch does not seek to exercise any rights. Although U S WEST agrees that AirTouch does not waive any § 252(i) rights by entering into this interconnection agreement, U S WEST makes clear that it opposes the exercise of those rights by a party which has negotiated and/or arbitrated an approved agreement.

The Supreme Court observes that in many important respects the Telecom Act is a model of ambiguity, but that Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency. AT&T v. Iowa Utilities Board, 119 S.Ct. 721, 738. Various parties opposed the FCC's implementation of §252(i) and presented arguments similar to U S WEST in this case. The Supreme Court responded:

And whether the [FCC's] approach will significantly impede negotiations (by making it impossible for favorable interconnection service or network-element terms to be traded off against unrelated provisions) is a matter eminently within the expertise of the [FCC] . . .

During the comment period prior to issuing its *Local Interconnection Order*, the FCC was requested to clarify that §251 permits so-called “most favored nation” provisions, which allow a new entrant with an interconnection agreement to substitute the preferable terms included in a later agreement that the ILEC enters with a subsequent new entrant.²⁷ Consequently, the FCC concluded that §251(i) entitles all parties with interconnection agreements to MFN status, regardless of whether they include “most favored nation” clauses in their agreements.²⁸ This means that any requesting carrier may avail itself of any terms and conditions previously or subsequently negotiated by any other carrier for individual interconnection, service, or elements provided for in an agreement filed with, and approved by, the Commission, subject to the protections in 47 C.F.R. § 51.809.

The prime goals of the Telecom Act are nondiscriminatory treatment of carriers and promotion of competition. The FCC believes its approach to implementation of §251(i) will maximize competition by ensuring that carriers’ obtain access to terms and elements on a non-discriminatory basis. The FCC’s implementation presents a balanced approach to competing interests by establishing broad safeguards. The exercise of §251(i) rights will require a fact-specific case-by-case analysis; however, there is no uncertainty regarding the opportunity to exercise those rights by a party to an approved interconnection agreement.

D. Decision

Even though the FCC makes clear that all parties with interconnection agreements are entitled to MFN status regardless of whether they expressly include “most favored nation” clauses in their agreements, it is appropriate to do so when requested. This decision is not based upon the specific language proposed by the parties; however, the interconnection agreement should contain language consistent with AirTouch’s position that it may avail itself of any terms and conditions previously or subsequently negotiated by any other carrier for individual interconnection, service, or elements provided for in an agreement filed with, and approved by, the Commission, subject to the protections in 47 C.F.R. § 51.809.

III. IMPLEMENTATION SCHEDULE

Pursuant to 47 U.S.C. § 252(c)(3), the Arbitrator is to “provide 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, may contain implementation time lines. The parties shall

²⁷ FCC Local Interconnection Order, ¶ 1305.

²⁸ *Id.*, ¶ 1316.

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.

IV. CONCLUSION

The foregoing resolution of the disputed issues in this matter meets the requirements of 47 U.S.C. § 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.

A. 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 Arbitrator's 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.

B. Negotiated Agreements

a. A "request 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.

C. Arbitrated Agreements

a. A “request 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 “request 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.

D. 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.

E. 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 U.S.C. § 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.

F. Approval Procedure

1. The request will be assigned to 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. Commission 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.

G. Fees and Costs

1. 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 28th day of April 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

LAWRENCE J. BERG
Arbitrator