SERVICE DATE

FEB 24 2000

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between	)	DOCKET NO. UT-990385
AMERICAN TELEPHONE TECHNOLOGY, INC., and U S WEST COMMUNICATIONS, INC.	)	COMMISSION ORDER ADOPTING ARBITRATOR'S REPORT, IN PART; MODIFYING REPORT, IN PART; AND APPROVING NEGOTIATED AND ARBITRATED INTERCONNECTION AGREEMENT
Pursuant to 47 U.S.C. Section 252.	)	

BACKGROUND

Procedural History

1. This matter comes before the Commission[1] on review of an Arbitrator's Report and Decision (Report) pursuant to the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56 (1996) (Act). On March 23, 1999, American Telephone Technology, Inc. (ATTI) requested to negotiate an interconnection agreement (ATTI Agreement) with U S WEST Communications, Inc. (U S WEST). On August 27, 1999, ATTI filed with the Commission a petition for arbitration and request to receive arrangements previously approved by the Commission pursuant to Sections 252(b)(1) and 252(i) of the Act.

2. ATTI is a competitive local exchange carrier (CLEC) and is authorized to provide switched and non-switched local exchange and long distance services in Washington. U S WEST is an incumbent local exchange company (ILEC), as defined in 47 U.S.C. § 251(h) and provides local exchange and other telecommunications services throughout the state of Washington. The Commission has jurisdiction over the petition and the parties pursuant to 47 U.S.C. §§ 251-252 and RCW 80.36.610.

3. The majority of terms in the ATTI Agreement are made available by U S WEST from its existing interconnection agreement with AT&T Communications of the Pacific

[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.

Northwest, Inc.(AT&T Agreement),[2] pursuant to Section 252(i) of the Act and 47 C.F.R. § 51.809 (the FCC's pick and choose rule). Additionally, ATTI requests that U S WEST make available the rates, terms, and conditions for reciprocal compensation for local traffic, including traffic bound for Internet service providers (ISPs), contained in an interconnection agreement between U S WEST and MFS Intelenet, Inc. (MFS) (MFS Agreement).[3]

4. The Commission entered an Order on Arbitration Procedure, appointed an Arbitrator, and entered a Protective Order on September 9, 1999. U S WEST filed its response on September 24, 1999. On September 28, 1999, a prehearing conference was held to establish a procedural schedule, and a prehearing conference order was entered on October 8, 1999. Both parties filed direct testimony on October 15, 1999, and rebuttal testimony on October 19, 1999.

5. An arbitration hearing was conducted on October 28, 1999, at the Commission's offices in Olympia, Washington. Both parties filed post-hearing opening briefs on November 12, 1999, and responding briefs on November 18, 1999. The Arbitrator's Report was served on December 23, 1999. The Report established a schedule for the parties to request review of the Arbitrator's decisions, to request approval of negotiated and arbitrated terms, and to file an interconnection agreement.

6. On January 14, 2000, ATTI requested approval of the negotiated and arbitrated terms of the ATTI Agreement. On that same date, U S WEST filed a brief requesting that several decisions in the Arbitrator's Report be modified, and that the remainder of terms be approved. On January 25, 2000, ATTI filed a reply to U S WEST's brief. Also on that date, the parties filed an interconnection agreement containing language in support of both parties' positions.

7. Commission Staff made recommendations and the parties presented oral arguments regarding the Arbitrator's Report at an open public meeting on February 9, 2000. The Commission reviewed the record of the proceeding, the Arbitrator's Report, the ATTI Agreement, written comments by the parties, the written Commission Staff memorandum, and all oral comments made at the hearing.

Appearances

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[2] *In the Matter of the Petition for Arbitration of An Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S WEST Communications, Inc.*, Docket No. UT-960309, Commission Order Approving Agreement (July 11, 1997).

[3] *In the Matter of the Petition for Arbitration of An Interconnection Agreement Between MFS Communications Company, Inc., and U S WEST Communications, Inc.*, Docket No. UT-960323, Order Approving Negotiated and Arbitrated Interconnection Agreement (January 8, 1997). Specifically, ATTI requested that the following terms from the MFS Agreement be treated as an individual interconnection arrangement: Article V, Section D and Appendix A, Local Call termination rates and associated terms.

8. Jeffery Oxley, attorney, appeared on behalf of ATTI, and Lisa Anderl, attorney, appeared on behalf of U S WEST.

The Arbitrator's Report

9. The Arbitrator's Report makes the following decisions:

(1) Regarding ATTI's request that U S WEST make terms contained in the MFS Agreement available:

(a) the MFS Agreement remains in full force and effect;

(b) the terms requested by ATTI constitute an individual arrangement;

(c) the goals of the Act promoting competition and the nondiscriminatory treatment of carriers favor U S WEST making the MFS reciprocal compensation arrangement available to ATTI;

(d) U S WEST failed to establish that terms comprising the MFS arrangement are unfair or unreasonable under federal regulations;

(e) U S WEST must make the MFS arrangement available to ATTI;

(f) the reciprocal compensation arrangement expires either (i) 90 days after a new agreement between U S WEST and MFS becomes effective, or (ii) contemporaneously with other terms in the ATTI Agreement, whichever event occurs first;

(2) U S WEST must perform and ATTI must pay for the functions necessary to combine requested unbundled network elements (UNEs) in any technically feasible manner;

(3) adjacent collocation extends to nearby locations on property not owned by U S WEST, even where physical collocation space is not exhausted;

(4) a separate dispute resolution clause to expedite collocation disputes is not necessary;

(5) ATTI must make final payment for collocation space services if it takes possession and makes use of the space while a related dispute resolution process is pending; and

(6) quote preparation fees must be based on the additional costs actually incurred by U S WEST.

ATTI's Request for Approval

10. ATTI did not petition for review of any arbitration decision, and requests that the Commission approve the negotiated, arbitrated, and adopted terms of the Agreement.

U S WEST's Request for Review

11. U S WEST requests that the Commission reverse the decision that it must make the reciprocal compensation arrangement contained in the MFS Agreement available on the ground that the MFS Agreement has expired. Alternatively, U S WEST argues that the Report should be modified to provide that the reciprocal compensation arrangement terminates either (a)

90 days after notice from U S WEST that its original agreement with MFS will no longer be in effect, or (b) contemporaneously with the other terms in the ATTI Agreement, whichever event occurs first.

12. U S WEST requests that the Commission modify the Arbitrator's Report regarding combined UNEs and that it only be required to refrain from separating network elements that it currently combines. U S WEST also seeks reversal of the decision that adjacent collocation may occur on non-contiguous property or on premises not owned by U S WEST, even where on-site collocation space is not exhausted.

Commission Staff's Recommendations

13. Commission Staff recommends that the Commission adopt the Recommended Decision with two modifications. First, Commission Staff recommends that the effective term of the reciprocal compensation arrangement be modified to expire either (a) 90 days after a request for approval of a new agreement between MFS and U S WEST is filed with the Commission, or (b) on the expiration date of the ATTI Agreement, whichever event occurs first.

14. Second, Commission Staff recommends that the Arbitrator's decision permitting adjacent collocation even where on-site collocation space is not exhausted be modified because that relief was not requested by either party.

Summary of Commission Order

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

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

17. The Commission adopts the Arbitrator's decision that U S WEST must perform and ATTI must pay for the functions necessary to combine requested UNEs in any technically feasible manner.

18. The Commission modifies the Arbitrator's decision granting adjacent collocation even where on-site collocation space is not exhausted, because that relief was not requested by either party.

19. The Commission adopts all other arbitration decisions in the Report, and incorporates relevant discussions from the Report into this Order.[4] The Commission also approves the negotiated, arbitrated, and adopted terms of the ATTI Agreement.

MEMORANDUM

I. Relevant Proceedings

A. The Commission's Generic Cost and Pricing Proceeding

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

B. FCC Proceedings Implementing the Telecommunications Act of 1996

1. The FCC's pick and choose rule

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[4] Numerous changes to the exact text in the Report have been made to make the Commission's Order more clear and grammatically correct. However, where the Commission adopts a decision in the Arbitrator's Report, discussion of the issues is substantially unchanged.

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

21. On August 8, 1996, the Federal Communications Commission (FCC) issued its First Report and Order (Local Competition Order), and promulgated rules (FCC Rules).[6] The FCC concluded that Section 252(i) entitles all parties with interconnection agreements to exercise pick and choose rights regardless of whether they included pick and choose clauses in their agreements.[7] Numerous parties petitioned for judicial review of the Local Competition Order to the Eighth Circuit Court of Appeals and asked that court for a stay of the order.[8]

22. On September 27, 1996, the Eighth Circuit temporarily stayed the entire body of the FCC's Rules. On October 15, 1996, the Eighth Circuit stayed the FCC Rules relating to pricing of interconnection and the pick and choose provisions.[9]

23. On July 18, 1997, the Eighth Circuit entered an order vacating several of the FCC Rules.[10] 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.

24. On January 25, 1999, the Supreme Court ruled that the FCC's local competition rules, with the exception of 47 C.F.R. § 51.319, are consistent with the Act.[11] On June 10, 1999, the Eighth Circuit entered an order reinstating 47 C.F.R. § 51.809 (the "pick and choose" rule).

2. The FCC's combination of unbundled network elements rule

25. Among the rules initially vacated by the Eighth Circuit was the UNE combination rule, 47 C.F.R. § 51.315(c)-(f), and afterwards the court also vacated 47 C.F.R. §51.315(b).[12] On appeal, parties challenged the orders vacating Rule 51.315; however, the court did not address Rule 51.315(c)-(f).

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

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

[8] *Iowa Util. Bd. v. Federal Communications Comm'n*, 109 F.3d 418, 421 (8th Cir. 1996).

[9] *Iowa Util. Bd. v. Federal Communications Comm'n*, 109 F.3d 418 (8th Cir. 1996).

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

[11] *AT&T Corp. v. Iowa Util. Bd*, 119 S. Ct. 721 (1999).

[12] *Iowa Util. Bd. v. Federal Communications Comm'n*, 120 F.3d 753, 813 (8th Cir. 1997)

26. The Supreme Court rejected arguments by ILECs that the Act requires CLECs to combine network elements for themselves and reversed the Eighth Circuit's decision that Rule 315(b) violates the Act. Although the Eighth Circuit Court presently is considering the validity of Rule 315(c)-(f), the U. S. Court of Appeals for the Ninth Circuit recently considered the Supreme Court's decision regarding UNE combinations (MFS case).[13]

27. In that case, U S WEST appealed the decision of the Commission approving the MFS Agreement and the decision of the federal district court granting summary judgment on all issues to the Commission and MFS. The Ninth Circuit relied upon the Act and the Supreme Court's interpretation of the Act, and affirmed the provision in the MFS Agreement that requires U S WEST to combine elements at the request of MFS.[14]

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

28. Two central goals of the Act are the nondiscriminatory treatment of carriers and the promotion of competition.[15] The Act contemplates that competitive entry into local telephone markets will be accomplished through interconnection agreements between ILECs and CLECs, which will set forth the particular terms and conditions necessary for the ILECs to fulfill their duties under the Act. 47 U.S.C. § 251(c)(1). Each interconnection agreement must be submitted to the Commission for approval, regardless of whether the agreement was negotiated or arbitrated, in whole or in part. 47 U.S.C. § 252(d).

29. Section 252(i) of the Act permits third parties to obtain access to any individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under Section 252.[16] The FCC ordered that requesting carriers are entitled to obtain their statutory rights on an expedited basis, and left to state commissions the details of implementing expedited procedures for making arrangements available.[17]

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

30. On June 15, 1999, several parties filed a joint petition requesting that the Commission issue a declaratory order or an interpretive and policy statement regarding

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[13] *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999).

[14] *Id.* at 1121.

[15] Local Competition Order, 11 FCC Rcd at 16139, ¶ 1315.

[16] Local Competition Order, 11 FCC Rcd at 16139, ¶ 1314.

[17] Local Competition Order, 11 FCC Rcd at 161341, ¶ 1321.

implementation of the pick and choose rule. The petitioners alleged that their efforts to pick and choose provisions from existing interconnection agreements had demonstrated uncertainty as to the implementation of the pick and choose rule.

31. On June 29, 1999, the Commission served a notice that interested persons could file comments regarding implementation of the pick and choose rule in Docket No. UT-990355. On October 15, 1999, the Commission issued further notice to file supplemental comments regarding a draft interpretive and policy statement. On November 30, 1999, the Commission issued an Interpretive and Policy Statement consisting of ten guiding principles to implement Section 252(i) of the Act and the FCC's pick and choose rule (Section 252(i) Policy Statement).[18]

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

E. Standards for Arbitration

33. The Telecommunications Act provides that in arbitrating agreements, the state 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).

II. ISSUES, DISCUSSION, AND DECISIONS

A. Should U S WEST Make Available to ATTI the Reciprocal Compensation Arrangement in the U S WEST - MFS Interconnection Agreement?

34. The Arbitrator's Report found that U S WEST should make available to ATTI the reciprocal compensation arrangement contained in the MFS Agreement because the agreement remains in full force and effect, and established a termination date for the arrangement. U S WEST petitions for review of the Arbitrator's decision that the arrangement be made available, but alternatively seeks review of the decision establishing the termination date. The Commission affirms and adopts the decision that U S WEST must make available to

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

ATTI the MFS reciprocal compensation arrangement, but modifies the decision establishing the termination date of the arrangement.

1. ATTI's Position

35. ATTI argues that the term of the MFS Agreement is 2 ½ years and continuing thereafter unless and until a new agreement becomes effective. Therefore, ATTI concludes that by its own terms the MFS Agreement has not expired. ATTI argues that nondiscrimination principles require that it be permitted to receive the same reciprocal compensation arrangement from the MFS Agreement that the Commission recently approved between NEXTLINK and U S WEST (NEXTLINK case).[19]

2. U S WEST's Position

36. U S WEST argues that ATTI's request is inconsistent with the Commission's Section 252(i) Policy Statement because the MFS Agreement has expired; therefore, ATTI does not have the right to adopt the reciprocal compensation language of the MFS Agreement under Section 252(i).

37. U S WEST argues that all terms in the interconnection section of the AT&T Agreement are legitimately related, including terms for reciprocal compensation, and constitute an integrated arrangement. Therefore, ATTI must adopt the reciprocal compensation terms from the AT&T Agreement if it also adopts other interconnection terms.

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

3. Discussion and Decision

39. As mentioned above, the Commission recently issued a policy statement consisting of ten guiding principles regarding implementation of Section 252(i) of the Act and the FCC's pick and choose rule. Principle 6 of the Commission's Section 252(i) Policy Statement addresses the period of time during which arrangements must be made available:

> The "reasonable period of time" during which arrangements in any interconnection agreement (including entire agreements) must be made available

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[19] *NEXTLINK Washington, Inc. and U S WEST Communications, Inc.*, Docket No. UT-990340, Commission Order Adopting Recommended Decision, In Part, and Modifying Recommended Decision, In Part (September 9, 1999).

> for pick and choose by a requesting carrier extends until the expiration date of that agreement. A requesting carrier may not receive arrangements from any agreement after the expiration date.

Section 252(i) Policy Statement, ¶ 18.

40. Thus, under this guideline, the MFS reciprocal compensation arrangement need not be made available to ATTI if the MFS Agreement has expired. This issue also arose in a recent FCC case (Global NAPS-New Jersey Order).[20] In the Global NAPS-New Jersey Order, the FCC referred to a dispute arising under Section 252(i) regarding the expiration date of the agreement being adopted:

> [A] carrier opting-into an existing agreement takes all of the terms and conditions of that agreement (or the [requested] portions of that agreement), including its original expiration date. It appears from the record that one of the disputes between the parties was over the termination date of the agreement being opted-into. This dispute underscores the importance of contractual terms that unambiguously establish a termination date.

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

41. The MFS Agreement states:

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

MFS Agreement, Section XXXIV.V, at 87.

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

42. ATTI persuasively argues that the MFS Agreement both provides that the agreement is effective for a period of 2 ½ years subsequent to its approval, *and* that it is effective unless and until a new agreement, addressing all of the terms of the initial agreement, is approved by the Commission. The ambiguity created by the statement of a limited effective period of 2 ½ years, modified by the provision that the agreement may continue in effect for an indefinite period of time, cannot be resolved on the basis of language in the MFS Agreement alone.

43. The term "expire" is defined as "to come to an end," and "terminate" is defined as "to come to an end in time."[21] Although Section XXXIV.Q of the MFS Agreement (entitled "Survival") states that the parties' obligations shall survive the termination or expiration of the agreement, there are no other terms that expressly provide for the termination or expiration of rights. The only terms that could possibly result in the termination of MFS's rights under the agreement are stated in Section XXXIV.JJ (entitled "Default"). That section provides that U S WEST may seek legal and/or regulatory relief if MFS fails to meet its obligations under the agreement. However, Section XXXIV.V merely obligates the parties to commence negotiations. The parties are not obligated to enter into a new agreement, and there are no express provisions that allow U S WEST to terminate the initial agreement if a new agreement does not timely become effective.

44. Section XXXIV.V in the MFS Agreement stands in marked contrast to contract language that appears in recently negotiated U S WEST interconnection agreements. For example, the Commission recently approved a negotiated amendment to the original agreement between U S WEST and NEXTLINK.[22] The amendment states that the agreement will expire on August 15, 2000, and sets forth express conditions that must be met in order for the Agreement to remain in effect past that date and not terminate.

45. Another example is the interconnection agreement between U S WEST and Digital Communications, Inc. (Digital Agreement).[23] Section XXXIV.V of the Digital Agreement provides that the agreement shall terminate on December 15, 2000. If Digital fails to extend the effective period of the agreement past that date by meeting certain specific conditions, the agreement expressly provides that it terminates and Digital must take service under tariffs that are generally available to all carriers until a new agreement is effective between the parties.

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[21] Webster's Collegiate Dictionary, 409, 1216 (10th Ed. 1996).

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

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

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

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

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

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

50. Furthermore, on July 12, 1999 (five days after their agreement supposedly expired), U S WEST and MFS jointly requested that the Commission approve an amendment to their initial agreement, adding a new section regarding cageless physical collocation (MFS Amendment No. 1).[24] The terms of the MFS Agreement were not modified in any other way. The MFS Amendment No. 1 states:

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

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

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

51. On December 13, 1999, U S WEST and MFS again jointly requested that the Commission approve an amendment to their initial agreement (MFS Amendment No. 2).[25] Amendment No. 2 deletes Section VI.I.2(b) in its entirety and inserts a new Section VI.I.6 modifying U S WEST's obligation to provide MFS with network traffic reports. The MFS Amendment No. 2 states:

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

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

52. The provision in the MFS Agreement that, "[t]he parties agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective," does not evidence an intent that the agreement expire on July 8, 1999. U S WEST interprets Section XXXIV.V as if it obligated the parties to commence negotiations *no later than six months prior to its expiration*; however, that interpretation is inconsistent with the plain language of the agreement, and goes to the heart of the issue. The agreement between the parties that negotiations commence on a specific date does not implicate the date on which the agreement expires.

53. We again note that the goals of the Act are to prohibit discriminatory treatment of carriers and to promote competition.[26] These goals favor making the MFS reciprocal compensation arrangement available to ATTI and other requesting carriers. The MFS reciprocal compensation arrangement is currently effective between numerous CLECs and U S WEST pursuant to requests that the MFS Agreement be made available in its entirety. Furthermore, U S WEST fails to provide evidence that terms comprising the MFS arrangement are unfair or unreasonable under 47 C.F.R. § 51.809(b).

54. The Commission rejects U S WEST's arguments that the interconnection provisions in the AT&T Agreement are integrated, and that compensation provisions are "legitimately related" to the rest of the terms and conditions for providing interconnection service. The Commission also rejects U S WEST's argument that ATTI seeks "rates, terms, and conditions" for interconnection not contained in any existing agreement.

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

[26] Local Competition Order, 11 FCC Rcd at 16139, ¶ 1315. See also 47 U.S.C. § 251(c)(2)(D).

> In its Rules, the FCC requires, in relevant part:
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> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any *individual* interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.

47 C.F.R. § 51.809(a) (emphasis added). U S WEST, having failed to prevail on its argument that FCC Rule 809 should be vacated and that agreements only be made available in their entirety, now argues that the Commission should read the word "individual" out of the rule. U S WEST's proposal that the 15 pages and 17 subsections of terms in Attachment 4 to the AT&T Agreement be treated as an individual interconnection arrangement is not consistent with the Act and FCC regulations.

> 55. The FCC discussed this issue in its Local Competition Order:
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> Given the primary purpose of section 252(i) of preventing discrimination, we require incumbent LECs seeking to require a third party agree to certain terms and conditions to exercise its rights under section 252(i) to prove to the state commission that the terms and conditions were legitimately related to the purchase of the individual element being sought.

Local Competition Order, 11 FCC Rcd at 16139, ¶ 1315. The FCC also requires that ILECs prove that additional terms and conditions to requested *interconnection* arrangements are legitimately related.

> 56. The Commission's Section 252(i) Policy Statement makes clear the incumbent LEC's burden:
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> Principle 10: An ILEC bears the burden of proving that certain terms and conditions are legitimately related to any requested individual interconnection, service, or element arrangements. An ILEC may impose additional terms and conditions as part of an arrangement only if the ILEC proves to the Commission that the interconnection, services or elements comprising the arrangement are either technically inseparable or are related in a way that separation will cause an increase in underlying costs. Arrangements are not "legitimately related" solely because they were negotiated jointly or through *quid pro quo* bargaining.

Section 252(i) Policy Statement, ¶ 22.

57. U S WEST generally argues that different compensation arrangements may affect trunking arrangements, billing requirements, and the class of customers that a carrier targets. However, U S WEST expressly does not challenge ATTI's request on the basis of costs, and it fails to offer sufficient evidence to establish that the AT&T bill and keep compensation mechanism for terminating traffic is technically inseparable from other interconnection terms.

58. ATTI requests that U S WEST make available the same reciprocal compensation arrangement that the Commission ordered U S WEST to provide in the NEXTLINK case. In that case, an agreement between U S WEST and NEXTLINK provided that either party could seek an alternate reciprocal compensation plan if terminating traffic was sufficiently out of balance. NEXTLINK requested that the terms in Article V, § D, Appendix A - Local Call Termination rates, and associated terms from the MFS Agreement be made available as an arrangement.

59. The Commission upheld NEXTLINK's request that U S WEST make available the MFS reciprocal compensation arrangement based on the terms of its agreement and on Section 252(i). The Commission's Order established that the reciprocal compensation terms requested by ATTI constitute an individual interconnection arrangement.

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

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

Section 252(i) Policy Statement, ¶ 20.

61. An interpretive and policy statement is not a Commission order; nor is it binding on the Commission or parties who may come before it in formal proceedings.[27] The general purpose of the Commission's Section 252(i) Policy Statement is to inform the telecommunications industry of how the Commission plans to implement the requirements of Section 252(i) and the FCC's pick and choose rule and to establish guidelines for carriers making requests. The Policy Statement adopts principles limiting the period during which an interconnection agreement or arrangement must be made available for pick and choose. The

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[27] RCW 34.05.230 states that agency interpretive and policy statements are advisory only.

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

62. It would be inequitable to ATTI to associate an effective term with the MFS arrangement that would be subject to expiration upon the approval of a new agreement between MFS and U S WEST.[28] In that case, ATTI likely would receive insufficient notice that it must plan an alternative arrangement. Likewise, it would be inequitable to U S WEST if ATTI received the MFS arrangement for an indefinite term or for any longer than necessary to provide ATTI with sufficient notice.

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

64. The Commission rejects U S WEST's proposed modification because U S WEST may not be able to provide advance written notice 90 days before a new agreement becomes effective in all instances.[29]

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

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

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

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[28] Upon the approval of a new agreement, the current agreement expires and U S WEST will no longer be required to make those arrangements available.

[29] For instance, voluntary negotiated agreements generally are reviewed and approved by the Commission under Section 252(e) within 30 days after a request for approval is filed.

B. Should U S WEST Be Required to Combine Network Elements for ATTI When U S WEST Does Not Ordinarily Combine Those Elements in its Own Network or to Combine its Own Elements with Those of ATTI?

68. The Arbitrator's Report requires U S WEST to (1) combine unbundled network elements when providing them to ATTI, even when those elements are not ordinarily combined in U S WEST's own network and (2) combine its unbundled network elements with those of ATTI. U S WEST petitions for review of the decision that it must perform and ATTI must pay for the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from U S WEST's network, or with UNEs possessed by ATTI. The Commission affirms and adopts the decision in the Arbitrator's Report.

1. ATTI's Position

69. ATTI requests that U S WEST make available terms and conditions related to unbundled network elements (UNEs) from the AT&T Agreement, but requests that combinations of UNEs be made available as a separate arrangement. ATTI petitions to obtain UNE combinations by arbitration, and it proposes contract language for approval.

70. ATTI argues that the provision for combinations in the AT&T Agreement is not legitimately related to other UNE terms. ATTI cites the fact that the FCC adopted a separate rule governing the provision of combinations in support of its argument that UNE combinations can be separated from other UNE-related terms. ATTI further argues that U S WEST failed to prove that UNE combinations are technically inseparable from other UNE-related terms or will cause an increase in underlying costs.

71. ATTI requests that U S WEST both make available combinations of UNEs that it currently combines and those that are not already combined, including UNEs from ATTI's network. Although the FCC reissued its rule regarding UNEs following the Supreme Court's remand, ATTI argues that it is entitled to receive the same UNEs that are provided in the AT&T Agreement, and that any changes to that list must be made subject to the "regulatory changes" and "amendments" provisions.

2. U S WEST's Position

72. U S WEST argues that all UNE-related terms in the AT&T Agreement, including UNE combinations, are legitimately related and constitute an individual arrangement. Therefore, ATTI cannot substitute language relating to UNE combinations and either must adopt the unaltered UNE provisions in the AT&T Agreement or must present comprehensive evidence regarding UNEs as an open issue for arbitration. Because ATTI did not present comprehensive evidence in support of its proposed language, U S WEST argues that ATTI must adopt UNE-combination terms from the AT&T Agreement.

73. U S WEST also argues that its obligation to provide UNEs does not extend to all network elements but only to those elements that meet the "necessary and impair" test in Section 251(d)(2) of the Act, and that the FCC has specifically required ILECs to unbundle. ATTI is not entitled to unbundled access to, or combinations of, other network elements. Finally, U S WEST argues that it is not required to combine UNEs that are not already combined in its network.

3. Discussion and Decision

74. The parties identified and submitted the UNE-combinations issue as a legal issue to be resolved in arbitration; not as a factual issue. ATTI's request for combined UNEs includes proposed contract language that raises factual issues not addressed in the record or that are indirectly related to combined UNEs. For example, ATTI proposes terms regarding pricing adjustments, provisioning intervals, circuit conversions, and Operations Support System (OSS) functions.

75. Accordingly, the decisions that ensue are not based upon ATTI's proposed language, and the Commission does not adopt that language. However, the Commission also rejects U S WEST's argument that ATTI must therefore adopt the UNE combination terms in the AT&T Agreement. ATTI's claims that it is entitled to treat combined UNEs as an individual arrangement and that U S WEST is obligated to provide combinations should be resolved by the Commission.

76. U S WEST's obligation to provide UNEs does not extend to all network elements but only to those elements that meet the "necessary and impair" test in Section 251(d)(2) of the Act and that the FCC has specifically required ILECs to unbundle. Since both parties agree that the terms for unbundled network access in the AT&T Agreement be made available to ATTI (Attachment 3), any changes to the list of network elements must be made pursuant to Part A, Section 17 (Amendment of Agreement) and Section 21 (Governing Law).

77. The Commission retains jurisdiction to require ILECs to unbundle additional network elements, but it also must apply a standard consistent with that articulated by the Supreme Court. Although ATTI requests that U S WEST be required to combine "individual Network Elements" with "other Network Elements" or "network components," ATTI does not identify any additional network element with the requisite specificity to determine whether access is "necessary" or whether lack of access "impairs" its ability to provide service.

78. Provisions for UNE combinations are not legitimately related to other terms for unbundled access to network elements in the AT&T Agreement.[30] If the two specific references to UNE combinations were removed from the AT&T Agreement, the 52 pages of

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[30] References to combinations of UNEs appear in Attachment 3, Section 1.2.2.

other terms relating to UNEs would be unaffected. The Commission's Section 252(i) Policy Statement, Principle 10, states, "An ILEC bears the burden of proving that certain terms and conditions are legitimately related to any requested individual interconnection, service, or element arrangements."

79. U S WEST fails to present evidence that the UNE combination terms in the AT&T Agreement are either technically inseparable or cause additional costs if treated as an individual arrangement. The FCC's treatment of UNE combinations under 47 C.F.R. § 51.315 is separate from specific network element unbundling requirements under 47 C.F.R. § 51.319, and supports the conclusion that terms relating to UNE combinations comprise an individual arrangement.

80. The Act states, in pertinent part, that it is:

> "The duty [of the incumbent LEC] to provide, to any requesting telecommunications carrier *for the provision of a telecommunications service*...access to network elements on an unbundled basis[.] An incumbent local exchange carrier shall provide such unbundled network elements in a manner *that allows requesting carriers to combine such elements in order to provide such telecommunications service.*"

47 U.S.C. § 251(c)(3) (emphasis added).

81. The Act, therefore, expressly permits the combination of elements by a requesting carrier for the purpose of providing a telecommunications service. The FCC takes this view, finding no basis to conclude from the Act's language "a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements."[31] Consistent with this interpretation, the FCC Rules permit requesting carriers to combine unbundled elements to provide a telecommunications service. 47 C.F.R. § 51.315(a).

82. As discussed above, the Eighth Circuit initially vacated the FCC's Rules requiring ILECs to combine network elements for CLECs, and on rehearing also vacated Rule 315(b), which prohibited an ILEC from separating network elements it currently combines in its network unless requested by the CLEC.

83. On January 25, 1999, the Supreme Court issued its decision in *AT&T Corp.* With respect to the FCC's combination rule, the Supreme Court reversed the Eighth Circuit's decision that Rule 315(b) violates the Act. In affirming this rule, the Court rejected the argument that the Act requires CLECs to combine network elements for themselves. Accordingly, U S WEST must provide UNE combinations to ATTI that it currently combines in its network.

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[31] Local Interconnection Order, 11 FCC Rcd at 15666, ¶ 328.

84. In its review of the MFS Agreement, the U. S. Court of Appeals for the Ninth Circuit interpreted the Supreme Court's decision regarding UNE combinations. The MFS Agreement states:

> USWC [U S WEST] agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS.

MFS Agreement, ¶ XXXI.A.3. The District Court had previously held that this provision does not violate the Act because it provides for compensation to U S WEST for performing the functions necessary to combine the elements; thus, it does not upset pricing distinctions between unbundled elements and resold services.

85. The Ninth Circuit Court affirmed the provision in the MFS Agreement that requires U S WEST to combine elements at the request of MFS. The Court did not rely on the FCC's Rules to affirm the provision, rather it relied upon the Act and the Supreme Court's interpretation of the Act. According to the Court:

> The district court's holding sustaining the provision in the MFS Agreement requiring U S West to combine unbundled network elements at MFS's request before leasing must be affirmed under the rationale of [*AT&T Corp.*], sustaining a provision prohibiting an incumbent from separating already-combined elements before leasing.

MFS case, at 1121. The Ninth Circuit Court did not rely on the federal regulations and its decision does not unlawfully intrude on the Eighth Circuit Court's jurisdiction as argued by U S WEST.

86. The Supreme Court considered whether the Act mandates that elements must never be provided in a combined form. In resolving this issue, the Supreme Court held:

> Because [47 U.S.C. § 251(c)(3)] requires elements to be provided in a manner that "allows requesting carriers to combine" them, incumbents say that it contemplates the leasing of network elements in discrete pieces. It was entirely reasonable for the [FCC] to find that the text does not command this conclusion. It forbids incumbents to sabotage network elements that are provided in discrete pieces, and thus assuredly contemplates that elements may be requested and provided in this form. . . But it does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form.

AT&T Corp., 119 S. Ct. at 737. It follows, the Court held, that the FCC regulation prohibiting an ILEC from separating already-combined network elements was not inconsistent with the Act.

87. The Ninth Circuit Court followed that holding:

> It also necessarily follows from [*AT & T Corp.*] that requiring US West to combine unbundled network elements is not inconsistent with the Act: the MFS combination provision does not conflict with the Act because the Act does not say or imply that network elements may only be leased in discrete parts.

MFS case at 1121. The Ninth Circuit Court found that the Supreme Court undermined the Eighth Circuit's rationale for invalidating 47 C.F.R. § 51.315(c)-(f), and concluded that it must follow the Supreme Court's reading of the Act by upholding the terms in the MFS Agreement despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.

88. Likewise, the Commission follows the Ninth Circuit Court's decision. Procedural objections aside, U S WEST presents no compelling argument in support of its position that it should not be required to combine network elements at the request of other carriers. U S WEST must perform and ATTI must pay for the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from U S WEST's network, or with network elements possessed by ATTI. However, U S WEST need not combine UNEs in any manner requested if not technically feasible, but must combine UNEs ordinarily combined in its network in the manner they are typically combined.

C. Should U S WEST Provide Adjacent Collocation To Nearby Premises Where U S WEST Does Not Own the Property?

89. The Arbitrator's Report requires U S WEST to provide adjacent collocation to nearby premises where U S WEST does not own the property. Further, the Report requires U S WEST to provide adjacent collocation even when space is not legitimately exhausted inside a U S WEST central office. U S WEST petitions for review of both requirements. The Commission adopts the requirement for off-premises nearby collocation, but modifies the Arbitrator's Report by rescinding the requirement that adjacent collocation be provided even where space is not legitimately exhausted because that specific relief was not requested by any party.

1. ATTI's Position

90. ATTI proposes contract language that would establish collocation either on U S WEST's premises or other nearby property when space has been exhausted in a U S WEST wire center. ATTI argues that its proposal is consistent with the FCC's Advanced Services Order

and 47 C.F.R. § 51.323 (standards for physical and virtual collocation).[32] According to ATTI, the only limits placed on adjacent collocation by the FCC are technical feasibility and "reasonable safety and maintenance requirements."

91. ATTI argues that even if the express language of the FCC's order does not support off-premises adjacent collocation, it is consistent with the FCC's intent. ATTI proposes that U S WEST bear the costs to extend AC power up to a maximum of 200 feet from the U S WEST power source (so long as it is safe and technically feasible), and that ATTI bear all other costs where it seeks off-premises adjacent collocation.

92. Finally, ATTI argues that the FCC expressly empowered state commissions to take measures they deem necessary to implement adjacent collocation, including the approval of nearby locations and adjacent collocation even when physical collocation space is available.

2. U S WEST's Position

93. U S WEST argues that the Advanced Services Order does not allow ATTI to collocate at "nearby locations" that are not on U S WEST's property. According to U S WEST, "adjacent" means "contiguous," and U S WEST takes exception to ATTI's use of the word "collocation" to refer to locating its equipment outside U S WEST's premises. U S WEST objects to ATTI's proposed contract language because it does not address the allocation of costs for off-premises adjacent collocation.

3. Discussion and Decision

94. Collocation space has been a scarce commodity since the inception of the Act, and scarcity will continue as demand to collocate increases. In that context, the Commission supports the development of alternatives to meet demand within the bounds of technical feasibility, and reasonable safety and maintenance requirements. The FCC provides for such an alternative:

> An incumbent LEC must make available, where space is legitimately exhausted in a particular incumbent LEC premises, collocation in adjacent controlled environmental vaults or similar structures to the extent technically feasible. The incumbent LEC must permit the new entrant to construct or otherwise procure such an adjacent structure, subject only to reasonable safety and maintenance requirements.

47 C.F.R. § 51.323(k)(3).

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[32] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, 14 FCC Rcd 4761 (1999) Advanced Services Order).

95. The word "adjacent" is reasonably defined as "not distant: NEARBY," and is distinguishable from its synonym "contiguous," which implies having contact on all or most of one side.[33] A controlled environmental vault consists of a space that includes sufficient air conditioning, sufficient space for maintenance and expansion, sufficient and correct power, and a solid electrical ground.[34] Any secure enclosed space that provides a suitable controlled environment constitutes a compliant similar structure.

96. The Advanced Services Order discusses collocation in an adjacent structure:

> Such a requirement is, we believe, the best means . . . of addressing the issue of space exhaustion by ensuring that competitive carriers can compete with the incumbent, even where there is no space inside the LEC's premises.

Advanced Services Order, ¶ 44. Thus, the FCC envisioned off-premises, adjacent collocation where space is legitimately exhausted on U S WEST's premises.

97. The further an adjacent collocation space is located from a central office, the higher the costs and greater the risk that quality of service will be adversely impacted. Thus, concerns for economic efficiency and quality of service dictate that adjacent collocation occurs no further from central offices than necessary.

98. The physical boundary of adjacent collocation must be dictated by technical feasibility, and not the name by which it is known. When a requesting carrier incurs the expense of securing and conditioning an adjacent structure and the expense of provisioning facilities to interconnect, it is the only party at risk if its quality of service is adversely affected by a poor business decision.

99. ATTI may select vendors to perform adjacent collocation services in the same manner as it is permitted to select vendors to perform physical collocation services. U S WEST can protect itself through contractual terms limiting liability.

100. Although there may be reasons why a new entrant should be allowed to construct or otherwise procure an adjacent structure even when physical collocation space is available, no such request was made by either party. The Commission finds there is no immediate need to impose an additional state requirement as recommended by the Arbitrator. ATTI's proposed language is adopted with one modification: ATTI must bear all expenses for adjacent collocation at nearby premises.

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[33] Webster's Collegiate Dictionary 14 (10th Ed. 1996).

[34] Newton's Telecom Dictionary 292 (15th Ed. 1999).

D. Should The Agreement Include a Separate Dispute Resolution Clause to Expedite Collocation Disputes?

101. Neither party petitioned for review of the Report's finding on this issue. Accordingly, the Commission affirms and adopts the finding that a separate dispute resolution clause to expedite collocation disputes should not be required.

1. ATTI's Position

102. ATTI proposes contract language for a separate dispute resolution clause to expedite collocation. ATTI argues that collocation is an activity for which time is of the essence, and that expedited procedures are necessary.

2. U S WEST's Position

103. U S WEST states that terms requested by ATTI in the AT&T Agreement include an expedited dispute resolution process. U S WEST argues that a separate dispute resolution clause is not necessary because ATTI also can file an informal complaint with the Commission or formally petition for relief under WAC 480-09-530.

3. Discussion and Decision

104. A separate dispute resolution clause to expedite collocation disputes is superfluous. In addition to ATTI's request that dispute resolution terms in the AT&T Agreement be made available, the parties may file a petition under the Commission's rule for enforcement of interconnection agreements, WAC 480-09-530.

E. Should Final Payment for Installation of Collocation Equipment Be Based on Completion of the Job or on ATTI's Reasonable Satisfaction?

105. Neither party petitioned for review of the Report's finding on this issue. Accordingly, the Commission affirms and adopts the finding that ATTI must make final payment if it takes possession and makes use of the collocation space or facilities while the dispute resolution process is pending.

1. ATTI's Position

106. ATTI argues that it should not be required to make final payment to U S WEST for collocation space if the space provided does not meet ATTI's reasonable satisfaction. Since ATTI pays 50% of the total cost as a down payment, ATTI argues that it is fair for it to retain final payment until the dispute is resolved.

2. U S WEST's Position

107. U S WEST argues that it is entitled to reimbursement for services provided under the agreement, including collocation, pursuant to Section 252(d)(1) of the Act. U S WEST also argues that ATTI's proposed contract language does not define "reasonable satisfaction" and effectively leaves the decision to pay entirely up to ATTI. U S WEST proposes that ATTI make final payment and seek relief for specific performance through the dispute resolution process.

3. Discussion and Decision

108. There is insufficient evidence in the record to determine a standard of commercial reasonableness for U S WEST's performance of services. Disagreements over U S WEST's compliance with its duty to perform specific services should be addressed through the dispute resolution process, including a petition for enforcement of interconnection agreement pursuant to WAC 480-09-530.

109. Payment for services to provide collocation space are non-recurring charges. This issue does not involve the reasonableness of the charges assessed; rather, it involves the adequacy of performance. It is possible that a collocation space may be functional, yet doesn't comply with the parties agreement. ATTI should not unfairly benefit from U S WEST's performance without making payment.

110. If ATTI does not take possession and make use of the collocation space or facilities while dispute resolution is pending it may retain final payment until the process is completed. However, ATTI must make final payment if it takes possession and makes use of the collocation space or facilities while the dispute resolution process is pending. Final payment by ATTI shall not constitute a waiver of any objections to U S WEST's performance.

F. Is U S WEST Entitled to a Quote Preparation Fee When ATTI Requests Cross-connection to Another Collocated CLEC?

111. Neither party petitioned for review of the Report's finding on this issue. Accordingly, the Commission affirms and adopts the finding that U S WEST is entitled to recover its actual costs for preparing quotes at ATTI's request.

1. ATTI's Position

112. ATTI proposes that a request for CLEC-to-CLEC cross-connection may be included on the original collocation application form without incurring any separate or additional quote preparation fee (QPF) or other charge, and without extending the applicable collocation

time intervals. ATTI argues that minimal additional time is required to prepare a quote at the outset of service.

113. Where CLEC cross-connection is separately requested subsequent to the original application form, ATTI proposes that it pay U S WEST a QPF based on U S WEST's reasonable and necessary costs for work performed.

2. U S WEST's Position

114. U S WEST argues that it is entitled to recover the costs incurred when its engineers determine the route for cross-connections (ensuring that overhead cable racking and routing are in place), in addition to any costs incurred for actually performing the cross-connect. These activities require U S WEST to prepare a quote, and in turn, entitles U S WEST to compensation. U S WEST presented testimony and argues that it is developing a separate QPF that will reflect the actual work and costs associated with cross-connects.

3. Discussion and Decision

115. U S WEST is entitled to recover costs caused by competing carrier requests, even if they are relatively small. The QPF for an original collocation application should provide for the recovery of the actual costs incurred to perform up-front technical assessments. The telecommunications industry is dependent on incremental charges, and if U S WEST performs an additional technical assessment as the result of ATTI's request for cross-connection, it is entitled to recover its additional costs.

116. Furthermore, if the additional cost to perform a technical assessment for cross-connection differs between requests made contemporaneous or subsequent to an original collocation application, then the QPF also should differ. Any disagreement regarding the assessment of a QPF should be addressed through the dispute resolution process, including a petition for enforcement of interconnection agreement filed with the Commission.

III. OTHER MATTERS

117. In all other respects, the Commission affirms and adopts the Arbitrator's Report.

118. Having considered the Arbitrator's Report and comments filed by the parties, the entire record herein, and all written and oral comments made on behalf of the parties, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

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

120. The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities, and practices of telecommunications companies in the state.

121. The Washington Utilities and Transportation Commission is authorized by the Telecommunications Act of 1996 to arbitrate and approve interconnection agreements between telecommunications carriers, pursuant to Sections 251 and 252 of the Act. The Commission is specifically authorized by state law to engage in that activity. RCW 80.36.610.

122. U S WEST Communications, Inc. (U S WEST), is engaged in the business of furnishing telecommunications services, including, but not limited to, basic local exchange service within the state of Washington, and is a local exchange carrier as defined in the Act.

123. American Telephone Technology, Inc. (ATTI), is a telecommunications carrier as defined in the Act, and is operating within the state of Washington, and provides basic local exchange services within the U S WEST service area.

124. ATTI previously requested that U S WEST make available the reciprocal compensation arrangement in the MFS Agreement under Section 252(i) of the Act. U S WEST rejected ATTI's request.

125. On August 27, 1999, ATTI filed a petition for arbitration under 47 U.S.C. § 252(b).

126. On December 23, 2000, an Arbitrator's Report and Decision issued resolving disputes. The parties requested approval of negotiated and arbitrated terms on January 14, 2000. The parties filed an interconnection agreement consistent with the Arbitrator's Report on January 25, 2000.

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

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

129. Provisions for UNE combinations are not "legitimately related" to other terms for unbundled access to network elements in the AT&T Agreement.

130. U S WEST fails to present evidence or persuasive argument that the UNE combination terms in the AT&T Agreement are either technically inseparable or cause additional costs if treated as an individual arrangement.

131. Collocation space is a scarce commodity, and scarcity will continue as demand to collocate increases.

132. The further an adjacent collocation space is located from a central office, the higher the costs and greater the risk that quality of service will be adversely impacted. When a requesting carrier incurs the expense of securing and conditioning a nearby structure and the expense of provisioning facilities to interconnect, it is the only party at risk if its quality of service is adversely impacted by a poor business decision.

133. The Agreement will facilitate local exchange competition in the state of Washington by enabling ATTI to enter the local exchange market and increase customer choices for local exchange services.

CONCLUSIONS OF LAW

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

135. This arbitration and approval process was conducted pursuant to and in compliance with 47 U.S.C. § 252 and the Commission's Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996.

136. Pursuant to Section 252(i) of the Act, a local exchange carrier must make available any interconnection, service, or network element provided under an agreement approved under Section 252, to which it is a party, to any other requesting telecommunications carrier on the same terms and conditions as those provided in the agreement.

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

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

139. U S WEST bears the burden of proving that certain terms and conditions are legitimately related to any requested individual interconnection, service, or element arrangements.

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

141. The Act does not say or imply that UNEs must be separately provided and never in combined form. The requirement that U S WEST must perform and ATTI must pay for the functions necessary to combine requested UNEs in any technically feasible manner does not conflict with the Act.

142. The FCC envisioned off-premises adjacent collocation where space is legitimately exhausted on U S WEST's premises.

143. The negotiated dispute resolution terms in the ATTI Agreement and the Commission's rule for enforcement of interconnection agreements, WAC 480-09-530, reasonably provide for the expedited resolution of collocation disputes.

144. The negotiated terms of the Agreement are consistent with the public interest, convenience, and necessity.

145. The negotiated terms of the Agreement do not discriminate against any other telecommunications carrier.

146. The arbitrated provisions of the Agreement meet the requirements of Section 251 of the Act, including the regulations prescribed by the FCC pursuant to Section 251, and the pricing standards set forth in Section 252(d) of the Act.

147. The laws and regulations of the state of Washington, and Commission orders shall govern the construction and interpretation of the Agreement. The Agreement shall also be subject to the jurisdiction of the Commission and the Washington courts.

ORDER

THE COMMISSION ORDERS:

148. The Commission approves ATTI's request that U S WEST make available the reciprocal compensation arrangement in the MFS Agreement under Section 252(i) of the Act.

149. The reciprocal compensation arrangement expires either (a) 90 days after a request for approval of a new agreement between MFS and U S WEST is filed with the Commission, or (b) on the expiration date of the ATTI Agreement, whichever event occurs first.

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

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

152. U S WEST must perform and ATTI must pay for the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from U S WEST's network, or with network elements possessed by ATTI. However, U S WEST need not combine UNEs in any manner requested if not technically feasible, but must combine UNEs ordinarily combined in its network in the manner they are typically combined.

153. ATTI must bear all expenses for adjacent collocation at nearby premises.

154. ATTI either must not take possession and make use of collocation space or make final payment while a related dispute resolution process is pending.

155. If U S WEST performs an additional technical assessment as the result of ATTI's request for cross-connection, it is entitled to recover its additional costs.

156. The Agreement shall be effective as of the date of this Order. Within seven days of service of this Order the parties must execute and file a revised interconnection agreement incorporating the decisions in this Order.

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

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

158. The laws and regulations of the state of Washington, and Commission orders shall govern the construction and interpretation of the Agreement. The Agreement shall also be subject to the jurisdiction of the Commission and the Washington courts.

DATED at Olympia, Washington, and effective this 24th day of February 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner