BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between	)	DOCKET NO. UT-990300
AIRTOUCH PAGING, and U S WEST COMMUNICATIONS, INC.	)	COMMISSION ORDER MODIFYING ARBITRATOR'S REPORT, AND APPROVING INTERCONNECTION AGREEMENT WITH MODIFICATIONS
Pursuant to 47 U.S.C. Section 252.	)	

I. INTRODUCTION

1. Procedural History

1. On July 28, 1998, AirTouch Paging (AirTouch), requested to negotiate an interconnection agreement with U S WEST Communications, Inc. (U S WEST). On January 4, 1999, AirTouch timely filed a Petition for Arbitration with the Washington Utilities and Transportation Commission (Commission)[1] pursuant to 47 U.S.C. § 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).

2. 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.

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

4. On April 28, 1999, the Arbitrator's Report and Decision (Report) was entered. On May 11, 1999, AirTouch requested clarification of the Report, and on May 21, 1999, the Arbitrator entered his Second Supplemental Order (Supplemental Order) addressing two issues.

5. On May 28, 1999, each party filed a request for approval of an agreement (AirTouch Request for Approval and U S WEST Request for Approval, respectively), and the Commission granted an extension of time to file the agreement.

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[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.

Each party challenged several decisions by the Arbitrator, and proposed alternative language to resolve a remaining contract language dispute regarding the location of points of network interconnection. On June 1, 1999, the parties filed their Paging Connection Agreement (Agreement). On June 9, 1999, each party filed a response to the other's request for approval.

6. On June 22, 1999, the Commission convened a hearing at its offices in Olympia, Washington, to consider the parties' requests for approval. The Commission reviewed the record of the proceeding; the Arbitrator's Report; the Agreement; written comments by the parties; the Commission Staff memorandum; and all oral comments made at the hearing by Stellman Keehnel and Richard Busch for AirTouch, John Devaney for U S WEST, and Assistant Attorney General Jeffrey Goltz and David Griffith for Commission Staff. Commission Staff recommended that one decision by the Arbitrator be modified, and supported U S WEST's proposed contract language on the remaining dispute between the parties with one modification.

7. At the conclusion of the hearing, the Commission took all matters under advisement. After full deliberation and discussion as summarized herein, the Commission approves all provisions of the Agreement as submitted, except: (1) the provision for a true-up mechanism for reciprocal compensation is disallowed; (2) the only appropriate contract language on the issue of "pick-and-choose" to be included in the Agreement is the verbatim language from section 252(i) of the Telecom Act; (3) at the request of either party, the parties must reasonably cooperate to produce a more accurate estimate of exempt traffic; (4) U S WEST's proposed language regarding sections 2.6.4.3 through 2.6.4.5 of the Agreement, as modified by Commission Staff, is approved; and (5) AirTouch's proposed language regarding sections 2.6.4.2 through 2.6.4.4 of the Agreement is rejected.

2. Negotiations and Arbitrations Under the Telecommunications Act of 1996

8. All commercial mobile radio service (CMRS) providers, including paging providers, meet the definition of "telecommunications carrier" because they are providers of telecommunications services as defined in the Telecom Act; thus, they are entitled to the benefits of section 251(c), including the right to request interconnection and obtain access to unbundled network elements at any technically feasible point within an incumbent local exchange carrier's (ILEC's) network.[2]

9. ILECs (such as U S WEST) are obligated, pursuant to section 251(b)(5) of the Telecom Act, to enter into reciprocal compensation arrangements with CMRS providers for the transport and termination of local traffic originating on each

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[2] *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, ¶ 993 (August 8, 1996) (Local Competition Order), Appendix B- Final Rules (FCC Rules).

other's network, pursuant to the FCC's Rules.[3] The FCC determined that sections 251 and 252 "are designed to achieve the common goal of establishing interconnection and ensuring interconnection on terms and conditions that are just, reasonable, and fair."[4] Furthermore, the FCC concluded that it is consistent with the broad authority of those provisions that sections 251 and 252 be applied to local exchange carrier (LEC)-CMRS interconnection.[5]

10. As a practical matter, sections 251 and 252 create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between ILECs and telecommunications carriers, including CMRS providers. The ILEC and the requesting CMRS provider are required to negotiate interconnection agreements in good faith.[6] If the parties are unable to resolve all issues through negotiation, a party to the negotiation may request the state commission to arbitrate the open issues. 47 U.S.C. § 252(b)(1).

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

11. On February 8, 1996, the federal Telecom Act became law. The purpose of the Telecom Act is to:

> [P]rovide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . .

H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996). The Telecom Act contemplates certain duties for state commissions. One duty is to arbitrate unresolved issues in interconnection agreements. 47 U.S.C. § 252(b). In addition to the general procedures for arbitrations set forth in Section 252 of the Telecom Act, the Commission implemented supplementary procedures for conducting arbitrations under the Act. *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Interpretative and Policy Statement, WUTC Docket No. UT-960296, 170 PUR4th 367 (June 28, 1996). In arbitrating disputed issues, the Commission has exclusive authority to set the prices for interconnection, unbundled network elements, transport and termination, and the wholesale prices for resold telecommunications services. 47 U.S.C. § 252(d).

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[3] FCC Local Competition Order, ¶ 1008.

[4] FCC Local Competition Order, ¶ 1023.

[5] Id.

[6] 47 U.S.C. § 251(c)(1).

12. Each interconnection agreement must be submitted to the state commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated, in whole or in part, by the state commission. 47 U.S.C. § 252(e)(1). The Agreement between AirTouch and U S WEST is the result of that process.

4. The Commission's Generic Cost and Pricing Proceeding

13. On October 23, 1996, the Commission entered an order declaring that a generic proceeding would be initiated in order to review costing and pricing issues for interconnection, unbundled network elements,[7] transport and termination, and resale. That proceeding is underway.[8]

14. The determination that price proposals made in this arbitration are interim rates is based on cost evidence specifically submitted in the instant proceeding, our recent actions regarding cost studies, and our expertise as regulators. The findings and conclusions with respect to price proposals and supporting information are made in this context and do not necessarily indicate Commission approval or rejection of cost and price proposals for purposes of the generic case.

5. The AirTouch Request for Approval

15. AirTouch requests that the Commission modify three of the Arbitrator's decisions:

- AirTouch's rate of compensation for terminating traffic originating on U S WEST's network should be increased;
- The configuration of shared interconnection facilities should be subject to mutual agreement; and
- The effective date for termination compensation should be revised.

AirTouch's Request for Approval also presents arguments supporting its proposed language for the designation of points of connection between AirTouch and U S WEST.

6. U S WEST's Request for Approval

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[7] Unbundled network elements (UNEs) are the physical and functional elements of the network (e.g., local loops, switch ports, and dedicated and common transport facilities).

[8] *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. The Commission held hearings in October and December 1998 to set permanent prices. The Commission expects to issue a final pricing decision in July, 1999.

16. U S WEST also requests that the Commission modify three of the Arbitrator's decisions:

- All terms of the Agreement should become effective only upon the Commission's approval of the Agreement;
- U S WEST's proposed percentage of transit traffic should be adopted; and
- AirTouch's "pick-and-choose" rights under section 252(i) of the Telecom Act should not be defined prior to AirTouch exercising those rights.

17. U S WEST's Request for Approval also presented arguments supporting its proposed language for the designation of points of connection.

II. ARBITRATED ISSUES

1. Should AirTouch's Compensation Rate for Terminating Local Traffic Be Modified?

A. Arbitrator's Decision

18. The Arbitrator found that AirTouch's paging terminal is the functional equivalent of an end-office switch,[9] and reciprocal compensation is limited to the costs of terminating a call at the paging switch. The transmission of a message from the AirTouch switch to the paging device of an AirTouch subscriber is entirely AirTouch's responsibility, and AirTouch should recover those costs from its subscribers.

19. The Arbitrator found that several investments improperly included in the AirTouch cost study may be subject to correction by rerunning the study, but overall the study does not appear to be subject to correction without the introduction of new evidence. Consequently, 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 proposed U S WEST local switching rate in the Commission's pending generic cost proceeding is a reasonable proxy for costs actually incurred by AirTouch in terminating local traffic.

B. AirTouch's Position

20. AirTouch argues that the record establishes that its costs to terminate calls originating on U S WEST's network are higher than U S WEST's proposed rate as

[9] An end-office switch establishes line to line, line to trunk, and trunk to line connections.

ordered by the Arbitrator. Alternatively, if a proxy rate is to be used, AirTouch argues that the proxy should be a higher rate.

21. AirTouch argues that section 252(d)(2)(A)(ii) of the Telecom Act provides that the standard of proof for cost studies is that a carrier may establish its costs through a "reasonable approximation," and that it has met that burden. According to AirTouch, a line-by-line review of its cost study must be performed, and the Commission should list with specificity and particularity each element of the study which is not acceptable. AirTouch cites five "items" that it believes the Arbitrator relied on to conclude that its cost study is inadequate: (1) AirTouch's proposed interLATA facilities; (2) projected growth rates; (3) cost allocations between paging and voice mail services; (4) allocation of investments and subscribers between Washington and Oregon; and (5) the cost of agency software. AirTouch contends that each item constitutes a reasonable approximation and/or can be readily excluded from the cost study in order to arrive at an appropriate rate.

22. AirTouch contends that the Arbitrator erroneously rejected rebuttal testimony to segregate costs between the states of Washington and Oregon. Therefore, AirTouch requests that the Commission either provide for the introduction of this evidence or remand this matter to the Arbitrator to admit additional evidence.

23. Finally, AirTouch argues that the Arbitrator erred by concluding that its Glenayre paging terminal constituted the functional equivalent of an end-office switch, and by concluding that AirTouch was not entitled to compensation for network costs beyond its paging switch. According to AirTouch, the Glenayre terminal is the functional equivalent of a tandem switch,[10] and paging providers are entitled to compensation for all network components utilized to deliver a paging message to a subscriber.

24. AirTouch argues that its costs are clearly higher than the generic proceeding rate, even if certain cost elements are excluded. AirTouch requests that the Commission allow it to initiate "Phase II" proceedings in the instant case in order to present additional cost study evidence, if AirTouch is not satisfied with the termination compensation rate that is adopted by the Commission.

C. U S WEST's Position

25. While U S WEST disagrees with the Arbitrator's conclusion that AirTouch is entitled to terminating compensation, U S WEST states that after reaching

[10] A tandem switch connects one trunk to another.

that decision the Arbitrator properly rejected AirTouch's cost study and properly adopted the proposed end-office rate from the generic cost proceeding. U S WEST argues that although the FCC concluded that forward-looking economic cost studies "typically involve a 'reasonable approximation of the additional cost,' rather than determining such costs 'with particularity,'"[11] AirTouch is not relieved from the obligation to develop a reliable TELRIC cost study.[12] U S WEST states that the deficient "items" in AirTouch's study are so fundamental as to render the study inherently unreliable for any purpose. But even if AirTouch's obligation were to provide only an approximation of costs, U S WEST argues that the standard would not excuse AirTouch from its failure to provide verifiable support for the inputs to its study.

26. U S WEST agrees with the Arbitrator's decision that the facilities beyond AirTouch's paging terminal do not perform switching functions. While a paging call is fairly characterized as one transaction, it consists of two processes; first, a call that crosses U S WEST's network ends when the calling party hangs up. Thereafter, the second process occurs entirely on AirTouch's network through the use of equipment to transmit the page to an AirTouch subscriber. AirTouch's obligation to its paging subscribers begins when the calling party hangs up. Accordingly, U S WEST agrees with the Arbitrator's decision that the Glenayre paging terminal is not a tandem switch, and that no other switching functions are performed in the AirTouch network.

27. U S WEST opposes AirTouch's proposal that further cost proceedings be conducted, and argues that AirTouch is not entitled to reopen the record. The lack of finality that would result from this approach to Telecom Act arbitrations would: (1) reduce incentives for parties to make their best case in the first instance; (2) increase the time and expense associated with interconnection arbitrations; and (3) eliminate certainty regarding interconnection relationships necessary in the business community.

D. Discussion and Decision

28. The Commission need not conduct a line-by-line analysis of the AirTouch cost study in light of its obvious and substantial deficiencies. The cost "items" that render the study unreliable are not line items that can be readily subtracted or adjusted. As discussed in the Arbitrator's Report, AirTouch's cost study relies on a projected growth rate and an allocation of expenses between paging and voice mail services that are wholly without any statistical basis and cannot be reasonably verified. Furthermore, the record indicates that AirTouch's own economics expert was unaware prior to the hearing that the investments used in the cost study included improper costs

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[11] FCC Local Competition Order, ¶ 1056.

[12] Total Element Long Range Incremental Cost (TELRIC). TELRIC is a method of calculating what phone servive should cost based on incremental cost of equipment and labor, not counting the embedded cost of the old network.

from other states.[13] These costs can not be adjusted without admitting new and previously undisclosed evidence.

29. AirTouch's request to submit additional evidence at trial in order to adjust its study for out-of-state costs did not properly constitute rebuttal evidence and was properly denied by the Arbitrator. AirTouch knew or should have known that its cost study included expenses incurred in other states, and the admission of new evidence at the hearing to segregate those costs as rebuttal evidence would have deprived U S WEST of due process to conduct discovery and present other evidence related to those calculations.

30. The Commission agrees with, and adopts, the discussion and decision in the Arbitrator's Report finding that U S WEST's proposed end-office rate is a reasonable proxy to compensate AirTouch for terminating local traffic at its Glenayre paging terminal. There is no legal basis for allowing AirTouch to submit additional evidence of its costs, and to the extent that such a decision may be discretionary, the Commission finds that no additional proceedings are warranted based on the record. The "interim" rate in the instant proceeding is subject to the Commission's final determination of rates in the generic cost proceeding, or until such time as the FCC makes a further determination.

31. However, the Arbitrator's decision in the Second Supplemental Order that the compensation rate be subject to true-up at a later date is inconsistent with Commission practice and policy. In this regard, an interim rate means that a temporary rate remains in effect until a permanent rate is established. The permanent rate may result in a rate change, but it does not involve a true-up. Therefore, the decision by the Arbitrator providing for a true-up of the local traffic termination compensation rate is reversed, and the Agreement must be modified accordingly.

2. Should the Effective Date for the Payment of Compensation for Transporting or Terminating Local Traffic Originating on U S WEST's Network Be Modified?

A. Arbitrator's Decision

32. U S WEST and AirTouch are parties to a preexisting interconnection agreement that requires AirTouch to compensate U S WEST for the transport of traffic, including traffic that originates on U S WEST's network. Further, that Agreement does not require U S WEST to compensate AirTouch for the use of switching facilities to terminate traffic originating on U S WEST's network. The Arbitrator decided that AirTouch was entitled to relief from the costs of transporting U S WEST's local traffic as of the date it requested to renegotiate the preexisting agreement (July 28, 1998), but

[13] Hearing Transcript, at 296.

that it was entitled to compensation for the use of its switching facilities to terminate U S WEST's local traffic only subsequent to the Commission's approval of the arbitrated agreement.

B. AirTouch's Position

33. AirTouch believes that the Commission, in its discretion, should order U S WEST to commence paying termination compensation to AirTouch as of the date that AirTouch requested negotiations. AirTouch argues that unless termination compensation is awarded as of that date, U S WEST will be rewarded for its refusal to acknowledge its obligation to compensate AirTouch, in compliance with the Telecom Act. AirTouch states that 47 C.F.R. § 51.717(b) establishes the principle that due compensation should be paid sooner rather than later to a requesting carrier, even though it acknowledges that the rule does not directly apply to paging carriers.

C. U S WEST's Position

34. U S WEST argues that FCC Rule 51.717 applies only to two-way commercial mobile radio service (CMRS) providers, and not to paging providers; thus, the rule neither requires nor permits the imposition of terms and conditions of an interconnection agreement prior to the date it is approved by a state commission. U S WEST contends that the Arbitrator's decision to extend the protections of Rule 51.717 to AirTouch results in an impermissible retroactive application of the effective date of an interconnection agreement.

D. Discussion and Decision

35. This issue arises in the historical context of ILECs charging CMRS carriers, including paging providers, for transporting and terminating traffic that originates on the ILECs' networks.[14] 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.[15] 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.[16]

36. Paging providers are also treated as CMRS providers by the FCC Local Competition Order and Rules, with the exception that paging providers are not

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[14] FCC Local Interconnection Order, ¶¶ 1080-1084.

[15] Id., at ¶ 1041.

[16] Id., at ¶ 1042.

entitled to the presumption that their costs for terminating local traffic are symmetrical to ILEC costs. A paging provider independently must establish its costs in order to receive compensation for terminating traffic.[17]

37. The FCC adopted Rule 51.703(b), which provides that a LEC may not assess charges on any other telecommunications carrier for local traffic that originates on the LEC's network. 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.[18]

38. The FCC also 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) entitles a CMRS provider "to assess upon the incumbent LEC the same rates for the transport and termination of local telecommunications traffic that the incumbent LEC assesses upon the CMRS provider pursuant to the pre-existing arrangement." This would allow AirTouch to assess U S WEST the same rates for transporting traffic originating on AirTouch's network as U S WEST assessed against AirTouch for transporting traffic originating on U S WEST's network. However, AirTouch, as a paging provider, does not originate traffic and would appear to be ineligible for protections afforded by Rule 51.717, but for the provisions of Rule 51.703.

39. 47 C.F.R. § 51.703 is unequivocal in letter, as well as spirit. Read together with 47 C.F.R. § 51.717, it is clear that Rule 51.717 is intended to provide some relief for charges improperly assessed in contravention of Rule 51.703. Accordingly, the Commission agrees with the decision by the Arbitrator that AirTouch is entitled to relief from rates charged by U S WEST to transport traffic originating on U S WEST's network as of the date AirTouch requested negotiations, as provided for in Rule 51.717. However, because AirTouch is not entitled to a presumption of symmetrical costs for terminating traffic and independently must establish its costs, it is not entitled to receive compensation prior to doing so.

40. U S WEST's argument characterizing the application of Rule 51.717 as the impermissible retroactive enforcement of an unapproved interconnection agreement is unpersuasive. Because the relief provided for in 47 C.F.R. § 51.717 is not being enforced prior to the Commission's approval of an agreement between the

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[17] FCC Local Interconnection Order, ¶¶ 1085-1093.

[18] 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.

parties, the findings of the Commission do not constitute impermissible retroactive enforcement.

3. Should the Agreement Define AirTouch's "Pick-and-Choose" Rights Under Section 252(i) of the Telecom Act?

A. Arbitrator's Decision

41. The Arbitrator agreed with AirTouch's position that it is entitled to exercise its rights under § 252(i), as implemented by the FCC's Local Competition Order and Rules, during the term of its interconnection agreement with U S WEST. The Arbitrator's Report directed that the Agreement contain language allowing AirTouch to avail itself of any *previously or subsequently* negotiated "interconnection, service, or network element" under an agreement filed with, and approved by, the Commission.

B. U S WEST's Position

42. US WEST recognizes AirTouch's "pick-and-choose" rights under section 252(i) of the Telecom Act (also known as "most favored nation" (MFN) status); however, it believes that the most straight-forward way to describe those rights in the Agreement is to include the verbatim language from the statutory provision. U S WEST also argues that the decision to permit a party to an approved agreement to avail itself of terms *previously* approved in other agreements is neither supported by section 252(i), the FCC's Local Competition Order, nor FCC Rule 51.809 (47 C.F.R. § 51.809).

C. AirTouch's Position

43. AirTouch argues that it should be allowed to adopt terms contained in previously approved interconnection agreements under section 252(i), and that the Arbitrator's decision should be upheld. AirTouch contends that section 252(i) is a primary tool of the Telecom Act for preventing discrimination under section 251, and that estopping adoption of terms in another agreement solely on the basis that it was previously, as opposed to subsequently, approved is inconsistent with that strong policy.[19]

44. AirTouch argues that several practical considerations support the Arbitrator's decision. U S WEST's position would require a requesting carrier to become familiar with each and every approved agreement prior to signing its own agreement, or else be deemed to have waived certain rights. Such a requirement would be contrary to the objective of expedited entry into competitive markets. AirTouch points out that 47 C.F.R. § 51.809 establishes certain limitations on the adoption of terms in other agreements that apply equally to both previously and

[19] AirTouch cites the FCC's Local Competition Order, ¶ 1296.

subsequently approved agreements. Finally, AirTouch cites language in the FCC's Local Competition Order in support of its position.

D. Discussion and Decision

45. 47 U.S.C. § 252(i) states:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this 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.

46. In AT&T v. Iowa Utilities Board, the Supreme Court upheld the FCC's "pick-and-choose" rule, 47 C.F.R. § 51.809, implementing 47 U.S.C. § 252(i). 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.[20] Clearly, parties to interconnection agreements are entitled to exercise rights pursuant to section 252(i); however, because AirTouch does not seek to exercise any rights at this time, issues relating to the implementation of section 252(i) are not ripe for determination in this proceeding.

47. The Commission agrees with U S WEST that the Arbitrator's Report should be modified, and that the only appropriate language to be included the Agreement is the verbatim language from section 252(i) of the Telecom Act.

4. Should the Configuration of Shared Interconnection Facilities Be Subject to Mutual Agreement?

A. Arbitrator's Decision

48. AirTouch's interest in ensuring that interconnection facilities are properly sized to avoid undue call blocking is an interest shared by all carriers and users. The Commission adopted WAC 480-120-515 providing for network performance standards in recognition of that widespread interest. The Arbitrator concluded that U S WEST must provide Paging Connection Service facilities engineered to be consistent with federal court decisions interpreting the Telecom Act, with BellCore Special Report SR-TAP-000191, and with WAC 480-120-515. The fact that U S WEST may be required to share facilities for the transport and termination of calls does not also

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[20] Id., ¶ 1316.

require that all aspects and elements of those facilities be subject to mutual agreement between the parties.

B. AirTouch's Position

49. Because interconnection facilities are used to deliver third-party (non-U S WEST) transit traffic to AirTouch (for which AirTouch will be paying a *pro rata* share of facilities), AirTouch claims an interest independent of U S WEST in ensuring that facilities are properly sized to prevent blocking. AirTouch argues that the general network performance standards set forth in WAC 480-120-515 do not adequately protect its interests. According to AirTouch, the Arbitrator's decision undermines its ability to bargain with U S WEST and exposes it to an unreasonable risk of potential harm caused by U S WEST's unilateral right to reconfigure existing arrangements.

C. U S WEST's Position

50. U S WEST argues that AirTouch is not entitled to exercise the same control as U S WEST over facilities for which AirTouch pays a fraction of the expense. U S WEST acknowledges that it cannot exercise control over its network in a way that discriminates against interconnecting carriers, but argues that control over configuration of its network remains with U S WEST pursuant to the decision of the United States Court of Appeals for the Eighth Circuit in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997). In that decision, the Court held that the Telecom Act requires ILECs to provide requesting carriers with interconnection that is "equal in quality" to what the ILEC provides itself, its affiliates, or other carriers. Furthermore, U S WEST argues that ILECs are not required to provide "superior" quality interconnection upon request.

D. Discussion and Decision

51. AirTouch's arguments that the standards set forth in WAC 480-120-515 do not adequately protect its interests and that it is entitled to mutual control of facilities are unpersuasive. The majority of the costs for the shared interconnection facilities are borne by U S WEST to deliver local traffic originating on U S WEST's network. The fact that AirTouch is responsible for a portion of that cost does not entitle AirTouch to co-determine the configuration of interconnection facilities. U S WEST is accountable for violations of state and federal statutes and regulations, and the State of Washington affords AirTouch an expedited process for enforcing its interconnection agreement with U S WEST. The Commission agrees with, and adopts, the discussion and decision on this issue in the Arbitrator's Report.

5. Should the Arbitrator's Determination of the Percentage of Exempt Traffic Be Modified?

A. Arbitrator's Decision

52. "Exempt traffic" includes transit traffic, interMTA traffic, and certain interLATA traffic. Transit traffic refers to local traffic that U S WEST transports to AirTouch's network but does not originate on U S WEST's network; therefore, U S WEST is not obligated to pay AirTouch reciprocal compensation for transit traffic. Unlike cost information substantially under the control of AirTouch, both parties have access to information relevant to this issue, and, indeed, both parties submitted evidence. Therefore, the Arbitrator resolved this issue on the basis of which proposal was the most reasonable based on the record.

53. Each party proposed a percentage of exempt traffic that was a compromise to their respective traffic studies. The Arbitrator concluded that each study was unreliable in one respect or another, and established a reasonable range of exempt traffic. While AirTouch's proposal for 20% was considered to be the minimum reasonable range, the Arbitrator concluded that U S WEST's proposal of 33.8% exceeded the maximum reasonable range of 30%. The Arbitrator also provided that either party may seek modification of the exempt traffic rate through the dispute resolution process in the Agreement if more reliable paging-specific data is developed during the term of the Agreement.

B. U S WEST's Position

54. U S WEST argues that the Arbitrator first erred by not assigning AirTouch the burden of proving the amount of compensable and exempt traffic to be allocated between the parties. U S WEST also argues that the Arbitrator erred by creating an arbitrary "reasonable range" for exempt traffic. U S WEST contends that its study of Washington cellular traffic establishes that any reasonable range should extend to at least 41.5 percent. Furthermore, U S WEST contends that AirTouch's study resulting in an estimate of 7 percent exempt traffic (based on traffic delivered through U S WEST's toll tandem) does not provide any meaningful data to estimate the amount of local traffic originating on other carriers' networks.

C. AirTouch's Position

55. AirTouch argues that U S WEST did not object to the Arbitrator's decision to utilize the last-best-offer process to resolve this issue until it resulted in an adverse outcome. The objective of the last-best-offer process is to provide an incentive to the parties to present a compromise offer, which may not be wholly supported by the evidence. Because the arbitrator in a last-best-offer process is essentially choosing one compromise over another as the "more reasonable" proposal, the arbitrator must have maximum discretion.

56. AirTouch argues that in the context of the last-best-offer process, the allocation of the burden of proof is of no real significance because the last best offer need not be supported by the evidence. AirTouch refutes U S WEST's contention that it has the burden to prove the percentage of exempt traffic as part of a paging

provider's burden to prove its cost of terminating traffic. AirTouch agrees with the Arbitrator's conclusion that information concerning network traffic is accessible to both parties.

57. AirTouch states that it is willing to temporarily install SS7 lines in order to accurately measure traffic, but that U S WEST only makes SS7 available on a final purchase basis. AirTouch also argues that U S WEST has access to other automatic number identification (ANI) information that enables U S WEST to produce a more accurate estimate of exempt traffic (especially transit traffic) without the installation of SS7 technology. Furthermore, AirTouch claims that U S WEST strips AIN information from the local traffic stream prior to its delivery, thus depriving AirTouch of an additional means to produce a more accurate estimate.

58. AirTouch argues that the Arbitrator acted properly by establishing a reasonable range when faced with conflicting data concerning the exempt traffic percentage. In addition to the great discretion retained by the Arbitrator, AirTouch argues that its compromise offer of 20% exempt traffic is supported by its traffic study showing that toll traffic comprised 7% of total traffic.

D. Discussion and Decision

59. During the arbitration, AirTouch introduced evidence supporting a 7% transit traffic figure. U S WEST submitted evidence supporting a 41.5% transit traffic figure. Both parties submitted last best final offers with revised transit traffic figures; AirTouch proposed 20% and U S WEST proposed 33.8%. In a last best offer arbitration process, an allocation of the burden of proof is not relevant. Resolution of the dispute is fundamentally determined by which party's offer is more reasonable.

60. The Arbitrator did not act arbitrarily by establishing a reasonable range of exempt traffic based on the record, and by rejecting U S WEST's proposal for being outside of that range. But even assuming arguendo that the reasonable range was between 7% and 41.5%, the AirTouch proposal is a more reasonable compromise than that proposed by U S WEST. U S WEST's reliance on other carriers' cellular traffic is no more reliable than AirTouch's reliance on toll traffic to estimate the percentage of exempt traffic as defined in the Agreement.

61. The Arbitrator's decision that either party can seek modification of the percentage of exempt traffic during the term of the Agreement provides an appropriate alternative in the event that more reliable data becomes available. AirTouch suggests that there are means to produce a more accurate measurement, but requires the cooperation of the parties. To the extent that such means exist, upon request, a party must reasonably cooperate to produce more reliable data. The Commission agrees with, and adopts, the discussion and decision on this issue in the Arbitrator's Report.

6. What Proposed Language Most Fully and Accurately Incorporates the Arbitrator's Decision Regarding Points of Connection (POC)?

A. Arbitrator's Decision

62. The Arbitrator rejected both proposals for designating points of connection between AirTouch's and U S WEST's networks, but also found that both proposals have merit, in part. The Arbitrator sought a balance between the statutory right a CLEC to unilaterally designate a POC at any technically feasible location within an ILECs service area, and the statutory obligation of an ILEC to bear the cost of transporting local traffic originating on its network to the POC. AirTouch currently interconnects with U S WEST by purchasing direct inward dialing (DID) Outpulsing and DID Number Block Activation services (also known as Type 1 paging services) in blocks of 100 numbers. However, AirTouch also seeks to interconnect with U S WEST by obtaining assignments of NXX codes (or prefixes) in full or partial blocks of 10,000 numbers without cost from the North American Numbering Plan Administrator (NANPA).

63. The Arbitrator ruled that AirTouch may establish a POC anywhere in a LATA, but he also placed restrictions on the NXX codes assigned to the POC in order to strike a balance between each party's costs and the need to provide incentives for making efficient economic networking decisions. NXX codes "shall not extend beyond the boundaries of the geographic calling area of U S WEST's Wire Center/End-office/Tandem serving AirTouch's POC." For areas outside this geographic boundary, AirTouch may continue to purchase Type 1 paging services[21] from U S WEST. AirTouch is not required to establish a POC within the serving area of the U S WEST end-office where assigned DID numbers reside. However, U S WEST is required to provide intraLATA transport only up to "sixty airline miles between the interconnection point on U S WEST's network and the intraLATA POC designated by AirTouch"; AirTouch must provide or pay for additional transport.

64. The Arbitrator did not expressly specify contract language to incorporate his decisions into the Agreement. The parties were unable to agree on language, and they have submitted conflicting proposed language at sections 2.6.4.2 through 2.6.4.5 of the Agreement.

B. AirTouch's Position

65. AirTouch argues that it should be able to obtain NXX codes in blocks of 10,000 without having to locate a POC within the local calling area where those numbers reside. This would result in lower costs to AirTouch for fewer POCs and DID

[21] "Type 1 paging services" refers to interconnection at an end-office.

paging services, and higher costs to U S WEST for local traffic transport over longer distances.

C. U S WEST's Position

66. U S WEST argues that AirTouch should establish routing points and POCs within the serving areas of the local and toll tandems that serve the rate centers associated with its NXXs. This would result in higher costs to AirTouch for more POCs and transport between the POCs and the AirTouch switch, and lower costs to U S WEST for local traffic transport over shorter distances.

D. Discussion and Decision

67. Commission Staff supports the Arbitrator's decision. The Commission agrees with, and adopts, the discussion and decision in the Arbitrator's Report establishing terms and conditions for the location of POCs.

68. The Commission rejects the proposed AirTouch language, because it circumvents the Arbitrator's decision to distinguish between NXX code assignments and use of DID paging services. The Commission finds that AirTouch's proposed language is inconsistent with decisions in the Arbitrator's Report, and is rejected.

69. Staff also recommends modifying U S WEST's proposed language.[22] At the hearing on the parties' requests for approval of the Agreement, AirTouch proposed additional modifications to Staff's draft of section 2.6.4.4.1;[23] however, that proposed language still contravenes the Arbitrator's Report by permitting AirTouch to designate a POC within the U S WEST access-tandem service area where its NXXs reside, but potentially outside of the local calling area. Therefore, that proposed language also is rejected.

70. At the hearing on the parties' requests for approval of the Agreement, U S WEST proposed an additional modification to Staff's draft of section 2.6.4.5.1, and Staff does not object.[24] Commission Staff's draft, as further revised by U S WEST's proposed modification of section 2.6.4.5.1, fully and accurately reflects the

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[22] See Appendix B - Commission Staff's Draft Revising U S WEST's Proposed Sections 2.6.4.2 through 2.6.4.5.

[23] See Appendix C - AirTouch's Proposed Revision to Staff's Draft of Section 2.6.4.4.1.

[24] See Appendix C - U S WEST's Proposed Revision to Staff's Draft of Section 2.6.4.5.1.

Commission's decision on this issue, and the parties must incorporate that language into the Agreement.

III. ADOPTION OF ARBITRATOR'S REPORT AND DECISION

71. In all other respects, the Commission adopts the Arbitrator's Report and Decision. Having considered the Arbitrator's Report and Decision, the arbitrated Paging Connection Agreement, and accompanying requests for approval filed by the parties, the entire record herein, and all written and oral comments made to the Washington Utilities and Transportation Commission, the Commission makes the following findings and conclusions:

IV. FINDINGS OF FACT

72. 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.

73. The Washington Utilities and Transportation Commission is designated by the Telecommunications Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, under Sections 251 and 252 of the Act.

74. This arbitration and approval process was conducted pursuant to and in compliance with the Commission's *Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996,* Docket No. UT 960269, June 27, 1996.

75. On April 28, 1999, pursuant to the Commission's Order On Arbitration Procedure in this docket, the Arbitrator issued a Report and Decision resolving the disputed issues between the parties to this proceeding -- AirTouch Paging and U S WEST Communications, Inc. *See* Appendix A.

76. On June 1, 1999, the parties submitted a Paging Connection Agreement (Agreement) to the Commission for approval, in part. Both parties requested modification of the Arbitrator's Report and stated their respective positions regarding disputed language in the Agreement. The Agreement properly incorporates the decisions of the Arbitrator as to the disputed issues. Pursuant to agreement of the parties, to the extent the final provisions vary from specific decisions of the Arbitrator, the provisions are treated as negotiated provisions.

77. The Arbitrator's decision that the compensation rate for terminating local traffic be subject to a true-up at a later date is inconsistent with Commission practice and policy.

78. AirTouch does not seek to exercise any rights pursuant to section 252(i) of the Telecom Act at this time.

79. The production of a more accurate measurement of exempt traffic requires that the parties reasonably cooperate with each other.

80. There is a proper foundation for Commission Staff's recommendations regarding the approval and rejection of disputed contract language proposed by the parties.

81. AirTouch's proposed language regarding the location of points of connection is inconsistent with decisions in the Arbitrator's Report.

82. Commission Staff's draft revising U S WEST's proposed contract language, including U S WEST's proposed revision to Staff's draft of section 2.6.4.5.1, fully and accurately reflects the Arbitrator's decisions regarding the location of points of connection.

83. The Commission has reviewed and analyzed the Commission Staff recommendation, the Arbitrator's Report and Decision, the Agreement, the filings of the parties, and the record herein, including the oral comments made at the open meeting. The Commission hereby adopts and incorporates by reference the discussions and decisions in the Arbitrator's Report and Decision, subject to modifications and Commission Staff's recommendations regarding the approval and rejection of disputed language as discussed in the instant Order.

VI. CONCLUSIONS OF LAW

84. The arbitrated provisions of the Agreement meet the requirements of section 251 and the pricing standards set forth in section 252(d) of the Telecommunications Act of 1996.

85. The negotiated provisions of the Act do not discriminate against a telecommunications carrier not a party to the agreement and are consistent with the public interest, convenience, and necessity.

86. Issues relating to the implementation of section 252(i) of the Telecom Act are not ripe for determination until a party seeks to exercise those rights.

87. The Agreement, as modified by this Order, is consistent with Washington and federal statutes and regulations, and with the orders and policies of this Commission and the FCC.

ORDER

IT IS ORDERED that:

88. The Paging Connection Agreement between U S WEST Communications, Inc., and AirTouch Paging for the State of Washington, filed on June 1, 1999, is approved, subject to modifications and Commission Staff's recommendations regarding the approval and rejection of disputed language as discussed in the instant Order.

89. The economic terms contained in the Agreement are interim, subject to modification or replacement by the Commission's Final Order in the generic cost and price proceeding, Docket No. UT 960369 et al., or until such time as the FCC makes a further determination.

90. In the event that the parties revise, modify or amend the Agreement approved herein, the revised, modified, or amended Agreement shall be deemed a new negotiated agreement under the Telecommunications Act and shall be submitted to the Commission for approval, pursuant to 47 U.S.C. § 252(e)(1) and relevant provisions of state law, prior to taking effect.

91. On or before July 8, 1999, the parties shall submit a revised and signed agreement in accordance with this Order.

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92. The agreement shall be effective as of the date of this Order, except that AirTouch is entitled to relief from the costs of transporting U S WEST's local traffic as of July 28, 1998.

DATED at Olympia, Washington and effective this 1st day of July 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner