

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held at its office
in Jefferson City on the 17th
day of October, 1997.

In the Matter of AT&T Communications of the South-)
west, Inc.'s Petition for Arbitration Pursuant to)
Section 252(b) of the Telecommunications Act of) Case No. TO-97-63
1996 to Establish an Interconnection Agreement)
Between AT&T Communications of the Southwest, Inc.)
and GTE Midwest Incorporated.)
)

ORDER GRANTING RECONSIDERATION IN PART OF FINAL ARBITRATION ORDER
AND OTHERWISE DENYING MOTIONS FOR CLARIFICATION,
REHEARING AND/OR RECONSIDERATION

I. Procedural History

On July 31, 1997, the Commission issued its Final Arbitration Order in this case. The Commission lengthened its normal ten day deadline for the filing of requests for reconsideration or clarification to twenty days from the date of the Order. Requests for reconsideration or clarification were filed by GTE Midwest Incorporated (GTE), the Office of the Public Counsel (OPC), and AT&T Communications of the Southwest, Inc. (AT&T). GTE also filed a Motion to Clarify and Establish Administrative Record. AT&T filed a responsive pleading.

After reviewing the pleadings relating to the Final Arbitration Order, the Commission will grant the requests for relief where appropriate. All other Motions for Rehearing, Clarification, and/or Reconsideration shall be denied unless specifically granted within this Order.

II. Arbitration Procedure:

GTE and OPC each raise issues concerning the procedures that were used by the Commission in determining the permanent interconnection rates. The parties are clearly confusing this arbitration proceeding with a contested case proceeding. There is no correlation between the two in terms of the procedures used to obtain data, source of the data, and use of the data to ascertain a reasonable rate for an interconnection agreement. The pleadings filed after the Final Arbitration Order suggested that the Commission was required to permit parties to review the rate schedules recommended by the Arbitration Advisory Staff, hold hearings with cross-examination and presentation of additional evidence, and allow oral argument and filing of briefs. These assertions are not supported by the case law relating to the Federal Arbitration Act (FAA).

Arbitrators may properly refuse to give reasons for their decisions,¹ and are no more obligated to give reasons for an award than is a jury expected to explain a verdict.² Further, unless required by statute or the terms under which a case is submitted to the arbitrator, it is not necessary that the award be accompanied by specific findings of fact or conclusions of law.³ Clearly, these cases indicate that there are no rigid standards that must be employed in making arbitration awards. There are no specific requirements for hearings, discovery, evidence, etc. These cases make it clear that the Commission, sitting as arbitrator, is free to

¹ Birchtree Financial Service, Inc. v. Thomas, 821 S.W.2D 120 (Mo. App. W.D. 1991).

² Hamilton Metals, 763 S.W.2D at 227.

³ Id.

use whatever information it finds useful, from whatever source and is not required to explain the award.

The FAA, as well as the Missouri Arbitration Act (MAA), provides that awards may be vacated only for very limited reasons such as corruption, fraud, undue influence, evident partiality by an arbitrator, or the arbitrators exceeding their powers.⁴ Absent one of these limited reasons, a court must confirm the arbitrator's award.⁵ Even an arbitrator's mistake of fact or mistake of law is insufficient to vacate an award.⁶ Given these very minimal standards for vacating or modifying an arbitration award, the Commission finds that the highly structured, contested case type procedures advocated by GTE and OPC are inappropriate and unnecessary where there is mandatory arbitration under the Telecommunications Act of 1996 (the Act).

III. Issues for Reconsideration:

GTE argues that the Commission's rulings requiring it to provide to AT&T a higher quality of service than it provides itself are contrary to a recent opinion of the United States Court of Appeals for the Eighth Circuit. See Iowa Utilities Board v. Federal Communications Commission, No. 96-3321 (8th Cir., July 18, 1997). The Commission agrees. In its prior orders this Commission was bound to give effect to the rules set in place by the Federal Communications Commission (FCC) to implement the Act. Specifically, 47 C.F.R. Sections 51.305(a)(4) and 51.311(c) require an incumbent LEC (local exchange company) to provide interconnection at levels

⁴ See, § 435.405.1, RSMo Supp. 1996, and 9 U.S.C.A. § 10.

⁵ Holman v. Transportation World Airline, Inc., 737 F. Supp. 527, 530 (E.D. Mo. 1989).

⁶ Stifel, Nicolaus and Co., Inc. v. Francis, 872 S.W.2D 484, 485 (Mo. App. W.D. 1994).

of quality superior to what the ILEC provides to itself, where technically feasible, upon request of another carrier. The Eighth Circuit found these rules to be inconsistent with the plain language of the Act which requires an incumbent to provide interconnection that is at least equal in quality to the facilities the ILEC provides to itself.⁷ The Eighth Circuit vacated 47 C.F.R. Sections 51.305(a)(4) and 51.311(c). The Commission finds that, its Final Arbitration Order shall be modified to the extent that it requires GTE to provide interconnection at levels of quality superior to what GTE provides to itself. Each such directive shall be modified to require GTE to provide interconnection at levels of quality at least equal to what GTE provides to itself.

IV. Review of Submitted Agreements:

AT&T and OPC argue that the Commission should not have rejected the previously submitted, through unexecuted, interconnection "agreements".⁸ They contend that the Commission should have examined the purported agreements, made a ruling on each item of disputed language, and issued an order approving the agreement.

It is unclear to the Commission how an unexecuted document containing many disputed contract provisions could constitute an agreement between the parties. AT&T and OPC also failed to indicate which of the various "agreements" submitted to the Commission by AT&T or GTE should be reviewed and approved. The most recent such submission was the "Interconnection, Resale and Unbundling Agreement between GTE Midwest Incorporated and AT&T Communications of the Southwest, Inc." filed on

⁷ § 47 U.S.C. 251(c)(2)(C)

⁸ Agreements were submitted on these dates: August 15, 1996, by AT&T (Petition, Appendix 17); September 30, 1996, by AT&T, (Proposed Terms); October 2, 1996, by GTE; February 3, 1997, by AT&T; September 30, 1997, by AT&T.

September 30 by AT&T. The text of the agreement consists of 66 pages, followed by 15 attachments of various lengths. The first ten pages alone, the General Terms and Conditions sections, contain eight instances of disputed language.

This proceeding was conducted pursuant to 47 U.S.C. Section 252 that requires the State Commission to arbitrate any open issues. Section 252 specifically states:

(4) ACTION BY STATE COMMISSION

(A) The State commission shall limit its consideration of any petition under paragraph (1)⁹ (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)¹⁰. (Emphasis added).

The Commission fully dealt with each of the 68 issues delineated by the parties in the First Revised Issues Memorandum filed on October 28, 1996. The issues presented by the disputed language in the submitted documents which, according to AT&T and OPC, should have been determined by this Commission, would require the Commission to weed through volumes of testimony, more than 59 exhibits, and 1,200 pages of transcripts in order to find answers to questions not properly presented in the arbitration petition and response.

MCI Telecommunications Corporation (MCI) raised a similar issue before the FCC in a Section 252(e)(5) challenge. The FCC, in rejecting MCI's petition for preemption of this Commission for failure to act in Case No. TA-97-40, found that state commissions cannot be preempted for failure to arbitrate issues that were not "clearly and specifically" presented by

⁹ Section 252, paragraph "(1) Arbitration" is the section of the act which provides authority for a party to file for arbitration.

¹⁰ Section 252, paragraph "(3) Opportunity to Respond" is the section under which a non-petitioning party is given 25 days to respond to the petition.

the parties. See In the Matter of Petition of MCI for Preemption Pursuant to Section 252(a)(5) of the Telecommunications Act of 1996, ¶ 37, FCC 97-345, released September 26, 1997. In its discussion the FCC cited the Act's requirement that a state commission "limit its consideration . . . to the issues set forth in the petition and in the response, if any."¹¹ The FCC emphasized the parties' obligation to negotiate in good faith and to present to a state commission all issues in dispute. As illustration the FCC pointed to the Missouri Commission's directive that the parties submit a Joint Issues Memorandum clearly identifying each unresolved issue and the parties' positions on each issue. The parties injected "catch-all" language in Issue No. 42 which the FCC found failed to satisfy the duty to present all open issues as required by Section 252(b)(2).¹² In the same order the FCC encouraged state commissions to vigorously enforce the good faith negotiation requirement. The submission of the type of document in dispute here for Commission approval clearly evidences a failure of these parties to negotiate in good faith.

IT IS THEREFORE ORDERED:

1. That the Petition for Reconsideration and Clarification filed by GTE Midwest Incorporated on August 20, 1997, is denied except as set out in this Order.

2. That the Motion to Clarify and Establish Administrative Record filed by GTE Midwest Incorporated on August 20, 1997, is denied except as set out in this Order.

¹¹ 47 U.S.C. §252(b)(4)(A).

¹² MCI Preemption Petition, at ¶ 34.

3. That the Motion for Reconsideration filed by the Office of the Public Counsel on August 20, 1997, is denied except as set out in this Order.

4. That the Application for Rehearing or Reconsideration filed by AT&T Communications of the Southwest, Inc. on August 20, 1997, is denied except as set out in this Order.

5. That AT&T's Response to GTE's Petition for Reconsideration filed by AT&T Communications of the Southwest, Inc. on September 3, 1997, is denied except as set out in this Order.

6. That the Interconnection, Resale and Unbundling Agreement between GTE Midwest Incorporated and AT&T Communications of the Southwest, Inc. filed by AT&T Communications of the Southwest, Inc. on September 30, 1997, is rejected.

7. That, to the extent that the Final Arbitration Order requires GTE Midwest Incorporated, upon request by AT&T Communications of the Southwest, Inc., to provide interconnection at levels of quality superior to what GTE provides to itself, where technically feasible, it shall be modified. The Final Arbitration Order is modified to provide that GTE shall provide interconnection to AT&T at levels of quality at least equal to what GTE provides to itself.

8. That the Final Arbitration Order, issued on July 31, 1997, shall remain in full force and effect except as specifically modified by this order.

9. That the parties shall prepare and submit to the Commission for approval an interconnection agreement reflecting the modifications embodied in this order and the permanent rates set out in Attachments A and B to the Final Arbitration Order, issued July 31, 1997.

10. That the interconnection agreement described in Ordered Paragraph 2 shall be submitted to the Commission no later than November 7, 1997, and shall include no disputed language, and present no issues not properly presented in the petition and response that initiated this arbitration.

11. That the parties shall comply with the Commission's determinations on each and every issue.

12. That any proposed interconnection agreements previously filed in this case are rejected and all pending motions which have not been previously addressed are denied.

13. That this order shall become effective on October 17, 1997.

BY THE COMMISSION



Cecil L. Wright
Executive Secretary

(S E A L)

Lumpe, Ch., Crumpton, Drainer
and Murray, CC., concur.

Wickliffe, Deputy Chief Regulatory Law Judge

Atty/Sec'y: Winkler / Payne

10-14
Date Circulated

10-97-63
CASE NO.

Kreiter, Chairman

(Signature)
Crimpton, Commissioner

Com 2,3,4,5,6
Murray, Commissioner

(Signature)
Lump, Commissioner

(Signature)
D. Miner, Vice-Chair

10-16
Agenda Date

Action taken: 4-0 1/11

Must Vote Not Later Than _____

STATE OF MISSOURI
OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,
Missouri, this 17th day of October, 1997.

(Signature)
Cecil I. Wright
Executive Secretary