Exhibit No.:
Issue: Traffic Termination
Witness: Billy H. Pruitt
Type of Exhibit: Direct
Case No.: IO-2005-0468
Date Testimony Prepared:
July 21, 2005

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the matter of Petition of Alma Telephone Company for Arbitration of Unresolved Issues Pertaining to a Section 251(b)(5) Agreement With T-Mobile USA, Inc.	))))	Case No. IO-2005-0468, et al Consolidated

DIRECT TESTIMONY

OF

BILLY H. PRUITT

ON BEHALF OF T-MOBILE USA, INC.

Filed July 21, 2005

Q. Please state your name and address.

A. My name is Billy H. Pruitt. My business address is 59 Lincord Drive, St. Louis, MO 63128-1209.

Q. By whom are you employed and in what capacity?

A. I am President and Principal Consultant for Pruitt Telecommunications Consulting Resources, Inc.

Q. Would you please outline your educational background and business experience?

A. I joined Southwestern Bell Telephone Company in 1968 as a Teletype and Data Repair Technician and then served as a Central Office Repair technician until 1970. In 1970 I was drafted into the US Army and was trained as a Radio Relay and Carrier Attendant but served as a forest fire fighter. Upon my return to Southwestern Bell I was assigned as a Switching Technician and, over time, served in many different outside plant and central office craft technical positions. I obtained a Bachelor of Arts in Political Science degree from St. Louis University in 1981. In 1983, I was appointed a Manager in the Access Services group where I performed detailed costs studies and developed rates for multiple switching technologies required to provide switched access services. In 1986 I obtained a Master of Business Administration degree from Webster University. I was also promoted to the position of Area Manager Rates and Cost Studies in 1986 and managed a work group responsible for switched access cost study and rate development and the associated filings with state and federal regulatory bodies. In 1990 I was appointed Area Manager Regional Sales where I developed and

presented competitive proposals for complex network services and served as the Division's regulatory liaison. I retired from Southwestern Bell in December 1998.

Q. Do you have any experience in the wireless industry?

A. Yes. In September 1999 I accepted a position as a Senior Engineer in the Carrier and Wholesale Interconnection Management group at Sprint PCS. In this assignment I was a lead negotiator responsible for negotiation of interconnection agreements between Sprint PCS and other telecommunications carriers and for providing expert witness testimony for Sprint PCS. In March 2003 I was assigned to Sprint's Access Management organization where I provided regulatory policy and contract expertise in support of Sprint long distance, wireless, and local service initiatives. Due to a Sprint reorganization, I was assigned to the Sprint Business Solutions organization where I provided general enterprise support to various Sprint organizations involved in the development and delivery of products and services to Sprint's wholesale customers. I also negotiated contracts with LECs and alternate access vendors for services and facilities required in the Sprint network. In addition, I provided general negotiation and contract support to the various negotiation teams at Sprint that negotiated interconnection agreements with incumbent local exchange carriers and other carriers, and I provided expert witness testimony when required. In the performance of my responsibilities at Sprint PCS I was required to understand and implement on a day-to-day basis the obligations imposed on Sprint PCS by the Communications Act of 1934 as amended by the Telecommunications Act of 1996 and the resulting rules and regulations of the

Federal Communications Commission ("FCC") and the state public utility authorities.

Q. What are your responsibilities in your current position?

A. In December 2004, after 5 years of employment with Sprint, I accepted a voluntary buyout in order to open a telecommunications consulting practice providing interconnection negotiation support services to telecommunications providers. I have been involved in that consulting practice since that time.

Q. Have you testified previously before any state regulatory commissions?

A. Yes. I have provided testimony on issues similar to the issues in this case before the Iowa Utilities Board, the Nebraska Public Service Commission, the Oklahoma Corporation Commission, the Tennessee Regulatory Authority, and the Missouri Public Service Commission. My testimony before the Missouri Commission on these issues came when I was employed by Sprint. I testified in the complaint case proceedings between several rural local exchange carriers and Sprint PCS, Case No. TC-2002-57 (consolidated).

Q. What is the purpose of your testimony?

A. The purpose of my testimony is to provide input to the Commission regarding the positions of T-Mobile USA, Inc. ("T-Mobile") in Case No. IO-2005-0468, *et al.* consolidated, regarding unresolved issues associated with negotiations for interconnection and reciprocal compensation agreements between T-Mobile and Alma Telephone Company, Chariton Valley Telephone Company, Mid-Missouri Telephone Company, and Northeast Missouri Telephone Company (I will sometimes refers to these companies collectively as "LECs"). I will provide the T-

Mobile policy position for each arbitration issue. In addition, I will also provide testimony as to why T-Mobile believes that certain issues which the LECs have raised should not be decided by the Arbitrator in this proceeding, rather, they should be considered in a Commission complaint proceeding which has been pending between the same parties for several years, and, if the LECs believe that this proceeding does not cover all applicable time periods, then an expanded or separate complaint proceeding should be ordered.

ISSUE NUMBER 1: COORDINATED RESOLUTION OF PAST COMPENSATION ISSUES WITH PROSPECTIVE TRAFFIC TERMINATION AGREEMENT

Q. What is the T-Mobile position with respect to Issue No. 1?

A. Issue 1 of the Disputed Points List was raised by the LECs, and it involves whether the Arbitrator should decide whether T-Mobile delivered uncompensated traffic to the LECs prior to their request for negotiations in January, 2005, and if so, how much traffic was sent prior to January, 2005, and for this traffic, how much T-Mobile should compensate the LECs for the termination of that traffic to their end user customers. It is T-Mobile's position that language concerning compensation arrangements for traffic occurring prior to the commencement of negotiations should not included in the Traffic Termination Agreement. The past compensation at issue here is currently before the Commission in the Complaint Proceeding, Case No. TC-2002-57.

Q. For what reasons is consideration of those issues inappropriate in this arbitration?

A. Given the proper scope of this arbitration proceeding, the lengthy history in the Complaint Proceeding, and the severe time constraints under which the Commission must conclude this arbitration, the Commission should limit this

arbitration proceeding to issues that must be resolved so the parties can execute the Traffic Termination Agreements. Issues involving the exchange of traffic prior to January, 13, 2005, involve a different period of time (which may result in different facts) and involve different legal issues (such as wireless termination tariffs). In short, the Rural LEC language dealing with past compensation found in their proposed Section 5.5 should not be included in the Traffic Termination Agreement, and the Arbitrator should not make resolution of the issues now pending in the Complaint Proceeding a de facto condition precedent for resolution of a Traffic Termination Agreement between T-Mobile and the LECs.

Q. Why would resolution of the existing dispute about past traffic and past compensation become a condition precedent to resolution of the Traffic Termination Agreement?

A. For the simple reason that the language which the LECs propose for Section 5.5 would recite the existence of a settlement between each of the LECs and T-Mobile. This language could not be included in the Agreement unless, in fact, the parties reached agreement on those disputed issues.

Q. Do you understand that in the style of interconnection arbitration adopted by the Missouri Public Service Commission, the arbitrator typically picks between two language proposals by the parties?

A. Yes, I do.

Q. Does T-Mobile have a proposal for language for the agreement?

A. T-Mobile's proposal is that the Traffic Termination Agreement should be silent on the issues of past traffic volumes, traffic jurisdiction, and past compensation. These issues are encompassed, principally, in Issues 1 through 5 as identified by the LECs in their Petitions and subsequent pleadings, and the relevant language proposal by the LECs is contained in Section 5.5 of the Agreement. T-Mobile proposes that

Section 5.5, as proposed by the LECs, be deleted in its entirety and that the Agreement contain no language addressing traffic volumes, jurisdiction, and compensation prior to the date on which the LECs requested that negotiations commence. That took place on January 13, 2005.

Q. Are there any federal rules that provide support for the T-Mobile position?

Yes. With respect to the proper scope of this arbitration, federal rules are clear that reciprocal compensation obligations imposed by the Act and the FCC implementing rules are triggered only when one carrier requests compensation from another carrier in the form of a Section 252 negotiation request- and not before. The point is that the LECs did not request compensation as part of a request for negotiation until January 13, 2005, when they made their formal request for open negotiations. For example, FCC Rule 20.11(f) specifies that "[o]nce a request for interconnection is made" by a rural LEC to a wireless carrier, "the interim transport and termination pricing described in § 51.715 shall apply."[1] FCC Rule 51.715(a)(2), in turn, makes clear that a carrier "may take advantage of such an interim arrangement *only after it has requested negotiation.*"[2]

Q. Is the T-Mobile position further supported by federal court decisions?

Yes. Federal courts have uniformly held that the reciprocal compensation requirements in the Act apply only after a request for negotiation is made.[3]

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[1] 47 C.F.R. §20.11(f).

[2] FCC Rule 51.715(d) authorizes a state commission to "true up" interim rates once it establishes rates in its arbitration order.

[3] *See, e.g., U S WEST* v. *Anderson,* No. CV 97-9-H-CCL, 1999 U.S. Dist. LEXIS 22159, at *15 (D. Mont., Sept. 14, 1999)("WWC [Western Wireless] was entitled to mutual compensation from the date it issued its demand letter.")(appended hereto as **Schedule A**); *U S West* v. *Utah Public Service Comm'n,* 75 F. Supp. 2d 1284 (D. Utah 1999); *U S WEST* v. *Serna,* No. 97-124 JP/JHG, 1999 U.S. Dist. LEXIS 21774 (D.N.M., Aug. 25, 1999)(Appended hereto as **Schedule B**); *U S WEST* v. *Reinbold,* No. A1-97-025, 1999 U.S. Dist. LEXIS 20067 (D. Mont., May 14, 1999)(Appended hereto as **Schedule C**).

Q. Have State regulatory commissions previously addressed this issue?

A. Yes. The State commissions have reached the same result as the federal courts in applying the relevant federal law.[4] Indeed, State commissions have already rejected the very argument made by the Petitioners here – and federal courts affirmed both of those State commission decisions. For example, in an arbitration with a wireless carrier, a Nebraska rural LEC argued that it was entitled to compensation back to March, 1998, and asked that the issue be resolved in the arbitration proceeding, even though the wireless carrier did not make its negotiation request until August, 2002. The Nebraska Public Service commission rejected the rural LEC argument and "disagree[d] with the Arbitrator's utilization of the March 1998, commencement date":

> According to the FCC, in order to take advantage of interim arrangements, negotiations must have been requested by the parties. The record demonstrates that on August 26, 2002, WWC transmitted to Great Plains a bona fide request for the commencement of negotiations for purpose of § 252 of the Act. As such, the Commission finds that the applicable rate per MOU determined by this Commission with regard to Issue 3 shall apply to such MOUs beginning on August 25, 2002.[5]

The local federal district court affirmed this portion of the Nebraska Commission's order.[6]

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[4] *See, e.g., Petition of AT&T Wireless Services for Arbitration of Interconnection, Rates, Terms, and Conditions Pursuant to the Telecommunications Act of 1996*, Oregon ARB 16, 1997 Ore. PUC LEXIS 1, at *25 (July 3, 1997)("The reciprocal compensation obligation arose on October 3, because the request for interconnection was filed on that date.")(Appended hereto as **Schedule D**); *Petition of AT&T Wireless Services for Arbitration of an Interconnection Agreement with U S WEST Communications Pursuant to 47 U.S.C. § 252(b),* Minn. Docket No. P-421/EM-97-371, 1997 Minn. PUC LEXIS 118 (July 30, 1997)("[T]he effective date for beginning reciprocal compensation is October 3, 1996," which was the date the interconnection request was made.")(Appended hereto as **Schedule E**).

[5] *Petition of Great Plains Communications for Arbitration to Resolve Issues Relating to an Interconnection Agreement with WWC License,* Application No. C-2872 (Sept. 23, 2003).

[6] *See WWC License* v. *Boyle,* No. 4:03CV3393, slip op. at 7-8 (D. Neb., Jan. 20, 2005)(Appended hereto as **Schedule F**). However, the court vacated that portion of the Nebraska Commission order which held the rural LEC's reciprocal compensation obligations extended only to calls that terminate in its local exchange. *See id.* at 5 ("Thus, as a matter of federal law, the Commission erred in ruling that Great Plains owed no

Q. Are you aware of any other relevant supporting decisions?

A. Yes. An Oklahoma rural LEC sought to include past compensation for a period prior to the request for negotiations in an arbitration proceeding with a wireless carrier. The Oklahoma arbitrator struck this request from the arbitration proceeding, stating, "It does not belong in an arbitration, it's a separate cause before the Commission and the Commission does not have the power to make the determination."[7] Once again, the local federal district court rejected the rural LEC appeal of this issue and affirmed the Oklahoma Commission's decision.[8]

Q. What is your conclusion regarding the inclusion of past compensation language in a Traffic Termination Agreement?

A. It would be inappropriate for the Commission to include language dealing with past compensation in the Traffic Termination Agreements between the Rural LECs and T-Mobile. The Arbitrator should determine that this issue is not before the Commission in this arbitration and should reject the LECs' proposal for Section 5.5 of the Traffic Termination Agreement. The Traffic Termination Agreement should not contain Section 5.5 or any language similar in content to the language proposed by the LECs.

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reciprocal compensation to Western Wireless for calls originated by Great Plans and terminated by Western Wireless within the same MTA, *whether or not the call was delivered via an intermediate carrier*. Therefore, this Court directs that the agreement between Great Plains and Western Wireless be modified to reflect that reciprocal compensation obligations apply to *all calls* originated by Great Plains and terminated by Western Wireless within the same MTA.")(emphasis added).

[7] *Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 309 F. Supp. 2d 1299, 1312 n.22 (W.D. Ok. 2004), aff'd 400 F.3d 1256 (10th Cir. 2005).

[8] *Atlas Telephone*, 309 F.Supp.2d at 1311-12. The rural LECs abandoned this issue in their appeal to the 10th Circuit. *See Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d 1256. Notably, the 10th Circuit affirmed the Oklahoma Commission's decision that a rural LEC's reciprocal compensation obligations extend to all intraMTA calls that originate in its service area. *Id.* at 1264 ("Nothing in the text of these provisions provides support for the RTC's contention that reciprocal compensation requirements do not apply when traffic is transported on an IXC network.").

ISSUE NUMBER 2: PAST TRAFFIC VOLUMES

Q. What is the T-Mobile position with respect to Issue No. 2?

A. T-Mobile believes that reciprocal compensation obligations for T-Mobile and the Rural LECs were triggered on January 13, 2005, because that is the date on which the LECs requested negotiations. Therefore, any true-up would be for the period January 13, 2005 until the Commission has issued its final Order.

Q. Would it be appropriate for the Commission to rule on any traffic exchanged prior to January 13, 2005?

A. No. As stated in my response to Issue No. 1, it would be inappropriate to include past compensation language in a Traffic Termination Agreement between T-Mobile and the Rural LECs. Therefore, it would also be inappropriate for the Commission to determine that some volume number associated with this historical traffic was justified. In addition, T-Mobile simply does not agree with the traffic data figures that the Rural LECs have submitted.

Q. What is your conclusion regarding the Commission making a determination as to the volume of traffic exchanged prior to the request for negotiations was received?

A. The Commission should find that this arbitration proceeding is limited to the issues that must be resolved so the parties can execute the Traffic Termination Agreements. These issues do not include traffic exchanged prior to the Rural LEC request for negotiations on January 13, 2005

Q. Does T-Mobile make that proposal in its Disputed Points List?

A. Yes. In its DPL, T-Mobile indicates that the Arbitrator should determine the dates between which the true-up should be calculated. As noted above, T-Mobile believes that the true-up should be made between the request for negotiations on

January 13, 2005, and the effective date of the Traffic Termination Agreement, which T-Mobile proposes be set in March, 2005.

ISSUE NUMBER 3: PAST TRAFFIC JURISDICTION

Q. What is the T-Mobile position with respect to Issue No. 3?

A. Consistent with my testimony above concerning past traffic and compensation, it is T-Mobile's position that it would be inappropriate to include past compensation language in a Traffic Termination Agreement between T-Mobile and the Rural LECs. Therefore, it would also be inappropriate for the Commission to determine what jurisdictional factors should be associated with this historical traffic. Past traffic jurisdiction is not an issue for arbitration for all of the policy reasons identified in my answer to Issue No. 1 above. That testimony applies equally to Issue 3, so the relevant period for traffic which has already been exchanged between the parties is the true-up period between January 13, 2005, and March, 2005.

Q. Putting to the side the relevance of Issue 3, do you agree with the jurisdictional allocations which the LECs have proposed to be included in Appendix 2 of the Traffic Termination Agreement?

A. No, I do not. T-Mobile simply does not agree with the IntraMTA/InterMTA proposals that the Rural LECs have made in the Complaint Proceeding, with the exception of Alma's proposal, which conceded in the Complaint Proceeding that all T-Mobile traffic delivered to Alma is IntraMTA in nature. This is also true with respect to the LECs' proposals for the Traffic Termination Agreements.

Q. What is your conclusion regarding the Commission making a determination as to the jurisdiction of any traffic exchanged prior to the request for negotiation being received?

A. The Commission should find that any issues pertaining to the exchange of traffic and the jurisdiction of that traffic prior to the request for negotiations on January 13, 2005 are not relevant to the arbitration proceeding and should not be addressed in the Traffic Termination Agreements which result from the arbitration and should not be ruled on by the Commission.

ISSUE NUMBER 4: COMPENSATION RATES FOR PAST TRAFFIC

Q. What is the T-Mobile position with respect to Issue No. 4?

A. As stated above, it would be inappropriate to include any past compensation language in a Traffic Termination Agreement between T-Mobile and the rural LECs. Therefore, it would also be inappropriate for the Commission to determine that some arbitrary rate should be associated with this historical traffic.[9] A transport and termination rate associated with historical compensation is not an issue for arbitration for all of the related policy reasons stated above. That is a matter to be resolved in the Complaint Proceeding. In addition, T-Mobile simply does not agree with the rates proposed by the Petitioners for the past exchange of traffic. Those rates are much too high, and appear to be based solely on rates which other wireless carriers have agreed to pay, without regard to the actual costs incurred by the LECs in completing the wireless-originated traffic.

[9] It almost goes without saying that the amount of the compensation which T-Mobile pays to the LEC, and which the LEC pays to T-Mobile, will depend on the volume, jurisdiction (interMTA/intraMTA and interstate/intrastate), and per minute rate for traffic termination.

Q. What is your conclusion regarding the Commission making a determination as to the compensation rate for any traffic exchanged prior to the request for negotiation being received?

A. The Commission should find that any issues pertaining to the exchange of traffic and the transport and termination rates associated with that traffic prior to the request for negotiations in January 13, 2005 are not relevant to the arbitration proceeding.

ISSUE NUMBER 5: PAST COMPENSATION AMOUNTS

Q. What is the T-Mobile position with respect to Issue No. 5?

A. It would be inappropriate to include any past compensation language in the Traffic Termination Agreement between T-Mobile and the Rural LECs. Therefore, it would also be inappropriate for the Commission to determine that some past compensation amount should be associated with this historical traffic. In addition, T-Mobile does not agree with the amounts proposed by the Petitioners. However, T-Mobile does agree with the LECs to the extent the parties must true-up their reciprocal compensation for the timeframe between January 13, 2005, and March, 2005.

Q. What is your conclusion regarding the Commission making a determination as to the total compensation related to any traffic exchanged prior to the request for negotiation being received?

A. The Commission should find that any issues pertaining to the exchange of traffic and a past compensation amount associated with that traffic prior to the request for negotiations on January 13, 2005 are not relevant to this arbitration proceeding. There are both legal and practical reasons for this result, as outlined in great detail above.

ISSUE NUMBER 6: PROSPECTIVE INTERMTA/INTERSTATE FACTORS

Q. What is the T-Mobile position with respect to Issue No. 6?

A. T-Mobile agrees that the InterMTA and interstate factors to be included in the prospective Traffic Termination Agreements are proper issues for arbitration for each of the LECs in this proceeding. T-Mobile agrees with Alma's proposal to treat all traffic as intraMTA (i.e., a 0% interMTA factor). T-Mobile does not agree to the proposals made by the other three Rural LECs: Chariton Valley (26 % interMTA/20 % interstate); Mid-Missouri (16 % interMTA/20 % interstate); and Northeast (22.5 % interMTA/20 % interstate). These proposals are not based on empirical evidence, but rather on voluntary settlements which other wireless carriers have reached with the Petitioners. Given the specific circumstances of the arbitrations in question (the local service areas of the Rural LECs and T-Mobile, and the relationship of those areas to the LATA and MTA boundaries), the factors must be determined through use of empirical evidence and appropriate surrogates.

Q. What do you mean when you say that the factors proposed by the LECs are based on other wireless agreements?

A. Simply put, many wireless carriers have agreed to traffic termination agreements with the LECs, based solely on the settlement of a pending dispute for traffic termination charges. None of these agreements has been the subject of testimony or hearing. Lump sum settlement payments have been made by the wireless carriers to the LECs, without regard to any evidence-based determination of the jurisdiction of the telecommunications traffic which the wireless carriers deliver to the LECs.

ISSUE NUMBER 7: PROSPECTIVE INTRAMTA RATE

Q. What is the T-Mobile position with respect to Issue No. 7?

A. T-Mobile agrees that the intraMTA rate to be included in the Traffic Termination Agreements is a proper issue for arbitration. FCC orders and rules specify that an incumbent LEC has the burden of demonstrating that its proposed rate for call termination is based on the forward-looking (TELRIC) costs of the traffic sensitive component of local switching, plus a reasonable allocation for forward-looking (TELRIC) common costs. The cost study information provided by the Rural LECs will be analyzed by Mr. Craig Conwell in his Direct Testimony. The rate which T-Mobile advocates for this Issue is contained in its language for Appendix 1 of the Agreement.

Q. Have the Rural LECs indicated any other support for their proposed $0.035 rate per Minute-of use?

A. Yes. The Rural LECs have provided the justification that some other wireless carriers have agreed in the past to this rate in agreements that were negotiated without arbitration.[10] Therefore, the Rural LECs deem this rate to be appropriate, even though it appears to have been arrived at without regard to the costs incurred by the LECs in terminating the traffic from the wireless carriers.

Q. Does the agreement by other carriers to a certain amount indicate that this amount is related to the LEC costs?

A. There is no way of knowing. It would be pure speculation to answer that question. That some other carriers in the past voluntarily agreed to pay 3.5 cents per minute prospectively as part of an overall settlement of all issues (including traffic factors, balance-of-traffic determinations, other terms and conditions, and possibly also past

[10] *See* Alma Petition at 6 Third ¶ 1.

traffic issues) is not relevant in this arbitration proceeding. It certainly has no basis in the facts or the evidence before this Arbitrator. Having chosen arbitration as their preferred procedure for resolving the open issues (because T-Mobile refused to bend to their negotiating tactics), the Rural LECs must now live by the rules developed for arbitration – including the preparation, presentation, and defense of documented, Rural LEC-specific TELRIC cost studies, and proving that each of the proposed call termination rates complies with governing federal law. If they fail to discharge their burden of proof, the Arbitrator cannot adopt their proposed termination rate of 3.5 cents per minute. There is simply no evidence that the Arbitrator can point to in an attempt to support a decision adopting the LECs' arguments.

Q. In your opinion, have the Petitioners complied with the filing requirements for TELRIC cost studies?

A. No. In their presentation of the issues in their Petitions, the Petitioners have failed to comply with 4 CSR 240-36.040(3)(E), which specifies that an arbitration petition "must contain . . . [a]ll relevant documentation that supports the petitioner's position on each unresolved issue." They have also failed to comply with 47 U.S.C. § 252(b)(2)(A), which similarly requires the petitioner requesting arbitration to provide "all relevant documentation" concerning the unresolved issues "at the same time as it submits the petition." Here, the LECs provided no cost support, or any cost data, for their proposed rate. Because they did not submit with their Petitions a TELRIC cost study justifying their proposed rate of 3.5 cents/minute, the Commission has no choice but to reject the Petitioners' proposed rate for call termination.

Q. If the Commission cannot adopt the LECs' proposal, what other choices does it have?

A. In the testimony of Craig Conwell, T-Mobile has proposed a rate of .0074 cents per minute, and that amount will be incorporated into T-Mobile's proposal for the language in Appendix 1 of the Agreement. In proposing that rate, T-Mobile has provided objective evidence to support its position, evidence which is competent and sufficient to support the Arbitrator's decision to select T-Mobile's alternative.

Q. In the absence of valid and proper cost support, are there reciprocal and symmetrical rates per MOU that T-Mobile is willing to accept on an interim basis?

A. Yes, in the absence of valid and proper cost support, T-Mobile is willing, as a show of good faith, to implement a reciprocal and symmetrical interim per minute rate of $0.004 per minute for end-office switching and $0.0015 per minute for tandem switching provided under 47 C.F.R. § 51.715, as described by the FCC in its Declaratory Ruling and Report and Order in CC Docket No. 01-02, FCC 05-43 (February 29, 2005). T-Mobile offers that rate to each of the LECs in this arbitration.

ISSUE NUMBER 8: THE RURAL LECS ARE REQUIRED TO COMPENSATE T-MOBILE FOR CALL TERMINATION OF ALL INTRAMTA TRAFFIC-INCLUDING TRAFFIC THEY FIRST SEND TO AN INTERMEDIATE CARRIER

Q. What is the T-Mobile position with respect to Issue No. 8?

A. FCC rules specify that reciprocal compensation shall be paid for all intraMTA traffic that is exchanged between a LEC and a wireless carrier. T-Mobile has proposed language for Section 4.1.1 which states that principle simply: "IntraMTA traffic calls as defined in Section 2 of this Agreement shall be compensated based on the local termination rate established in Appendix 1, and such Compensation for

Local Traffic shall be reciprocal and symmetrical." T-Mobile's proposed language does nothing more than state each party's obligation to pay reasonable reciprocal compensation for the termination of traffic it originates and sends for termination on the other party's network.

Q. Does the Act include any compensation rules regarding the exchange of traffic between a Rural LEC and a CMRS provider such as T-Mobile?

A. Yes. 47 U.S.C. § 251 (b)(5) imposes the duty upon a Rural LEC "to establish reciprocal compensation arrangements for the transport and termination of telecommunications". The FCC has codified the Rural LECs' interconnection obligations and the applicable reciprocal compensation rules at 47 C.F.R. Part 51 – Interconnection and at 47 C.F.R. § 20.11. At 47 C.F.R. § 51.701(b)(2) the FCC has defined the scope of traffic exchanged between a Rural LEC and CMRS provider that is subject to the FCC's reciprocal compensation rules to be:

> "(2) Telecommunications traffic between a LEC and a CMRS provider that at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter."

Q. Are CMRS providers responsible for paying compensation to a Rural LEC that terminates a call originated by that CMRS provider's customers?

A. Yes. CMRS providers are responsible for paying the terminating Rural LEC the appropriated terminating reciprocal compensation charges for all IntraMTA traffic pursuant to a valid, Commission approved, interconnection agreement. Likewise, it is the Rural LEC's responsibility to compensate the CMRS provider for all IntraMTA traffic that originated on the Rural LEC's network and is terminated by the CMRS provider.

Q. Is a Rural LEC obligated to establish reciprocal compensation arrangements with a CMRS Provider for traffic exchanged through a third party carrier?

A. Yes. All LECs have the duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.703(a). There is no exception for traffic exchanged indirectly via a third provider. In addition to any Section 251 obligations, a LEC also has a separate and distinct duty to provide the type of interconnection reasonably requested by a wireless provider pursuant to 47 C.F.R. § 20.11(b).[11]

Q. What is the appropriate pricing methodology for establishing a reciprocal compensation rate for the exchange of traffic between a Rural LEC and a CMRS Provider?

A. The Commission should adopt the interim rates pursuant to 47 C.F.R. § 51.715 until the Rural LECS (1) produce appropriate cost studies, and (2) rebut the presumption of roughly balanced traffic. Under FCC regulations, 47 C.F.R. § 51.705, only three options are available to the Commission for establishing Rural LEC compensation rates:

> (a) An incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of:
>
> > (1) The forward-looking economic costs of such offerings, using a cost study pursuant to §§51.505 and 51.511;
> > (2) Default proxies, as provided in § 51.707; or
> > (3) A bill-and-keep arrangement, as provided in §51.713.

[11] 47 C.F.R. § 20.11 – Interconnection to facilities of local exchange carriers.

(a) A local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request...

(b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.

(1)A local exchange carrier shall pay reasonable compensation to a commercial radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.

(2) A Commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connections with terminating traffic that originates on the facilities of the commercial mobile radio service provider.

The FCC's default proxy rates are the rates Identified in 47 C.F.R. § 51.707.

Q. Can access charges be applied to IntraMTA traffic?

A. No. The FCC made it clear that under the 1996 amendments to the Communications Act, access charges are not to be imposed upon IntraMTA traffic, stating:

> 1035. With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs...
>
> 1036. On the other hand, in light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under Section 251(b)(5). Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA). Because wireless licensed areas are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (i.e. MTA) serves as the most appropriate definition of local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.[12]

Q. Has the FCC issued any subsequent orders that support the T-Mobile position?

A. Yes. In an Order released April 27, 2001, the FCC further expanded on its previous pronouncements, stating:

> 47. We note that the exchange of traffic between LECs and commercial mobile radio service (CMRS providers is subject to a slightly different analysis. In the *Local Competition Order*, the Commission noted its

[12] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, CC Docket No. 96-98, 11 F.C.C. Rcd. 15299 ¶1035-1036 (Aug. 8, 1996). (Hereinafter referred to as the *Local Competition Order.)*

jurisdiction to regulate LEC-CMRS interconnection under section 332 of the Act but decided, at its option, to apply sections 251 and 252 to the LEC-CMRS Interconnection. At that time, the Commission declined to delineate the precise contours of or the relationship between its jurisdiction over LEC-CMRS interconnection under sections 252 and 332, but made it clear that it was not rejecting section 332 as an independent basis for jurisdiction. The Commission went on to conclude that section 251(b)(5) obligations extend to traffic transmitted between LECs and CMRS Providers, because the latter are telecommunications carriers. The Commission also held that reciprocal compensation, rather than interstate or intrastate access charges, applies to LEC-CMRS traffic that originates and terminates within the same Major Trading Area (MTA). In so holding, the Commission expressly relied on its "authority under section 251(g) to preserve the current interstate access charge regime" to ensure that interstate access charges would be assessed only for traffic "currently subject to access charges," although the Commission's section 332 jurisdiction could serve as an alternative basis to reach this result. Thus the analysis we adopt in this Order, that section 251(g) limits the scope of section 251(b)(5), does not affect either the application of the latter section to LEC-CMRS interconnection or our jurisdiction over LEC-CMRS interconnection under section 332. (Emphasis added.[13]

Q. Why do you believe that the underlined section of this subsequent FCC decision is noteworthy?

A. The FCC reaffirmed the application of the IntraMTA rule established in the Local Competition Order—that CMRS calls that originate and terminate within a single MTA as determined at the initiation of the call are within the scope of § 251(b)(5) for compensation purposes and access charges do not apply.

Q. Do the reciprocal compensation requirements of 47 U.S.C. § 251(b)(5) apply to landline-originated IntraMTA traffic that is delivered to a CMRS Provider via an IXC?

A. Yes. The FCC rules expressly provide for the payment of reciprocal compensation on all intraMTA traffic without regard to how it may be delivered. There is no exemption in FCC rules for calls that a LEC originates but first sends to an

[13] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation fro ISP-Bound Traffic,* CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, Release Number: FCC 01-131 (Released: April 27, 2001), ¶ 47.

intermediary carrier. Reciprocal compensation obligations apply to all intraMTA traffic regardless of whether the traffic is completed directly or indirectly.[14] Moreover, the reciprocal compensation obligation is not affected by the type of intermediary carrier, be it a transiting carrier or an IXC. In this regard the FCC determined in the Local Competition Order that all traffic to or from a CMRS network that originates and terminates in the same MTA is subject to transport and termination rates under section 251(b)(5) rather than interstate and intrastate access charges.[15] Thus for a call originated by a Rural LEC customer that is carried by an IXC and terminates to T-Mobile within the same MTA under the existing FCC rules, the Rural LEC is obligated to pay reciprocal compensation charges to T-Mobile. The federal courts have confirmed that these rules require a LEC to pay compensation for "all calls originated by [a LEC] and terminated by [a wireless carrier] within the same MTA, *regardless of whether the calls are delivered via an intermediate carrier....*" [16] The matter is well-settled.

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[14] See, also, Corporation Commission of Oklahoma, *In the Matter of: Application of Southwestern Bell Wireless L.L.C> et al. for Arbitration under the Telecommunications Act of 1996, Cause Nos. PUD 200200149, 200200150, 200200151, 200200153, Order No. 466613, p. 4, Unresolved Issue No. 2 (August 9, 2002)("[E]ach carrier must pay each other's reciprocal compensation for all intra-MTA traffic whether the carriers are directly or indirectly connected, regardless of an intermediary carrier.")*(Appended hereto as **Schedule G**).

[15] *Local Competition Order ¶ 1043.)*

[16] *WWC License, L.L.C.* v. *Anne C. Boyle, et al.*, No. 4:03CV3393, Memorandum Opinion, Slip op. at 6 (emphasis added). *See also Atlas Telephone,* 309 F. Supp. 2d at 1309-10 ("[T]he mandate expressed in these [FCC rule] provisions is clear, unambiguous, and on its face admits of no exceptions. . . . Nothing in the text of these provisions provides support for the RTC's contention that reciprocal compensation requirements do not apply when traffic is transported on an IXC network.").

ISSUE NUMBER 9: THE RURAL LECS ARE REQUIRED TO COMPENSATE T-MOBILE FOR CALL TERMINATION OF ALL INTRAMTA TRAFFIC- INCLUDING TRAFFIC THEY SEND TO A T-MOBILE CUSTOMER WITH A PORTED NUMBER

Q. What is the T-Mobile position with respect to Issue No. 9?

A. The FCC rules specify that reciprocal compensation shall be paid for all IntraMTA traffic that is exchanged between a LEC and a wireless carrier. There is no exemption in FCC Rules for calls to wireless customers that utilize a ported telephone number. This simply part-and-parcel of the obligation of each carrier to compensate the other carrier for the costs incurred in completing calls from the originating carrier.

Q. Where is this Issue addressed in proposed language for the Agreement?

A. In Section 1.1, the LECs propose to exclude this type of traffic from reciprocal compensation by proposing the following language: "This Agreement shall not apply to traffic or calls completed by either Party in compliance with any obligation to port numbers of the former customers of one Party when that customers takes service from the other Party."

Q. What does T-Mobile propose?

A. T-Mobile proposes that this language not be incorporated into the Agreement. Without this language, the Agreement will simply reflect the obligation to pay mutual compensation for all intraMTA traffic, including the specific type of traffic addressed by Issue 9. In short, T-Mobile's proposal is addressed in the Agreement through the rejection of the LECs' proposed exclusionary language at the end of Section 1.1.

ISSUE NUMBER 10: THE COMMISSION SHOULD ORDER AN APPROPRIATE BILLING MECHANISM BETWEEN THE PARTIES

Q. What is the T-Mobile position with respect to Issue No. 10?

A. For the termination of intraMTA traffic, use of T-Mobile's proposed $ 0.0074 rate per MOU is appropriate for two independent reasons. First, the Rural LECs have not provided any data that indicates the relative volumes of traffic that they exchange with T-Mobile is and that they will include all intraMTA traffic in these traffic volumes (*see* Issues 8 and 9 above), and it is their burden to prove the relative volumes of the traffic, if they want the Arbitrator to adopt their proposed allocation factors.[17] Second, as discussed in Issue 7 above, the Rural LECs have utterly failed to support their 3.5 cent rate with a TELRIC study and have further failed to comply with Commission rules requiring the submission of such a study with their arbitration petitions. This proposal is addressed in the language which T-Mobile proposes for Section 5.1.1.

Q. Does T-Mobile have an alternative proposal?

A. Yes. In the alternative, a net-billing approach is an industry-standard mechanism for capturing the balance of traffic (land-to-mobile and mobile-to-land percentages) while reducing the administrative burden of cross-billing.

Q. Please describe how a net-billing regime would work.

A. As indicated in Section, 5.1.3 of T-Mobile's proposed Traffic Termination Agreement, the LEC would determine how much T-Mobile owes it from terminating traffic sent by T-Mobile, subtract the amount its owes T-Mobile for

[17] Under FCC rules, a state commission may presume that traffic exchanges are balanced "unless a party rebuts such a presumption." 47 C.F.R. § 51.713(c). The Rural LECs have not, at least to date, submitted any evidence that traffic between the parties is not balanced when all intraMTA traffic is considered.

terminating LEC-originated traffic to T-Mobile customers, and delivering a payment to T-Mobile for their difference. This would require a single payment every month, rather than a possibility of multiple payments between the parties.

ISSUE NUMBER 11: FUTURE INTERMTA OR INTERSTATE TRAFFIC STUDIES MAY NOT USE WIRELESS TELEPHONE NUMBERS AS A BASIS FOR DETERMINING THE ORIGINATION OR TERMINATION POINT OF A CALL

Q. What is the T-Mobile position with respect to Issue No. 11?

A. The FCC has ruled that the location of the originating cell site should be used to separate IntraMTA traffic from InterMTA traffic and that a wireless customer's telephone number does not reflect the customer's location at the time of a call.[18] This is true of both originating and terminating wireless calls. T-Mobile therefore agrees with the Rural LEC proposal that for T-Mobile "the origination or termination point for a call shall be the cell site/base station that serves, respectively, the calling or called party at the beginning of the call.[19] Yet, the Rural LECs appear to disregard this rule because they propose that they be allowed to use instead a wireless customer's telephone number in the preparation of a "valid InterMTA traffic study."[20] This internal inconsistency in the Agreement, and the proposal to part from FCC requirements, must be eliminated by the Arbitrator.

Q. Is it appropriate to use the location of the cell site normally connected through a wireless customer's "home" cell site?

A. No. Because the telephone number of a wireless phone is not associated with any given cell site(s) and does not provide any information related to cell site location, it would be inappropriate to use the study methodology proposed in the language of

[18] *Local Competition Order at ¶1044.*
[19] *See* Proposed Agreement at ¶ 2.7 (emphasis added)
[20] *See id.* at ¶¶ 5.1, 5.2.

the Rural LECs. Their proposal would grossly overstate the level of InterMTA traffic. The only appropriate cell site location to be used to jurisdictionalize traffic between a rural LEC and a wireless carrier is the cell site used by the wireless carrier to actually originate or terminate any give call.

Q. What would be the effect of reliance on the wireless customer's telephone number?

A. Many calls would be incorrectly identified as interMTA calls. This is especially true if the customer uses his phone for the most obvious of reasons: to make a trip, whether business or pleasure. InterMTA calls will be assigned to the intraMTA jurisdiction. Interstate calls will appear to be intrastate.

Q. Is this Issue addressed in the Agreement?

A. Yes. For example, in Section 2.7, the undisputed language says that "for TMUSA, the origination or termination point of a call shall be the cell site/base station that serves, respectively, the calling or called party at the beginning of the call." This language states elegantly that the appropriate inquiry is *where* the call originates or terminates on the wireless network, not the NPA-NXX assigned to the wireless customer, ignoring the location of the customer when the call occurs. In effect, Section 2.7 recognizes one of the most important features of wireless service: its mobility.

ISSUE NUMBER 12: SCOPE OF COMPENSATION FOR TRAFFIC EXCHANGED

Q. What is the T-Mobile position with respect to Issue No. 12?

T-Mobile requests an explicit statement in the Traffic Termination Agreements that the compensation obligation for intraMTA traffic is reciprocal and symmetrical. The rate that a Rural LEC charges T-Mobile for terminating T-Mobile traffic should

be the same rate used by T-Mobile to charge a Rural LEC for terminating a Rural LEC's intraMTA traffic. T-Mobile objects to certain compensation language proposed by Petitioners because the language is unclear and subject to varying interpretations, including potentially imposing an obligation upon T-Mobile to compensate Rural LECs for traffic originated by the Rural LECs.[21]

Q. Does T-Mobile's proposal appear in the Agreement?

A. Yes. T-Mobile proposes that the Arbitrator approve the language proposed by T-Mobile for Section 4.1.1. As discussed above, this language acknowledges the parties' obligation to provide mutual compensation for traffic termination.

ISSUE NUMBER 13: EFFECTIVE DATE OF THE TRAFFIC TERMINATION AGREEMENTS

Q. What is the T-Mobile position with respect to Issue No. 13?

A. The Rural LECs have provided the following effective dates for the Traffic Termination Agreements: March 12, 2005 for Alma; May 17, 2005 for Chariton Valley; April 20, 2005 for Mid-Missouri; and April 13, 2005 for Northeast. T-Mobile does not understand the rationale behind the Rural LECs' choice of these effective dates. T-Mobile considers January 13, 2005 as the proper effective date of the Traffic Termination Agreements, because that is the date the parties agreed to negotiate the Traffic Termination Agreements.

[21] *See* Proposed Agreement at ¶4.1.2, "Compensation for Non-local Intrastate Traffic originated by, and under the responsibility of, ILEC and terminating to TMUSA, if any, shall be based on the rate for termination of non-local intrastate traffic identified in Appendix 1". and similar language at ¶ 4.1.3.

Q. Does the Agreement contain that proposal?

A. Yes. The first paragraph of the Agreement recites the parties' proposals concerning the effective date, and includes T-Mobile's position that the effective date should be January 13, 2005.

ISSUE 14: DO THE LECS HAVE TO PROVIDE RECIPROCAL COMPENSATION, WHERE T-MOBILE IS INDIRECTLY INTERCONNECTED TO THEIR NETWORKS?

Q. What is indirect interconnection?

A. Indirect interconnection describes the scenario that exists when the CMRS provider's MSC is physically connected by a dedicated transport facility to a third-party telecommunications carrier's switch to which the Rural LEC network is also connected. In an indirect interconnection scenario, there is no dedicated transport facility between the CMRS provider and the Rural LEC.

Q. Do the Petitioners have an obligation to provide reciprocal compensation where T-Mobile is indirectly interconnected to their networks?

A. Yes. As stated in my response to Issue 8, the Act and the FCC rules clearly specify that reciprocal compensation shall be paid for all intraMTA traffic that is exchanged between a LEC and a wireless carrier. There are no exemptions for traffic exchanged on an indirect basis.

Q. Could you restate the statutory provision and/or FCC rules that require the Rural LECs to interconnect with T-Mobile regarding the exchange of traffic between their respective networks?

A. Yes. Sections 251 and 252 of the Act created the framework for both the exchange of traffic between the ICOs and CMRS providers such as T-Mobile, and the resulting compensation due each party for terminating traffic originated on the other's network. The Act spells out the duties of telecommunications carriers with

respect to the exchange of traffic. The very first general duty of a Rural LEC as a telecommunications carrier is "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers". (47 U.S.C. § 251(a)(1); 47 C.F.R. § 51.100(a)(1)). In addition, 47 C.F.R. § 20.11(a) states that "[a] local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier..." The Rural LECs are therefore required to connect to T-Mobile on an indirect basis. In addition, 47 C.F.R. § 20.11(b) states that "Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation." The Rural LECs are required to enter into reciprocal compensation arrangements for indirect traffic exchanged with T-Mobile.

ISSUE NUMBER 15: RESPONSIBILITY FOR TRANSPORT COSTS INCURRED FOR TERMINATING LAND-TO-MOBILE TRAFFIC

Q. Do the Petitioners have an obligation to compensate T-Mobile for transport costs incurred in terminating land-to-mobile traffic?

A. Yes. The FCC has established a Calling Party Network Pays ("CPNP") regime for telecommunications traffic. Under this regime, when a Rural LEC or a CMRS provider is an originating party, it is responsible for all costs of delivering its originated intraMTA traffic to a terminating party and compensating the terminating party for the use of its network in the termination of this intraMTA traffic. For CMRS provider originated traffic routed through a third party provider, CMRS providers acknowledge their responsibility to pay the third party provider for the costs associated with delivery of CMRS provider originated traffic to the terminating party's network. These costs typically include a switching charge and charges associated with the common transmission facilities to the subtending LEC's

network. Likewise, the ICOs are obligated to pay any third party transit costs associated with delivering their originated traffic to the terminating party in addition to compensating the terminating party for the use of its network.

Q. Do any FCC rules address the issue of who is responsible for costs of LEC originating traffic terminating to a CMRS provider?

A. Yes. 47 C.F.R. § 51.703(b) states that "[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." This rule codifies the general principle that the calling party's network pays for the costs associated with the calls it generates.

ISSUE NUMBER 16: ABILITY FOR RURAL LEC CUSTOMERS TO DIAL T-MOBILE CUSTOMERS ON A LOCAL BASIS

Q. Do the Petitioners have the right to discriminate against T-Mobile by requiring their customers to dial 1+ to reach all T-Mobile customers, including those with telephone numbers in the same locale?

A. No. The FCC rules expressly require dialing parity regardless of the called party's provider. In addition, basic principles of fairness and non-discrimination require the Rural LECS to charge the same end user rates.

Q. Please outline your position on this point.

Under existing laws the Rural LECs are required to provide dialing parity to CMRS providers such as T-Mobile. 47 C.F.R. § 51.207 provides that "a LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call *notwithstanding the identity of the customer's or the called party's telecommunications provider.*"[22] This code section on its face precludes dialing distinctions based on the identity of the telecommunications service provider. Further, the FCC has specifically rejected

[22] Emphasis added. *See also* 47 U.S.C. § 251(b)(3).

Independent LEC claims that they do not have to provide dialing parity to CMRS providers.[23] T-Mobile is not aware of any support for the Rural LEC position that the treatment of originating landline to wireless traffic for dialing purposes is negotiable as opposed to being required by federal law.

Q. Does this conclude your Direct Testimony?

A. Yes it does.

[23] *See in the matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Area Code Relief Plan for Dallas and Houston.* CC Docket Nos. 96-98, 95-185, 92-237, Second Report and Order and Memorandum Opinion and Order, Release Number: FCC 96-333, 1996 FCC Lexis 4311 (Released: August 8, 1996) at ¶ 68 ("We reject USTA's argument that the section 251(b)(3) dialing parity requirements do not include an obligation to provide dialing parity to CMRS Providers.")

STATE OF MISSOURI)
) ss.
COUNTY OF SAINT LOUIS)

VERIFICATION

Comes now Billy H. Pruitt Pruitt, being of lawful age and duly sworn, and states that he has read the foregoing direct testimony, and that it is true and correct to the best of his knowledge and belief.

Billy H. Pruitt
Billy H. Pruitt

Sworn to and subscribed before me this 20 day of July, 2005

Debbie S Eckert
Notary Public
Debbie S Eckert

My commission expires: 9-10-05

DEBBIE S. ECKERT
Notary Public - Notary Seal
STATE OF MISSOURI
St. Louis County
My Commission Expires: Sept. 10, 2005

LEXSEE 1999 U.S. DIST. LEXIS 22159

US WEST COMMUNICATIONS, INC., a Colorado Corporation, Plaintiff, vs. BOB ANDERSON, DAVE FISHER, NANCY McCAFFREE, DANNY OBERG, and BOB ROWE, Commissioners of the Montana Public Service Commission, and WESTERN WIRELESS CORPORATION, a Washington Corporation, Defendants.

CV 97-9-H-CCL

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION

1999 U.S. Dist. LEXIS 22159

September 14, 1999, Decided
September 14, 1999, Filed

DISPOSITION: [*1] Plaintiff's motion for summary judgment DENIED and defendants' motions for summary judgment GRANTED. Plaintiff's complaint DISMISSED, and all relief DENIED.

LexisNexis(R) Headnotes

COUNSEL: For U.S. WEST COMMUNICATIONS, INC., plaintiff: Stuart L. Kellner, John L. Alke, Michael F. McMahon, HUGHES, KELLNER, SULLIVAN & ALKE, Helena, MT. Norton Cutler, Wendy M. Moser, Blair A. Rosenthal, U.S. WEST COMMUNICATIONS, INC., Denver, CO.

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For WESTERN WIRELESS CORPORATION, defendant: Michael S. Lahr, CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH, Helena, MT. Douglas P. Lobel, KELLEY, DRYE & WARREN, Washington, DC. Joseph A. Boyle, KELLEY, DRYE & WARREN, Parsippany, NJ.

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JUDGES: CHARLES C. LOVELL, United States District Judge.

OPINIONBY: CHARLES C. LOVELL

OPINION:

ORDER

Before the court are the parties' cross motions for summary judgment. At the heart of this dispute is an order issued by defendant Montana Public Services Commission (MPSC) establishing the parameters of the interim reciprocal compensation arrangement between plaintiff and defendant Western Wireless Corporation (WWC). Plaintiff requests that this court set aside the MPSC's order, while defendants seek an order enforcing it. All parties have stated, and the court finds, that there are no material facts at issue in this case. Therefore, final adjudication by summary judgment is appropriate.

Background

The Telecommunications Act of 1996 ("the Act"), 47 U.S.C. § 251 *et seq.*, had as a central purpose the introduction of greater competition into local telephone markets. The Act required incumbent local exchange carriers (ILECs), such as plaintiff in this case, to take certain steps to open up the local carrier market to competing local exchange carriers (CLECs) and Commercial Mobile [*3] Radio Services (CMRSs). Defendant WWC is a CMRS. Of particular relevance is the requirement that ILECs allow CLECs and CMRSs to interconnect with ILECs' local exchange networks "on rates, terms, and conditions that

SCHEDULE A

are just, reasonable, and nondiscriminatory . . . ." 47 U.S.C. § 251(c)(2)(D).

The Act went into effect on February 8, 1996. On March 29, 1996, defendant WWC submitted a written request to plaintiff seeking to renegotiate their compensation agreement in light of the Act. Under the contract then in force, WWC was required to compensate plaintiff for calls originating on WWC's network that plaintiff terminated on its own local exchange network, while plaintiff had no obligation to compensate WWC for calls originating on plaintiff's network that WWC terminated. The parties were unable to reach an agreement and submitted the dispute to defendant MPSC on September 6, 1996. n1

> n1 The Act assigns to state utility commissions the responsibility for determining whether interconnection agreements reached between ILECs and CLECs/CRMSs are consistent with the terms of the Act and for approving or rejecting those agreements. The Act also authorizes those commissions to arbitrate disputes concerning the terms and conditions of such agreements. 47 U.S.C. §§ 251-252. The Act further permits a party dissatisfied with a ruling issued by a state utility commission to challenge in federal court whether the commission's decision comports with the terms of the Act. 47 U.S.C. § 252(e)(6).

[*4]

On August 8, 1996, the Federal Communications Commission (FCC), complying with its obligations under the Act, promulgated administrative rules pertaining to the implementation of the Act. Of direct significance to the matter at hand is an administrative rule codified at 47 CFR § 51.717. This rule makes two significant provisions:

> "(a) Any CMRS provider that operates under an arrangement with an incumbent LEC that was established before August 8, 1996 and that provides for non-reciprocal compensation for transport and termination of local telecommunications traffic is entitled to renegotiate these arrangements with no termination liability or other contract penalties. "(b) From the date that a CMRS provider makes a request under paragraph (a) of this section until a new agreement has been either arbitrated or negotiated and has been approved by a state commission, the CMRS provider shall be entitled 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." 47 CFR § 51.717.

The administrative rules, including 47 [*5] CFR § 51.717, were immediately challenged in a suit filed by various telecommunications companies. The Eighth Circuit issued a temporary stay of those rules, see Iowa Utility Board v. FCC, 109 F.3d 418 (8th Cir. 1996), but partially dissolved that stay—including as it pertained to 47 CFR § 51.717—on November 1, 1996. n2

> n2 The Eighth Circuit subsequently ruled on the merits of the challenge to the FCC's rules. See 120 F.3d 753 (8th Cir. 1997) and 124 F.3d 934 (8th Cir. 1997). The matter was then appealed to the United States Supreme Court, which affirmed in part and reversed in part the decisions of the Eighth Circuit. See AT&T v. Iowa Util. Board, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999). None of these decisions undermined the validity of 47 CFR § 51.717.

On December 27, 1996, defendant MPSC issued Arbitration Order 5949b. In pertinent part, this order required plaintiff to pay defendant WWC for all traffic originating with plaintiff [*6] that WWC transported or terminated between March 29, 1996 (the date WWC made its demand for renegotiation) and the date upon which the parties' new agreement would take effect. The order further set the rate of compensation owed by plaintiff as that which defendant WWC was obligated under the pre-existing contract to pay plaintiff for plaintiff's transport and termination of calls originating on defendant WWC's network. This mutual reciprocal compensation scheme, identical to the terms of 47 CFR § 51.717(b), was confirmed by defendant MPSC's Final Order Approving Arbitrated Agreement, which was issued on February 5, 1997. Plaintiff then brought the instant action challenging the MPSC's decision to set the onset date for plaintiff's mutual reciprocal compensation date as March 29, 1996.

Discussion

The first issue the court must address in adjudicating this matter is the degree of deference to be afforded to the MPSC's ruling. Plaintiff urges that the MPSC be accorded no deference and requests that the court conduct a *de novo* review of the MPSC's decision. Defendants counter that at least some deference is appropriate.

In support of their argument, defendants direct [*7] the court to Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) for the proposition that while a court

reviewing an agency's construction of a statute is to reject those conclusions that are clearly contrary to Congress' intent or otherwise thwart the purpose of the relevant statutory scheme, deference is appropriate where the agency's interpretation goes to a point about which the statute is ambiguous or silent. Although Chevron addressed a federal district court's review of a federal agency's construction of a stature, defendants urge that its reasoning applies equally as well in this case, where Congress entrusted state agencies with significant oversight responsibility for the implementation of the Act. Defendants cite to Wilder v. Virginia Hosp. Assoc., 496 U.S. 498, 110 L. Ed. 2d 455, 110 S. Ct. 2510 (1990), in support of this proposition as well.

While defendants' arguments are cogent, a review of the jurisprudence in this field demonstrates that the district courts that have considered this issue since the enactment of the Act—including our sister district courts in the Northern [*8] District of California and the Western District of Washington n3—have uniformly concluded that the proper posture for a federal district court reviewing a state utility commission's decision interpreting the Act is to conduct a *de novo* review of all questions of law, while deferring to the agency on questions of fact. The reasoning for this approach was first elucidated by the District of Colorado in US West Communications v. Hix, 986 F. Supp. 13 (D. Colo. 1997). Various of the Hix defendants urged that court to apply Chevron and its progeny to hold that a state agency's determination was entitled to significant deference. The Hix court declined to do so.

> "Even though state commissions are given authority to interpret certain portions of the Act, Chevron and its progeny are not controlling. Many of the reasons why deference is given to federal agencies in those cases do not apply here. For example, deference is given federal agencies because their activities are subject to continuous congressional supervision by virtue of Congress' powers of advice and consent, appropriation, and oversight.... Second, state commissioners, while having [*9] experience in regulating local exchange carriers in intrastate matters, have little or no expertise in implementing federal laws and policies and do not have the nationwide perspective of a federal agency. Thus, giving deference to state commission determinations might only undermine, rather than promote, a coherent and uniform construction of federal law nationwide." Id. at 17 (internal citations and quotations omitted).

n3 See, e.g., US West Communications, Inc. v. Hix, 986 F. Supp. 13, 18 (D. Colo. 1997); AT&T Comm. of the Southern States, Inc. v. BellSouth Telcoms., Inc., 7 F. Supp. 2d 661. (E.D.N.C. 1998); MCI Telecommunications Corp. v. BellSouth Telecomm., Inc., 7 F. Supp. 2d 674. (E.D.N.C. 1998); GTE South Inc. v. Morrison, 957 F. Supp. 800 (E.D. Va. 1998); AT&T Communications Inc. v. Pacific Bell, 1998 U.S. Dist. LEXIS 10103, 1998 WL 246652 (N.D.Cal. 1998); Illinois Bell Tel. Co. v. WorldCom Tech., 1998 U.S. Dist. LEXIS 13412, 1998 WL 419493 (N.D. Ill. 1998); MCIMetroAccess Transmission Service v. GTE Northwest Inc., 1998 U.S. Dist. LEXIS 11335 (W.D.Wash. 1998).

[*10]

The Hix court examined the framework of the Act (which did not itself specify the proper standard of review) in an effort to find an analogous scheme from which to extract guiding principles. 986 F. Supp. at 17. The closest point of comparison the Hix court found was to the federal-state relationship in implementing Medicaid plans, where state human services agencies are charged with implementing a federal scheme, subject to some oversight by the Health Care Financing Administration and judicial review by federal courts. Id. at 18. Drawing on the Tenth Circuit's Medicaid plan decision in Amisub and Colorado Health Care Assoc. V. Colorado Dept. Of Social Services, 842 F.2d 1158 (10th Cir. 1988), the Hix court adopted a similar standard of review.

> "The first inquiry of this Court in reviewing the interconnection agreements approved by the [state commission] is whether the [commission's] action was procedurally and substantively in compliance with the Act and its implementing regulations. This is a question of law which must be reviewed de novo. If the [commission's] action is found to be in compliance with federal law and regulations, then the [commission] [*11] will be given deference, through application of the arbitrary and capricious standard, as to all other issues." 986 F. Supp. at 19.

The court finds this conclusion apposite and applies that standard to this case. n4 Having determined that defendant MPSC's decision concerning the onset date of plaintiff's mutual reciprocal compensation obligation to defendant WWC is to be reviewed *de novo*, the court now turns to the substance of this dispute.

n4 As there are no issues presented here beyond whether defendant MPSC's decision is in compliance with the Act, the "arbitrary and capricious" portion of this standard will not become relevant to the matter at hand.

Plaintiff contends that defendant MPSC's selection of March 26, 1996, as the date from which plaintiff owed mutual reciprocal compensation to defendant WWC amounts to a retroactive application of the law and should be set aside because the Act makes no provision for retroactive applicability. In support of this contention, plaintiff asserts [*12] that defendant MPSC relied on the FCC's administrative rule pertaining to mutual reciprocal compensation obligations, codified at 47 CFR § 51.717. n5 As noted above, that rule was promulgated on August 8, 1996, but was stayed by the Eighth Circuit until November 1, 1996. Plaintiff therefore asserts that this rule only went into effect on the latter date, and that no mutual reciprocal compensation obligation could arise prior to that date. To set the date any earlier, plaintiff avers, contravenes the principles concerning retroactive applicability laid out in Bowen v. Georgetown University Hospital, 488 U.S. 204, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988).

n5 The result reached by MPSC is in perfect accordance with the terms of that section. The parties disagree as to whether defendant MPSC based its decision exclusively on 47 CFR § 51.717 or simply took it into account as one factor among several guiding its resolution, but wherever the truth may lie, this dispute does not alter the court's analysis. Therefore the court sees no need to resolve it.

[*13]

Plaintiff's argument, however, misses the forest for the trees. The relevant date for the fixing of its mutual reciprocal compensation obligation is the effective date of the Act itself, rather than the effective date of the administrative rules. Plaintiff argues that the latter date is the relevant one because the FCC never indicated that its rules were to be applied retroactively. However, this claim elides the distinction between the importance of the administrative regulations and the effect of the enactment of the Act itself. Plaintiff's argument would require the court to accept the premise that the right to receive mutual reciprocal compensation was created only by the FCC rules and had no basis in the Act itself. This misapprehends the Act.

47 U.S.C. § 251(b)(5) provides that an ILEC has an obligation to establish a reciprocal compensation plan with a CLEC or CMRS seeking market entry. In cases such as this, where parties cannot agree on a reciprocal compensation plan (or other aspects of the obligations imposed by 47 U.S.C. § 251), 47 U.S.C. § 252 authorizes state utility commissions to arbitrate between [*14] the parties. Defendant MPSC accepted that responsibility in this matter. 47 U.S.C. § 252(b)(4)(C) states that in arbitrating provisions of an interconnection agreement under the Act, a state utility commission shall "resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement." "Subsection (c)" refers to 47 U.S.C. § 252(c), which provides in relevant part that "in resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall . . . ensure that such resolution and conditions meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission pursuant to section 251 of this title* . . . ." 47 U.S.C. § 252 (c) (1) (emphasis added). 47 CFR § 51.717 was promulgated pursuant to § 251 of the Act. See 47 CFR Part I, Subpart A.

The language of 47 U.S.C. § 252 (c) (1) makes clear Congress anticipated that the FCC would promulgate [*15] rules designed to implement the Act, and that those rules were to be an integral part of the national telecommunications program envisioned by the Act. The administrative rules do not create any substantive rights or duties independent of the Act. Therefore, plaintiff's focus on the effective date of the administrative rules is irrelevant. As the Act was already in effect at the time defendant WWC submitted its demand for renegotiation to plaintiff, defendant WWC was entitled to mutual reciprocal compensation from the date it issued its demand letter. The MPSC correctly reached this conclusion in arbitrating the dispute between plaintiff and defendant WWC, as reflected in the orders of December 27, 1996, and February 5, 1997. Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment is DENIED and defendants' motions for summary judgment are GRANTED. Plaintiff's complaint is DISMISSED, and all relief is DENIED.

LET JUDGMENT ENTER.

The clerk is directed to notify the parties of the entry of this order.

Done and dated this 14 day of September, 1999.

CHARLES C. LOVELL

United States District Judge

LEXSEE 1999 U.S. DIST. LEXIS 21774

U S WEST COMMUNICATIONS, INC., a Colorado Corporation, Plaintiff, v. ERIC SERNA, JEROME BLOCK, and WILLIAM POPE, Commissioners of the New Mexico State Corporation Commission; and WESTERN WIRELESS CORPORATION, a Washington Corporation, Defendants.

Civ. No. 97-124 JP/JHG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

1999 U.S. Dist. LEXIS 21774

August 25, 1999, Decided

DISPOSITION: [*1] Plaintiff US West's Motion for Summary Judgment (Doc. No. 69) DENIED.

LexisNexis(R) Headnotes

COUNSEL: For US West Communications, Inc., plaintiff: Thomas W. Olson, Esq., Victor R. Ortega, Esq., Andrew S. Montgomery, Esq., Montgomery & Andrews, Santa Fe, NM.

For US West Communications, Inc., plaintiff: James H Gallegos, Ted Smith, Russell P Rowe, Esq, Michael C Thompson, Esq, Wendy M Moser, US West, Inc., Law Department, Denver, CO.

For US West Communications, Inc., plaintiff: Bruce L. Herr, Esq., The Los Alamos National Laboratory, Office of Laboratory Counsel, Los Alamos, NM.

For Eric Serna, Jerome Block, defendants: Stuart M. Bluestone, Esq., NM Attorney General's Office, Santa Fe, NM.

For Western Wireless Corporation, defendant: Bruce E. Castle, Esq., James T. Reist, Esq., Eastham Johnson, Monnheimer & Jontz, PC, Albuquerque, NM.

For Western Wireless Corporation, defendant: Douglas Lobel, Esq., Kelley Drye & Warren, LLP, Washington, DC.

For Western Wireless Corporation, defendant: Joseph Boyle, Kelley Drye & Warren, LLP, Parsippany, NJ.

For USA, Federal Communications Commission, intervenors: Raymond Hamilton, Esq., US Attorney's Office, District of New Mexico, Albuquerque, [*2] NM.

For Federal Communications Commission, intervenor: David Zaring, Esq, US Department of Justice, Federal Programs - Civil Division, Washington, DC.

For US West Communications, Inc., counter-defendant: Thomas W. Olson, Esq., Victor R. Ortega, Esq., Andrew S. Montgomery, Esq., Montgomery & Andrews, Santa Fe, NM.

For US West Communications, Inc., counter-defendant: James H Gallegos, Ted Smith, Russell P Rowe, Esq, Michael C Thompson, Esq, Wendy M Moser, US West, Inc., Law Department, Denver, CO.

JUDGES: James A. Parker, UNITED STATES DISTRICT JUDGE.

OPINIONBY: James A. Parker

OPINION:

MEMORANDUM OPINION AND ORDER

On January 19, 1999, Plaintiff US West Communications, Inc. ("U S West") filed its Motion for Summary Judgment (Doc. No. 69). After a careful review of the law and the briefs, I conclude that the Plaintiff's motion should be denied.

I. Background

In the Telecommunications Act of 1996 ("the Act"), Congress enacted a plan to transform the monopolistic structure of local telephone service markets by helping to lower barriers to entry into those markets for new competitors. The Act effectively opens up local markets by imposing several new obligations on [*3] the existing providers of local telephone service in those markets. The Act refers to the current local providers such as U.S. West as "incumbent local exchange carriers" or "incum-

SCHEDULE B

bent LECs." See §§ 47 U.S.C.A. 251(c), (h), 252(j) (West Supp. 1999). Among other duties, the Act requires incumbent LECs to (1) allow other telecommunication carriers (such as cable television companies and current long-distance providers) to interconnect with the incumbent LEC's existing local network to provide competing local telephone service (interconnection); (2) provide other telecommunication carriers access to elements of the incumbent LEC's local network on an unbundled basis (unbundled access); and (3) sell to other telecommunication carriers, at wholesale rates, any telecommunications service that the incumbent LEC provides to its retail customers (resale). Id. § 251(c). Through these three duties, and the Act in general, Congress sought "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications [*4] Act of 1996, Pub.L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996).

When a competing carrier asks an incumbent LEC to provide interconnection, unbundled access, or resale under the Act, both the incumbent LEC and the competing carrier have a duty to negotiate in good faith the terms and conditions of an agreement that accomplishes the Act's goals. §§ 47 U.S.C.A. 251(c)(1), 252(a)(1). Consequently, a company seeking to enter the local telephone service market, such as Defendant Western Wireless Corporation (" Western Wireless"), may request an incumbent LEC to provide it with any one or any combination of these three services. Alternatively, if the parties had a preexisting agreement, the competing carrier may petition the incumbent LEC to renegotiate the agreement under the Act. If the incumbent LEC and the carrier seeking entry are unable to reach a negotiated agreement, either party may petition the jurisdictive state utility commission to conduct a compulsory arbitration of the open and disputed issues and arrive at an arbitrated agreement. See id. § 252(b). The final agreement between the incumbent LEC and the competing carrier, whether arrived [*5] at through negotiation or arbitration, must be approved by the state commission. Id. § 252(e)(1). A party may seek review of a state commission's decision in federal district court. Id. § 252(e)(6).

In this case, on March 29, 1996 Defendant Western Wireless (a competing carrier) made its request to U.S. West to negotiate an interconnection agreement and a reciprocal compensation arrangement. On September 6, 1996, after the parties failed to reach an agreement on all issues, Western Wireless filed a petition for arbitration with the New Mexico Public Regulatory Commission ("NMPRC"), which was then known as the New Mexico State Corporation Commission. On January 2, 1997, the NMPRC issued its Findings of Fact and Conclusions of Law and Order defining the terms of the interconnection agreement between U.S. West and Western Wireless. Record Proper at 506. On January 31, 1997, U.S. West filed its original Complaint in this court appealing the NMPRC's January 2, 1997 Order. In an Order entered March 5, 1997, the NMPRC adopted the Interconnection Agreement, Record Proper at 666, and on March 13, 1997, the NMPRC denied U.S. West's motion for rehearing. Record Proper at 673. Then, in a Memorandum [*6] Opinion and Order entered February 27, 1998, this court dismissed U.S. West's January 31, 1997 original Complaint for lack of jurisdiction because the NMPRC had not yet approved the Interconnection Agreement at the time the Complaint was filed. On March 10, 1998, U.S. West filed its First Amended Complaint.

II. Legal Standard

As I stated in the Memorandum Opinion and Order entered March 31, 1998, the standard of judicial review of the NMPRC's purely legal conclusions and determinations of procedural and substantive compliance with federal law is *de novo*. I review the NMPRC's factual findings to determine whether they are arbitrary and capricious.

III. Analysis

A. Interim Reciprocal Compensation

On February 8, 1996, the Telecommunications Act of 1996 became law. On March 29, 1996, Western Wireless petitioned U.S. West to negotiate an interconnection agreement under the Act. Then, on August 8, 1996, the Federal Communications Commission ("FCC") issued administrative rules that implemented the Act. In re Implementation of Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) [*7] ("First Report and Order"). The First Report and Order filled in many of the gaps left by the Act, including the compensation that incumbent LEC's would receive for fulfilling their obligations under the Act. The FCC also promulgated a rule that states that, as of the date a competing carrier petitions an incumbent LEC to negotiate a new agreement until the time that an interconnection agreement is approved by the state, the competing carrier may charge the incumbent LEC the same rates for termination of telecommunications traffic that the incumbent LEC charged the competing carrier ("interim reciprocal compensation"). 47 C.F.R. § 51.717. In its Order entered January 2, 1997, the NMPRC applied the FCC's rule and determined that U.S. West must pay interim reciprocal compensation to Western Wireless beginning March 29, 1996, the date that Western Wireless informed U.S. West that it wished to renegotiate its interconnection agreement.

U S West argues that the NMPRC erred in requiring U.S. West to pay interim reciprocal compensation to Western Wireless beginning March 29, 1996. U.S. West argues that the NMPRC's decision on this issue constitutes an improper retroactive application of [*8] 47 C.F.R. § 51.717, which went into *effect* after March 29, 1996.

However, as the NMPRC and Western Wireless correctly point out, U.S. West's duty to pay reciprocal compensation originated with the Act itself, which went into effect *before* March 29, 1996. The Act specifically imposes upon incumbent LECs "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). Thus, the NMPRC's decision requiring U.S. West to pay reciprocal compensation as of March 29, 1996 was not a retroactive application of the law, because that duty predated Western Wireless' request.

Furthermore, the NMPRC was entitled to rely upon the FCC regulations in interpreting the Act, which is less than a model of clarity. See U.S. West Communications, Inc. v. Reinbold, 1999 U.S. Dist. LEXIS 20067 *3, A1-97-025, slip op. at 2 (D.N.D. May 14, 1999) ("The timing of the rate application to begin on March 29, 1996, the date of request by Wireless, is a determination within the decision making authority of the arbiter. It is not an abuse of discretion to be guided by the directions contained in a rule not yet in effect.")

B. The Rate [*9] of Reciprocal Compensation

U S West contends that the NMPRC's decision that U.S. West must compensate Western Wireless at the "tandem" switch rate, rather than at the "end office" switch rate, was arbitrary and capricious.

The Act requires incumbent LEC's to establish reciprocal compensation agreements for the transport and termination of telecommunications traffic on each other's networks. 47 U.S.C. § 251(b)(5). Under the Act,

> a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
> (ii) such term and condition determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

47 U.S.C. § 252(d)(2)(A).

In this case, the NMPRC determined that Western Wireless should be compensated at U.S. West's "tandem rate" for terminating calls that originate [*10] on U.S. West's network. In the most simplified terms, a "tandem" switch is used to interconnect all "end offices" in a common geographic area. An "end office" switch, by contrast, generally connects calls from one caller to another within a smaller geographic area. The cost of tandem transport and termination is higher than that of end office switching.

In determining the rate of reciprocal compensation to be applied in this case, the NMPRC stated:

> Given the functionality and geographic scope of Western's network, the Commission finds that, on an interim basis, Western should receive compensation for the transport and termination of calls originated on US West's network equivalent to U.S. West's rate for tandem transport and termination. . . . Accordingly, the Commission finds that U.S. West's TELRIC costs are a reasonable approximation of Western's costs, and that U.S. WEST's interconnection rates should be applicable to Western as well.

Findings of Fact and Conclusions of Law and Order filed January 2, 1997, Record Proper at 515. See also Order on Motion for Rehearing entered March 13, 1997, Record Proper at 675-76.

U S West challenges this finding by the NMPRC [*11] on three grounds. First, U.S. West argues that the NMPRC erred in its reliance upon the FCC's rule of "geographic comparability" because the rule was vacated by the Eighth Circuit Court of Appeals. Second, U.S. West contends that there is no evidence in the record to support a finding that the geographic scope of a switch is an appropriate proxy for its cost of operation. Third, U.S. West asserts that Western Wireless should not be compensated at U.S. West's tandem rate because Western's switch does not perform functions similar to those performed by U.S. West's tandem switch.

1. The Validity of the Rule of Geographic Comparability

The rule of "geographic comparability" provides that "where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate." 47 C.F.R. § 51.711(a)(3) (1998). See also First Report and

Order, 11 FCC Rcd 16042 (1996). U.S. West argues that the NMPRC's reliance upon this rule was arbitrary and capricious because the rule was vacated by the [*12] Eighth Circuit in Iowa Utilities Board v. FCC, 120 F.3d 753, 800 n.21 (8th Cir. 1997). However, the Supreme Court overruled the Eighth Circuit's decision vacating the geographic comparability rule. AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 119 S. Ct. 721, 732-33, 142 L. Ed. 2d 834 (1999). n1 Consequently, the NMPRC's reliance upon 47 C.F.R. § 51.711(a)(3) was not improper.

> n1 In its reply brief, U.S. West acknowledges that the Supreme Court has reversed the Eighth Circuit on this issue. Instead, U.S. West proposes that this court await the outcome of a pending substantive challenge to the rule of geographical comparability. However, U.S. West does not specify when a decision is expected in that case.

U S West does not appear to argue that the NMPRC lacked evidence on which it could conclude that Western Wireless' network served a geographic area similar to that of U.S. West's network. In fact, such evidence was presented to the NMPRC, which therefore had substantial [*13] evidence to support its conclusion that Western Wireless' network serves a geographic area similar to U.S. West's network. See Transcript of Proceedings held December 10, 1996 at pp. 37-40, 44.

2. Geographic Scope of a Switch as an Appropriate Proxy for its Cost

Second, U.S. West argues that the NMPRC erred because no evidence was presented, and the NMPRC did not find, that the geographic scope of Western Wireless' system as compared to U.S. West's tandem switch is an appropriate measure for Western Wireless' costs. U.S. West also faults Western Wireless for failing to submit cost studies that prove its costs of switching telecommunications traffic.

U S West overlooks the plain language of the FCC's administrative rule, which provides that "rates for transport and termination of local telecommunications traffic shall be symmetrical" except in certain narrow circumstances. 47 C.F.R. § 51.711(a) (1998). See also First Report and Order, 11 FCC Rcd at 16040 ("We conclude that it is reasonable to adopt the incumbent LEC's transport and termination prices as a presumptive proxy for other telecommunications carriers' additional costs of transport and termination. [*14] ") The rule clearly states that where, as here, the switch of another carrier serves a geographic area comparable to the area of the incumbent LEC's tandem switch, "the appropriate rate for the carrier . . . is the incumbent LEC's tandem interconnection rate." 47 C.F.R. § 51.711(a)(3). See also First Report and Order, 11 FCC Rcd at 16042. In short, because the FCC has established a presumption in favor of symmetrical rates where the geographic area served by the incumbent LEC and the competing carrier are the same, the NMPRC was not required to find that Western Wireless' actual costs were precisely identical to U.S. West's costs.

Furthermore, U.S. West's criticism of Western Wireless' failure to submit its own cost studies for the NMPRC's consideration is without merit. Under the regulations, Western Wireless is required to submit such cost studies only if it is seeking a rate of compensation that is higher than U.S. West's tandem rate. See 47 C.F.R. § 51.711(b). Western Wireless made clear that it did not submit cost studies because it was asking to be compensated at U.S. West's tandem rate, not a higher rate. See Transcript of Proceedings held December 10, 1996 at [*15] pp. 40-42.

3. The Functions Performed by Western's Wireless' Switch

U S West argues that Western Wireless should not be compensated at the tandem rate because Western Wireless' network cannot perform the same functions as U.S. West's tandem switch. However, U.S. West points no rule within the Code of Federal Regulations which requires the NMPRC to evaluate the comparative functionality of U.S. West's and Western Wireless' switching apparatus. The only discussion of functionality occurs in Paragraph 1090 of the FCC's First Report and Order, in which the FCC directs the states to evaluate the functions performed by a carrier's "new technologies" vis-a-vis the incumbent LEC's tandem switch. First Report and Order, 11 FCC Rcd 16042. However, even that discussion of functionality concludes with the directive that states should apply the geographic comparability rule. n2 Id. Consequently, it is unclear from the First Report and Order whether reciprocal compensation should be based on a finding of geographic comparability alone, or whether the state must also find functional comparability.

n2 The First Report and Order states:

> We find that the "additional costs incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are unlikely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed

> through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.
>
> First Report and Order, 11 FCC Rcd 16042.

[*16]

Ultimately, this question is moot because the NMPRC found that Western Wireless should be compensated at U.S. West's tandem rate based upon both "the functionality and geographic scope of Western's network." Record Proper at 515. As discussed above, there is substantial evidence in the record to support the NMPRC's application of the geographic comparability rule. Similarly, there is sufficient evidence in the record upon which the NMPRC could reasonably conclude that Western Wireless' system has functional equivalence to U.S. West's tandem switch. See Record Proper at 145-46, 359; Transcript of Proceedings held December 10, 1996 at pp. 37-49.

For all of these reasons, the NMPRC's decision was not arbitrary and capricious, and U.S. West's motion for summary judgment on this issue should be denied.

C. The Amount of US West's Traffic That is Terminated on Western Wireless' Network

Under the Act, U.S. West must pay Western Wireless reciprocal compensation for terminating calls that originate on U.S. West's network. See 47 U.S.C. § 252(d)(2)(A)(i). Similarly, Western Wireless must compensate U.S. West for terminating calls that emanate from [*17] Western Wireless' network. Id. According to U.S. West, it has the "SS7" technology to accurately record the actual amount of telecommunications traffic it receives from Western Wireless, and therefore the amount that Western Wireless must pay to U.S. West is not in dispute. Plaintiff's Brief at 14. However, U.S. West contends that Western Wireless' system does not have similar SS7 capabilities. Therefore, U.S. West has agreed that an "administrative factor" should be used as an approximation of the amount of U.S. West's traffic that is terminated by Western Wireless. Record Proper at 205; Plaintiff's Brief at 15.

The NMPRC concluded that an administrative factor of 24% was appropriate—that is, that U.S. West should be required to pay Western Wireless for terminating 24% of the total amount of telecommunications traffic between the two carriers. Record Proper at 515-16; 677. U.S. West argues that there is insufficient evidence in the record to support the imposition of an administrative factor of 24%, and argues that 17% (the amount proposed by U.S. West) is a more appropriate figure.

A review of the record reveals that neither U.S. West nor Western Wireless knows exactly how much [*18] of U.S. West's telecommunications traffic is terminated by Western Wireless. U.S. West complains that Western Wireless' proposed figure of 24% was "not New Mexico specific" but instead was "based on an average between the various PCS holding[s] of Western in Salt Lake City, Portland, and Hawaii." Plaintiff's Brief at 16; Transcript of Proceedings held December 10 at 107-09. U.S. West also argues that Western Wireless' study was probably based on the number of calls made rather than on minutes of use, and therefore does not reflect actual traffic levels. Plaintiff's Brief at 16.

On the other hand, U.S. West's proposed administrative factor of 17% is based upon a traffic sampling done by U.S. West and another competing carrier in Arizona and New Mexico. Plaintiff's Brief at 15-16; see Transcript of Proceedings held December 10 at 169-70. Therefore, like that of Western Wireless, U.S. West's study does not measure the amount of telecommunications traffic that begins with U.S. West and is terminated by Western Wireless in New Mexico. U.S. West trumpets the fact that five other providers of mobile telephone services have accepted an administrative factor of 17% based upon this study. [*19] Plaintiff's Brief at 16; Record Proper at 207. However, that fact does not advance the inquiry into the amount of traffic that Western terminates on U.S. West's behalf, and may only reflect the other competing carriers' unwillingness to dispute the issue with U.S. West.

Overlaying these two studies is the testimony of Brian Kirkpatrick, who testified that an administrative proxy of 24% is probably conservative, because it is based on Western Wireless' cellular market only and does not include its PCS services. Transcript of Hearing held December 10, 1996 at 33-34; 70. Similarly, Andrew Nenninger testified that Western Wireless' PCS operations in other states generally terminate about 46% of the

traffic that begins on land-based phone systems. Id. at 107-09.

In its Order on Rehearing entered March 13, 1997, the NMPRC explained that it had concluded that an administrative factor of 24% was a "reasonable resolution" to the dispute where both sides challenged the validity of the others' proposed percentages, which ranged from 17% to 46%. Record Proper at 677. Given the limited and conflicting information provided to the NMPRC by the parties, I cannot say that the NMPRC's decision to [*20] impose an administrative factor of 24% was arbitrary and capricious.

D. Unconstitutional Taking of U.S. West's Property

U S West claims that the NMPRC's decision to (1) require U.S. West to pay Western Wireless reciprocal interim compensation beginning March 29, 1996; (2) compel U.S. West to compensate Western Wireless at the "tandem" rate; and (3) apply an administrative factor of 24% for calls originating on U.S. West's network that are terminated by Western Wireless, amounts to an unconstitutional taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Because I conclude that the NMPRC's decision on each of these issues was proper, U.S. West's motion for summary judgment on this claim should be denied.

IT IS THEREFORE ORDERED that Plaintiff US West's Motion for Summary Judgment (Doc. No. 69) is DENIED.

8-25-99

James A. Parker

UNITED STATES DISTRICT JUDGE

LEXSEE 1999 U.S. DIST. LEXIS 20067

U.S. WEST COMMUNICATIONS, INC., Plaintiff,-v-LEO M. REINBOLD, BRUCE HAGEN, SUSAN WEFALD, COMMISSIONERS OF THE NORTH DAKOTA PUBLIC SERVICE COMMISSION; and WESTERN WIRELESS CORPORATION, Defendants.

A1-97-025

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, SOUTHWESTERN DIVISION

1999 U.S. Dist. LEXIS 20067

May 14, 1999, Decided
May 14, 1999, Filed

DISPOSITION: [*1] Action dismissed with prejudice.

LexisNexis(R) Headnotes

COUNSEL: For U S WEST COMMUNICATIONS, INC., plaintiff: Daniel S. Kuntz, ZUGER KIRMIS & SMITH, BISMARCK, ND.

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For USA agent Federal Communications Commission, USA, FEDERAL COMMUNICATIONS COMMISSION, intervenors: Martha Hirschfield, Theodore C. Hirt, U.S. Department of Justice, Washington, DC.

For LEO M REINBOLD, BRUCE HAGEN, SUSAN WEFALD, NORTH DAKOTA PUBLIC SERVICE COMMISSION, defendants: Charles E. Johnson, PUBLIC SERVICE COMMISSION, BISMARCK, ND.

For WESTERN WIRELESS CORPORATION, defendant: J. Philip Johnson, WOLD JOHNSON, FARGO, ND.

For WESTERN WIRELESS CORPORATION, defendant: Brad Mutschelknaus, Douglas A. Lobel, Joseph A. Boyle, Kelley, Drye & Warren LLP, Washington, DC.

JUDGES: Patrick A. Conmy, Judge of the District Court.

OPINIONBY: Patrick A. Conmy

OPINION:

MEMORANDUM AND ORDER

U. S. West appeals from the order of the North Dakota Public Service Commission adopting the Interconnection [*2] Agreement between U.S. West and Western Wireless. The action is brought pursuant to the language of the Telecommunications Act of 1996. This Court has previously explored the Act and it's acronymic code speak, and will not reiterate the history and purpose of the Act.

U.S. West challenges the agreement in two primary substantive areas. The first is the use of the pricing mechanism in place for a "tandem switch" instead of using the pricing mechanism for an "end user switch." The second relates to the use of a percentage to determine traffic volume rather than an actual metering system, and the beginning date for the charges to begin. The tandem switch selection provides a more favorable economic position to Wireless and U.S. West alleges that the percentage established in not accurate and again favors Wireless.

A procedural challenge is also made, attempting to give the Court de novo review authority over the actions of the commission in both legal and factual determination. This latter challenge has been resolved in earlier litigation, with the determination that de novo review is applicable only to legal interpretations of the Act, while the standard on factual matters is one of [*3] clear error or abuse of discretion.

The actions taken nationwide under the Act created a firestorm of litigation, generally brought by the companies who had previously enjoyed a monopoly status. We now have the luxury of being able to review the rulings of the United States Supreme Court which validated the rules

SCHEDULE C

issued by the Federal Communications Commission, and which were the subject of much of earlier controversy. The determination that the FCC has the power to make rules defining and regulating intrastate rates and pricing structures for purposes of effectuating the Act has undercut a great deal of the challengers' positions in these cases. Previous decision of this and other Courts have rejected the constitutional challenge that the Act involves a taking of the property of U.S. West without due process or compensation.

After review of the material submitted, this Court cannot say that the determination to reject the position of U.S. West that Wireless should be compensated based on end office switch rates is clear error or an abuse of discretion. In a like fashion, the timing of the rate application to begin on March 29, 1996, the date of request by Wireless, is a determination [*4] within the decision making authority of the arbiter. It is not an abuse of discretion to be guided by the directions contained in a rule not yet in effect.

Finally, the assignment of a 22% administrative factor as an approximation of the actual traffic between the two carriers also does not rise to the level of clear error or abuse of discretion. That a study used as the basis for such assignment is less than perfect is not a basis for rejection. Perfection is a state unique only to appellate courts.

In summary, the Court finds that the Interconnection Agreement challenged in this action is a valid exercise of the authority granted by the Telecommunication Act of 1996, and that the factual findings contained therein are not so flawed as to warrant reversal.

The action is ordered dismissed, with prejudice.

Dated this 14th day of May, 1999.

Patrick A. Conmy

Judge of the District Court

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Interconnection Agreement challenged in this action is a valid [*5] exercise of the authority granted by the Telecommunication Act of 1996, and that the factual findings are not so flawed as to warrant reversal.

May 14, 1999
Date

LEXSEE 1997 ORE PUC LEXIS 1

In the Matter of the Petition of AT&T Wireless Services, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to the Telecommunications Act of 1996.

ARB 16

Oregon Public Utility Commission

1997 Ore. PUC LEXIS 1

July 3, 1997, Issued

OPINION: [*1]

ARBITRATOR'S DECISION

Procedural History

On October 3, 1996, AT&T Wireless Services, Inc. (AWS), served U S WEST Communications, Inc. (USWC), with a written request under the Telecommunications Act of 1996 (47 U.S.C. § 151 *et seq.*) (the Act). The request asked USWC to terminate AWS's existing interconnection contract and negotiate a new agreement for interconnection, services, and network elements under the Act to facilitate AWS's provision of wireless services in Oregon. On March 6, 1997, AWS filed a timely petition for arbitration with the Commission. In accordance with § 252(b)(1) of the Act, AWS requested the Commission to resolve all the unresolved issues raised in AWS's petition. Ruth Crowley, an Administrative Law Judge with the Commission, was designated to act as Arbitrator.

On April 1, 1997, USWC filed a Response and Motion to Dismiss. On April 2, 1997, the parties and the Arbitrator held a telephonic prehearing conference. During the conference, the parties agreed to the schedule for this docket, including an opportunity for AWS to reply to USWC's motion to dismiss. On April 25, 1997, the Arbitrator issued a ruling denying [*2] USWC's motion to dismiss and determining that all the issues for which USWC requested dismissal were proper for arbitration under the Act. On May 9, 1997, another prehearing conference was convened by telephone to discuss procedures, discovery issues, and related topics.

Evidentiary hearings in this matter were conducted on May 20, 1997, for the purpose of conducting cross examination of the prefiled testimony of several witnesses in the proceeding. After the hearings, AWS filed five exhibits (AWS 15 through AWS 19). Through stipulation or by ruling of the Arbitrator, these items were admitted into evidence.

Statutory Authority

This proceeding is being conducted under 47 U.S.C. § 252(b). The standards for arbitration are set forth in 47 U.S.C. § 252(c):

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251; (2) establish any rates for interconnection, [*3] services, or network elements according to subsection (d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

On August 8, 1996, the Federal Communications Commission (FCC) issued rules pursuant to 47 U.S.C. §§ 251 and 252. 47 C.F.R. § 51.100 *et seq.*

On October 15, 1996, the Eighth Circuit Court of Appeals stayed operation of the FCC rules relating to pricing and the "pick and choose" provisions. *Iowa Utilities Board v. Federal Communications Commission et al.*, Case Nos. 96-3321 et seq. (8th Cir., October 15, 1996) (Order Granting Stay Pending Judicial Review). On November 12, 1996, the United

SCHEDULE D

States Supreme Court issued a ruling which declined to lift the stay. The stay will remain in effect until the appeals are decided on the merits. Because of the stay, I have considered the FCC pricing rules to be advisory and not binding on this arbitration.

On November 1, 1996, the Eighth Circuit Court of Appeals issued an order partially lifting its October 15 stay with respect to Commercial Mobile Radio Services (CMRS) issues. The Court determined [*4] that the stay should be lifted with respect to reciprocal compensation set forth in FCC Rules 51.701, 51.703, and 51.717, based on a motion filed by AirTouch asserting that the stay was never meant to apply to CMRS interconnection. That November 1 order made these FCC rules applicable to this arbitration proceeding.

USWC argues that because of the stay, the Commission may not use or rely on the FCC's default and proxy prices for unbundled network elements and for the avoided cost discount for resale services.

USWC further argues that the Commission should not hesitate to look to and rely on state law and policy where there is no inconsistency with federal law. The Act, USWC contends, recognizes the importance of the state commissions' role in implementing congressional intent embodied in the Act, and explicitly preserves the right of state commissions to consider and apply state law where not inconsistent with the Act. *See, e.g.*, §§ 252(e)(2)(A)(ii), 252(e)(3), 252(f)(2), 253(b), 253(c). The Act also preserves the Commission's authority to take action consistent with the public interest (§ 253(b)).

Issues Presented for Arbitration

The parties have presented the following [*5] issues for arbitration:

Issue A. Reciprocal Compensation for Termination and Transport

This issue focuses on four separate questions:

> Should the Commission order a bill and keep arrangement between AWS and USWC for transport and termination of local traffic?
>
> If bill and keep is not adopted, what are the appropriate rates each carrier should pay the other for transport and termination of local traffic?
>
> If bill and keep is not adopted, what are the appropriate rates AWS should pay USWC for delivery of transit traffic?
>
> On what date should the reciprocal compensation mechanism begin to apply?

1. Bill and Keep

AWS: AWS contends that bill and keep arrangements avoid the waste of resources resulting from a monetary exchange of roughly equal amounts of compensation. AWS points out that USWC witness Don Mason testified that "[USWC has] advocated if it's within 5 percent either way, that bill and keep would be appropriate . . . ." Mr. Mason also testified that all of USWC's interconnection arrangements with independent local exchange companies are on a bill and keep basis, even when balance of traffic is outside the 5 percent threshold. AWS requests an agreement [*6] that is commensurate with the terms USWC offers to other carriers.

AWS argues that imposing bill and keep on an interim basis for the interconnection agreement between AWS and USWC is consistent with the prior actions of this Commission. To date, according to AWS, the Commission has never refused a request for bill and keep. Bill and keep, according to AWS, has become the default arrangement between incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). Moreover, AWS argues that its costs greatly exceed USWC's costs, so USWC should not be concerned about relative traffic levels. Competitive neutrality also requires bill and keep.

AWS argues that exchange of traffic between AWS and USWC is no different from exchange of traffic between AECs and should be treated the same. This Commission has ordered interim bill and keep arrangements between USWC and CLECs including MCI, Electric Lightwave, Inc., and TCG. *See* Order No. 96-021, dockets CP 1, 14, and 15; Order No. 96-325, docket ARB 2; Order No. 97-003, docket ARB 3/6. These decisions were made without reference to specific traffic studies.

The FCC order discusses the use of bill and keep [*7] where traffic is in balance. However, AWS argues that its discussion has an essential underlying assumption that the parties with the same amount of traffic also have the same costs. *See* FCC Order P1111. Furthermore, according to AWS, the FCC order does not specifically state that it relied on a review of wireless costs. Thus AWS argues that bill and keep is appropriate where the traffic multiplied by the cost on each side is the same.

AWS asserts that the only factual question in the present arbitration with respect to bill and keep is whether AWS and USWC have total costs that would be roughly in balance even where more traffic is terminated on USWC's network than on AWS's network. AWS argues that its evidence on this point is straightforward. Its witness, Dr. Thomas Zepp, showed that even if one assumes a traffic balance of 80/20, with mobile to land traffic exceeding land to mobile by a ratio of four to one, the costs are still roughly in balance or are slightly higher on AWS's side. Dr. Zepp also reported that AWS's wireless traffic sensitive costs per minute were substantially higher than comparable costs per minute for USWC. AWS notes that the FCC has acknowledged that [*8] the CMRS costs of termination is generally considered higher than the cost of LEC termination (FCC Order P1117).

USWC: USWC argues that bill and keep should not be ordered in this arbitration, because traffic is substantially out of balance. In approximately 40 agreements between CMRS providers and USWC, the CMRS providers have agreed that land to mobile traffic is one fourth or less of total traffic. USWC argues that AWS attempts to insert a new standard into the FCC Order by assuming that bill and keep is appropriate not only where traffic is in balance but where the traffic multiplied by the costs on both sides are the same. USWC also challenges AWS's cost study because it is insufficient to justify a departure from the presumption of symmetrical compensation. Moreover, USWC asserts that AWS has included the costs of its cell sites in its cost calculations. USWC points out that according to the record, AWS's cell sites are not switches but the equivalent of USWC's local loop and should not be included as part of AWS's costs.

Resolution: ***Bill and keep rejected.*** Where we have approved interim bill and keep rates in past arbitrations, we have done so on a finding that [*9] traffic would be within a few percentage points of equilibrium. *See* Order No. 96-021 at 55. That finding applies only to exchange of traffic between ILECs and CLECs. AWS asks us to treat CMRS carriers no differently from other CLECs, but as AWS admits, that traffic is not in equilibrium between CMRS carriers and ILECs.

AWS also notes that the Commission has never refused a request for bill and keep in an arbitration. However, the only other set of wireless/ILEC arbitration petitions we received did not request bill and keep. *See* ARB 7 and 8, Western Wireless petitions. The remaining wireless/ILEC interconnection agreements we have processed have been negotiated agreements.

AWS asserts that even with the imbalance in traffic exchange, its costs and USWC's are in equilibrium or AWS's costs are slightly higher. AWS's cost study has not been reviewed, even informally, by Commission Staff, and I am hesitant to accept it without review. I am especially concerned that AWS's cost study may include inappropriate inputs, such as cell sites. Given the uncertainty about AWS's cost study, I believe it is inappropriate to accept the interpretation urged by AWS, that the FCC Order has [*10] an essential underlying assumption that parties with the same amount of traffic also have the same costs. Therefore, I reject bill and keep for this arbitration.

2. Appropriate Symmetrical Rates

AWS argues that if the Commission does not adopt bill and keep, it should base rates for transport and termination on relevant UM 351 rates (subject to modification in UM 844). AWS is willing to have the Commission use USWC costs as a proxy for AWS and to set AWS's rates for transport and termination at a symmetrical amount. AWS believes that the termination rate applicable to termination of traffic by AWS should be the USWC tandem and transport rate.

Under AWS's proposal, bill and keep would apply where traffic is in balance. Traffic balance should be presumed if the dollar difference in statewide obligations are within 10 percent of each other. AWS argues that traffic balances should be based on statewide differences in dollar obligations instead of minutes of use, because the costs of transit traffic and 2B traffic are less than for 2A traffic. The net payment would be made by the carrier with the larger obligation.

AWS proposes to pay USWC the rates established in UM 351, [*11] Order No. 96-283, Revised Appendix C, as modified by UM 844, Order No. 97-239, Appendix C. AWS will pay USWC the tandem rate for traffic terminated at USWC's tandem, plus average transport, and the end office rate for traffic terminated at USWC's end office.

Tandem Issue. For USWC traffic terminated at AWS's Mobile Switching Center (MSC), AWS proposes that it should be compensated at the tandem rate. AWS bases its argument on the following passage from the FCC Order at P1090:

> States shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

AWS argues that its MSC can and does terminate calls to any physical location to which USWC's tandem can [*12] terminate calls. In fact, according to AWS, its MSC has a larger geographic coverage than USWC's tandem switch, because the MSC can deliver calls across different LATAs and USWC's tandem cannot.

In addition to geographic comparability, the FCC Order mandates consideration of the functions new technologies perform as well. AWS points out that this Commission also requires a consideration of the functionality of the competitive carrier's switch to determine the structure of reciprocal compensation rates (Order No. 96-324, ARB 1, at 4).

AWS contends that its MSC provides functions similar to a USWC tandem switch. The MSC switches calls from cell site to cell site, switches calls from one MSC to another MSC, routes calls to a landline telephone in the least cost manner, and routes calls through interexchange carriers for delivery to roaming customers.

AWS cites further examples of how the IS/41 tandem located in the MSC provides tandem switch functions. For instance, for a land to mobile call, the call travels from the original LEC access tandem to an MSC. The MSC, using the Home Location Register, which tracks the mobile customer's location, routes the call to the appropriate MSC, [*13] IXC, or LEC access tandem. For the duration of the call, two connections are maintained: the original connection from the LEC access tandem to the MSC, and the new connection between the MSC and a second MSC, IXC, or LEC access tandem. When this occurs, according to AWS, the MSC is performing a fundamental tandem function by establishing a shared communication path between two switching offices through a third switching office, the tandem switch. AWS's IS/41 tandem also maintains shared trunk groups between MSCs for handoff purposes and performs transit functions, both types of traditional tandem functions that USWC's tandem switch also performs.

AWS asserts that USWC's position is that the MSC is more like an end office than a tandem switch. AWS points out that the average MSC cell site distance for AWS is commensurate with the standard USWC interoffice distance. No USWC local loop comes close to this average distance between AWS's MSCs and cell sites. Moreover, AWS's MSC and cell site costs are traffic sensitive, while according to FCC Order P1057, local loop costs are not traffic sensitive. Furthermore, AWS's MSC provides a transit function, again like a tandem. When a non AWS [*14] wireless customer roaming in AWS's major trading area (MTA) makes a mobile to land call, AWS argues that involves transit.

AWS notes that the arbitrator in ARB 7, Order No. 97-033, found that Western Wireless's switch does not operate as a tandem, and urges that the finding there is not binding on this proceeding. AWS also points out that in ARB 8, Order No. 97-034, the Commission established symmetrical rates between Western Wireless and GTE and compensated Western Wireless as though its switch is a tandem. AWS argues that the Commission should find that AWS's MSCs function as tandem switches and base reciprocal symmetrical compensation accordingly.

USWC: USWC argues that the Commission should adopt USWC's Total Element Long Run Incremental Cost (TELRIC) pricing, which has been submitted in this docket. USWC also seeks to recover a portion of its actual common costs and the existing depreciation reserve deficiency as an addition to its TELRIC costs. USWC argues that the Commission should not adopt any methodology that results in recovery of less than USWC's actual expenses. USWC also argues that the Commission must recognize that in today's world of rapid technological change, [*15] lives of depreciable assets are much shorter than originally predicted. When the forecast of projected usefulness of plant and equipment is longer than the time that plant and equipment are actually useful, a reserve deficiency results. USWC estimates its Oregon reserve deficiency to be $107.4 million and seeks to recover it through local and tandem switching usage prices over a five year period.

Tandem Issue. USWC argues that AWS's switch network does not qualify for tandem switch rates. 47 C.F.R. 701(c) defines "transport" as:

> the transmission and any necessary tandem switching of local telecommunications traffic . . . from the interconnection point between the two carriers to the terminating carrier's end office that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

47 C.F.R. 701(d) defines call termination as:

> termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

According to USWC, the evidence in this case shows that AWS's switch performs only the end office [*16] functions of call termination. The AWS switch connects callers to AWS subscribers and delivers the traffic to the called party. USWC argues that the AWS switch does not perform transport; that is, it does not deliver the traffic from the interconnection point to the end office serving the called party. When transport is involved, USWC asserts, two switching functions are involved: transport (switching the call to the appropriate end office) and call termination (connecting the call to the called party).

USWC points out that under the existing contract, when AWS chooses to interconnect and deliver traffic originating on its network to USWC at a USWC tandem switch, AWS is charged both the tandem switching and transport element (between the incumbent LEC's two switches) and the end office switching rates, for a total price of $.0245 per minute of use. If AWS chooses to interconnect and deliver its traffic to USWC at an end office location, AWS will pay only the end office switching charge (currently $.0206).

USWC argues that the components of the AWS network are comparable to the components of the USWC network, and that the AWS MSC functions like a USWC end office. That is, when [*17] a USWC customer calls an AWS subscriber, the AWS MSC provides only a single switching service. When a call is routed through a USWC tandem switch to a USWC end office, two switching functions are involved. The AWS switch only connects AWS subscribers to each other or to other service provider networks that are directly connected to the MSC, for the sole purpose of delivering calls to or receiving calls from AWS subscribers. USWC contends that these are end office switching functions, as defined in the Order and Rules. AWS relies on USWC to perform the tandem switching functions necessary to reach all other local service provider networks and the subscribers.

Moreover, USWC points out, AWS can avoid the tandem switching charge by delivering its traffic to USWC end offices for termination. AWS has only one switching facility. Therefore, if the Commission determines that AWS's switch is a tandem subject to tandem switching rates, USWC has no way to avoid an unneeded tandem switching charge on AWS's network. When AWS delivers a call to USWC, USWC is required to perform both tandem and end office switching functions for every call delivered by AWS and terminated to a USWC customer. AWS [*18] could itself perform the tandem functions of directing the call to the appropriate end office, but has decided to have USWC perform that function and incur those costs.

Resolution:

a. ***UM 351/UM 844 rates adopted for transport and termination by USWC.*** USWC proposes to base rates on its TELRIC pricing proposal submitted in this docket, which includes a portion of its actual common costs and the existing depreciation reserve deficiency. The Commission has consistently chosen to base rates set in arbitrations on its own cost study docket (UM 773) and its pricing dockets (UM 351 and UM 844). There is good reason to do so in this arbitration as well.

The Commission has spent years working out a methodology for costing and pricing, and the dockets named above are the result of that work. The methodology is established and reviewable. USWC's methodology and results are unreviewed and the inclusion of a depreciation reserve deficiency is a departure from standard Commission costing/pricing policy. I will adopt the UM 351 rates (set forth in Revised Appendix C to Order No. 96-283) as modified by UM 844, Order No. 97-239, Appendix C, for transport and termination between the [*19] parties.

AWS suggests that bill and keep should apply where traffic is in balance, and asserts that traffic balance should be presumed if the dollar difference in statewide obligations are within 10 percent of each other. I take this to be a suggestion to enhance administrative efficiency. If the parties choose to handle their mutual financial obligations in this way, they are free to work out that arrangement, but I will not adopt the proposal as part of this arbitration.

b. The AWS switch is not a tandem. AWS argues that its switch is a tandem in terms of geographic area and of functionality. However, I believe that USWC has pointed out the central functional difference between a tandem and an end office switch. AWS does not incur the costs of both end office and tandem switching functions. The MSC switch does not provide its subscribers with connections to the rest of the world. That connectivity comes via USWC's tandem.

If the Commission were to ignore the connectivity that a tandem provides and consider AWS's switch eligible for tandem rates, USWC would not be compensated for the distinctive function that its tandem performs. The result would be to allow AWS to [*20] charge a tandem charge for costs it does not incur, and to avoid tandem switching charges on USWC's network when it chooses to establish direct connections to USWC's end offices. I conclude that USWC is obligated to pay AWS at the end office rate established for USWC's end offices.

3. Compensation for Transit Traffic

AWS: AWS witness Ms. Mounsey defined transited third party traffic as follows:

> [Transit traffic is] traffic that will either originate or terminate on the network of a third party provider, and will transit the network of the LEC (or some other carrier, which could be the CMRS provider). For example, if a CLEC sends a call to an AWS customer via the USWC tandem, USWC performs a transiting function. Similarly, if an AWS customer calls a customer of a CLEC and the call is routed over the USWC tandem, USWC also performs a transiting function. In the current case, AWS argues that compensation for transit traffic involves traffic delivered by AWS to USWC for termination to a third carrier.

According to AWS, there is no dispute about USWC's willingness to provide transit services to AWS nor about USWC's right to be compensated for the delivery of transit [*21] traffic. AWS believes that USWC would be fully compensated for transit through a bill and keep arrangement; however, should the Commission not adopt that arrangement, AWS proposes to pay USWC the combined tandem switching and average transport rate of $.003421 for traffic delivered to non USWC customers that terminates at USWC's tandem.

The parties also disagree on the proper compensation to be paid with respect to other carriers if bill and keep is not adopted for transit traffic. AWS is willing to negotiate agreements with other carriers for termination charges associated with transited traffic. Until such agreements can be negotiated, AWS urges that USWC should not bill or collect such termination charges for carriers using its facilities for transited traffic unless those carriers have a reciprocal arrangement themselves. AWS and the third parties using USWC's facilities should pay USWC the appropriate transit charge and should originate and terminate their own traffic on a bill and keep basis. AWS wants to avoid the result it believes USWC is seeking, that AWS would pay a third party carrier for termination while that carrier does not compensate AWS.

USWC: USWC believes [*22] that it is entitled to compensation for the termination of transit traffic based on TELRIC costs. USWC bases its position on § 252(d)(2)(A) of the Act, which provides that reciprocal compensation shall be based upon terms and conditions that provide for mutual recovery "by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." 47 C.F.R. § 51.701 defines reciprocal compensation as follows:

> For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

USWC argues that a bill and keep arrangement for transit traffic is entirely inappropriate and would result in USWC receiving no compensation for that traffic. None of this traffic is originated or terminated by USWC and USWC does not use AWS for transit calls. Although USWC agrees to continue [*23] to provide AWS with the option of using USWC's tandem switches to third party carriers, USWC argues that it should be able to recover the costs of transit traffic, which include tandem switching and transport, on a usage sensitive basis. USWC notes that AWS agrees that if the Commission rejects the bill and keep proposal, AWS should pay USWC the rates ordered by the Commission in this docket for transit traffic.

Resolution: ***AWS shall pay USWC the rates ordered in this docket for transit traffic.*** I have rejected bill and keep as a compensation arrangement between the parties in this docket. I find that USWC is entitled to compensation for termination of transit traffic. Consistent with the compensation decisions above, the appropriate rate for transit traffic to third parties is that established in UM 351, as modified by UM 844.

4. Effective Date for Reciprocal Compensation

AWS argues that it is entitled to reciprocal compensation from October 3, 1996, the date that it submitted its request for interconnection to USWC. AWS bases this claim on FCC Rule 717(b), which provides:

> From the date that a CMRS provider makes a request [for interconnection] until a new [*24] agreement has been either arbitrated or negotiated and has been approved by a state commission, the CMRS provider shall be entitled to assess upon the incumbent LEC the same rates for transport and termination that the incumbent LEC assesses upon the CMRS provider pursuant to the preexisting arrangement.

Because AWS requested interconnection on October 3, 1996, it argues that the reciprocal compensation obligation should date back to that time. USWC contends that the Eighth Circuit's stay, which was imposed before AWS's request for interconnection and not lifted until November 1, 1996, precludes enforcement of the reciprocal compensation obligation until November 1, 1996. AWS argues that an administrative agency order that is initially stayed and then allowed to go into effect is effective as of its initial issuance date. Thus the FCC Order requiring reciprocal compensation was effective as of September 7, 1996, thirty days after publication in the Federal Register. According to AWS, the lifting of the stay rendered it effective on October 3, the day AWS submitted its request for interconnection.

The FCC Order provides that the right to reciprocal compensation pending a new [*25] agreement begins "as of the effective date of the rules we adopt pursuant to this order" (FCC Order P1094). The effective date is defined as "30 days after publication of a summary in the Federal Register" (FCC Order P1442). AWS argues that one could interpret the lifting of the stay as a reinstatement of the September effective date or as USWC does, as causing the rules to become effective on November 1. This interpretation, according to AWS, ignores the precise language of the rule, which states that the right runs from the date the request for a new agreement was sent.

AWS suggests the following way to harmonize the two dates. AWS's right to receive interim reciprocal compensation actually went into effect on November 1, when the FCC Order was allowed to become operative on lifting the stay. Second, because of the explicit language of the rule, the effective date for the commencement of compensation under this newly effective right was the date of the request for a new agreement, in this case October 3.

USWC: USWC argues that AWS seeks reciprocal compensation in this proceeding prior to the effective date of FCC Rule 51.717. USWC argues that Rule 51.717 became effective [*26] on November 1, 1996, the day after which the Eighth Circuit modified its stay.

Resolution: ***Effective date for reciprocal compensation obligation is October 3, 1996.*** I am persuaded by AWS's legal arguments that the effective date for the stayed rules relates back to the original effective date on the lifting of the stay. The reciprocal compensation obligation arose on October 3, because the request for interconnection was filed on that date, after the effective date of Rule 51.717.

Issue B. Application of Access Charges

AWS asserts that transport and termination charges apply to local calls. Access charges apply to the delivery of toll calls. According to AWS, AWS and USWC agree on this point. They also agree, with one exception, that all CMRS calls originating and terminating within the same MTA are to be treated as local calls.

The one issue outstanding between the parties concerns access charges for intra MTA, interstate roaming calls. These calls occur when a wireless customer roaming from her home location places a call that originates and terminates within a single multistate MTA but crosses a state boundary. Such calls, because they originate [*27] and terminate within the same MTA, are to be treated as local calls for compensation purposes. The FCC Order P1036 states:

> Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.

That is, AWS argues, all such calls are local in nature. There is no exception for the types of calls at issue here.

AWS points out that access charges were not assessed on intra MTA interstate calls under the 1994 agreement. This fact, AWS argues, confirms its position that these calls are not subject to access charges.

AWS contends that under USWC's proposal in this case, if two customers, one based in Portland, Oregon, and one based in Vancouver, Washington, are both physically in Portland and place a call to Vancouver, the Portland customer's call would be rated as a local call by USWC because it is an intra MTA call. USWC would treat the Vancouver customer's call as an interstate roaming call, despite the fact that it is an intra MTA call, and USWC would impose access charges. Currently, access charges would not apply to such [*28] a call.

For these reasons, AWS argues that the Commission should determine that all intra MTA traffic between the AWS and USWC networks is subject to local compensation rates under § 251(b)(5) and that none of this traffic is subject to interstate or intrastate access charges.

USWC: USWC asserts that intra MTA roaming calls should be subject to interstate access charges and that AWS should be required to identify the amount of such traffic. USWC bases its position on an excerpt from the FCC Order P1043:

> Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges.

The FCC inserted a footnote at the end of that passage (footnote 2485; citations omitted):

> Some cellular carriers provide their customers with a service whereby a call to a subscriber's local cellular number will be routed to them over interstate facilities when the customer is "roaming" in a cellular [*29] system in another state. In this case, the cellular carrier is providing not local exchange service but interstate, interexchange service. In this and other situations where a cellular company is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access

> to an interexchange carrier and may expect to be paid the appropriate access charge . . . . Therefore, to the extent that a cellular operator does provide interexchange service through switching facilities provided by a telephone company, its obligation to pay carrier's carrier [i.e., access] charges is defined by § 69.5(b) of our rules.

Resolution: ***Intra MTA traffic between the AWS and USWC networks is subject to local compensation rates under § 251(b)(5); none of this traffic is subject to interstate or intrastate access charges.***

The entire text of FCC Order P1043 makes clear that USWC's reliance on P1043 to support its position is misplaced. The entire paragraph reads:

> As noted above [P1036], CMRS providers' license areas are established under federal rules, and in many cases are larger than the local exchange service areas that state commissions [*30] have established for incumbent LECs' local service areas. We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges. Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges[footnote 2845 here]. Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges (citations [*31] omitted).

The entire context of the passage makes clear that USWC's argument is without merit. The paragraph establishes the principle that most traffic between LECs and CMRS providers is not subject to interstate access charges unless carried by an IXC. The narrow exception to that rule is for calls that are essentially forwarded to a roaming CMRS subscriber. A description of that forwarding service is the gist of the footnote USWC cites. Those calls are, by definition, *not* calls that originate and terminate in the same MTA. The rule states unambiguously that calls that originate and terminate in the same MTA, based on locations at the beginning of the call, are not subject to interstate or intrastate access charges. I will apply that rule in this arbitration.

Issue C. Paging Services

Compensation for Termination of Paging Traffic. According to AWS, the paging service dispute between AWS and USWC focuses on two issues: whether USWC is required to compensate AWS for termination of paging calls and whether USWC is prohibited from charging AWS for the facilities used to deliver paging traffic. In both cases, AWS asserts that the question is primarily legal, although [*32] AWS proposes UM 351 rates and USWC relies on the TELRIC study that has not been reviewed by the Commission. AWS argues that it is entitled to be compensated for the termination of paging traffic originated by USWC and AWS need not compensate USWC for facilities used to deliver such calls, because USWC is the originator of all such calls.

AWS argues that compensation for termination of paging traffic is governed by the Act and the FCC order. The Order defines paging providers as "telecommunications carriers," and under the Act, all telecommunications carriers are entitled to reciprocal compensation from incumbent LECs (47 U.S.C. § 251(b)(5)). There is no exclusion in the terms of the Act that would prevent these rules from applying to paging providers. AWS points out that the Order makes the inclusion of paging providers explicit (FCC Order P1008):

> Accordingly, LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks.

[*33]
At P1092 of the Order, the FCC further stated:

> Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers' networks.

In response to USWC's argument that a California arbitrator's decision reached the opposite result, AWS points out that the California Public Utilities Commission rejected the arbitrator's decision as failing to comply with §§ 251(b)(5) and 252(d)(2)(A)(I) of the Act. *Application of Cook Telecom, Inc., for Arbitration Pursuant to Section 252 of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Pacific Bell*, CPUC 97-05-095 (97-02-003 May 21, 1997) at 13.

Given the express determination by the FCC that paging providers are entitled to compensation, AWS contends that USWC's argument that paging traffic is one-way traffic fails to convince. AWS urges that USWC must compensate AWS for the termination of all paging traffic.

Prohibition on Charges for Paging Facilities. AWS argues that if paging providers must be compensated for termination of traffic, [*34] they must not be charged for the facilities used to deliver such traffic. AWS cites to P1092 of the FCC Order, which states that paging providers "should not be required to pay charges for traffic that originates on other carriers' networks." At P1042, the FCC also explicitly prohibits the imposition of such charges, as they had been applied in the past:

> We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

AWS argues that by seeking to impose facilities charges on AWS as it has done in the past, USWC is trying to circumvent this explicit FCC rule. AWS urges the Commission to reject this effort and preclude USWC from imposing any facilities charges for LEC originated paging traffic.

USWC argues that AWS is not entitled to receive "reciprocal compensation" for AWS's termination of paging customers' calls, because paging service is one way and does [*35] not originate traffic for termination on USWC's network. Because there is no mutual exchange of traffic with paging services and USWC will receive no compensation from AWS, USWC argues that § 252(d)(2) of the Act does not apply.

USWC also contends that AWS should be required to pay for facilities required to connect AWS's dedicated paging facilities to USWC's network. USWC believes that AWS's position is tantamount to having USWC ratepayers subsidize significant portions of the expense of providing paging service to AWS customers. USWC notes that on April 25, 1997, Southwestern Bell Telephone Company wrote to the FCC requesting clarification of whether a March 3, 1996, letter from the FCC Common Carrier Bureau, which addresses charges by LECs to terminate calls that originate on their networks, was intended to apply to facilities charges. On May 22, 1997, the FCC established a pleading cycle to take comment on the Southwestern Bell letter. USWC asks the Arbitrator to take official notice of the FCC notice and asks the Arbitrator to allow for possible changes as this issue continues to unfold.

Resolution: ***AWS is entitled to compensation for paging traffic terminated on its*** [*36] ***network. USWC may not impose facilities charges until the FCC reaches a decision on the Southwest Bell inquiry.***

I find that the plain language of FCC Order P1008 establishes an obligation for USWC to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers. USWC's argument that traffic is not exchanged does not override the plain meaning of the Order.

In accordance with USWC's request, I take official notice of the FCC notice of pleading cycle on the Southwestern Bell letter pursuant to OAR 860-014-0050. Because of the uncertainty surrounding payment for the facilities required to connect a paging service to USWC's network, I will not allow USWC to impose a facilities charge at present. If the FCC

eventually decides that facilities charges are appropriate, USWC may impose them on AWS at that time.

Issue D. Access to Unbundled Network Elements

AWS: *General Extent of Unbundling.* AWS argues that § 251(c)(3) of the Act imposes on USWC a duty to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point. FCC Rule 51.319 requires USWC to provide AWS with access to the local [*37] loop, network interface devices, local and tandem switches (including all software features provided by such switches), interoffice transmission facilities, signaling networks (including but not limited to signaling links and signaling transfer points), call related databases, operational support systems functions, and operator services/directory assistance facilities.

The FCC also made clear that state commissions could require the unbundling of additional network elements (FCC Order P366). AWS requests that the Commission adopt the level and extent of unbundling established in Order No. 96-283 (UM 351) for purposes of the Interconnection Agreement between AWS and USWC. AWS proposes that USWC be required to negotiate in good faith if AWS determines that another aspect of unbundling is required for specific wireless applications. AWS urges the Commission to approve the language in Section 2(F) of the AWS proposed Interconnection Agreement for unbundling additional network elements.

Access to USWC's Operational Support Systems (OSS). AWS asserts that USWC is legally required to provide AWS access to its OSS on an unbundled basis equivalent to the access it itself enjoys. OSS [*38] generally relate to a variety of computer databases and systems that support services necessary in the operation of a network. USWC's OSS are a network element under § 153(45) of the Act, which must be unbundled on request, according to § 251(c)(3). The FCC requires USWC to provide access to its preordering, ordering, provisioning, and maintenance/repair by January 1, 1997. FCC Order PP316, 516-28. By Order No. 96-283, at 3, this Commission also ordered USWC to provide access to its OSS by January 1, 1997.

AWS points out that electronic interfaces are necessary to access USWC's OSS. According to AWS, the FCC has directed the use of electronic interfaces to the support systems (FCC Order P535):

> For example, to the extent that customer service representatives of the incumbent have access to available telephone numbers or service interval information during customer contacts, the incumbent must provide the same access to competing providers. Obviously an incumbent that provisions network resources electronically does not discharge its obligations under Section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile based ordering.

[*39]
AWS argues that according to the record, AWS requires a real time electronic interface with USWC for ordering, provisioning, and maintenance/repair functions. AWS needs the ordering and provisioning interface to order network service from USWC and the maintenance interface to facilitate necessary maintenance or repair functions such as trouble entry, status updates, trouble escalation, and ticket closure.

According to AWS, USWC has introduced no evidence concerning specifications or details of its existing interfaces. USWC did not put forth any electronic interface proposal during contract negotiations. AWS urges that because the record contains no proposal by USWC to provide parity in access to its OSS, the Commission should require interfaces to access USWC's OSS as contained in the AWS Interconnection Agreement. *See* Section 3; Section 5(c).

Pricing of Unbundled Elements. AWS argues that the overriding principle to follow in pricing is that USWC's rates for the services it provides should be based on Commission approved UM 773 costs and UM 351 prices, as modified in Docket UM 844.

USWC chooses to ignore the Commission's UM 773 costs and advocates instead a new cost [*40] study that is unapproved by the Commission. USWC witness Mason admitted that USWC's position, if adopted, would be inconsistent with UM 351 rates and UM 773 costs. This new USWC cost study includes a surcharge to recover its depreciation reserve deficiency from its total actual cost calculation. AWS points out that the FCC has stated that the inclusion of inadequately depreciated costs into the price of unbundled network elements and interconnection "is not the proper remedy." FCC

Order P706.

Resolution: ***Level and extent of unbundling established in Order No. 96-283 (UM 351) adopted; AWS access to USWC OSS ordered; pricing of unbundled elements in accordance with UM 351 prices, as modified by UM 844***

USWC did not respond to these arguments in its brief. I agree with AWS's proposal to use Order No. 96-283 to set the level and extent of unbundling for this arbitration.

USWC is obligated to provide AWS unbundled access to its OSS. The FCC required USWC to provide access to its preordering, ordering, provisioning, and maintenance/repair by January 1, 1997. FCC Order PP316, 516-28. By Order No. 96-283, at 3, this Commission also ordered USWC to provide access to its OSS by [*41] January 1, 1997.

The appropriate prices for unbundled network elements are those established in Order No. 96-283, UM 351, as modified by Order No. 97-239 (UM 844).

Issue E. Access to Poles, Ducts, Conduits, and Rights-of-Way

AWS: *Scope of Access*. AWS argues that § 251(b)(4) of the Act imposes on all LECs the obligation "to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224" of the Act. AWS contends that nondiscriminatory access, a requirement of § 224(f)(1), means that USWC must take reasonable steps to allow AWS access to its poles, etc., on the same terms and conditions as USWC provides itself. The FCC, according to AWS, has made it clear that an incumbent LEC is prohibited from favoring itself over a competitor with respect to such access. FCC Order P1157. AWS contends that USWC's duty to provide access flows from the incumbent to the other carrier and is not reciprocal.

AWS argues that it seeks reasonable, nondiscriminatory access to USWC's poles, ducts, conduits, and other rights of way, consistent with the [*42] Act and the FCC Order. AWS urges the Commission to require USWC to accommodate the differing technological needs of AWS as a CMRS provider. For instance, AWS needs to deploy innovative microcellular technologies to decrease the need for additional cell sites and improve the availability and signal quality of the cellular service. AWS asks the Commission to specifically authorize AWS's use of microcell technology in its access to the required USWC rights of way. The AWS proposed contract language in Section 8 requires USWC to provide equal, nondiscriminatory access to rights of way under terms and conditions as favorable as USWC would provide itself, consistent with the Act.

Space Reservation. AWS contends that the appropriate mechanism for determining access priority consistent with § 251(b)(4) of the Act is first come, first served. USWC has attempted to condition AWS's access to poles, conduits, and other rights of way on USWC's ability to reserve excess capacity. AWS maintains that the FCC Order P1170 explicitly provides that the Act does not permit the pole or conduit owner to favor itself by reserving space to meet some undefined future need.

AWS does not oppose USWC [*43] maintaining spare capacity in conduits and ducts for maintenance and administrative purposes, but argues that USWC should not be permitted to maintain spare capacity for other reasons. This position is consistent with the Commission's determination in ARB 3/6 that USWC may reserve space reasonably necessary for maintenance and administrative purposes based on a bona fide development plan (Order No. 97-003 at 5-6).

Modification of Facilities. AWS argues that the FCC Order PP1161-1164 requires incumbent LECs to take reasonable steps to expand the capacity if necessary to accommodate access to rights of way, just as the incumbent LEC would do to accommodate its own increased needs. To implement this requirement, AWS contends, USWC must prove that additional access requested is not technically feasible. If necessary, USWC must exercise its powers of eminent domain to expand an existing right of way over private property to accommodate a request for access (FCC Order P1181). Accordingly, AWS argues that the Commission should require USWC to expand capacity when it is not currently available. Such a result, AWS contends, is consistent with the arbitrated decision between USWC, MCI, [*44] and AT&T, ARB 3/6, Order No. 97-003 at 25.

USWC argues that § 251(b)(4) of the Act obligates all local exchange carriers, including AWS, to provide access to poles, ducts, conduits, and rights of way to competitors. Accordingly, USWC requests that any contract provision concerning access to poles, ducts, and conduits must be reciprocal.

USWC agrees to provide nondiscriminatory access to its poles, etc., on a first come, first served basis, as long as sufficient capacity exists. USWC argues, however, that it must keep a certain level of spare capacity for maintenance and administrative purposes, and identifies that level of spare capacity as 15 percent. USWC does not believe that it should be required to construct or rearrange facilities for another carrier.

Resolution: ***Duty to afford access to poles, ducts, conduits, and rights of way is reciprocal; USWC may keep spare capacity for maintenance and administrative purposes based on a bona fide development plan; USWC must take reasonable steps to expand capacity where necessary.***

The language of § 251(b)(4) applies to all local exchange carriers. It is not limited to incumbents. Therefore, the obligation to grant access [*45] to poles, etc., is reciprocal. Both carriers shall provide access to their poles, etc., under terms and conditions as favorable as they would provide themselves.

USWC is to allocate space on its poles, etc., in a nondiscriminatory way, on a first come, first served basis. USWC may reserve reasonable space for its maintenance and administrative needs, in accordance with a bona fide development plan.

When space is not sufficient to afford access to poles, etc., USWC shall take reasonable steps to expand capacity. These steps include exercising its power of eminent domain. FCC Order P1181. *See also* Order No. 97-003 at 25.

USWC is to take reasonable steps to accommodate the differing technological needs of AWS as a CMRS provider. For instance, AWS shall be permitted to use microcell technology in its access to the required USWC rights of way.

Issue F. Contract Language

AWS requests the Commission to adopt its proposed language in the Interconnection Agreement submitted to the Commission as AWS/17. AWS maintains that its proposed language complies with federal law and should be adopted as the agreement of the parties in this arbitration, after it is modified to reflect [*46] the substantive decisions of the Arbitrator. Besides specific provisions addressing technical interconnection matters, the AWS proposed Interconnection Agreement contains appropriate general terms and conditions (term, termination, covenants and warranties, indemnification, confidentiality, alternative dispute resolution procedures, force majeure and successors and assigns). The general terms and conditions set forth in AWS's contract on these standard commercial issues are reasonable, necessary, and workable.

AWS contends that the form of the agreement, including general terms and conditions, is a disputed issue to be resolved in this arbitration. If the Commission were to issue a decision that did not order a comprehensive agreement between the parties on the theory that details could be negotiated later, AWS maintains, the purpose of the Act would be undermined and the Commission would invite further delay.

AWS argues that USWC's proposed agreement is highly repetitive, often discussing the same issue in multiple sections. This renders the USWC agreement confusing, AWS asserts, because obligations are repeated and stated in different ways. The USWC form agreement is also ambiguous [*47] in many of its terms, AWS contends. AWS cites the following example: Section 5.3 purports to address virtual and physical collocation under terms and conditions "described in Section 6 herein." Section 6 then provides, "the parties will enter into a separate Collocation Agreement." This ambiguity, AWS contends, creates uncertainty about the rights and obligations of the parties and would require further negotiations outside of this proceeding.

AWS argues that the USWC form agreement is also internally inconsistent. For instance, Section 20 suggests that USWC will meet certain service standards, but Section 20.3 provides that "if USWC fails to meet the performance criteria, USWC will use its best efforts to meet the Performance Criteria for the next Specified Review Period." AWS maintains that the fact that other states have adopted USWC's template agreement does not cure its deficiencies. This Commission, in previous arbitration proceedings, opted not to use USWC's form agreement. *See, e.g.*, Order No. 97-021; 97-003. AWS

urges the Commission to adopt the general terms and conditions as proposed by AWS in this proceeding, subject to any modifications based on the Commission's [*48] decision in this docket..

USWC argues that the Arbitrator cannot make findings based on proposed contract language otherwise unsupported by evidence in the record. USWC objects to AWS's proposed contract in part because the agreement seeks to impose terms and conditions outside of the requirements of the Act. AWS did not identify with specificity all the terms and conditions of its proposed interconnection agreement as disputed issues. Accordingly, USWC argues that those issues lacking substantial evidentiary support are not properly before the Arbitrator.

Moreover, USWC contends that AWS's proposed interconnection agreement includes terms and conditions that do not fall within §§ 251, 252(d), or the establishment of an implementation schedule, to which § 252 of the Act limits the matters at issue in arbitration. For that reason, the Arbitrator lacks authority to impose contractual language relating to those subjects.

Resolution: ***AWS to submit contract to USWC; USWC to execute within 15 days.***

While I favor the greater specificity of AWS's proposed interconnection agreement, I am persuaded by USWC's argument that it contains matters beyond the scope of my authority [*49] as Arbitrator to adopt. Therefore, I direct AWS to prepare a contract that is within the scope of what is contemplated by the Act and the FCC Order, and to incorporate into it the decisions in this arbitration. AWS is to submit the contract to USWC, and USWC is to execute it within 15 days. I am hopeful that the 15-day window will give the parties time to work out any differences about contract language that might remain after the decision in this matter has issued. I also encourage the parties to collaborate in the contract drafting process to the extent possible.

Issue G. Service Quality Issues

AWS: *Performance Standards*. AWS believes that service quality standards are extremely important in provisioning its wireless services. AWS has had problems with USWC in terms of provisioning delays, service outages, and blocking.

Section 251(c)(3) of the Act requires that unbundled elements be provided on a reasonable and nondiscriminatory basis. The FCC Order also requires:

> to the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting [*50] telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself.

AWS also cites to FCC Rule 51.311(b) for the same principle. AWS argues, contrary to USWC's position, that the FCC does not limit performance levels to those which the incumbent provides to itself. *See* Rule 51.311(c); FCC Order PP55, 970.

AWS argues that each of the quality and performance standards it has proposed is based on specific industry standards, reliability objectives, and performance specifications, as detailed in the AWS proposed Service Level Agreement sponsored by AWS's technical witness, Russell Thompson. According to AWS, in negotiations USWC refused to give AWS any information regarding its own internal quality or performance standards.

AWS urges the Commission to reject USWC's proposal to monitor data rather than comply with specific performance standards. In the arbitration between AT&T, MCI, and USWC, the Commission recognized the need for the development of quality standards and adopted the arbitrator's decision to require USWC to prepare detailed specifications showing its existing service quality and performance standards. Order No. 97-003 [*51] at 10. AWS urges the Commission to recognize here, as it did in that order, that the Act, the FCC Order, and state law require the incumbent to provide services and facility at least at parity with the services and facilities it provides itself.

Performance Credits . AWS also argues that the Commission should approve a system of performance credits resulting

from USWC's failure to meet the service quality and performance standards set forth in its Interconnection Agreement. AWS maintains that the performance credits are necessary to give effect to the quality standards in the Agreement. They will create an incentive to comply with the standards and compensate AWS for unascertainable losses resulting from USWC's noncompliance. Accordingly, AWS contends that the Commission should not only require USWC to satisfy explicit performance and quality standards such as those AWS proposes, but also approve AWS's proposed performance credits described in Section 6 of its proposed Interconnection Agreement as a remedy for USWC's failure to comply.

USWC argues that the Act obligates it to provide facilities and equipment at least equal in quality to that provided by the LEC to itself [*52] (§ 251(c)(2)(C)). The Act does not require particular levels of service quality from incumbent LECs, however, nor does it give the Commission authority to impose such standards. USWC opposes AWS's performance standards because AWS has given no evidence of what these standards entail, nor of their reasonableness. USWC also argues that the penalties AWS proposes are illegal and bear no relationship to any potential harm that failure to meet a specific standard might cause. USWC argues that there is insufficient evidence in the record to support adoption of these standards.

Resolution: ***No service quality standards imposed.***

The service quality standards requested by AWS in its interconnection agreement are quite detailed and the record lacks sufficient evidence to adopt them. Moreover, the Commission is currently conducting a service quality docket for high end telecommunications services (AR 324). One purpose of that docket is to set service quality standards that will meet most of AWS's concerns. As USWC points out in its brief, AWS has other avenues of recourse available to it if USWC's service quality is deficient: the dispute resolution procedures in the arbitration agreement, [*53] a formal or informal complaint filed with the Commission, or recourse to FCC and the United States District Courts.

Issue H. Access to Service Arrangements ("Pick and Choose")

AWS: AWS seeks inclusion of a "most favored nations" provision in the Interconnection Agreement to require USWC to make available to AWS any interconnection, service, or network element set forth in an agreement between USWC and another carrier at the same rates, terms, and conditions. AWS argues that the plain language of § 252(i) supports a requesting carrier's ability to choose among individual provisions contained in publicly filed interconnection agreements. The language requires an incumbent to make available "any interconnection, service, or network element provided under an agreement approved under [§ 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

AWS argues that a most favored nations clause does not undermine the negotiation process. Instead, AWS asserts, allowing a carrier to choose among contract provisions will facilitate the process and avoid relitigation of issues previously determined [*54] by the Commission. It will also enable smaller carriers, who lack bargaining power, to obtain favorable terms and conditions negotiated by larger carriers. AWS is aware that the Eighth Circuit Court of Appeals has stayed FCC Rule 51.809, but believes that the most favored nations mandate arises from § 252(i) of the Act.

USWC: USWC opposes AWS's contention that it should be allowed to pick and choose individual provisions of other agreements. The Eighth Circuit has stayed the FCC's pick and choose rule. The Court stated that the pick and choose rule would operate to undercut any agreements that were actually negotiated or arbitrated (Order Granting Stay Pending Judicial Review, p. 17). Moreover, USWC notes that the Commission previously decided this issue in Arbitration Order Nos. 97-052, 97-053, and 97-150. In those cases, the Commission rejected similar requests to allow companies to pick and choose portions of different agreements. USWC urges that the Commission should maintain consistency with its previous decisions on this point.

Resolution: ***The contract should not contain a "pick and choose" clause.***

In response to AWS's argument that the Act, not the FCC Rules, [*55] give rise to the right to pick and choose among various contract provisions, I find the language of § 252(i) vague as to how a carrier gains access to the terms of other agreements. Therefore, I give considerable weight to the Eighth Circuit's stay of the FCC rule.

In granting the stay of the FCC "pick and choose" provisions, the Eighth Circuit acknowledged that potential competitors will be inconvenienced by having to renegotiate the terms of their agreements with incumbent carriers if the FCC's rules are subsequently upheld. Nevertheless, the Court found that "it would be easier for the parties to conform any variations in their agreements to the uniform requirements of the FCC's rules if the rules were later upheld than it would be for the parties to rework agreements adopted under the FCC's rules if the rules were later struck down." The Court further concluded that any harm that potential competitors may endure as a consequence of the stay is outweighed by the irreparable injury that the incumbent carriers would sustain in absence of a stay.

The FCC's interpretation of § 252(i) should not be incorporated in the AWS/USWC interconnection agreement. If the FCC's "pick and choose" [*56] rule is ultimately upheld, it will apply to the contract. In that event, AWS will be able to renegotiate the terms of its agreement to include the rates, terms and conditions incorporated in other interconnection agreements executed by USWC.

Issue I. Admissibility of Exhibits AWS 7-14

AWS argues that the Commission should admit Exhibits AWS 7 through 14 because they impeach the testimony of USWC that the 1994 interconnection agreement has not expired, by showing the parties' signed acknowledgment of the expiration date. These documents also show that USWC's position in this case regarding the FCC-required reciprocal compensation arrangement between January 1, 1997, and the final order in this case is contrary to prior agreement of the parties. Any language in these documents expressing agreement between the parties to exclude such documents from any arbitration proceeding has been voided by USWC's breach of its other obligations in those agreements.

One issue in this proceeding concerns the termination date of the 1994 agreement between AWS and USWC. FCC Rule 51.717(b) states that reciprocal compensation prior to the execution of an arbitrated agreement shall be [*57] based on the parties' preexisting arrangement. For the period from January 1, 1997, on, that preexisting arrangement is the parties' Interim Agreement, AWS Exhibit 9. AWS contends that the 1994 agreement had expired on December 31, 1996. The parties stipulated that Exhibits AWS 7 through 14 would be introduced as proprietary and confidential, subject to the protective order in this docket.

AWS argues that these exhibits are relevant and should be admitted because USWC advocates a position contrary to the Interim Agreement, AWS Exhibit 9. According to AWS, the confidentiality provision of the Interim Agreement has been obviated by USWC's breach of the other agreements found in Exhibits 7 through 14. AWS urges the Commission to decide that the 1994 agreement had been terminated and that the Interim Agreement governs their relationship prior to the outcome of this arbitration.

USWC: USWC believes that this dispute is not properly before the Commission and asks the Arbitrator not to include the issue in his decision. USWC believes that the Commission does not have jurisdiction over the 1994 agreement, because it preexists the Act. The Act does not authorize state arbitration of [*58] preexisting contracts, and the Commission has no statutory basis to allow it to resolve such disputes. USWC urges that the parties should resolve their dispute as a private contractual dispute, using the civil remedies available to them.

Resolution: ***The Commission has no jurisdiction over the 1994 Agreement.***

I agree with USWC that the Act does not confer on state commissions jurisdiction over preexisting agreements. Moreover, the status of the 1994 agreement was not identified as an issue in AWS's petition for arbitration or in USWC's reply. Under § 252(b)(4) of the Act:

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

As I read this section, I may not consider the status of the 1994 agreement in this arbitration. Because I have no jurisdiction over the 1994 agreement, it is not necessary to rule on the admissibility of AWS Exhibits 7 through 14.

Other Issues

In its brief, **USWC** identified two other issues that **AWS** did not brief: Balance of Traffic and Physical Interconnection [*59] and Collocation.

AWS's petition identifies the balance of traffic issue as follows: "Should the parties engage in bill and keep compensation when traffic is balanced in a particular market or cellular geographic service area (CGSA) or only when it is balanced on a full-state basis?" AWS did not address this issue in testimony, and I consider it no longer part of the case.

Physical Interconnection. AWS proposed negotiated meet points for interconnection and traffic exchanged via two way trunk groups. USWC agrees that mid-span meet arrangements and points of interconnection should be negotiated. However, USWC recommends that the Arbitrator establish a reasonable limit on the length of facilities USWC must construct as part of a mid-span meet arrangement and also ensure USWC is adequately compensated for any such arrangements. USWC proposes that a reasonable standard would be to require USWC to build no more than one mile of facilities to the meet point but in any case no more than one half the distance of the jointly provided facilities.

USWC advocates that the interconnection agreement should also provide for the establishment of direct trunks when traffic between a USWC [*60] end office and the AWS switch exceeds 512 CCS. USWC argues that this is necessary to ensure an efficient mix of direct trunk transport and tandem switching.

Collocation. USWC and AWS have agreed on most collocation issues but do not agree on AWS's request for collocation of remote switching units (RSUs). USWC has opposed collocation of remote switching units in its end offices. USWC notes that the FCC has required an incumbent LEC to collocate only transmission equipment (FCC Order P581). An RSU is switching equipment, not transmission equipment, which will be used not primarily for interconnection or access to unbundled elements but for interconnection with other collocated CLECs. USWC recognizes, however, that the Commission has previously allowed collocation of RSUs (Order No. 97-003). If the Commission orders collocation of RSUs in this proceeding, the restrictions on the use of RSUs found in Order No. 97-003 should apply.

Resolution:

Physical Interconnection: ***Parties to negotiate mid-span meet arrangements and points of interconnection; limit imposed on length of facilities USWC must construct; compensation necessary; direct trunks to be established when traffic*** [*61] ***between a USWC end office and the AWS switch exceeds 512 CCS.***

The parties should negotiate meet points for interconnection and traffic exchanged on two-way trunks. I adopt USWC's proposed reasonable standard for length of facilities it must construct as part of a mid-span arrangement, as well as USWC's proposal to establish direct trunks when traffic between its end office and the AWS switch exceeds 512 CCS.

Collocation: ***AWS may collocate RSUs subject to the restrictions on use of RSUs found in Order No. 97-003.***

Arbitrator's Decision

1. Within 30 days of the Commission's final order in this matter, AWS shall submit to USWC an executed contract incorporating the Commission's findings. USWC shall execute the contract within 15 days of receipt and deliver copies to the Commission. The fully executed contract shall be effective immediately.

2. Consistent with the policy adopted by the Commission, any member of the public may submit written comments on this decision. Comments must be filed with the Commission no later than July 14, 1997.

Dated this 3rd day of July, 1997 in Salem, Oregon.

Ruth Crowley, Arbitrator

LEXSEE 1997 MINN PUC LEXIS 118

In the Matter of the Petition of AT&T Wireless Services, Inc. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b)

DOCKET NO. P-421/EM-97-371

Minnesota Public Utilities Commission

1997 Minn. PUC LEXIS 118

July 30, 1997

PANEL: Edward A. Garvey, Chair; Joel Jacobs, Commissioner; Marshall Johnson, Commissioner; Don Storm, Commissioner

OPINION: ORDER RESOLVING ARBITRATION ISSUES

PROCEDURAL HISTORY

On October 3, 1996, AT&T Wireless Services, Inc. (AWS) served U S WEST Communications, Inc. (USWC) with a request to negotiate under the Telecommunications Act of 1996, 47 U.S.C. § 251. The parties failed to reach an agreement on the issues subject to negotiation.

On March 7, 1997, AWS petitioned the Commission for arbitration of all unresolved issues pursuant to the Act.

On April 17, 1997, the Commission issued its ORDER GRANTING PETITION, ESTABLISHING PROCEDURES FOR ARBITRATION. This Order referred the arbitration between AWS and USWC to the Office of Administrative Hearings (OAH) for a contested case hearing before an Administrative Law Judge (ALJ). The Commission's Order limited party intervention in the proceeding to the Minnesota Department of Public Service (the Department) and the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG) OAG/RUD. The Department and the RUD/OAG subsequently intervened in the proceeding.

The arbitration hearing began on May 6, 1997 and continued on May 7, 1997. The arbitration record closed on May 23, 1997, when reply briefs were received.

On June 6, 1997, the ALJ issued the Arbitration Decision in this matter. AWS and USWC filed exceptions on June 11, 1997.

On June 30, 1997, the Commission heard oral argument by the parties and on July 2, 1997, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

I. Preliminary Matters

A. Administrative Notice

Minn. Stat. § 14.60, subd. 4 provides:

> Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified in writing either before or during hearing, or by reference in preliminary reports or otherwise, or by oral statement in the record, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may

SCHEDULE E

> utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence in the hearing record.

Pursuant to this statute, the Commission will take administrative notice of the stayed rules in Appendix B of the FCC order, as well as the related explanatory paragraphs in the *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98*. The Commission has given notice at the hearing on this matter that it intends to do this and has given parties an opportunity to respond in oral argument. Certain portions of the order have already been made a part of the record of the arbitration.

As a result of its action in taking administrative notice of the items noted, the FCC methodologies have become part of the record in this matter and the Commission considers them as it would other evidence in the case.

B. Clarifying the Effect of the Stay

The Commission has no legal obligation to apply the methodologies, proxies or other directives contained in the stayed portions of the FCC's order. However, most of the FCC order has not been stayed and the Commission may not disregard these portions on the basis that it finds them illegal or unconstitutional.

The Commission, unlike a court, does not have the authority to declare a statute unconstitutional on its face. Neeland v. Clearwater Hospital, 257 N. W. 2d 366, 368 (Minn. 1977). Likewise, the Commission does not have the authority to declare a federal rule invalid. The federal courts of appeals have exclusive jurisdiction

> . . .to enjoin, set aside, suspend (in whole or part) or to determine the validity of...all final orders of the Federal Communications Commission made reviewable by section 402 (a) of title 47.

28 U.S.C. § 2342 (1).

While the Commission has challenged the statutory authority of the FCC to regulate the pricing of intrastate telephone services, it has done so properly by intervening in a lawsuit before a federal court of appeals, not by declaring portions of the rule invalid.

C. Burden of Proof

In its April 17, 1997, ORDER GRANTING PETITION, ESTABLISHING PROCEDURES FOR ARBITRATION in this matter, the Commission determined that USWC has the burden of proof in these proceedings. The Commission stated:

> The burden of proof with respect to all issues of material fact shall be on U S WEST. The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute.

The Commission's decision is consistent with the FCC's August 8, 1996 Order in CC Docket No. 96-98 in which the FCC specifically established a proof standard of clear and convincing evidence applicable to local exchange companies (LECs) who would deny an entrant's request for a method of achieving interconnection or access to unbundled elements.

The explicit placement of the burden of proof on U S WEST by the Commission and the FCC acknowledges that USWC and other LECs have a monopoly, not only over the local exchange network but also over information about the network that is needed to make major decisions in this proceeding.

D. Agreements Subject to Modification, Commission Approval

The agreements arbitrated in this proceeding may need to be modified in the future for several reasons. First, the parties may continue to negotiate as the states make their decisions. Second, some decisions may have to be made on an interim basis subject to later amendment in future proceedings. These future FCC and Commission decisions, including rulemakings, may need to be incorporated in these agreements. Indeed, the FCC Rules indicate that a party violates the duty under the Act to negotiate in good faith if it refuses

> . . . to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules.

47 CFR § 51.301 (c)(3).

Therefore, the Commission hereby clarifies that the agreements it approves in this Order are subject to modification by negotiation or by future Commission direction. Any future modifications or amendments should be brought to the Commission for approval.

E. Timeframe for Reconsideration and Final Contract Language

Minn. Rules, Part 7829.3000, subp. 1 establishes a 20 day timeframe for filing petitions for reconsideration. The Commission believes that a shorter timeframe is desirable in this case to act efficiently to promote the goals of the Federal Telecommunications Act. In considering whether a variance to allow parties to file a petition for rehearing or reconsideration within 10 days of the issuance of the Order is appropriate, the Commission notes that it may vary its rules pursuant to Minn. Rules, Part. 7829.3200 when:

. enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule;

. granting the variance would not adversely affect the public interest; and

. granting the variance would not conflict with standards imposed by law.

Applying these standards, the Commission finds that granting such a variance is warranted and will do so. First, varying the time frame for petitions for reconsideration from twenty days to ten will not impose an excessive burden upon the parties to this proceeding as it provides parties sufficient time to prepare their petitions and allows adequate time for the Commission to carefully and thoughtfully analyze the petitions for reconsideration. It will also allow the Commission to act efficiently to promote the goals of the Federal Act. Second, varying the time frame for the filing of petitions for reconsideration will not adversely affect the public interest, but instead will allow an orderly, efficient processing of this matter. Third, granting the variance would not conflict with standards imposed by law.

The Commission notes that it is not changing the 10 day time period allowed for answers to petitions for reconsideration. Minn. Rules, Part. 7829.3200, subp. 4.

Since the Commission desires to coordinate consideration of the final contract language with its review of the petitions for reconsideration, this Order will give the parties 30 days from the issuance of this Order to file final contract language. Interested parties and participants will have 10 days to file comments on the submitted final contract language.

II. Disputed Issues: Analysis and Action

A. Bill & Keep

Under 47 U.S.C. § 251(b)(5), each LEC has the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. "Bill & Keep" is a compensation agreement where two interconnected carriers terminate each others traffic without billing each other. This method reduces the use of resources devoted to measuring traffic and billing.

1. AWS

AWS proposed that the companies be allowed to "bill & keep" in this case because, it argued, the amount of compensation to be exchanged between parties will be "equivalent". AWS explained that although the **traffic** between AWS and USWC is substantially unbalanced, AWS' higher costs to terminate traffic (more than 4 times USWC's cost) mean that in net, the dollar value of the compensation owed each other may be in balance.

AWS asserted that USWC has not presented any evidence regarding its own costs or AWS' costs, while AWS has provided evidence to indicate that its costs are substantially higher that the costs of USWC. AWS stated that it is prepared to waive full cost recovery to gain the advantages of "bill & keep".

2. USWC

USWC argued that the Commission should reject "bill & keep" as a compensation mechanism for transport, termination, and transit. USWC stated that the FCC concluded that bill & keep could be imposed by a state only if traffic is roughly balanced in two directions, is expected to remain so, and neither carrier has rebutted the presumption of symmetrical rates. USWC stated that traffic flows between it and AWS will rarely, if ever, reflect a stable pattern of balanced traffic because AWS will choose to serve particular types of customers and will target non-random groups, while USWC must serve all comers. USWC noted that in many of its existing agreements with CMRS providers the traffic is significantly unbalanced, e.g. land-to-mobile traffic is typically less than 25 percent of total traffic.

3. The Department

The Department recommended that "bill & keep" be rejected as a compensation mechanism for transport and termination. The Department rejected AWS' and USWC's cost studies as unreliable. The Department noted that AWS' evidence was extremely sketchy and USWC's cost studies were seriously flawed. Furthermore, the Department argued that the record is unclear as to what degree traffic between the parties is out of balance. Given the uncertainty regarding actual costs and actual traffic flows, the Department did not believe there is enough evidence to find that "bill & keep" will fully compensate both parties.

4. The ALJ

The ALJ did not explicitly address the issue of "bill & keep" but did make an explicit recommendation regarding the prices to be implemented in this proceeding. It appears that the ALJ's decision to recommend prices implies that it is not recommending "bill & keep".

5. Analysis and Action

Under 47 U.S.C. § 252(d)(2)(A) reciprocal compensation is not just and reasonable unless it

> . . . provides for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

Given the uncertainty regarding actual costs and actual traffic flows, the Commission does not believe there is enough evidence in this record to find "bill & keep" will compensate both parties. Therefore, the Commission finds that "bill & keep" is not an appropriate compensation mechanism for transport, termination, and transit.

B. Interim Prices

All parties and the ALJ agreed that permanent rates for exchange of traffic should not be set in this proceeding and should be set in the Commission's generic cost docket (P-442, 5321, 3167, 466, 421/CI-96-1540). At issue here is what interim rates will be established that will be subject to a true-up when permanent rates are set in the generic cost docket.

1. AWS

AWS sponsored proposed interim rates based on its modification of a USWC cost study, making adjustments to the cost of capital and depreciation rates. AWS proposed the following interim rates based on the cost study it submitted in this proceeding:

Type 2B (end office termination)	$ .0025 per minute of use
Type 2A (tandem switching and transport)	$ .0020 per minute of use
Transit (tandem switching and transport)	$ .0020 per minute of use

2. USWC

USWC proposed two alternatives for interim prices:

1. The rates set in the March 1, 1994, agreement between the parties:

Type 2B (end office termination)	$ .0206 per minute of use
Type 2A (tandem switching and transport)	$ .0245 per minute of use
Transit (tandem switching and transport)	$ .0245 per minute of use

or

2. The interim rates set in the U S WEST Consolidated Arbitration docket:

Type 2B (end office termination)	$ .00260 per minute of use
Type 2A (tandem switching and transport)	$ .00556 per minute of use
Transit (tandem switching and transport)	$ .00556 per minute of use

3. The Department

The Department stated that neither party has submitted sufficient information to determine permanent rates for transport and termination. According to the Department, USWC has not supported the use of any cost study including the study it provided to AWS at AWS' request.

The Department noted that the cost study relied on by AWS on this subject is not based on TELRIC principles and was rejected in the Consolidated Arbitration. The Department further stated that AWS' modification of the USWC cost study is not sufficient to make that study appropriate.

The Department recommended that the Commission adopt the interim rates determined in the Consolidated Arbitration docket at this time and establish permanent rates with the guidance of the USWC's Generic Cost docket. The Department further recommended that the interim rates which would prevail at the conclusion of this proceeding, through to the conclusion of the Generic Cost docket, should be subject to true-up as was ordered in the Consolidated Arbitration.

4. The ALJ

The ALJ stated that it is appropriate to adopt as interim rates in this proceeding the interim rates for transport and termination ordered by the Commission in the Consolidated Arbitration Proceeding. The interim rates should prevail from the conclusion of this proceeding to the conclusion of the generic cost docket. The interim rates should be subject to true-up based on the permanent rates established in the Generic Cost proceeding.

5. Commission Action

Section 252(b)(4)(A) of the Act states:

> The State commission shall limit its consideration of any petition under paragraph (1) [Arbitration.] ... to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

Since the cost studies supporting the rates set in the USWC Consolidated Proceeding are not part of the record in this proceeding, they may not be relied on as the best evidence available. Those rates were based on Hatfield 2.2.2 which is not part of the record evidence.

The contract rates in the March 1994 contract between USWC and AWS were approved by the Commission in 1994. However, these rates were not cost-based and were approved under a different regulatory structure. As such, they are unsuitable for adoption as interim rates in this case.

As between USWC's cost study as is and its cost study as modified by AWS, the Commission finds that USWC's unmodified cost study is preferable because the Commission has approved the 13-year depreciation life used in that study. Hence, the Commission finds that the best evidence in the record is USWC's unmodified cost study.

The resulting rates are:

End Office Termination:	.001994
Tandem & Transport:	.001114
End Office Termination and Tandem & Transport:	.003108
Transit:	.001114

These rates do not include an amount of depreciation reserve deficiency (.00130), as originally requested by USWC. USWC subsequently withdrew its request to recover the depreciation reserve deficiency in the rates set in this Order, stating that the depreciation reserve deficiency should be established for all ILECS in a separate study. In these circumstances, the Commission finds that the absence of an amount of depreciation reserve deficiency in the rates established in this Order do not render such rates unreasonable. In so finding, the Commission is not determining that the rates ultimately adopted as a result of the generic cost proceeding will or will not contain an amount of depreciation reserve deficiency. The Commission notes, however, that depreciation reserve deficiencies have never been approved by this Commission.

C. Compensation to AWS From Third Party Carrier

The parties could not agree on what termination charges would be owed to AWS by third party carriers for calls originating with a third party carrier, transiting U S WEST's network, and terminating on AWS' network. Nor could the parties agree on USWC's role in facilitating the collection of these charges by AWS in the interim period when AWS has not developed agreements with third party carriers.

1. AWS

AWS argued that until it can arrange agreements with third party carriers, USWC should not bill or collect termination charges for carriers using its facilities for transited traffic unless those carriers have a reciprocal arrangement themselves. According to AWS, third party carriers and AWS should originate and terminate their own traffic, vis-a-vis each other, on a "bill & keep" basis.

2. USWC

USWC asserted that it is not responsible for the monetary arrangement between originating and terminating carriers. USWC argued that it is not required to negotiate transiting arrangements and to bill for them on behalf of AWS and that AWS' relationships with third party carriers have nothing to do with this proceeding between USWC and AWS.

3. The Department and the ALJ

Neither the Department nor the ALJ commented on this issue.

4. Commission Action

The Commission finds that it is consistent with the Act that USWC be required to make its recording and billing services available to AWS to facilitate AWS' collection of termination charges owed it by third party carriers. Of course, if AWS does use USWC's recording and billing services it must compensate USWC at a reasonable rate.

D. Compensation for Traffic Terminated at AWS' MSCs

The parties could not agree whether AWS should be compensated for its Mobile Switching Center (MSC) at the same rate USWC is compensated for its tandem switch or at the lower, end office rate.

1. AWS

AWS argued that it should be compensated at the higher tandem switch rate for use of its MSCs. AWS stated that its MSC can and does terminate calls to any physical location to which USWC's tandem can terminate calls and performs functions remarkably similar to a USWC tandem switch.

AWS referred to the Commission's decision in the Consolidated Arbitration where the Commission stated that competing local exchange company (CLEC) switches perform the same function as the incumbent's tandems in that they both route and carry the calls of the other carrier's subscribers. AWS argued that there is no demonstrable difference between a CLEC switch, AWS' MSC, and USWC's tandem.

2. USWC

U S WEST's position is that AWS' switched network does not perform a tandem switching function and, therefore, does not qualify for higher tandem switching rates. USWC argued that AWS' switch functions as an end office switch, that AWS provides only a single switching function, and that AWS does not incur the costs that USWC does in performing two switching functions.

USWC also rejected AWS' argument that USWC should pay tandem rates, as opposed to end office rates, simply because AWS claims to have higher costs. The key factor, according to USWC, is that AWS' MSC does not perform a tandem function, that even though AWS may employ an IS41 Tandem switch, that equipment is not used to perform a tandem switching function.

3. The Department

The Department supported the position taken by AWS, that AWS's MSCs should receive compensation at the tandem switch rate. Citing the FCC Order at Paragraph 1090, Department stated that state commissions are directed to consider the functionality and the geographic area to be served by a competitor's switch in comparison to the LEC's switch. The Department noted that AWS' MSC switches appear to function in both end office and tandem capacities, that AWS' cell site control switch and cell sites work together to perform end office functions. Additionally, the Department noted that AWS' MSCs perform transit functions by routing calls to other wireless carriers.

4. The ALJ

The ALJ noted that Paragraph 1090 of the FCC's First Order directs that states consider the functionality and geographic area to be served by a competitor's switch in comparison to the LEC's switch. The ALJ found that AWS' MSC switches appear to function in both end office and tandem capacities, that AWS' cell site control switch and cell sites work together to perform end office type functions, and that AWS' MSCs perform transit functions by routing calls to other wireless carriers to complete the roaming calls of its customers. The ALJ further noted that by virtue of the MSCs' technical capabilities and interconnections with other networks and AWS's roaming agreements with other wireless carriers, AWS subscribers can place and receive calls for out-[state] Minnesota. The ALJ concluded, therefore, that AWS' MSCs are comparable to USWC's tandem switches and, as such, warrant compensation at USWC's tandem rate for USWC traffic terminated at AWS's MSC.

The ALJ expressed surprise that several other State Commissions have determined that a wireless network does not qualify to be compensated at the tandem rate, in light of the quantum of proof imposed on a LEC on this type of issue and the Act's focus on competition and accommodation to new technologies. In any event, the ALJ noted, the Minnesota Commission addressed this issue as it relates to Minnesota competing local exchange carriers who do not have wireless networks in the Consolidated Arbitration Proceeding Order. See Order, pages 70-72. In that Order, the Commission stated that it was inappropriate to focus on "certain technical and functional differences between U S WEST's tandems and typical CLEC switches". The ALJ stated he was unpersuaded that the technical differences between AWS's MSC warrants treating AWS's MSC like a USWC end office and concluded that USWC failed to prove that the difference justifies different compensation in rates.

5. Commission Analysis and Action

Paragraph 1090 of the FCC's Order states, in part:

> States shall also consider whether new technologies (e.g. fiber ring or wireless networks) **perform** functions similar to those performed by an incumbent LEC's tandem switch and thus, **whether some or all calls** terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate. (emphasis added.)

The Commission has considered the functionality and geographic factors cited by the FCC and concludes that some but not all of the calls terminating on AWS' network should be priced at the same rate USWC is compensated for its tandem switch.

All the parties and the ALJ acknowledged that AWS' MSC switches function in end office capacities for some calls and in tandem capacities for others. The Commission finds that actual performance of the switch on a given call, rather that the capacity to perform with respect to that call is the critical question. n1 The Commission finds, therefore, that it would be appropriate to compensate AWS at the higher tandem rate for calls that require its switch to perform tandem switching functions and to be compensated at the lower end office rate for calls that simply require end office function.

> n1 If the FCC paragraph meant that all calls terminated on a switch that had the capacity to perform tandem switch functions should be compensated at the tandem switch rate, the FCC's reference to the Commission determining whether "some or all" of the calls should be so compensated would have no meaning. To give meaning to the "some or all" language, actual performance of the switch on an given call, rather than abstract capacity to perform, is the key to the rate at which the terminating switch function should be compensated on such a call.

The Commission will direct USWC to work out, in conjunction with AWS, an appropriate means to identify the functions actually performed with respect to the USWC calls terminated at AWS's MSC and to compensate AWS accordingly.

E. Access Charges for Intra-MTA n2 Roaming Calls

> n2 MTA refers to the Major Trading Area, which is the geographical area considered by the FCC to be the local calling area of a CMRS provider, such as AWS. Roaming areas are much smaller geographic areas defined either by the signal reach of a cell site or by marketing practices which may aggregate several cell sites into a single roaming area for billing purposes. As such, a CMRS subscriber may make a call within the MTA, that is subject to roaming charges, and that crosses a state boundary.

The Major Trading Area (MTA) is the geographical area considered by the FCC to be the local calling area of a CMRS provider, such as AWS. The MTA relevant to AWS in this proceeding covers a large area: almost all of Minnesota, all of North Dakota, over half of South Dakota, a significant portion of Wisconsin, and a small portion of Iowa. The parties could not agree on the compensation for calls that 1) originate and terminate within the MTA and 2) cross state boundaries.

1. ASW

AWS asserted that the MTA is the appropriate definition of its local service area and, as such, calls originating and terminating within the MTA should be subject to transport and termination charges, not interstate or intrastate access charges.

2. USWC

USWC argued that intra-MTA traffic that transits interstate facilities is subject to interstate access charges and that AWS should be responsible for identifying such traffic. USWC argued that it charged AWS access charges under the 1994 pre-existing agreement and, therefore, it is entitled to continue to collect those charges. USWC claimed that under the pre-existing agreement access charges were not differentiated, but were included in a single "blended rate" that included toll

charges. USWC asserted that it is unnecessary to find that access charges were explicitly delineated under the pre-existing contract in order to find that the current payment of charges by AWS is appropriate.

3. The Department

The Department cited Paragraph 1043 of the FCC Order to show that the FCC seeks to maintain the status quo ante with respect to access charge payments for interstate roaming traffic. The Department argued that USWC has not met its burden of proof on this issue, i.e. that it has not provided evidence that it has been collecting interstate access from AWS in the past under the parties' 1994 agreement. Therefore, the Department argued, USWC is not entitled to collect interstate access charges with respect to intra-MTA roaming calls.

4. The ALJ

The ALJ recommended that USWC not be allowed to assess AWS interstate access charges for intra-MTA roaming. The ALJ noted that Paragraph 1043 of the FCC's First Order specifically refers to interstate roaming traffic, and states in part:

> ...the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS can continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.

Based on this language, the ALJ concluded that the FCC is seeking to maintain the status quo ante with respect to access charge payments for interstate roaming traffic. The ALJ found that USWC has failed to prove that AWS' originating intra-MTA roaming traffic was subject to access charges prior to the FCC's First Order and therefore was not entitled to apply such charges to such traffic now.

5. The Commission's Analysis and Action

In the Commission's view, the FCC Order (Paragraph 1043) seeks to maintain the status quo ante regarding intra-MTA roaming charges. The Commission finds that USWC has failed to prove that such traffic was subject to interstate access charges prior to the FCC's Order. Therefore, the Commission concludes that USWC must not assess AWS interstate or intrastate access charges for intra-MTA roaming traffic.

F. Compensation for Terminating Paging Calls

The parties could not agree whether AWS was entitled to receive compensation from USWC for terminating paging calls originating in USWC's service area.

1. AWS

AWS argued that it is entitled to be compensated for the termination of paging traffic originated by USWC, and that AWS need not compensate USWC for facilities used to deliver such calls because USWC is the originator of such calls. Regarding USWC's claim that AWS has the duty to provide reciprocal compensation, AWS references Paragraph 1008 of the Order which states, in part:

> Accordingly, LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, ...

AWS also cited Paragraph 1092 of the Order which states, in part:

> Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers' networks ...

2. USWC

USWC argued that AWS is not entitled to receive compensation from USWC for terminating paging calls originating

in USWC's service area. USWC acknowledged that the duty to provide reciprocal compensation for transport and termination arises under § 251(b)(5) but argued that reciprocal compensation is inappropriate for AWS' paging services because paging services are one-way communication, i.e. no calls originate on AWS' facilities to be terminated by USWC.

3. The Department

The Department agreed with AWS. The Department contended that it has seen no legal authority offered in this proceeding to permit the ALJ to depart in this instance from the general rule that each party pays for calls originating on their own network (Initial Brief, pp. 16-17). Referencing the FCC First Report and Order, Paragraphs 1008, 1042, and 1092, the Department argued that (i) paging providers are considered to be telecommunications carriers, (ii) LECs are prohibited from charging paging providers for calls originating on other carrier's networks, and (iii) parties that terminate page calls must be compensated by the company upon whose network the page call originated.

4. The ALJ

The ALJ recommended that AWS not be required to pay for the termination of any USWC originated calls through direct termination charges. The ALJ found that AWS is allowed to charge for the termination of USWC originated paging calls based on the outcome of the FCC's future review of this issue that is provided under the FCC Order.

5. Commission Analysis and Action

Paging providers are defined in the FCC Order as "telecommunications carriers," and under the Act, all telecommunications carriers are entitled to reciprocal compensation from incumbent LECs. (47 U.S.C. § 251(b)(5)). The FCC Order states the rule clearly:

> Accordingly, LECs are obligated, pursuant to section 251(b)(5) and the corresponding pricing standards of section 252(d)(2), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, ... (FCC Order, P 1008)

The FCC has reiterated this rule as follows,

> Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, ... (FCC Order, P 1092).

The Commission finds no exclusion in the Act or the FCC Order that would prevent application of the clear rule that AWS should be compensated by USWC for terminating paging calls originating in USWC's service area.

G. Dedicated Paging Facilities

The parties could not agree whether AWS should be required to pay for facilities required to connect AWS' dedicated paging facilities to USWC's network.

1. AWS

With respect to charges for paging facilities, AWS relied on paragraphs 1092 and 1042 which state, respectively, in part as follows:

> Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers' networks ...

and

> We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must

> cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

AWS argued that by trying to impose facilities charges on AWS, as it has done in the past, USWC is trying to circumvent this rule.

2. USWC

USWC proposed that AWS should be required to pay for facilities required to connect AWS' dedicated paging facilities to USWC's network. USWC noted that Southwestern Bell requested clarification from the FCC regarding its rules for interconnection between LECs and paging carriers and that on May 22, 1997, the FCC established a pleading cycle to receive comments on Southwestern Bell's request. USWC asked that any Commission decision should be designed to accommodate later action by the FCC.

3. The Department

The Department stated that no legal authority has been offered in this proceeding that would justify permitting the ALJ to depart from the general rule that each party pays for calls originating on their own network. The Department argued that USWC benefits from the facilities used to transport paging traffic because those facilities permit USWC's customers to place paging calls. Additionally, the Department noted that paging calls that originate from USWC customers generate return calls to USWC's network for which USWC is compensated for termination.

4. The ALJ

The ALJ recommended that the AWS should not be required to pay USWC for any usage of facilities associated with the delivery of paging services. The ALJ noted that the FCC expressly prohibits the imposition of charges as they had been applied in the past, stating at Paragraph 1042 of its Order:

> We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge. (FCC Order, Paragraph 1042) (emphasis added).

The ALJ cited Paragraph 1042 of the FCC Order and stated that the requirement that paging providers be compensated for the termination of LEC-originated traffic similarly requires that they not be charged for the facilities used to deliver such traffic. Consequently, the ALJ reasoned, the facilities used for the delivery of such traffic must also be paid for by USWC.

5. The Commission's Analysis and Action

The FCC Order Paragraph 1042 quoted above clearly states that incumbent LECs must provide traffic to the CMRS provider without charge. FCC Rule § 51.703 (stay lifted) states:

> A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.

As a result, the Commission finds that AWS is not required to compensate U S WEST for the facilities used to deliver paging traffic to AWS' paging network.

H. Effective Date for Reciprocal Compensation

The parties agree that reciprocal compensation is required by FCC rules, but disagreed as to the date when reciprocal compensation should begin.

1. AWS

AWS argued that the effective date for reciprocal compensation should be October 3, 1996, the date when AWS submitted

its request for interconnection to USWC.

2. USWC

USWC argued for a November 1, 1996 effective date because that was the day the 8th Circuit Court lifted the stay of the FCC rules.

3. The Department

The Department argued that the effective date should be October 3, 1996. The Department argued that in lifting the stay, the Court determined that incumbent LECs, such as USWC, were not entitled to protection from FCC rule 51.717. Consequently, the Department reasoned, USWC should not receive a benefit that the Eighth Circuit has determined the Company is not entitled to have.

4. The ALJ

The ALJ recommended an October 3, 1996 effective date. The ALJ reasoned that an order of an administrative agency, such as the FCC, that is initially stayed and then allowed to go into effect is effective as of its initial issuance date. The ALJ noted although the Eighth Circuit Court of Appeals temporarily stayed the effectiveness of FCC Rule 51.717(b), the Court lifted the stay on November 1. Thus, the Rule went into effect permitting reciprocal compensation from the original submission of an interconnection request. In this case, the ALJ found, lifting of the temporary stay rendered the Rule effective on October 3, the day AWS submitted its request for interconnection.

The ALJ stated that if AWS does not receive reciprocal compensation from the original effective date of the FCC Order, AWS will be denied the benefit which it had been unjustly restricted from receiving due to the erroneous entry of a stay.

5. Commission Action

The Commission is persuaded by the arguments presented by AWS, the Department and the ALJ and finds that the effective date for beginning reciprocal compensation is October 3, 1996.

I. Rates Pending Order

The parties disagreed over the level of reciprocal compensation rates should apply between the commencement of reciprocal compensation until an Order is issued in this proceeding.

1. AWS

AWS argued that the March 1994 contract expired on December 31, 1996, so the contract rates set by that contract cannot be used for reciprocal compensation. AWS stated that the Amendment (Exhibit 14) provides for a true-up for the remaining months of 1996 after the 1994 contract expires and the Interim Agreement (Exhibit 13) provides for a true-up for the period beginning January 1, 1997, to the "results" of this arbitration.

2. USWC

USWC argued that the March 1994 contract contained an "evergreen clause" which provided that after December 31, 1996, the contract would remain in effect on a month by month basis until written notice was given by one of the parties. USWC claimed that the Exhibits relied on by AWS clearly indicate that the parties contemplated that the March 1994 contract would remain in effect until the resolution of the dispute through negotiation and/or arbitration. USWC characterized the good faith lump sum payments (provided for in the Amendment and the Interim Agreement) as an expedient to allow the parties to continue their business relationship without interruption of service.

3. The Department

The Department took no position on whether the subsequent agreements between the parties have supplanted the March 1994 agreement but noted that the 1994 rates should prevail unless the Commission determines that the amendment and interim agreements are binding.

4. The ALJ

The ALJ found that the record did not conclusively establish whether that agreement was terminated on December 31, 1996 or continued in effect after this date. To determine the intention of the parties, the ALJ applied that parole evidence rule and considered the language contained in the pertinent agreements, Exhibits 13, 14 and 15. Upon review of these exhibits, the ALJ concluded that the 1994 contractual relationship between the parties continued and that the parties intended to clarify compensation issues.

According to the ALJ, Exhibits 13, 14 and 15 show that AWS and USWC had substantial, dynamic disagreements over their compensation relationship and that these parties intended to change their compensation relationship. The ALJ found that USWC has failed to prove that the parties intended to continue the 1994 compensation rates after December 31, 1996. The ALJ indicated that the parties should honor the agreements identified in Exhibits 13, 14 and 15, but noted that the exhibits focus primarily on true-ups and do not clearly state what rates apply.

5. The Commission's Analysis and Action

The question whether the parties modified the March 1994 contract is a red herring in this proceeding that the Commission will not pursue. Whether the contract terminated or not is not relevant to the Commission's decision in this proceeding. Any changes to this agreement, subsequent to AWS' request for renegotiation, are a contractual dispute between two private parties and not a matter that need concern the Commission.

FCC Rules § 51.717 set the initial reciprocal compensation rate at that rate prevailing in the pre-existing agreement until the state commission approves a different rate. The parties agree as to the rates set by their March 1994 contract and the Commission has not approved any rate agreement other than the going-forward rates set in this Order. See above at Section B on pages 6-9. The rates in existence at the beginning of reciprocal compensation were set by Commission approved tariff. No other rates have been approved by this Commission since then. Whatever the parties arranged between themselves subsequently does not alter the fact that the Commission has approved no other rates than those in the March 1994 contract.

Accordingly, the Commission will make no decision regarding the status of the parties' interim agreements (Exhibits 13, 14, and 15) and direct the parties to seek resolution of their dispute on this issue in another forum. The rates which shall prevail from the commencement of reciprocal compensation until an arbitration order is issued in this proceeding are the rates set by the parties March 1994 agreement. No true-up is warranted.

J. Pick and Choose Option

1. AWS

AWS claimed that USWC must make available to AWS any rates, terms, and conditions that have been approved in agreements between USWC and other telecommunications carriers. AWS cited Federal Act Section 251(i) as obligating USWC to 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 upon the same terms and conditions as those provided in the agreement.

AWS argued that the Federal Act and FCC Rules support the interpretation that individual provisions of publicly filed interconnection agreements can be selected by a requesting carrier.

2. USWC

USWC argued that the Commission should reject AWS' recommended pick and choose provision in this case. USWC noted that the FCC Rules and Orders allowing a pick and choose provision were stayed by the Eighth Circuit Court of Appeals. USWC further noted that in staying the rule, the Court stated that such a provision would operate to undercut any agreements that were negotiated or arbitrated. USWC also noted that the Minnesota Commission has rejected the pick and choose rule in the Consolidated Arbitration Proceeding, Docket Nos. P-421/M-96-729, 855, 909.

3. The Department

The Department analyzed the Federal Act, FCC Rules and Orders, and the Commission's earlier decision in the Consolidated Arbitration Proceeding. The Department noted that the FCC's rules which would have permitted AWS to "pick and choose" terms from other agreements, has been stayed in Federal Court. The Department further noted that in its earlier ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT in Docket Nos. P-421/M-96-729, 855, 909, the Commission directed that the following language be added to the Agreement:

> The Parties agree that the provisions of Section 252(i) of the Act shall apply, including final state and federal interpretive regulations in effect from time to time.

The Department recommended that this language also be required in the agreement between AWS and USWC because of the unsettled nature of the law.

4. The ALJ

According to the ALJ, the applicable law is Section 252(i) of the Act which provides:

> 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.

The ALJ noted that in 47 C.F.R. § 51.809, the FCC interpreted Section 252(i) to require local exchange carriers to make available

> ...any individual interconnections, 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.

However, the ALJ also noted that on October 15, 1996, the Eighth Circuit Court of Appeals stayed 47 C.F.R. § 51.809, the so-called "pick and choose" rule at issue. Accordingly, the ALJ recommended that the parties include in their agreement a recognition that the law on this issue is unsettled, as was ordered in the Commission's March 17, 1997 Order after reconsideration in the Consolidated Arbitration Proceeding.

5. Commission Action

For the reasons articulated above by the Department and the ALJ, the Commission finds it appropriate to direct the parties to include in their agreement language adopted by the Commission in the consolidated arbitration that recognizes the unsettled state of the law on the application of section 252(i). n3 The specific language is:

> The parties agree that the provisions of section 252(i) of the Act shall apply, including final state and federal interpretive regulations in effect from time to time.

> n3 In making their recommendations, both the Department and the ALJ noted that the Eight Circuit Court of Appeals had stayed 47 C.F.R. § 51.809, the so-called "pick and choose" rule. The fact that subsequently the Eighth Circuit Court of Appeals has issued a final order striking down the "pick and choose" rule (July 18, 1997) strengthens their recommendations and the further demonstrates the reasonableness of the Commission's decision on this issue.

K. Points of Interconnection

The parties could not agree on which of them should determine the points of interconnection.

1. AWS

AWS argued that it is entitled to interconnection at whatever point it believes is technically feasible subject to the same reasonable space and equipment limitations that are imposed on other LECs and incumbent LECs. AWS also claimed that it entitled to physical collocation for remote switching units (RSUs) and digital loop carriers (DLCs) or virtual collocation. AWS cited Federal Act Sections 251(c)(2) and (6), FCC Rule 51.305, and FCC Order, Paragraphs 212 and 573, in support of its positions.

AWS also argued that USWC is not entitled to select points of interconnection. AWS stated that the burden was on USWC to demonstrate with clear and convincing evidence that a requested point of interconnection is not technically feasible and alleged that USWC has not demonstrated any infeasible interconnection in this proceeding.

2. USWC

USWC stated that it would offer the choice of virtual collocation, physical collocation, or mid-span meet arrangements as the points of interconnection if they are technically feasible. Additional points of interconnection must be requested via the bona fide request process.

3. The Department

The Department supported AWS' right to determine where to interconnect subject to interconnection points being technically feasible for USWC. The Department cited the Commission's decision in its ORDER RESOLVING ARBITRATION ISSUES issued December 2, 1996 in the Consolidated Arbitration Case. In that Order, the Department noted, the Commission required USWC to allow interconnection at any technically feasible point on its network requested by the CLEC.

4. The ALJ

The ALJ agreed with the Department that the Commission/ should adopt language similar to what it adopted in the Consolidated Arbitration Order, providing that AWS should be entitled to interconnect its network with USWC at any point that is technically feasible subject to space and equipment limitations.

5. Commission Action

The Federal Act and FCC rules are clear. AWS has the right to interconnect and USWC will be required to allow interconnection at any technically feasible point on the network that AWS requests.

L. One-Mile Distance Mid-Span Meet Point

1. USWC

USWC proposed that a limit be placed on the length of facilities that USWC must construct to establish a mid-span meet point arrangement. USWC stated that a reasonable standard would be to limit USWC's construction obligation to no more than one mile of facilities and no more than one-half the distance of jointly provided facilities. USWC also recommended that direct trunks should be established when traffic between USWC and AWS exceeds 512 CCS. USWC explained that the reason for this recommendation is to ensure an efficient mix of direct trunk transport and tandem switching.

2. AWS

AWS objected to USWC's proposal, arguing that the Federal Act and FCC Order allow AWS to select any technically feasible method of interconnection and access to unbundled network elements with no limitation on distance.

AWS noted that USWC's proposed one mile limitation for meet points is contrary to what USWC agreed to in the consolidated arbitration proceeding and argued that USWC should not be permitted to discriminate against AWS in this proceeding by arbitrarily imposing a distance limitation which shifts the costs of interconnection to AWS.

AWS proposed that the companies negotiate meet points and each party should be responsible for costs to construct facilities to the meet points.

3. The Department

The Department cited the Commission's ORDER RESOLVING ARBITRATION ISSUES issued December 2, 1996 in which the Commission noted that USWC agreed to negotiate mid-span meet points of interconnection without any preset distance limitation. The Department recommended a similar determination in this proceeding that no distance limit be set.

4. The ALJ

The ALJ recommended the same treatment in this docket as the Commission adopted in the Consolidated Arbitration Proceeding, i.e. to not limit the distance for meet points.

5. Commission Action

The Commission finds that the Federal Act and FCC Order allow AWS to select any technically feasible method of interconnection and access to unbundled network elements with no limitation on distance. Accordingly, the Commission will not accept USWC's proposal and will adopt AWS' no limit midspan meet point recommendation.

M. Collocation of AWS' RSUs and DLCs

1. AWS

AWS sought authority to collocate remote switching units (RSUs) and digital loop carrier systems (DLCs) at USWC premises. AWS argued that USWC's opposition to collocation of any equipment that is not "transmission equipment" is contrary to FCC and Minnesota Commission decisions. AWS acknowledged that the FCC stated that it would not immediately require an ILEC to permit collocation of switching equipment. However, AWS stated that the FCC also left it to State Commission's to determine whether particular equipment is used for interconnection or access to unbundled elements and noted that the Minnesota Commission determined in the Consolidated Arbitration Proceeding that collocation of RSUs and DLCs equipment is required.

Furthermore, according to AWS, USWC witness Londgren agreed to allow collocation of RSUs and DLCs consistent with the Commission's limitations determined in the consolidated arbitration proceeding.

2. USWC

In its Brief, USWC withdrew its objection to collocating RSUs based on the Commission's decision in the Consolidated Arbitration Proceeding. USWC acknowledged that the Commission has adopted AWS' position on collocating in other arbitration proceedings but noted that those decisions have been appealed. Pending the results of the appeal, USWC agreed to collocate RSUs in its end offices.

3. The Department

The Department noted that the Federal Act and FCC Rules had been interpreted by the Commission in its decision in the Consolidated Arbitration Proceeding. The Department stated that there was no reason to change or modify the Commission's earlier decision to allow collocation of RSUs and DLCs.

4. The ALJ

The ALJ stated that the Commission has explicitly ordered that U S WEST permit RSUs and DLCs to be collocated. Consolidated Arbitration Order at 16. The Commission found that collocated equipment need not be exclusively used for interconnection or access to unbundled network elements. According to the ALJ, AWS should be entitled to physical collocation of equipment necessary for interconnection or access to unbundled network elements, including RSUs and DLCs.

5. Commission Action

Consistent with its reasoning and action in the Consolidated Arbitration Order, the Commission will allow the collocation of RSUs and DLCs on USWC's premises. It is understood that, as stated in the Consolidated Arbitration Order, RSUs are not to be used to avoid toll access charges by USWC.

N. Definition of "Collocated Premises"

1. USWC

USWC argued that the definition of "collocated premises" should be restricted to USWC's central offices and tandems, in which event requests for collocating on premises other than tandem and end office switching facilities would not be automatically granted but would be based on a bona fide request process.

2. AWS

AWS disagreed with USWC's proposed definition of "collocated premises." AWS argued that the Federal Act, Section 251(c)(6) obligates ILECs to provide nondiscriminatory access to collocated space at its "premises." AWS contended that the FCC has determined that premises include a broad range of facilities including central offices, wire centers, tandem offices, structures owned or leased, and any other structures which house network facilities and public rights-of-way. AWS asserted that USWC's proposed restriction contradicts the FCC's determination that collocation can only be limited if the ILEC demonstrates that a particular location is technically infeasible. AWS noted that USWC has not presented any evidence of infeasibleness of locations at which AWS seeks collocation.

AWS urged that its contract language should be adopted since (according to AWS) it is consistent with FCC Rules and the Minnesota Commission decisions in the Consolidated Arbitration Proceeding.

3. The Department

The Department stated that the Commission adopted the FCC's position that collocation must be permitted at LEC central offices, serving wire centers, and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities. The Department stated that there is no reason to modify or change the Commission's decision on collocation in this proceeding.

4. The ALJ

The ALJ recommended the same treatment in this docket as the Commission adopted in the Consolidated Arbitration Proceeding. According to the ALJ, "collocated premises" should be broadly interpreted to include all buildings and other structures that contain network facilities.

5. Commission Action

Consistent with its reasoning and action in the Consolidated Arbitration Order, the Commission will not restrict the definition of "collocated premises" to central offices and tandems as urged by USWC.

O. Determination of Exhausted Space

1. USWC

USWC proposed to condition physical and virtual collocation on space availability. The only party to address USWC's proposal was AWS.

2. AWS

AWS noted that the FCC and the Minnesota Commission mandated that space for collocation be allocated on a first-come, first-served basis. FCC Order P 585; Consolidated Order, p. 17. AWS stated that while the FCC permitted ILECs to retain a "limited amount of floor space for defined future uses," ILECs were not permitted to reserve space for future use on terms more favorable than those applicable to other telecommunications carriers seeking space for their own use. FCC Order PP 585, 602, 604.

AWS asserted that to the extent USWC proposed to reserve space for its own use that exceeds the limitations imposed by the FCC its proposal must be rejected. AWS stated that if USWC denies AWS collocation space due to space exhaustion, the Commission should require USWC to provide detailed floor plans and explain the uses of its space and steps taken to avoid space exhaustion.

3. Commission Action

Consistent with its reasoning and action in the Consolidated Arbitration Order (page 17), the Commission will require USWC to explain and demonstrate the uses of its space if it denies AWS access due to space exhaustion.

P. Nondiscriminatory Access to Unbundled Network Elements

1. AWS

AWS asserted that USWC is required by the Federal Act, Section 251(c)(3) to provide nondiscriminatory access to unbundled network elements at any technically feasible point. According to AWS, USWC must negotiate in good faith for any special unbundling required for a wireless application.

AWS noted that FCC Rule 51.319 lists the following network elements that U S WEST must make accessible: local loop, network interface devices, local and tandem switches, interoffice transmission facilities, signaling networks, call-related databases, operational support systems functions, and operator services/directory assistance facilities. AWS noted that the FCC also stated that State Commissions could require the unbundling of additional network elements. (FCC Order, P 366).

AWS recommended that the Commission require USWC to negotiate and make available other unbundled elements that are necessary for wireless applications.

2. USWC

USWC asserted that it complies with all FCC requirements for providing unbundled network elements and that there is no dispute on this issue. USWC, in accordance with FCC rules, will negotiate with other carriers to make additional network elements available. USWC stated that AWS has not identified any specific additional network elements which it seeks to unbundle.

3. The Department

The Department noted that the FCC requires that an ILEC must make available at least seven network elements and allows state commissions to require further elements to be unbundled. The Department supported AWS' request that the Commission require the parties to negotiate for additional unbundled network elements rather than a requirement that AWS follow the bona fide request process suggested by USWC.

4. The ALJ

According to the ALJ, 47 U.S.C. § 251(c)(3) requires an incumbent LEC to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point. The FCC's rule requires the ILEC to unbundle the following elements: network interface device, local loop, switching capability, interoffice transmission facilities, signaling networks, call-related data bases, operational support systems, and operator services and directory assistance. 47 C.F.R. § 51.319.

The ALJ found that USWC's proposed bona fide request (BFR) process for each unbundled element is inconsistent with the FCC rules and should not be allowed. The ALJ stated that USWC is required to provide nondiscriminatory access to unbundled network elements at any technically feasible point. A network element is considered technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier. The ALJ stated that if AWS determines that another aspect of unbundling is required for a specific wireless application, USWC must negotiate with AWS in good faith for such application. Such an element must be provided unless USWC demonstrates it is not technically feasible.

5. Commission Analysis and Action

In the Consolidated Arbitration ORDER AFTER RECONSIDERATION, the Commission rejected USWC's request for a BFR process for each request for subloop access. The Commission stated:

> U S WEST's request for a BFR process for each request for subloop access reverses the thrust of the Act and the FCC rules and the burden of proof established in the Commission's own procedural order." (Reconsideration Order at 16).

The Commission finds that this reasoning should apply with equal force to this case. The Commission will require unbundling of additional elements on a case-by-case basis if it is technically feasible. 47 C.F.R. § 51.317. Under the burden of proof established for this proceeding, USWC will have the burden of proving the unavailability of particular unbundled network elements. Absent such a showing, USWC must provide nondiscriminatory access to unbundled network elements, including specific wireless applications, through negotiation.

Q. Access to Operational Support Systems

Operational support systems (OSS) include a variety of computer databases and systems which support network operating services. The parties did not agree whether USWC should be required to develop and implement electronic interfaces for access to its operational support systems for ordering, provisioning and maintenance/repair functions.

1. AWS

AWS complained that USWC has denied its legal obligation to provide nondiscriminatory access to its support systems, arguing that its legal obligation under 251(c) is mutually exclusive. According to AWS, USWC has separate and independent duties to: (1) negotiate in good faith; (2) interconnect facilities and equipment; (3) provide nondiscriminatory access to network elements on an unbundled basis; (4) offer telecommunications services for resale at wholesale rates; and (5) provide physical and virtual collocation.

AWS argued that without greater specificity in an agreement, it will not be guaranteed the same access to information as is available to USWC. AWS' proposed Interconnection Agreement Section 3 contains terms for the provision of an interface for transferring and receiving Order Confirmation, Completion Notices, and other information. Section 5(c) contains AWS' proposal for the provision of maintenance/repair interface including the implementation of uniform industry standards being developed by the Order and Billing Forum.

2. USWC

USWC countered that AWS did not raise this issue in its petition and therefore the Arbitrator need not consider it. According to USWC, the Federal Act limits the Commission's consideration of issues to those that are raised in the petition and in the response. USWC stated that it has not received a proposal from AWS on electronic access and without knowing AWS' requirements, it cannot formulate a response. USWC stated that AWS and U S WEST have only had limited negotiation of system access and that it (USWC) is willing to continue negotiations on this issue.

USWC argued that neither the Federal Act nor the FCC Order requires unbundled access to OSS for interconnection. USWC stated that the requirements stated in FCC Rules P51.305 are extensive and detailed and do not include access to operational support systems. Because both of the interconnecting companies maintain all facilities required to service their end use customers, there is no need to access the other carrier's OSS. USWC stated that it will evaluate any request from AWS to determine if it is achievable, the timing and the cost.

3. The Department

The Department recommended granting AWS' request for real time, electronic interfaces (access) to USWC's OSS services: ordering, provisioning, and maintenance systems. The Department stated that FCC Rule Section 51.319(f) specifically requires LECs to unbundle and provide nondiscriminatory access to the network operations support systems functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions. The Department also noted that in the Consolidated Arbitration Proceeding, the Commission interpreted the FCC First Order and refused to restrict how a purchaser of unbundled network elements might use those unbundled elements.

4. The ALJ

The ALJ noted that USWC's operational support system is a network element. The ALJ reasoned that because USWC's

operational support system is a network element, both the Act and FCC mandate access on a nondiscriminatory basis. To meet the Act's and the FCC's requirements, the ALJ stated, USWC must provide access to AWS at least equal in quality to that enjoyed by USWC. Because the record is void of any proposal by USWC to provide such parity, the ALJ concluded, it is reasonable to apply the electronic interfaces proposed by AWS.

5. Commission Action

The Commission finds that OSS is a network element. As required by the Act and FCC, therefore, the Commission will direct USWC to grant AWS access to these services on a nondiscriminatory basis. This decision is consistent with the Commission's refusal in the Consolidated Arbitration Proceeding to restrict how a purchaser of unbundled network elements might use those unbundled elements. It is also consistent with the Eighth Circuit Court of Appeals' July 18, 1997 order on petitions for review of the FCC's rules implementing the Telecommunications Act of 1996.

R. Remedies for Service Quality Violations

1. AWS

AWS recommended standards relating to network reliability, network interface specifications, error performance, operations, and administration of outages. AWS stated that its proposed service quality standards should be met by USWC and specific remedies imposed if not met.

2. USWC

USWC recommended that service quality standards be determined in a separate proceeding similar to how costs are being addressed. Although no current pending service quality case includes AWS, the standards determined in Docket No. 421/M-96-729,855,909-Merged could be applied to the U S WEST-AWS relationship.

Regarding performance credits, USWC objected to AWS' attempt to enforce penalties on USWC for not meeting AWS' requested performance standards. USWC asserted that penalties are illegal, unwarranted and unrelated to any harm that AWS may suffer. USWC argued that there is no evidence in the record that these penalties are appropriate nor does the Act or FCC rules permit them in the context of an arbitrated proceeding. USWC concluded that if AWS believes it is being illegally discriminated against it can seek remedies from the Commission, the FCC or the courts.

3. The Department

The Department stated the Federal Act requires that the quality of an unbundled element and the access to such unbundled element shall be at least equal in quality to that which the incumbent LEC provides to itself. The Department further noted that the FCC stated in its rules that if technically feasible the quality of an element and access to that element may "upon request, be superior in quality to that which the incumbent LEC provides to itself." The Department noted that competitors purchasing unbundled elements have a legitimate interest to ensure that their customers receive high quality service. Without specific service quality or performance standards a competitor may be unable to ensure the quality of service it expects. The Department stated that if USWC does not provide a sufficient level of service quality for its own customers, competitors should not be limited to that standard.

The Department noted that the Commission's service quality rules set broadly defined minimum standards. As such, they should not be the basis for setting service quality standards for competitors. The Department stated that AWS's proposal, including penalty provisions, reasonably addressed its needs as a competitor using USWC's network elements and services.

4. The ALJ

The ALJ noted the importance of service quality standards in the provision of wireless services. Over the years, the ALJ observed, AWS has experienced problems with USWC in terms of provisioning delays, service outages and blocking. The ALJ stated that AWS has drafted detailed quality and performance standards which relate directly to the functions of Network Reliability, Network Interface Specifications, Error Performance, Operations and Administration of Outages. The ALJ found that each of the proposed quality and performance standards is based on specific industry standards, reliability objectives and performance specifications.