

**BEFORE THE PUBLIC UTILITIES
COMMISSION
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE PETITION FOR ARBITRATION) ARBITRATION DECISION;
ON BEHALF OF WESTERN WIRELESS CORPORATION) NOTICE OF ENTRY OF
WITH U S WEST COMMUNICATIONS, INC.) ORDER

) TC96-160**

On September 6, 1996, the Public Utilities Commission (Commission) received a Petition for Arbitration from Western Wireless Corporation, d/b/a Cellular One (Western Wireless). Western Wireless petitioned the Commission, pursuant to Section 252(b)(1) of the federal Telecommunications Act of 1996 (federal Act), to arbitrate open issues related to its interconnection negotiations with U S WEST Communications, Inc. (U S WEST).

On October 1, 1996, the Commission received the Response of U S WEST to Western Wireless' Petition for Arbitration. Along with the Response of U S WEST, U S WEST also filed a Motion to Dismiss that portion of Western Wireless' Petition for Arbitration that sought to use the Federal Communication Commission's proxy rates during the course of the arbitration while new interconnection rates were being established. The Commission held a prehearing conference on October 7, 1996, at which time it directed the parties to file prefiled testimony along with a list of resolved and unresolved issues on or before October 28, 1996; allowed the parties to file optional re al testimony on or before November 15, 1996; and scheduled a hearing on this matter on November 26-27, 1996, in Room 412 of the State Capitol, Pierre, South Dakota.

The South Dakota Independent Telephone Coalition (SDITC) filed a Petition to Intervene on September 20, 1996. A regularly scheduled October 8, 1996, meeting the Commission considered SDITC's Petition to Intervene. The Commission voted to deny the Petition to Intervene due to SDITC's inability to show tha pecuniary interests would be directly and immediately affected by the Commission's order in the above referenced matter.

The hearing was held as scheduled on November 26, 1996. Following the hearing both parties filed briefs and proposed findings. A December 20, 1996, meeting, the Commission orally issued its decision on the following unresolved issues:

1. Whether U S WEST may be allowed to recover its depreciation reserve deficiency through these interconnection rates?
2. Whether Western Wireless should be allowed to be compensated at the tandem interconnection rate?

3. What is the percentage of traffic subject to reciprocal compensation for Western Wireless?
4. At what date shall U S WEST be required to compensate Western Wireless for traffic terminated on Western Wireless' network at current contract rates prior to implementation of the new rates? At what date are the new interconnection rates effective?
5. Whether all traffic that originates and terminates in the same MTA shall be subject to local interconnection rates?

The Commission having examined the evidence of record and being fully informed in the matter now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

Pursuant to 47 U.S.C. § 251(b)(5), local exchange carriers (LECs) have a duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

II

U S WEST is a local exchange carrier and an incumbent local exchange carrier as those terms are defined in 47 U.S.C. §§ 3, 251, and 252 of the federal Act.

III

Western Wireless is a telecommunications carrier as those terms are defined in 47 U.S.C. §§ 3, 251, and 252 of the federal Act. Western Wireless is also classified as a commercial mobile radio service (CMRS) provider.

IV

On August 8, 1996, the Federal Communications Commission (FCC) issued its First Report and Order, In the Matter of the Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185 (First Report) which contained the rules implementing local competition provisions and the interconnection provisions of the federal Act.

V

On September 27, 1996, the Eighth Circuit Court of Appeals temporarily stayed the implementation of these rules before their effective date. On October 15, 1996, the Eighth Circuit Court of Appeals granted a partial stay pending judicial review. The stay pertains to the following rules: §§ 51.501 to 51.515, 51.601 to 51.611, 51.701 to 51.717, and 51.809. On November 1, 1996, the Eighth Circuit Court of Appeals lifted the stay as to rules contained in §§ 51.701, 51.703, and 51.717.

VI

The FCC in ¶ 1008 of its First Report found that all CMRS providers, such as Western Wireless, offer telecommunications. The FCC further concluded that 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 for the transport and termination of traffic on each other's networks, pursuant to the rules governing reciprocal compensation.

VII

47 U.S.C. § 252(d)(2)(A) provides as follows:

IN GENERAL.--For purposes of compliance by an incumbent local exchange carrier with section 251 (b)(5), a State commission shall not consider the terms and conditions of 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 terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

VIII

On March 29, 1996, Western Wireless requested re-negotiation of its interconnection arrangements with U S WEST. Exhibit 1, Attachment A

IX

Pursuant to 47 U.S.C. § 252(b)(1), a party to a negotiation with an incumbent local exchange carrier may petition the state Commission to arbitrate any open issues. An arbitrated agreement must meet the requirements of 47 U.S.C. § 251 including the regulations prescribed by the Federal Communications Commission pursuant to that section and the standards set forth 47 U.S.C. § 252(d). See 47 U.S.C. § 252 (e)(2)(B).

X

On September 6, 1996, Western Wireless submitted a Petition for Arbitration asking the Commission, pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open, unresolved issues related to its negotiations with U S WEST. Exhibit 1.

XI

A hearing was held on this matter on November 26, 1996, in Room 412 of the State Capitol in Pierre, South Dakota.

RATES FOR TRANSPORT AND TERMINATION OF TRAFFIC

XII

On October 1, 1996, U S WEST proposed a set of rates for transport and termination of traffic. These

rates were subsequently revised on October 7, 1996. On October 18, 1996, Western Wireless accepted the revised rates. On October 24, 1996, the Commission received from U S WEST response to Western Wireless' acceptance of the revised rates. In its response, U S WEST stated that since the FCC's pricing rules had been stayed by the Eighth Circuit Court of Appeals it was now free to advocate the recovery of all costs associated with the provisioning of interconnection services and now wanted to recover what it termed its depreciation reserve deficiency.

XIII

U S WEST asked to recover 9.3 million dollars in depreciation reserve deficiency. Re al Testimony of Jon Lehner, Exhibit 9, at page 2, lines 11 to 12. The deficiency was defined by U S WEST as "the difference between the amount of previously accumulated depreciation actually recorded on the company's regulated books and the amount of depreciation that should have been booked to the reserve if current estimates of economic lives had been the basis for depreciation entries all along." Id. at lines 13 to 20. U S WEST proposed that the reserve deficiency be recovered on a per minute basis from the switching elements over a five year period. Id. at lines 21 to 22.

XIV

Initially, U S WEST claimed the depreciation reserve deficiency was 9.3 million dollars. Id. at page 2, lines 11 to 12. At the hearing, Jon Lehner, witness for U S WEST testified that the number was actually 6.6 million dollars after being adjusted for the sale of some of U S WEST's exchanges. Tr. at page 110, lines 5 to 6. The rate that U S WEST was then seeking to recover would be \$.0004 per minute of use. Tr. at page 110, lines 7 to 13. Under cross-examination, Mr. Lehner conceded that the alleged depreciation reserve deficiency may not be related to the actual cost of providing local and tandem switching. Tr. at page 125, lines 2 to 6. U S WEST did not submit any supporting cost documentation to prove the existence of the alleged depreciation reserve deficiency.

XV

The Commission finds that it will not allow U S WEST to recover its alleged depreciation reserve deficiency through these transport and termination rates. U S WEST has failed to provide any supporting documentation to prove that the depreciation reserve deficiency actually exists. Further, U S WEST has failed to show that the depreciation reserve deficiency is related to the cost of providing local and tandem switching.

XVI

The Commission finds that the following rates shall apply as mutual and reciprocal compensation for the transport and termination of interconnected traffic exchanged between the Western Wireless and U S WEST networks. These are the revised rates proposed by U S WEST and subsequently accepted by Western Wireless.

Call Termination

- Per MOU - Large Metro ---
- Per MOU - Medium Metro ---
- Per MOU - Other Areas ---

- Weighted Avg. Per MOU - 0.003334

Call Transport

- Tandem Switched Transport 0.001676
- Tandem Switching (Per MOU)

Tandem Transmission

Fixed

- 0 Mil - None
- Over 0-8 Miles - 0.000410
- Over 8-25 Miles - 0.000404
- Over 25-50 Miles - 0.000406
- Over 50 Miles - 0.000408

Per Mile

- 0 Mil - None
- Over 0-8 Miles - \$0.000012
- Over 8-25 Miles - 0.000014
- Over 25-50 Miles - 0.000014
- Over 50 Miles - 0.000010

APPROPRIATE RATE TO BE CHARGED BY WESTERN WIRELESS

XVII

The FCC promulgated a rule which states 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). However, this rule was stayed by

the Eighth Circuit Court of Appeals. Due to the stay, this Commission may choose to follow the rule or may make its own determination on this issue based on the evidence it received at the hearing.

XVIII

Western Wireless asserts that it is entitled to be compensated at the tandem interconnection rate because its network is comparable to U S WEST's network in terms of the geographical areas served and the functionalities of the network. Tr. page 43, lines 3 to 10. Western Wireless has two mobile telephone switching offices (MTSOs). Tr. at page 43, lines 18 to 19. One MTSO is located in Sioux Falls; the other is located in Rapid City. Tr. at 49, lines 14 to 16. In addition, Western Wireless has cell sites where radio traffic radio channels are assigned to subscribers. The cell sites are connected back to their MTSOs. Tr. at page 55, lines 7 to 11. A cell site is not a switch and does not have the intelligence of a switch. Id. at lines 3 to 6.

XIX

U S WEST's network consists of tandem switches that are connected with multiple U S WEST end office switches that serve a number of feeder and distribution areas. Testimony of Patricia Hatfield, Exhibit 10 at page 3, lines 10 to 12.

XX

An end office switch connects the customers served to the end office switching functions and determines where to route the call. Id. at page 3, lines 19 to 24. If the connecting direct trunk group to the terminating end office is temporarily at capacity, the originating end office switch selects an alternate trunk group to the tandem switch. The call is then delivered to the terminating office on an alternate route. Id. at page 3, beginning at line 27, to page 4, line 3.

XXI

A tandem switch connects multiple end office switches together and performs the alternate routing function. Id. at page 4, lines 10 to 12. U S WEST's tandem switches provide a separate and distinct call path between the originating end office switch and the terminating end office switch that differs from the primary direct end office route. Id. at page 4, lines 12 to 14.

XXII

Western Wireless interconnects with U S WEST at U S WEST's tandem switches. Tr. at page 137, lines 14 to 15. Western Wireless did not know if it had interconnection points with independent LECs in South Dakota. Tr. beginning at page 56, line 13 to page 57, line 8. By connecting with U S WEST a tandem switches, Western Wireless receives the benefits of originations from other interconnecting carriers. Tr. at page 137, lines 8 to 21.

XXIII

The Commission finds that the recovery of costs should be based on functionality not on geographic area served. The Commission finds that Western Wireless' network primarily provides only end office switch functions and therefore Western Wireless is not entitled to charge U S WEST the tandem interconnection rates for terminating U S WEST's traffic. Western Wireless' network does not provide the functionalities of tandem switches. Western Wireless' MTSOs do not provide alternate routing functions where the end office serving the calling party is unknown to the originating end office switch. Moreover, Western Wireless receives the benefits of connecting to U S WEST's tandem switches.

PERCENTAGE OF TRAFFIC SUBJECT TO RECIPROCAL COMPENSATION

XXIV

Under the federal Act, local exchange carriers have a duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications services. 47 U.S.C. § 251(b)(5). The FCC has defined a reciprocal compensation arrangement as an arrangement between two carriers "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." 47 C.F.R. § 51.701(e).

XXV

Western Wireless presented testimony that it had conducted a traffic study of its South Dakota network for calls between the networks of Western Wireless and U S WEST from October 20, 1996, through November 20, 1996. Tr. at page 90, lines 17 to 25. The traffic analysis showed the land to mobile calls on Western Wireless' network from U S WEST's network for that time period was 25.8%. Tr. at page 91, lines 5 to 9. Western Wireless conceded that although it can identify the percentage of traffic that comes from U S WEST's network to Western Wireless' network, it cannot identify all the components of that traffic. Tr. at page 87, lines 12 to 15. Western Wireless would agree to a 3% adjustment factor for the independent LEC traffic that was part of the 25.8% only if U S WEST could show that it was not receiving compensation for the independent LEC calls that pass through U S West's network and terminate on Western Wireless' network. Tr. at page 89, beginning at line 19, to page 90, line 5; Tr. at page 92, lines 8 through 10.

XXVI

U S WEST presented testimony that 17% is the appropriate percentage of traffic that should be used to determine compensation for traffic that originates on U S WEST's network and terminates on Western Wireless' network. Tr. at page 136, lines 10 to 18. In addition to calls originated by U S WEST end users and independent LECs, U S WEST maintained that the 25.8% figure mentioned by Western Wireless also included calls originated by interexchange carriers and other CMRS carriers. Tr. at page 137, lines 8 to 14. U S WEST presented testimony that the interexchange carrier terminating traffic that is brought through U S WEST tandem switches to terminate on Western Wireless' network is 8%. Tr. at page 139, lines 3 to 7. U S WEST also asserted that the 3% independent LEC origination land to mobile figure mentioned by Western Wireless was probably too low given that the independent LEC toll traffic on a mobile to land basis was 20%. Tr. at page 140, lines 2 to 11.

XXVII

Pursuant to 47 U.S.C. § 252(d)(2)(A)(i), reciprocal compensation for the transport and termination of traffic is based on the "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. . . ." (emphasis added); see 47 C.F.R. § 51.701(e). Based on the clear language of these provisions, U S WEST is responsible to compensate Western Wireless only for the telecommunications traffic that originates from U S WEST's customers using U S WEST's network.

XXVIII

The Commission finds that U S WEST's number of 17% as the percentage of traffic originated on U S

WEST's network and terminated on Western Wireless' network is the more reasonable number. Western Wireless' number of 25.8% included traffic that originated from interexchange carrier toll customers, other CMRS customers, and independent local exchange company customers. U S WEST presented testimony that this additional traffic would be, at a minimum, 11%. Therefore, U S WEST's proposed 17% is reasonable. In order for Western Wireless to be compensated for any traffic originated by non-U S WEST carriers, it will have to negotiate agreements with the other carriers for reciprocal compensation.

XXIX

The Commission further finds that this same factor of 17% shall be used to determine how the cost of the facilities that interconnect the networks of U S WEST and Western Wireless should be shared between Western Wireless and U S WEST. Each carrier shall be required to pay a portion of the facilities in direct proportion to the percentage of traffic that each carrier terminates over those facilities.

EFFECTIVE DATE OF RATES PURSUANT TO PRE-EXISTING CONTRACT AND EFFECTIVE DATE OF NEW RATES

XXX

47 C.F.R. § 51.717(b) provides that "from the date that a CMRS provider makes a request under paragraph (a) 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 the CMRS provider pursuant to the pre-existing arrangement."

XXXI

Paragraph 1094 of the FCC's First Report provides that "[p]ending the successful completion of negotiations or arbitration, symmetrical reciprocal compensation provisions shall apply, with the transport and termination rate that the incumbent LEC charges the CMRS provider from the pre-existing agreement applying to both carriers, as of the effective date of the rules we adopt pursuant to this order." (emphasis added)

XXXII

Although the FCC adopted the First Report which contained the rules implementing local competition provisions and the interconnection provisions of the federal Act on August 1, 1996, 47 C.F.R. § 51.717 did not become effective until November 1, 1996, when the Court of Appeals lifted the stay as it applied to certain rules contained in the First Report including 47 C.F.R. § 51.717.

XXXIII

The Commission finds that Western Wireless is entitled to receive reciprocal compensation at the existing contract rates effective November 1, 1996, until such time as the new rates go into effect.

XXXIV

The Commission finds that the new rates shall be effective at the time the interconnection agreement between Western Wireless and U S WEST is approved by this Commission pursuant to 47 U.S.C. § 252

(e), not when the arbitrated decision is issued.

DEFINITION OF AND APPLICABLE CHARGES FOR LOCAL TRAFFIC

XXXV

47 C.F.R. § 51.701(b) of the First Report defines local telecommunications traffic as "(1) telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission; or (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."

XXXVI

On November 1, 1996, the Eighth Circuit Court of Appeals lifted the stay as it applied to certain FCC rules, including 47 C.F.R. § 51.701(b) which had been temporarily stayed on September 27, 1996. Exhibit 6, page 6

XXXVII

South Dakota has three (3) Major Trading Areas (MTA) within its boundaries. These MTA's are commonly known as the Minneapolis/St. Paul MTA, the Denver MTA, and the Des Moines/Quad City MTA. Exhibit 11, Attachment 1

XXXVIII

The MTA determines what is a local call and subject to local mutual compensation for transport and termination, and what is a toll call and therefore subject to switched access charges for origination and termination of a call. Exhibit 6, page 7

XXXIX

The Commission finds that all calls originating and terminating within the MTA are deemed local for purposes of establishing mutual compensation.

XI

The Commission finds that traffic originating in another MTA which transits Western Wireless' network shall be reported to U S WEST and U S WEST shall be paid any applicable switched access charges.

XII

The Commission rejects the proposed Findings of Fact and Conclusions of Law submitted by the parties.

CONCLUSIONS OF LAW

I

The Commission has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-31 and the federal Telecommunications Act of 1996. The Commission may rely upon any or all of these or other laws of this state in making its determination.

II

U S WEST has failed to prove that it should be allowed to recover its alleged depreciation reserve deficiency through local interconnection rates with Western Wireless.

III

The local interconnection rates shall be those rates proposed by U S WEST on October 8, 1996, and subsequently accepted by Western Wireless.

IV

Western Wireless is not entitled to charge U S WEST tandem interconnection rates because Western Wireless's network does not contain the functionalities associated with a tandem switched network. The Commission is not required to follow 47 § C.F.R. 51.711(a)(3) because that rule has been stayed by the Eighth Circuit Court of Appeals.

V

The Commission finds that 17% is the appropriate percentage to be used for reciprocal compensation for calls that are terminated on Western Wireless' network that originate with U S WEST end customers. Pursuant to 47 U.S.C. § 252 (d)(2)(A)(i) and 47 C.F.R. § 51.701(e), the Commission concludes that Western Wireless is not entitled to receive reciprocal compensation for traffic carried on U S WEST's network but originated by other carriers' customers.

VI

Western Wireless is entitled to receive reciprocal compensation at existing contract rates effective November 1, 1996, until such time as the new rates go into effect.

VII

Prior to the approval of a new agreement, Western Wireless is entitled to assess upon U S WEST the same rates for the transport and termination of local telecommunications traffic that U S WEST assesses upon Western Wireless pursuant to their pre-existing contract.

VIII

The new rates shall be effective at the time the interconnection agreement between Western Wireless and U S WEST is approved by this Commission pursuant to 47 U.S.C. § 252(e), not when the arbitrated decision is issued.

IX

All traffic that originates and terminates within the same Major Trading Areas, as defined by the FCC, shall be subject to local interconnection rates as provided for in 47 C.F.R. § 51.701(b)(2).

X

The Commission rejects the proposed Findings of Fact and Conclusions of Law submitted by the parties.

XI

Western Wireless and U S WEST shall submit to the Commission, within 30 days from the date of this order, a completed interconnection agreement for approval by the Commission as required by 47 U.S.C. § 252(e).

PLEASE TAKE NOTICE that this Arbitration Decision and Order in Docket TC96-160 was duly entered on the 24th day of December, 1996.

Dated at Pierre, South Dakota, this 24th day of December, 1996.

CERTIFICATE OF SERVICE

BY ORDER OF THE COMMISSION:

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

KENNETH STOFFERAHN, Chairman

By: _____

JAMES A. BURG, Commissioner

Date: _____

LASKA SCHOENFELDER,
Commissioner

(OFFICIAL SEAL)

[CC99orders/includepgs/bottomlinks_insidepg.htm]