

Telecommunications Orders - Issued 1997

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

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252)))	FINDINGS OF FACT AND CONCLUSIONS OF LAW; ORDER AND NOTICE OF ENTRY OF ORDER
		TC96-184

On November 20, 1996, the Public Utilities Commission (Commission) received a filing from AT&T Communications of the Midwest, Inc. (AT&T) pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open issues related to its interconnection negotiations with U S WEST Communications, Inc. (U S WEST). U S WEST filed its response on December 16, 1996.

On January 10, 1997, the Commission issued an Amended Procedural Schedule; Order for and Notice of Hearing. In the Amended Procedural Schedule, the Commission scheduled a prehearing conference for January 13, 1997. The prehearing conference was held as scheduled.

On January 17, 1997, the Commission received a Joint Procedural Agreement submitted by U S WEST. In the Joint Procedural Agreement, U S WEST stated that AT&T had approved of the Agreement and that AT&T and U S WEST requested that the Commission adopt the proposed Agreement. The Agreement set forth the dates various witnesses would testify and the issues they would address. By Order dated January 22, 1997, the Commission adopted the Joint Procedural Agreement.

The hearing was held as scheduled on February 3, 1997, through February 7, 1997, in Pierre, South Dakota.

On February 26, 1997, AT&T and U S WEST each filed a Post-Hearing Brief and a Matrix of unresolved issues. On March 5, 1997, each party filed a Re al Brief and Findings of Fact and Conclusions of Law.

On March 17, 1997, the Commission rendered its oral decision on the unresolved issues in this docket.

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

FINDINGS OF FACT

1. The Federal Telecommunications Act of 1996 (federal Act) provides for the development of competition in the telecommunications industry. The federal Act opens up local markets by imposing new obligations on incumbent local exchange carriers (LECs). Under the federal Act, an incumbent LEC has the duty to interconnect with other telecommunications carriers, must provide other carriers access to the incumbent LEC's network elements on an unbundled basis, and must provide its retail services to other carriers at wholesale rates. 47 U.S.C. § 251(c). The federal Act requires an incumbent LEC to negotiate terms and conditions of service with the requesting carrier. 47 U.S.C. § 251(c)(1). If the parties are unable to reach a negotiated agreement on all areas, the federal Act provides for state Commissions to resolve any disputed issues. 47 U.S.C. § 252(b).
2. On August 8, 1996, the Federal Communications Commission (FCC) issued its First Report and Order in CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and CC Docket No. 95-185, In the Matter of Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers [hereafter referred to as First Report and Order]. The FCC also issued its Second Report and Order concerning these two dockets on August 8, 1996. These Orders seek to implement certain provisions of the federal Act through rules.
3. On October 15, 1996, the Eighth Circuit Court of Appeals stayed the following FCC rules: 47 C.F.R. §§ 51.501 to 51.515, inclusive, §§ 51.601 to 51.611, inclusive, §§ 51.701 to 51.717, inclusive, and § 51.809. Exhibit 53. On November 1, 1996, the Eighth Circuit lifted the stay for the following rules: 47 C.F.R. §§ 51.701, 51.703, and 51.717. Exhibit 53. The stayed rules involve the pricing of interconnection and unbundled elements, wholesale pricing standards to determine avoided retail costs, reciprocal compensation for transport and termination of local telecommunications traffic, and the so-called "pick and choose" rule.
4. On November 20, 1996, AT&T filed a petition with the Commission asking it to resolve open issues in its interconnection negotiations with U S WEST. Pursuant to 47 U.S.C. § 252(d)(4), the Commission must resolve each issue set forth in the petition no later than nine months after the date on which the local exchange carrier receives the request to negotiate an interconnection agreement. AT&T requested negotiations with U S WEST on June 20, 1996. The Commission must issue its arbitration decision on or before March 20, 1997.
5. AT&T included in its November 20, 1996, filing a 32 page arbitration matrix stating the unresolved issues and each party's position on each unresolved issue. Exhibit 7. The heading of the matrix noted that the issues were subject to continuing negotiations of the parties.
6. A prehearing conference was held on January 13, 1997. The parties filed prefiled testimony prior to the hearing which was held on February 3 through 7, 1997. At the end of the hearing the Commission directed the parties to file a joint updated matrix listing the unresolved issues. Tr. at 1459, lines 17-21.
7. AT&T and U S WEST each filed a post-hearing brief and separate matrixes on February 26, 1997. U S WEST submitted a 32 page matrix delineating its view of both AT&T's and U S WEST's current position for each unresolved issue. AT&T submitted an amended issue matrix that was 320 pages long. The use of separate matrixes is confusing and fails to comply with the Commission's directive. In fact, the parties apparently are uncertain as to whether some issues are unresolved. See Finding of Fact 41; AT&T's proposed Finding of Fact at 59 (access to customer addresses and numbers).
8. In addition, AT&T's matrix has the following deficiencies: (a) except for a nine page cost price addendum (which is incorrectly dated February 16, 1996), the matrix does not appear to be updated to

reflect AT&T's and U S WEST's current negotiating position since the latest date listed in the matrix is July 10, 1996; (b) the matrix is not limited to unresolved issues but also includes resolved issues; (c) AT&T did not present evidence on many of the issues listed in the 320 page matrix; and (d) the matrix is confusing, inconsistent, and fails to inform the Commission of exactly what the unresolved issues are.

9. Due to the failure of the parties to submit a joint matrix listing only unresolved issues and the position of each party on each of those unresolved issues, the Commission has attempted to discern the unresolved issues from the record. However, the Commission notes that if the parties themselves are not certain as to what issues they agree or disagree on, it is difficult to understand why the parties apparently believe that the Commission can determine this for them.

GENERAL TERMS AND CONDITIONS

10. AT&T's Petition at 52 raises the issue of what General Terms and Conditions are to be addressed in this arbitration. Exhibit 1. AT&T's proposed General Terms and Conditions are contained in AT&T's Proposed Interconnection Agreement. Exhibit 8, Part 1, Sections 1 to 33, at 8 to 33 and Attachment 1 to the Agreement. U S WEST's Proposed Interconnection Agreement contains its proposed General Terms and Conditions. Exhibit 4. Appendix B to U S WEST's post hearing brief indicates issues where probable accord has been reached. Based upon these sources in the record, the issues to be resolved with respect to general terms and conditions are as follows:

- (a) What shall be the term of the Agreement;
- (b) How shall payments be made under the Agreement;
- (c) Shall audits and inspections be allowed by AT&T of U S WEST records and under what circumstances;
- (d) Should the parties provide for indemnification;
- (e) Should there be limits on liability of the parties;
- (f) Should U S WEST provide a warranty as to its performance;
- (g) Should remedies be provided to the respective parties;
- (h) In what manner should disputes be resolved;
- (i) In what manner should information be treated as confidential when provided from one party to the other;
- (j) Should AT&T have the option to obtain local service or network elements which U S WEST may offer under other agreements;
- (k) Should there be a mutual obligation to make customer payment history available to the other party;
- (l) How shall patents and trademarks be treated;
- (m) Should the Agreement have a force majeure clause;
- (n) Which state's law governs the Agreement;
- (o) Should the Agreement intend to benefit third party beneficiaries;
- (p) How shall assignment and subcontracting be handled;
- (q) Should the Agreement address severability;
- (r) How shall contractual notices to the other party be handled;
- (s) Should the Agreement address successors and assigns;
- (t) Should AT&T be required to furnish a letter of authorization to U S WEST for disconnection and furnishing of certain services;
- (u) Should reciprocal services be the subject of this Agreement; and (v) Should this Agreement be considered a joint work product.

11. The Commission finds that the General Terms and Conditions present mixed issues of fact and law and it will address them in that context.

12. The Commission finds that an initial term of five years for the Agreement is reasonable for an Agreement of this length and complexity. The Commission further finds that the following concepts of mutual responsibility shall be agreed to by the parties: (1) provide sixty days notice to the other party for termination; (2) termination for breach with thirty days to cure the breach if the cause is nonpayment; (3) termination for breach if the cause is failure to perform and the breach affects the non-breaching party's subscribers, with ten days to cure the breach; and (4) optional termination of Agreement or any of its parts for other breach due to failure to perform if not cured within forty-five days.

13. The Commission finds affirmatively for the concept of payment of amounts due U S WEST from AT&T within thirty days of receiving U S WEST's invoice with a late charge, not to exceed an annual 12% rate, applied to past due amounts.

14. The Commission finds affirmatively for the concept that AT&T may audit records of U S WEST up to four times per year to ensure accuracy of U S WEST billings and invoices and for purposes of evaluating compliance with the Agreement. The Commission further finds that in order to implement this provision, it is reasonable to expect that such work may be done by auditors under contract with AT&T, that U S WEST will promptly correct billing errors, that U S WEST will cooperate in providing access to employees, facilities, books and records, that the frequency of audits may be accelerated if variances are over one percent of amounts payable by AT&T during the audit period, that audits are at AT&T's expense unless amounts in variance in the audit are over one percent of the aggregate charges payable to U S WEST during the audit period, that AT&T is to bear the cost of special data extractions it requests, that overpayments by AT&T to U S WEST are to be reimbursed, and that this provision survive the term of the Agreement by two years.

15. The Commission finds that indemnification as proposed by the parties has merit with the added finding that the indemnifying party shall have sole authority to defend an action with counsel of its choosing.

16. Regarding limits on liability, the Commission agrees with the concepts that the liability of AT&T shall not exceed amounts due from AT&T to U S WEST during a contract year; that U S WEST's liability should not exceed amounts due and owing AT&T plus amounts owed to U S WEST during a contract year; that there is no liability for either party for indirect, incidental, special, or consequential damages; and that the limitations do not apply to willful or intentional conduct. Parties shall be liable for lost profits.

17. The Commission finds that U S WEST shall perform its obligations under the Agreement at no less a level than the highest level which U S WEST uses for its own operations or those of its affiliates. U S WEST shall warrant that it shall perform under this standard, in a competitively neutral fashion at technically feasible points, for all rights, products, and services AT&T purchases from U S WEST pursuant to this Agreement.

18. The Commission finds that remedies in the Agreement shall be cumulative and not exclusive. In those remedies, the parties shall provide that the failure of U S WEST to switch a subscriber shall be deemed an illegal change in subscriber change selection which merits the reimbursement by U S WEST to AT&T for charges paid by the subscriber during the time that the subscriber remains a U S WEST customer.

19. The Commission finds that informal dispute resolution under the standards of the American Arbitration Association shall be followed. An arbitrator shall not have authority to award punitive damages. Arbitrator fees shall be paid by the losing party and, at the determination of the arbitrator, if

neither party has completely won or lost at arbitration, then the arbitrator shall apportion the costs. The laws of South Dakota shall govern the Agreement and the arbitration process.

20. The Commission finds that information transmitted from one party to the other party under the Agreement shall automatically be considered proprietary. Copies of proprietary information may be made by either party but shall bear copyright or proprietary notices; proprietary status shall continue for a period of five years from the time of receipt of the proprietary information. Exclusions to the obligations of this provision as delineated in AT&T's proposed agreement, Section 12.4, shall be followed.

21. Consistent with 47 U.S.C. § 252(i), the Commission finds that if U S WEST enters into an agreement with a party other than AT&T during the course of this Agreement which contains terms and conditions different from those available under this Agreement, AT&T may substitute terms and conditions of that agreement for terms and conditions contained in this Agreement.

22. The Commission finds that each party shall have an obligation to provide any customer's payment history to the other party upon request.

23. The Commission finds that nothing in the Agreement creates a license for a patent, trademark, or logo except that a limited license is created to use patents and copyrights necessary for the parties to use any facilities or equipment or to receive any service solely under this Agreement. Neither party shall have a right, unless otherwise agreed, to use the other party's logo, trademark, service mark, name, language, pictures or symbols, or words from which the other party's name may be inferred or implied in any product, service, advertisement, promotion, or any other publicity matter. The Commission further finds that neither party has an obligation to defend or save harmless the other party based on a claim, demand, or proceeding by any third party for patent, trademark, or copyright infringement claims.

24. The Commission finds that the Agreement shall contain a force majeure provision.

25. The Commission finds that no waiver of any provision of the Agreement or consent to default under the Agreement shall be effective unless it is in writing.

26. The Commission finds that the laws of the state of South Dakota shall govern this Agreement and U S WEST shall be responsible for maintaining such regulatory approvals as are necessary for it to perform under this Agreement. AT&T shall have a similar obligation with regard to approvals necessary for it to perform under this Agreement. Each party shall have an obligation to cooperate with the other in obtaining and maintaining necessary regulatory approvals.

27. The Commission finds that the Agreement shall not be intended to confer any rights on third party beneficiaries.

28. The Commission finds that neither party may assign the Agreement without the prior written consent of the other party. U S WEST may assign the Agreement to one of its affiliates which is wholly owned by U S WEST. U S WEST shall not subcontract for the performance of the Agreement or any part thereof without prior written consent of AT&T. In the event such subcontracting occurs, U S WEST shall retain full responsibility for performance under the Agreement.

29. The Commission finds that the Agreement shall contain a severability provision which allows the Agreement to function in the event parts of it are found to be invalid or unenforceable. In the event part of the Agreement is found to be invalid or unenforceable, the parties shall negotiate replacement language.

30. The Commission finds that the Agreement shall contain a provision for notices and who within each party's organization shall be notified of specific contractual events. Parties may change their designated representative by giving seven days' written notice to the other party. Notices are to be deemed effective when received.

31. The Commission finds that the Agreement shall be binding on and to the benefit of all successors and permitted assigns.

32. The Commission finds that AT&T shall be responsible to have a letter of authorization from an end user for handling disconnection of end user's service with U S WEST, for the providing of service by AT&T, and the providing of ancillary services. AT&T shall be responsible for providing written evidence of its authority to U S WEST.

33. The Commission finds that reciprocal services which U S WEST may wish to purchase from AT&T are not germane to nor the proper subject matter of this Agreement for interconnection.

34. The Commission finds that the Agreement is jointly produced by AT&T and U S WEST and shall not be deemed to be drafted by any one party thus dispelling with any presumptions or inferences which may be drawn against either party on the basis of who drafted the document.

INTERCONNECTION

POINTS OF INTERCONNECTION

35. The issues to be resolved with respect to points of interconnection are as follows:

- (a) Whether U S WEST may require AT&T to have one point of interconnection for exchange of local traffic to be within the local calling area;
- (b) Whether AT&T must go through a bona fide request process to obtain a particular type of interconnection that has previously been obtained at a different location by AT&T;
- (c) Whether AT&T must bear all of the economic costs of a meet point arrangement used by AT&T for interconnection or to access unbundled network elements; and
- (d) Whether U S WEST may impose a distance limitation for meet points used for interconnection.

36. Under the federal Act, an incumbent LEC's obligation with respect to interconnection is found at 47 U.S.C. § 251(c)(2) which provides as follows:

- (2) Interconnection. - The duty to provide, for the facilities and equipment of requesting telecommunications carrier, interconnection with the local exchange carriers network -
 - (A) for the transmission and routing of telephone exchange service and exchange access;
 - (B) at any technically feasible point within the carrier's network;
 - (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
 - (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

37. Pursuant to 47 C.F.R. § 51.305, the FCC has defined the following as technically feasible points that the incumbent LEC, at a minimum, must provide: (a) the line-side of a local switch; (b) the trunk-side of a local switch; (c) the trunk interconnection points for a tandem switch; (d) central office cross-connect points; (e) out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and (f) the points of access to unbundled network elements as described in 47 C.F.R. § 51.319.

U S WEST has agreed to provide interconnection at each of the above-listed points. Exhibit 23 at 19, lines 21-24. The parties have further agreed that U S WEST will provide, through a bona fide request process, interconnection at other technically feasible points. Exhibit 40 at 2, lines 5-6; Tr. at 270, lines 8-12.

38. AT&T may select for itself those points in U S WEST's network to which it wishes to interconnect. First Report and Order at ¶ 209. Therefore, the Commission finds that U S WEST may not require AT&T to have one point of interconnection for exchange of local traffic to be within the local calling area.

39. If, through the bona fide request process, a type of interconnection requested by AT&T is found to be technically feasible, AT&T shall not be required to request substantially similar interconnection through the bona fide request process. See 47 C.F.R. § 51.305(c) and (d).

40. Consistent with the federal Act, meet points for interconnection shall be made available upon request if technically feasible. 47 U.S.C. § 251(c)(2)(B). If the meet point arrangement is requested for purposes of interconnection pursuant to 47 U.S.C. § 251(c)(2), each party shall pay its portion of the cost to build out the facilities to the meet point. First Report and Order at ¶ 553. However, if the meet point arrangement is for access to network elements pursuant to 47 U.S.C. § 251(c)(3), then AT&T shall pay all of the economic costs of the meet point arrangement. Id.

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