

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

**IN THE MATTER OF THE INTERCONNECTION )      SECOND ARBITRATION  
CONTRACT NEGOTIATIONS BETWEEN AT&T )      ORDER; NOTICE OF ENTRY  
COMMUNICATIONS OF THE MIDWEST, INC. )      OF ORDER  
AND U S WEST COMMUNICATIONS, INC. )  
PURSUANT TO 47 U.S.C. SECTION 252      )      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 Rebuttal 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 issued its written decision on March 20, 1997.

On April 21, 1997, U S WEST and AT&T filed separate proposed Interconnection Agreements. AT&T also filed a Motion for Reconsideration/Modification of Order. At an April 28, 1997, meeting, the Commission considered how to proceed. After taking arguments from the parties, the Commission decided to take AT&T's Motion for Reconsideration/Modification of Order under advisement. In addition, the Commission found that the separate proposed Interconnection Agreements filed by U S WEST and AT&T failed to comply with the Commission's Order which required AT&T and U S WEST to submit a complete agreement to the Commission for approval within 30 days after the date of the Order. The Commission further found that the separate Interconnection

Agreements failed to comply with the federal Telecommunications Act of 1996 (federal Act).

On May 12, 1997, the Commission issued a procedural schedule that gave U S WEST until May 12, 1997, to file an answer to AT&T's Motion for Reconsideration/Modification of Order and allowed AT&T to reply on or before May 22, 1997. The Commission further found that it would set a new deadline for the parties to submit a single interconnection agreement signed by both parties after it had entered a decision on AT&T's Motion for Reconsideration/Modification of Order.

By order dated August 13, 1997, the Commission granted in part and denied in part AT&T's Motion for Reconsideration/Modification of Order. The Commission also ordered AT&T and U S WEST to submit a complete interconnection agreement within 30 days.

On September 12, 1997, an agreement for network interconnection and service resale between AT&T and U S WEST was filed with the Commission. The agreement contained several disputed items that the parties requested be resolved by the Commission. AT&T requested a hearing on the disputed issues; U S WEST maintained that a hearing was not needed. On October 20, 1997, U S WEST filed a Motion for Administrative Notice of the Eighth Circuit Court Order dated October 14, 1997.

At its October 28, 1997, meeting, the Commission considered whether any further hearing was needed to resolve the remaining disputed issues and also considered whether to grant U S WEST's Motion for Administrative Notice. At the meeting, AT&T asked for deferral of any evidentiary hearing pending further negotiations between U S WEST and AT&T concerning issues related to the combination of network elements as clarified by the Eighth Circuit's October 14, 1997, Order on Petitions for Rehearing. U S WEST agreed to deferral, pending further negotiations. The Commission agreed to defer action on resolution of the parties' unresolved issues. AT&T did not object to the Commission granting U S WEST's Motion for Administrative Notice. The Commission unanimously voted to grant the motion.

On September 4, 1998, U S WEST and AT&T filed another interconnection agreement with unresolved issues. The parties requested that the Commission resolve the outstanding issues. The parties also stated that the parties had agreed that the disputed issues may be resolved solely by briefs but also stated that they would supply additional information if requested by the Commission.

At its October 15, 1998, meeting, the Commission discussed whether it needed additional evidence in order to resolve the remaining disputed issues. The Commission unanimously voted to hold a prehearing conference and hearing. In its Order dated October 22, 1998, the Commission made it clear that it is not the responsibility of the Commission to ensure that the parties make a sufficient record.

At the prehearing conference held October 28, 1998, the parties informed the Commission that they had agreed to withdraw all of the disputed issues relating to SPOT

frame, shared transport, and recombination. The Commission pointed out that even with those issues withdrawn, other remaining issues argued by the parties may involve facts that are not in the record. In its Order for and Notice of Hearing, dated November 6, 1998, the Commission once again gave notice to the parties that additional evidence may be necessary if the parties want the Commission to decide all of the issues. The Commission also ordered the parties to resubmit their briefs with citations to the record. The Commission stated that if the parties do not want to have a hearing then they both should state in writing that they expressly waive any rights to a hearing. Unless both parties expressly waived their right to a hearing, the Commission ordered that a hearing would be held on November 17-19, 1998, beginning at 1:30 p.m., on November 17, 1998, in Room 412 of the State Capitol, Pierre, South Dakota.

On November 12, 1998, the Commission received a letter from U S WEST stating that the parties were able to reach agreement on all but two issues. The letter stated that "[t]he parties are developing a revised agreement and updated issues matrix detailing the issues that are closed, those that are 'parked' because they are pending before the United States Supreme Court, and the two open issues." The letter also stated that the parties waived their right to an evidentiary hearing on the open issues. On November 13, 1998, the Commission received AT&T's Revised Brief Regarding Disputed Issues in the Interconnection Agreement and U S WEST's Brief in Support of Remaining Interconnection Agreement Issues. Based on the parties' waiver of their right to an evidentiary hearing, the Commission cancelled the hearing scheduled for November 17, 1998.

At its December 14, 1998, meeting, the Commission considered this matter. The Commission unanimously voted to accept AT&T's definition of "itself" and AT&T's proposed language in section 52.3.3. The Commission also accepted U S WEST's position on the issue of intellectual property with the exception of section 5.2 which the Commission directed the parties to rewrite to provide that the Party Requesting Access has the option of having the Party Providing Access negotiate for the use of Third Party Intellectual Property or may choose to negotiate on its own behalf. The Commission further voted to require that the Party Requesting Access be responsible for all costs associated with obtaining the use of Third Party Intellectual Property and that AT&T's proposed language regarding indemnification be rejected.

Based on the evidence of record and the parties' briefs on these matters, the Commission makes the following Findings of Fact and Conclusions of Law.

## **FINDINGS OF FACT**

1. On September 4, 1998, U S WEST and AT&T filed another Interconnection Agreement with unresolved issues. The parties requested that the Commission resolve the outstanding issues. The parties also stated that they had agreed that the disputed issues may be resolved solely by briefs but also stated that they would supply additional information if requested by the Commission.

2. At its October 15, 1998, meeting, the Commission discussed whether it needed additional evidence in order to resolve the remaining disputed issues. The Commission unanimously voted to hold a prehearing conference and hearing. In its Order dated October 22, 1998, the Commission made it clear that it is not the responsibility of the Commission to ensure that the parties make a sufficient record.

3. On November 12, 1998, the Commission received a letter from U S WEST stating that the parties were able to reach agreement on all but two issues. The letter stated that "[t]he parties are developing a revised agreement and updated issues matrix detailing the issues that are closed, those that are 'parked' because they are pending before the United States Supreme Court, and the two open issues." The letter also stated that the parties waived their right to an evidentiary hearing on the open issues. On November 13, 1998, the Commission received AT&T's Revised Brief Regarding Disputed Issues in the Interconnection Agreement (Revised Brief) and U S WEST's Brief in Support of Remaining Interconnection Agreement Issues (Brief in Support). Based on the parties' waiver of their right to an evidentiary hearing, the Commission cancelled the hearing scheduled for November 17, 1998.

4. The first disputed issue concerns the definition of "itself." Part A, Definitions. U S WEST's definition includes the phrase "for the purposes of interconnection." AT&T's definition does not include that phrase. The effect of which definition is accepted by the Commission is found in Part A, section 52.3. As explained by AT&T, the parties agreed that if the Commission accepts AT&T's definition, the parties will capitalize the term "itself" in section 52.3. If the Commission accepts U S WEST's definition, the parties will leave the term uncapitalized. AT&T's Revised Brief at 5, footnote 1. The apparent effect of not capitalizing "itself" is that the term would be undefined. Thus, U S WEST would have agreed to provide access to its network elements that is "equal in quality" to the access that U S WEST provides to itself, with the term "itself" left undefined.

5. The Commission accepts AT&T's definition of "itself." Section 52.3 concerns the provisioning of network elements. The Commission agrees with AT&T that "U S WEST's proposal to not define the term "itself" when used in the context of performance standards for network elements would seemingly allow U S WEST to afford "Affiliates" or "Subsidiaries" unequal and preferential access to unbundled network elements." AT&T's Revised Brief at 7. Since U S WEST has agreed to provide access to network elements that is "equal in quality" to the access U S WEST provides to itself, that same standard should be equally applicable to its subsidiaries and affiliates. U S WEST should not be allowed to provide preferential access to network elements to its subsidiaries and affiliates.

6. A related issue is the language to be included in section 52.3.3. The Commission first finds that U S WEST's proposed language is ambiguous and vague and can be construed to conflict with the language of sections 52.3.1 and 52.3.2. The Commission further finds that AT&T's language which defines the words "equal in quality" is reasonable and adds needed specificity to the Interconnection Agreement.

7. Another unresolved issue concerns intellectual property. The Commission accepts Part A, section 5.3 of U S WEST's proposed provision since that is virtually identical to the first three sentences of AT&T's Part A, section 5.1. The Commission also accepts Part A, section 5.1 of U S WEST's proposed provision. The Commission finds that the Party Requesting Access should be responsible for all costs associated with obtaining the use of Third Party Intellectual Property since that is the party that will receive the benefits of the requested access. Thus, the Commission rejects AT&T's proposed language for Part A, section 5.1 because it requires the Party Providing Access to provide any necessary licenses at no cost to the Party Requesting Access.

8. With respect to Part A, section 5.2 of U S WEST's proposed provision, the Commission directs the parties to rewrite the section to provide that the Party Requesting Access has the option of having the Party Providing Access negotiate for the use of Third Party Intellectual Property. The Commission finds that the Party Providing Access may be in a better position to negotiate with its existing vendors to obtain the use of Third Party Intellectual Property for use by the Party Requesting Access. It will be up to the Party Requesting Access to decide whether it will negotiate on its own behalf or ask the Party Providing Access to negotiate.

9. In order to implement Finding of Fact 8, the Commission suggests that section 5.2 may be rewritten as follows:

**Obligations of Party Providing Access.** The Party Providing Access shall provide a list of all known and necessary Third Party Intellectual Property applicable to the other Party. The Party Requesting Access may request that the Party Providing Access negotiate any necessary licenses. If that request is made, the Party Providing Access shall enter into good faith negotiations with the owner of the intellectual property to obtain any necessary licenses. Any costs associated with obtaining the necessary licenses are the responsibility of the Party Requesting Access. If no request is made, it is the responsibility of the Party Requesting Access to obtain any necessary licenses and pay any costs associated with obtaining any necessary licenses. The treatment of Third Party licenses shall be in accordance with FCC rules and regulations and/or judicial determination.

This language is a suggestion and is not mandatory. The parties may develop their own language consistent with Finding of Fact 8.

10. On the related issue of indemnification, the Commission rejects Part A, sections 5.2 and 18.2 as proposed by AT&T. The Commission has already found in its Arbitration Order issued March 20, 1997, in Finding of Fact 23, "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." The Commission accepts U S WEST's proposed section 18.2 as being consistent with the Commission's prior decision on this issue. The Commission further finds that it is reasonable to expect

that a Party Requesting Access who is made aware of the need to obtain permission or a license and then fails to obtain such license or permission, is liable to the third party for that failure.

## **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapter 1-26, SDCL Chapter 49-31, specifically 49-31-81, and the federal Act, specifically 47 U.S.C. §§ 251 and 252.
2. The Commission accepts AT&T's proposed definition of "itself" as found in Part A, Definitions. The Commission rejects U S WEST's proposed definition of "itself" since the effect may be to allow U S WEST to give preferential access to its subsidiaries and affiliates.
3. The Commission accepts AT&T's proposed language in Part A, section 52.3.3 as a reasonable definition of the term "equal in quality." The Commission rejects U S WEST's proposed language in Part A, section 52.3.3 because it is ambiguous, vague, and can be construed to conflict with sections 52.3.1 and 52.3.2.
4. The Commission accepts Part A, section 5.3 of U S WEST's proposed provision since that is virtually identical to the first three sentences of AT&T's section 5.1.
5. The Commission accepts Part A, section 5.1 of U S WEST's proposed provision, finding that the Party Requesting Access should be responsible for all costs associated with obtaining the use of Third Party Intellectual Property since that is the party that will receive the benefits of the requested access.
6. The Commission further concludes that the parties shall rewrite section 5.2 of U S WEST's proposed provision to provide that the Party Requesting Access has the option of having the Party Providing Access negotiate for the use of Third Party Intellectual Property or may choose to negotiate on its own behalf. However, consistent with U S WEST's section 5.1, the Party Requesting Access shall be responsible for all costs associated with obtaining the use of Third Party Intellectual Property. The Commission suggests, but does not require, that section 5.2 be rewritten as stated in Finding of Fact 9.
7. The Commission rejects Part A, sections 5.2 and 18.2 as proposed by AT&T. The Commission has already found in its Arbitration Order issued March 20, 1997, in Finding of Fact 23, "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." The Commission accepts U S WEST's proposed language for Part A, section 18.2 as consistent with the Commission's prior order.

It is therefore

ORDERED, that AT&T and U S WEST shall incorporate the Commission's Findings of Fact and Conclusions of Law in its Interconnection Agreement.

**NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that this Order was duly entered on the 30th day of December, 1998. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 30th day of December, 1998.

**CERTIFICATE OF SERVICE**

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.

By: \_\_\_\_\_

Date: \_\_\_\_\_

(OFFICIAL SEAL)

**BY ORDER OF THE COMMISSION:**

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JAMES A. BURG, Chairman

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PAM NELSON, Commissioner

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LASKA SCHOENFELDER, Commissioner