BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of TCG Omaha, of Omaha Nebraska Petitioning for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 of the Rates, Terms and Conditions of Interconnection with US West Communications, Inc.	))))))	Application No. C-1379 Recommended Decision Granted in Part, Denied in Part Entered: March 4, 1997

APPEARANCES:

For TCG:
Loel P. Brooks
Brooks, Pansing Brooks, P.C.
755 NBC Center
1248 O Street
Lincoln, Nebraska 68508
and
Douglas W. Trabaris
Sears Tower, Suite 2100
233 S. Wacker Drive
Chicago, Illinois 60606

For US West Communications:
Dick Johnson
200 South 5th Street, Room 395
Minneapolis, Minnesota 55402

For the Commission Staff:
Deonne Bruning
1200 N Street, 300 The Atrium
Lincoln, Nebraska 68508

BY THE COMMISSION:

On February 8, 1996, TCG Omaha (TCG) filed a request for negotiation of an interconnection agreement with US West Communications, Inc. (US West). Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996 (the Act), TCG filed a petition for arbitration with the Commission on July 18, 1996. US West filed its response to the petition, pursuant to Section 252(b)(3) of the Act on August 12, 1996.

On August 27, 1996, the Commission entered Progression Order No. 3 in Docket C-1128 establishing the policies to be implemented concerning Section 252 arbitrations. The Commission voted to utilize outside arbitrators and directed parties to select a mutually acceptable arbitrator. The parties in this docket selected Richard Calkins to arbitrate the proceeding.

A hearing was held before the Arbitrator on October 14 - 16, 1996. Present for TCG was Loel Brooks, Jim Washington and Deborah Waldbaum. US West was represented by Richard Johnson, Christine Butler, Patti Hatfield and Al Bergman. Evidence was submitted by both parties.

The Arbitrator's decision was rendered November 1, 1996 and was subsequently amended on November 8, 1996. Consistent with the Arbitrator's recommended decision, TCG and US West filed an interconnection agreement with the Arbitrator. The Arbitrator submitted the parties' interconnection agreement to the Commission for approval on February 3, 1997. Pursuant to Commission policy, interested parties were allowed to submit written comments on

the interconnection agreement on or before February 19, 1997. Written comments were filed by US West, TCG, AT&T Communications of the Midwest and the Nebraska Independent Telephone Association.

A hearing was held on the interconnection agreement in the Commission Hearing Room on February 21, 1997 with Commissioner Rod Johnson chairing the proceeding. (Hereinafter referred to as the approval hearing.) Appearances were made by Loel Brooks and Doug Trabaris for TCG, by Dick Johnson for US West, by Deonne Bruning for the Commission staff and by Andy Pollock for AT&T.

DECISION

Section 252(e) of the Act requires state commissions to approve or reject any interconnection agreement adopted by negotiation or arbitration. Interconnection agreements established pursuant to arbitration must be in compliance with the Section 251 of the Act, as well as the provisions of Section 252(d). We also determine that Section 252(e)(3) mandates state commissions to review interconnection agreements to ensure they comply with state law. Using those standards, we make the following findings on the Arbitrator's recommendations.

I. Reciprocal Compensation Arrangements (Bill and Keep)

TCG stated in its written comments and at the approval hearing that "bill and keep" (B&K) is the most appropriate and administratively easy way for the companies to compensate each other for transporting and terminating local exchange traffic that originates on the other carrier's network. Further, TCG claims that US West has presented no evidence that the traffic between the two companies will be out of balance. While US West did not mention this issue in its written comments, it supported the Arbitrator's recommendation at the approval hearing. US West argued that it cannot be mandated to engage in B&K unless it voluntarily agrees to this payment arrangement.

We disagree with US West on this issue. We do not find that Congress intended B&K to apply only when companies mutually agree. It does not make sense that B&K, set forth in Section 252(d)(2)(B)(1) of the Act is limited to negotiated agreements. The standards of Section 252(d) do not apply to voluntarily-negotiated agreements. Therefore, we find that B&K may be imposed in the context of an arbitration proceeding.

We acknowledge that the Eighth Circuit Court of Appeals has stayed 47 C.F.R. 51.713 which provides that a state commission may impose B&K if certain conditions are met. We determine on an interim basis, independent of Rule 51.713 that B&K is appropriate for all termination if traffic is roughly balanced. B&K is more cost effective and administratively efficient. We also observe that B&K is consistent with the Arbitrator's ruling filed on February 3, 1997.

We find B&K should be incorporated in the agreement for the purpose of reciprocal compensation for terminating local calls, but should be subject to a measurement test in the future

to ensure traffic is balanced. We find it appropriate for TCG and US West to utilize B&K for one year. After the expiration of one year, the companies are directed to measure traffic for a three month period. At the end of the three month period, the measurement results are to be provided to the Arbitrator for review. The Arbitrator is to then provide the Commission with a recommendation based upon the traffic measurements. We therefore reject the Arbitrator's recommendation that B&K is not available. We order the Arbitrator to modify his recommendation and the interconnection agreement to be consistent with the terms set forth herein.

II. Tandem Compensation

This issue was addressed by TCG in its written comments and at the approval hearing. TCG stated that compensation for calls terminated at the tandem should be assessed if B&K was not available. US West addressed this issue only at the approval hearing, not in its written comments. US West supported the Arbitrator's recommendation regarding compensation for tandem switching and transport (transmission).

We find that this issue has not been adequately addressed in the agreement or by the Arbitrator in his ruling. The need for a tandem switch and the associated transport service are a result of the size of the market served and the technology currently employed to serve that market. While there may be evidence that future networks, including ones deployed by US West, may not include tandem switches and the associated transport facilities, we conclude that the service the tandem provides currently is a separate and distinct service from end office termination.

We find that a rate for tandem switching and tandem transmission should apply to terminating traffic between the two companies. The TCG argument that B&K for call termination should resolve this issue is incorrect. The Arbitrator failed to address whether TCG's switch will provide the same functionality in the same geographic area as the US West tandem. This is paramount to determining if B&K is an appropriate compensation mechanism. We conclude that the record is clear that US West's network does have a tandem switch and the associated transmission facilities. Neither the record nor the Arbitrator's ruling addresses adequately whether the switch or switches that TCG will install in Omaha will provide the same functionality to US West that the US West tandem switch will provide to TCG.

In conclusion, on this issue, we order that the tandem switching and transmission rates in the agreement are approved for TCG traffic delivered to the US West tandem switch. B&K should only apply when, and if, TCG demonstrates to the Arbitrator that their switch will provide the same functionality in the same geographic area and an amended interconnection agreement reflecting this change is filed and approved by this Commission. If incorporated, the B&K mechanism should be subject to the same review and measurement after one year as the process for termination of local traffic.

We note that while we approve the rates recommended by the Arbitrator (the US West TELRIC rates), such rates are applicable on an interim basis only. The Commission, pursuant to

its cost study docket, C-1415, will issue final rates in the future. All rates reflected in the Arbitrator's decision and interconnection agreement are subject to true-up after completion of C-1415.

III. Services Exempted from the Wholesale Discount

TCG argued in its written comments and at the approval hearing that a wholesale discount must be offered on all retail services, including but not limited to residential service, Centrex Plus, private line service, negotiated contracts and discounted services. TCG stated that the Arbitrator's recommendation to exempt such services violates Section 251 of the Act. US West did not address this issue in its written comments, but supported the Arbitrator's recommendation at the approval hearing stating it was inappropriate to set wholesale discounts on services priced below cost.

Section 251(c)(4)(a) of the Act requires US West to offer for resale at wholesale rates any telecommunications services it offers at retail. The Act further requires US West to discount the service by any costs that are "avoided" as a result of providing the service to a reseller as opposed to an end-user customer (see Section 252(d)(3)).

While we are sympathetic to US West's argument that it should not be forced to discount services priced below cost, we find no support in the Act to exempt certain services from wholesale discounts because they are not priced at cost. Accordingly, we reject the Arbitrator's recommendation on this issue as it violates Section 252(d)(3) and Section 251(c)(4) of the Act.

We remand this provision to the Arbitrator for resolution. We direct the Arbitrator to review the evidence and to render a recommendation regarding a wholesale discount for all retail services.

IV. Performance Standards

In its written comments and at the approval hearing, TCG urged the Commission to include performance standards in the interconnection agreement. TCG stated that standards must be included in the agreement to protect it from possible discrimination by US West. Further, TCG stated that the service quality US West currently provides its end-users its not acceptable. While US West did not respond to this issue in its written comments, it testified at the approval hearing that it would offer TCG the same level of service it provides itself. US West further offered to submit monthly reports of its service level and the level of service offered to TCG to demonstrate that it was not offering better services to itself.

We believe that monthly service reports to the Commission regarding the service US West provides CLECs should be remitted, however, we believe it is more appropriate to gather this information in the Commission's investigative docket monitoring US West's overall service quality, C-1098. Therefore, we do not require US West to provide monthly service reports as a part of this interconnection agreement.

We agree with TCG on this issue and believe performance standards must be included in the interconnection agreement, at least on an interim basis. To fulfill the provisions of Section 251 and to implement competition as Congress intended, performance standards are necessary. Further, a state responsibility of the Commission is to regulate the service quality of common carriers, including US West. We find the assessment of performance standards necessary to monitor whether adequate service is being offered to TCG.

We remand this issue back to the Arbitrator to develop, with the parties input, acceptable performance standards. The performance standards will be used on an interim basis until the Commission promulgates Rules and Regulations which establish performance standards that ILECs must provide CLECs. The Arbitrator is hereby ordered to provide performance standards to the Commission for approval.

We agree with TCG that damages should be assessed quickly and promptly upon finding that either company has significantly violated the terms of the interconnection agreement or the performance standards. At this time, however, the Commission has no authority to levy administrative fines for service quality infractions. Therefore, we approve the recommended decision. We have concerns, however, that the interconnection agreement does not define "expedited". Given the debate this term may generate, we believe it appropriate to define expedited to mean within ninety (90) days from the date a complaint is served upon the Arbitrator. We direct the Arbitrator to incorporate such language into the interconnection agreement.

If the Legislature grants authority to the Commission to administratively fine carriers for violating the terms of interconnection agreements or performance standards, this provision of the interconnection agreement should be revisited.

V. Dispute Resolution Clause

TCG urged the Commission in its written comments and at the approval hearing to include a "loser pays" provision in the interconnection agreement. TCG stated this would encourage contract compliance due to the burden of shouldering the costs of needless or frivolous claims. While US West did not address this issue in its written comments, it stated at the approval hearing that such a provision would be administratively difficult and would discourage voluntary resolutions.

While we hope both TCG and US West will carry out their responsibilities of the interconnection agreement, we believe it realistic to expect that disputes regarding the agreement will occur. We agree with TCG's position on this issue. Pursuant to the Commission's responsibilities under state and federal law, we find it is in the public interest to include a dispute resolution clause in the interconnection agreement. A dispute resolution clause will reduce frivolous claims and will also encourage compliance with the interconnection agreement.

We find that the Arbitrator shall, in his or her discretion, make a determination as to fault on a case-by-case basis and to assess the cost of the arbitration, including attorney fees,

accordingly. The Arbitrator may assess costs solely to one company or on a pro rata basis to both companies. If the Arbitrator rules that both parties are equally at fault, the "loser pays" provision shall not apply. The Arbitrator is hereby directed to alter his recommendation and the interconnection agreement accordingly.

VI. Payment of Special Construction Costs

TCG offered in its written comments and at the approval hearing that making TCG pay for all costs when other carriers utilize the network elements it has paid for places an unfair economic burden on TCG. US West, while not addressing this issue in its written comments, stated at the approval hearing that the Arbitrator's decision was appropriate and that US West should be able to recover its costs immediately.

While we agree with the Arbitrator's recommendation, we believe it should be modified. We approve the Arbitrator' recommendation that TCG pay all costs of special construction when no other carriers, including US West, will benefit from the service. We also approve the provision that US West and TCG will prorate the costs of service that will benefit both companies. Lastly, we agree it is appropriate for TCG to pay US West for special construction costs up front, even if other CLECs utilize the service. These recommendations are consistent with the Act and state law.

We find it inappropriate, however, to prevent TCG from recovering costs from other CLECs that utilize the service TCG has paid for. The Act provides that interconnection shall be on terms that are just, reasonable and nondiscriminatory. To force TCG to pay all the costs of a network element that other CLECs use is clearly discriminatory. Accordingly, we order the Arbitrator to establish, with input from TCG and US West, a method which allows TCG to recover costs from other CLECs that utilize services that have purchased by TCG. The Arbitrator is hereby ordered to modify his recommendation and the interconnection agreement accordingly.

VII. Virtual and Physical Collocation Costs Credit

TCG, in its written comments and at the approval hearing, urged the Commission to credit it for $150,000 it was forced to expend after February 8, 1996 to obtain virtual rather than physical collocation. US West did not address this issue in its written comments, but stated at the approval hearing that the Arbitrator's ruling was correct on this issue.

We find in favor of US West on this issue and approve the Arbitrator's recommendation as consistent with the Act and state law. The Arbitrator permitted TCG to be credited for changes which it paid to establish virtual collocation up to February 8, 1996. The documentation TCG provided at the approval hearing showed that TCG incurred approximately $75,000 of costs in each of US West's two end offices after February 8, 1996. This information was not presented to the Arbitrator or US West for proper review. Accordingly, we deny TCG's request and approve the Arbitrator's recommendation.

VIII. Most Favorable Terms and Conditions

In its written comments and at the approval hearing, TCG urged the Commission to include language in the interconnection agreement that pursuant to Section 252 of the Act, the services or network elements provided under an interconnection agreement to which US West is a party must be made available to other requesting telecommunications carriers, such as TCG. Both companies must follow the Act and we believe it unnecessary to include such language in the interconnection agreement.

The Arbitrator's recommendation, however, states US West agreed to include in this agreement the same language that was included in the interconnection agreement it negotiated with MFS. Such language was not included in the interconnection agreement. We therefore order the Arbitrator to correct this omission.

IX. Customers Guide in White Pages/Billing for Advertising

TCG requested the Commission in its written comments and at the approval hearing to include the Arbitrator's recommendation in the interconnection agreement. US West responded at the approval hearing that US West Direct was an unregulated entity that should not have duties in this interconnection agreement.

We agree with TCG on this issue. The Arbitrator's decision required US West to facilitate discussions between TCG and US West Direct concerning directory listing matters. The Arbitrator's decision also required US West to provide to TCG any new or renegotiated contract US West enters into with US West Direct within five (5) business days after consummation of such agreement. The interconnection agreement does not contain such language. We find both recommendations reasonable and in compliance with the Act. The Commission does not have authority over US West Direct, but, these provisions place obligations on US West Communications. Accordingly, the Arbitrator is hereby ordered to include such language in the interconnection agreement and submit it to the Commission for approval.

X. Dividing Switched Access Revenues

US West raised this issue in its written comments and at the approval hearing. US West stated it is contrary to the Act for TCG to receive not only the rates chargeable to the long distance carrier for tandem switching and transport, but also 30% of the end office charges that are payable by the long distance carrier to US West. TCG did not address this issue in its written comments, but testified at the approval hearing its support for the Arbitrator's recommendation.

We find it favor of US West on this issue. We believe it is not appropriate to impose a revenue sharing mechanism at this time. The Federal Communications Commission (FCC) is considering this issue in its pending access charge reform proceeding. Accordingly, we remand this issue back to the Arbitrator for correction consistent with our comments made herein.

XI. Other Issues in the Interconnection Agreement

We have reviewed the remaining provisions of the Arbitrator's recommendation and the parties' interconnection agreement and find them to be in compliance with the Act and federal law. Many provisions were agreed to by both parties. Such agreements were reviewed and determined to be nondiscriminatory and consistent with the public interest, convenience and necessity. Therefore, the aspects of the interconnection agreement and the Arbitrator's recommended decision, not specifically referenced, above are hereby approved.

XII. Comments offered by AT&T

At the approval hearing, AT&T expressed its concerns with the interconnection agreement. AT&T offered a position, not argued by TCG or US West, that the Commission reject the Arbitrator's recommendation that fiber and vertical features need not be unbundled. These issues are not contested by either US West and TCG and we do not believe it is appropriate to inject into this agreement such provisions.

ORDER

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Arbitrator's Recommended Decision is approved in part and rejected in part.

IT IS FURTHER ORDERED that the interconnection agreement containing the terms and conditions set forth herein be filed with the Commission for approval within thirty (30) days from the date of this Order.

IT IS FINALLY ORDERED that the Arbitrator render his modified recommended decision to the Commission for approval as soon as practicable.

MADE AND ENTERED at Lincoln, Nebraska this 4th day of March, 1997.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONER CONCURRING:

//s//Lowell C. Johnson
//s//Rod Johnson
//s//Frank E. Landis

COMMISSIONERS DISSENTING:
//s//Daniel G. Urwiller

Chairman

ATTEST:

Executive Director