BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of AT&T Communications of the Midwest, Inc. of Denver, Colorado, Petitioning for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an Interconnection Agreement with US West Communications, Inc.	Application No. C-1385 Interconnection Agreement Approved as Modified Entered: July 1, 1997

APPEARANCES:

For AT&T:
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For the Commission Staff:
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BY THE COMMISSION:

AT&T Communications of the Midwest, Inc. (AT&T) requested to negotiate an interconnection agreement with US West Communications, Inc. (USW) on March 1, 1996. Pursuant to Section 252(b)(1) of the Act, AT&T filed a petition for arbitration with the Commission on July 26, 1996. On August 6, 1996, AT&T amended their petition for arbitration. USW filed its reply to the petition on September 3, 1996.

On August 8, 1996, the Federal Communications Commission (FCC) issued Order 96-325 promulgating rules regarding Sections 251 and 252 of the Act. On October 15, 1996, pursuant to Iowa Utilities Board, et. al. v. Federal Communications Commission, et. al., Case No. 96-3321, et. seq., the U.S. Court of Appeals, Eighth Circuit stayed the implementation of the FCC rules relating to pricing and the "pick and choose" provisions. On November 12, 1996, the United Supreme States Court issued a decision declining to set aside the stay. As of the date of this order, the stay remains in effect.

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 the parties to select a mutually acceptable arbitrator. The parties in this docket selected Dr. Jerry Langin-Hooper to arbitrate the proceeding.

The Arbitrator rendered a decision in this docket and subsequently filed a proposed interconnection agreement with the Commission on March 17, 1997. In accordance with the Commission's policy in C-1128, interested parties were allowed to submit written comments on the interconnection agreement. Comments were timely filed by AT&T and USW. Late-filed comments were accepted from the Nebraska Independent Telephone Association.

A hearing was held to approve or reject the proposed interconnection agreement pursuant to Section 252(e) of the Act in the Commission Hearing Room on March 20, 1997. Appearances were made by Richard Johnson and John Devaney for USW, by Andrew Pollock and Mary Tribby for AT&T and by Deonne Bruning for the Commission staff. The Arbitrator, Dr. Langin-Hooper, was also present at the hearing.

On April 8, 1997, the Commission entered an Order remanding the interconnection agreement back to the Arbitrator. Issues pertaining to pricing were to be clarified and supplemented. Dr. Langin-Hooper submitted the requested information on May 6 and May 18, 1997, in accordance with the Commission's Order.

DECISION

Section 252(e)(1) of the Act requires that any interconnection agreement adopted by arbitration be submitted to the State commission for approval. Section 252(e)(2)(B) provides that State commissions may reject an agreement (or any portion thereof) adopted by arbitration only "if it finds that the agreement does not meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251, or the standards set forth in subsection (d) of this section." Section 252(e)(3) further provides that a State commission may utilize and enforce state law in its review of agreements.

The Commission reviewed the Arbitrator's decision, the proposed interconnection agreement and the parties' exceptions using the standards set out above. The Commission rendered a timely decision in compliance with the Act on April 8, 1997, and determined that the proposed agreement could not be approved as submitted. Consequently, the Commission has reviewed the supplemental comments submitted by Dr. Langin-Hooper. Except as indicated below, we conclude that the Arbitrator's decision comports with the requirements of the Act, applicable FCC rules and relevant state laws and regulations. We have provided clarification or additional explanation of the Arbitrator's decision where appropriate.

AT&T's Exceptions:

Issue A. The Arbitrator's decision regarding the cost of capital rate that applies to the determination of the costs of interconnection and unbundled network elements. AT&T raised its objection to the cost of capital rate recommended by the Arbitrator. AT&T claims this decision is not supported by evidence in the record and is therefore unreasonable and invalid. This issue was remanded back to the Arbitrator after the Commission's hearing. On remand, the Arbitrator altered his decision after reviewing the record evidence. The Arbitrator's amended decision is consistent with the Act and state law and is supported when examining the record.

The Commission has opened Docket C-1415 to establish an appropriate cost model for USW. If the determinations in Docket C-1415 support different pricing conclusions than those addressed in this proceeding, those changes should be incorporated into the interconnection agreement. We further believe a retroactive true-up should be implemented after the conclusion of C-1415 to correct any pricing errors. We, therefore, uphold the Arbitrator's decision on an interim basis.

Issue B. The refusal to require geographic deaveraging of unbundled network element pricing. AT&T claims that failing to establish deaveraged prices for unbundled network elements is inconsistent with the Act. We disagree and uphold the Arbitrator's decision. While we acknowledge that costs and rates may differ based on population density and other factors, we believe the record supports the finding that the cost evidence does not sufficiently support deaveraging.

Issue C. The refusal to approve bill and keep arrangements for the recovery of costs for transport and termination. AT&T claims the Arbitrator erred by not requiring USW to require a bill and keep arrangement. Section 252(d)(2)(B)(I) states that for any billing cycle, the parties may, upon mutual agreement, waive the reciprocal compensation requirements in favor of a bill and keep approach. The Nebraska Legislature addressed this issue in Legislative Bill (LB) 660 during the 1997 Legislative Session. Enacted into law, LB 660 sets forth that bill and keep arrangements shall not be imposed unless mutually acceptable to both negotiating parties. USW objects to the provisioning of bill and keep; thus, the Arbitrator's decision is upheld.

Issue D. The decision not to require USW to make grandfathered services available to new customers. AT&T claims the Arbitrator should have required USW to make grandfathered services available to new customers. We disagree and uphold the Arbitrator's decision. This issue was previously raised to this Commission in formal complaints filed by AT&T, MCI and McLeod Telemanagement regarding USW's withdrawal of Centrex Plus service (see FC-1252, FC-1253 and FC-1254). We find that USW has no obligation under federal or state law to offer grandfathered services to new customers.

The Act requires ILECs to offer at wholesale rates any telecommunications

service that the carrier provides at retail to subscribers who are not telecommunications carriers (see Section 251(c)(4)). The Act does not require grandfathered services to be made available to new customers. We, therefore, agree with the Arbitrator's decision. If USW reinstates any grandfathered services and makes them available at retail, such services should be made available at wholesale rates.

Issue E. The several post-hearing conferences and teleconferences conducted by the Arbitrator regarding the determination of the wholesale discount and costs of unbundled elements. AT&T argues that the post-hearing conferences which were conducted with the Arbitrator violate the Commission's Arbitration Policy. AT&T further states that new evidence was introduced at these proceedings which formed the basis for parts of the Arbitrator's decision. Both parties were in attendance at the conferences with the Arbitrator; and while we do not necessarily agree that additional conferences should have been held after the close of the Arbitration hearing, we do not find that such conferences violated the due process rights of either party. We reject AT&T's claims.

Issue F. The imposition of several reciprocal obligations on AT&T. AT&T argues the Act places certain obligations upon all LECs, while other responsibilities are imposed only on ILECs. AT&T states the Arbitrator unreasonably placed ILEC responsibilities upon AT&T. We agree and find that the Arbitrator violated the Act in this regard. Specifically, in paragraph 9.11 of the Recommended Agreement each party is required to provide the other party dialing parity for interexchange service. The reference to interexchange service should be stricken. The interconnection agreement should be accordingly modified to reflect that reciprocal obligations relate only to local service.

Issue G. The adoption of language that places the risk of infringement of intellectual property rights on the user and not the developer of software. AT&T asserts that the Arbitrator shifted the risk on an infringement completely to the party utilizing the software, as opposed to the party which originally developed the software. We agree with AT&T that this provision as it is written is unreasonable; however, we do not find the language recommended by AT&T in its Last Best Offer to be a fair remedy. Therefore, we direct the parties to rewrite this section. If mutually acceptable language cannot be submitted to the Commission, this section should be stricken from the agreement.

Issue H. The failure to limit the reservation of space for future use to use for local service. We agree with the Arbitrator and do not find it necessary to limit the amount of space USW may reserve for provisioning services. The Arbitrator's decision is in compliance with federal and state law. If AT&T believes USW is being unreasonable or discriminatory in the amount of space that must be reserved, it may file a formal complaint with the Commission.

Issue I. The omission of language requiring USW to facilitate negotiations between USW Media and AT&T concerning directory listings. AT&T states USW should facilitate

negotiations with its subsidiary, USW Media, for directory listings. We disagree and uphold the Arbitrator's decision. Such language is not required under federal or state law.

Issue J. The omission of language making clear that future stipulations between AT&T and USW, upon Commission approval, will supersede provisions of the Recommended Agreement. We agree with AT&T and find this change to be reasonable and in the public interest. The interconnection agreement should be accordingly modified to reflect that future stipulations made between the parties, upon the Commission's approval, will supersede the provisions of the Recommended Agreement.

USWs Exceptions:

Issue A. The Commission cannot lawfully adopt an agreement that is not supported by substantial evidence in the record.

Issue B. The agreement proposed by the Arbitrator exceeds the authority granted by the Federal Act.

Issue C. The agreement contains onerous terms and conditions having no support in the record or applicable law.

Issue D. The proposed agreement is not in the public interest.

We address the above objections raised by USW in concert. At the hearing and in its written comments, USW stated this Commission could not approve the proposed interconnection agreement because the decision was not based on record evidence. In the Commission Order entered April 8, 1997, in this docket, we directed the Arbitrator to clarify and explain to the Commission his decision regarding pricing matters with record evidence. Such information was submitted to the Commission on May 6 and May 18, 1997. Upon reviewing this information, we disagree with USW's allegations and find the Arbitrator's decision to comport with the evidence placed in the record. We further do not find the Arbitrator's actions to violate the Commission's Arbitration Policy. We lastly do not find the interconnection agreement to violate the public interest. These claims raised by USW are rejected.

Issue E. AT&T should not have direct access to USW's support systems. USW objects that the proposed agreement enables AT&T to review proprietary records relating to USW's customers. We agree with USW and find this section to be unreasonable. Confidential information may be obtained by AT&T by requiring USW to offer support systems. Therefore, we find this agreement should be modified to change the contract language to reflect that nondiscriminatory access to OSS "may" be offered. If the companies are unable to negotiate acceptable terms pertaining to OSS, the dispute resolution process will apply. This change is

consistent with the federal law and the section should be accordingly modified.

Issue F. The agreement imposes costly revised technical standards on USW's Nebraska telecommunications network. We find certain technical standards must be met in order for AT&T to offer quality services on a resale basis to its customers. We do not, however, believe that such standards should be unduly burdensome on USW. We accept the Arbitrator's recommendation regarding technical standards; however, we find that this issue should be reviewed in a separate investigative docket to determine appropriate service levels for all ILECs. This docket will be completed in an expeditious manner and will ensure that all technical standards required for ILECs are fair and in the public interest. Until this docket is finalized, USW may file with the Commission a formal complaint objecting to a specific technical standard that will cause irreparable financial harm during the interim time period. We approve the Arbitrator's recommendation on an interim basis.

Issue G. The agreement imposes intrusive new business practices and performance standards. AT&T is entitled to the same level of performance that USW provides to itself. We agree with USW that if AT&T wishes a higher level of service, it should pay for it. Therefore, if USW incurs additional costs to build or modify its facilities for the benefit of AT&T and those costs are not included in existing TELRIC collocation rates, USW is entitled to recover such costs. We find USW has the burden of showing that any claimed additional costs are not already recovered. If USW demonstrates it is entitled to recover additional costs, it is able to recover those costs through nonrecurring charges. USW must allocate nonrecurring charges among all requesting carriers in a competitively neutral manner.

The Commission uses terminology "competitively neutral" throughout this order. The Commission defines a competitively neutral standard to mean minimizing the impact of a particular pricing or costing structure on the ability of the various participants (Competitive Local Exchange Carriers (CLECs) including AT&T) within a given market to compete with each other and the ILEC. It is not intended to deprive USW of revenue to which it is legally entitled and should recover from its wholesale customers.

Issue H. The rates in the AT&T agreement for unbundled loops and other unbundled elements violate the Act's mandate that USW be permitted to recover its costs.

1. **Fill factors**
2. **Sharing the costs of installing outside plant**
3. **Costs of unbundling**
4. **Inclusion of non-switched digital special access lines**

The Commission opened Docket C-1415 to establish an appropriate cost model for USW. If the determinations in Docket C-1415 support different pricing conclusions than those addressed in this proceeding, those changes should be incorporated into the interconnection agreement. We, therefore, are unpersuaded that the Arbitrator's findings violate state or federal law or

unconstitutionally take either parties' property without just compensation. We further believe that a retroactive true-up should be implemented after the conclusion of C-1415 to correct any pricing errors. Since Docket C-1415 is pending at this time and we cannot accurately predict a completion date, we find it reasonable to limit the period to "true-up" rates in this proceeding retroactively to one year.

We disagree with the Arbitrator's recommended decision regarding the compilation of digital special access lines. Specifically, we reject the recommended decision and the Hatfield Model treatment of DS-1 and DS-3. We find that such lines should not be counted as the number of voice frequency channels but rather counted as the actual number of subscriber loops used to provide the service. For example, DS1 service provided over two copper pairs would be counted as two subscriber loops not twenty four (24) loops. The pricing model should be rerun accordingly. We will review this issue and the remainder of the Arbitrator's recommendation concerning pricing in Docket C-1415.

Issue I. The pricing standard found in Part VI of the proposed agreement at section 49.4 is at odds with the Arbitrator's December 2, 1996, preliminary decision. See resolution made in USW "Issue H" above.

Issue J. The wholesale discount rates the Arbitrator has preliminarily adopted would prevent USW from recovering its costs and violates the Act. See resolution made in USW "Issue H" above.

Issue K. The Act requires that the interconnection agreement not allow sham unbundling. While we are sympathetic to USW's concerns regarding sham unbundling, we do not find the Arbitrator's recommendation to violate state or federal law. The opportunity for AT&T to repackage unbundled network elements at a price less than the wholesale discount certainly exists in the business market. However, the retail prices of residential and business services are controlled by USW and sham unbundling can be remedied under Nebraska's statutes with rate changes. We do recommend that any retail price changes made by USW be implemented over time and be phased in slowly to minimize rate shock to consumers. The Arbitrator's decision is consistent with the federal act and the recommended decision is upheld.

Issue L. AT&T must be required to pay USW for all additional facilities and services that USW must provide. We agree with USW and find that AT&T should be obligated to pay the incremental costs associated with constructing additional facilities that it requests. Such costs should be spread across all competing local exchange carriers that utilize the additional facilities in a competitively neutral manner as described in USW "Issue G" above. The agreement should be modified accordingly.

Issue M. USW should not have to finance collocation costs requested by AT&T. We agree with USW. USW is entitled to recover the costs it incurs in providing collocation at the Total

Element Long Run Incremental Cost (TELRIC), plus a reasonable allocation of forward-looking common costs up front. USW is not required under federal or state law to defer payments for the benefit of AT&T. If AT&T pays USW construction and one-time fees and subsequently other CLECs take advantage of the improvements paid by AT&T, then the costs should be spread among all benefitting carriers. The agreement should be modified accordingly.

Issue N. A pick-and-choose clause is not authorized by the Act and the Commission should exclude it from any agreement. USW asserts that the pick-and-choose clause should not be included in the interconnection agreement. We agree. The pick-and-choose clause in the FCC Order has been stayed by the Eight Circuit on the basis that it would harm the negotiation process required under the Act. The Eighth Circuit is going to resolve this issue on the merits, and the decision whether the contract should contain such a clause should be made after the court's ruling. Until that time, the contract should not contain the disputed clause. We agree with USW and conclude that the decision should be modified accordingly.

Issue O. USW should not be required to offer dark fiber as an unbundled network element. USW alleges that dark fiber should not be unbundled. We disagree and uphold the Arbitrator's decision. The FCC has declined to address whether dark fiber should be unbundled and has left that decision to State commissions (see FCC Order 96-325, Para. 450). The FCC states, however, there is a presumption in favor of unbundling if it is technically feasible (see FCC Order 96-325, Para. 281). Dark fiber is nothing more than fiber installed under a cable sheath that is not currently connected to the electronics that make it functional. To the extent that dark fiber is available and to the extent that it is technically feasible, USW shall offer dark fiber as an unbundled network element. This section is approved.

Issue P. Packaged services and deregulated services that USW makes available to end users should not be provided for resale at wholesale rates. USW asserts that packaged and deregulated services should not be made available at wholesale rates. We disagree and uphold the Arbitrator's recommended decision. It is consistent with state and federal law.

Issue Q. Residential services should be resold with an avoided discount set at zero until such time as residential services are priced above cost. See resolution of USW "Issue H" above.

Issue R. Interim Portability Costs should be borne by the new entrants. We agree with USW, but find that the costs of interim portability costs should be borne by all carriers. Both CLECs and USW derive benefit from interim number portability; therefore, such costs should be spread across carriers. The agreement should be modified accordingly.

Issue S. AT&T and USW should be allowed to determine their own standards in electronic interfaces. USW asserts that it has come to an agreement on this section with AT&T and that their agreement should supersede the decision rendered by the Arbitrator. If AT&T and USW

have indeed reached agreement regarding this issue, it may be submitted to the Commission for review. If no such agreement has been made, we uphold the Arbitrator's decision. It is reasonable and in compliance with federal and state law.

ORDER

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Arbitrator's Recommended Decision is approved as modified herein.

IT IS FURTHER ORDERED that an Interconnection Agreement consistent with this Order be filed on or before July 31, 1997, to become effective August 8, 1997, pending the Commission's review.

MADE AND ENTERED at Lincoln, Nebraska this 1st day of July, 1997.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONER CONCURRING:

Chairman

ATTEST:

Executive Director

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

COMMISSIONER DISSENTING:

//s//Daniel G. Urwiller

DISSENT OF COMMISSIONER URWILLER:

The majority has created a source of conflict in its resolution of the quality standards issue. Whether AT&T or US West will have to bend its standards in order to make their networks compatible leaves the two companies at odds when the matter could easily be disposed of by requiring that both comply with standards promulgated by this Commission. Where Commission standards are presently lacking, the Commission should proceed in haste to adopt appropriate standards.

Section 252(d)(1) of the Act requires that a state commission determine "the just and reasonable rate" for interconnection and network elements and ensure that the rates are "nondiscriminatory" and "based on the cost ... of providing the interconnection or network element" and "may include a reasonable profit." Subsection (d)(3) requires that the state commission determine wholesale rates for telecommunications services "on the basis of retail rates charged to subscribers ..., including ... costs that will be avoided by the local exchange carrier." The majority has not provided the rates as required by the Act. The opening of a separate docket does not adequately dispose of the rate issues. The majority apparently concludes that Docket C-1415 will cure the problem. But what happens if it takes longer than a year to complete the investigation and establish rates? A retroactive "true-up" cannot be completed until the C-1415 docket is completed. Furthermore, the majority does not provide for payment of interest in the event retrospection reveals a significant discrepancy in the initial rate structure. Under the majority decision, US West, it is clearly conceivable, could be placed in the position of subsidizing AT&T's competition with it.

I am persuaded by the statement in the brief filed herein by US West that:

> Under the Agreement, AT&T can completely circumvent the resale provisions of the Act by engaging in sham unbundling. The Agreement allows AT&T to purchase the equivalent of a "finished" service solely through the purchase of unbundled network elements at "cost-based" rates. Thus, AT&T can order US West to provide a finished retail service but get a cheaper price than the Act's resale price (retail less cost avoided) by using the fiction that AT&T is buying unbundled network elements -- when in reality there is no unbundling involved and AT&T is not self-provisioning any element. In this manner, sham unbundling creates significant opportunities for price arbitrage between resale prices and the prices of unbundled elements.

It is unfortunate that the majority has felt compelled to allow the arbitrator to select the wholesale price discounts presented by either party and adopt them in total. I suggest that it is this Commission's prerogative, and duty, to examine the discounts and find a middle ground.

Daniel G. Urwiller
Commissioner Daniel G. Urwiller