

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of AT&T Communications of	)	Application No. C-1385
the Midwest, Inc. of Denver, Colorado	)	
Petitioning for Arbitration Pursuant to	)	Interim Order
Section 252(b) of the Telecommunications	)	
Act of 1996 to Establish an Interconnection	)	
Agreement with US West Communications.	)	Entered: April 8, 1997

APPEARANCES:

For AT&T:  
Andrew Pollock  
Knudsen, Berkheimer, et. al.  
1000 NBC Center  
Lincoln, Nebraska 68508  
and  
Mary Tribby  
1875 Lawrence Street, Room 1575  
Denver, Colorado 80202

For US West:  
Richard Johnson  
200 South 5th Street  
Room 395  
Minneapolis, Minnesota 55402  
and  
John Devaney  
607 14th St., N.W.  
Washington, D.C. 20005

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

BY THE COMMISSION:

AT&T Communications of the Midwest, Inc. (AT&T) requested to negotiate an interconnection agreement with US West Communications, Inc. (US West) on March 1, 1996. Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996, AT&T filed a petition for arbitration with the Commission on July 26, 1996. AT&T subsequently amended its petition for arbitration on August 6, 1996. US West filed its reply to the petition on September 3, 1996. Both AT&T and US West filed motions seeking protection of confidential information. These motions were granted by the Commission.

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.

Hearings were held before the Arbitrator from October 28 through November 1, 1996. The parties submitted their Last Best Offers on November 15, 1996, and post hearing briefs on

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November 22. On November 1, 1996, the parties and the Arbitrator filed a Request for Waiver, at the request of the Arbitrator, for authority to allow the Arbitrator to modify the Commission's best and final offer procedures so that the Arbitrator could make decisions that differed from the best and final offers proposed by the parties. In that request, the parties and the Arbitrator agreed that if the Arbitrator's decision differed from the best and final offers proposed, the arbitrator would cite the record evidence in support of his decision. This stipulation was approved by the Commission and specifically stated:

If the Arbitrator exercises his discretion by modifying any final offer of the parties, it is understood by the parties that the Arbitrator shall explain the basis for such recommendation to the Commission by referring to evidence in the record of the proceeding.

On December 2, 1996, the Arbitrator filed a Preliminary Decision. In that decision, the Arbitrator stated he would work with the parties to create an interconnection agreement for delivery to the Commission on January 3, 1997. That deadline was later extended several times by the agreement of both parties. On March 4, 1997 the Arbitrator filed the proposed interconnection agreement in this docket. Pursuant to the Commission's policy set forth in C-1128, interested parties were allowed to submit written comments on the interconnection agreement on or before March 14, 1997. US West and AT&T filed a joint motion requesting permission to submit their comments to the Commission no later than March 17, 1997. The motion was granted and comments were timely received from US West and AT&T. The Nebraska Independent Telephone Association filed comments beyond the published deadline and requested the Commission to accept the comments even though they were not timely filed. Neither party objected to the request, and therefore, the comments were accepted.

A hearing was held in the Commission Hearing Room on March 20, 1997 to determine whether the proposed agreement met the requirements set forth in Section 252(e) of the Act. Appearances were made by Dick Johnson and John Devaney for US West, by Andrew Pollock and Mary Tribby for AT&T and by Deonne Bruning for the Commission staff. The Arbitrator, Dr. Jerry Langin-Hooper, was also present at the hearing. No public comment was offered.

## DECISION

At the approval hearing (hereinafter referred to as hearing), US West objected to the proposed interconnection agreement on grounds that various issues were determined without substantial evidentiary support from the record. US West argued that, should the Commission adopt this agreement, it would result in an arbitrary and capricious decision. AT&T also raised concerns regarding the Arbitrator's decision, indicating that portions of the Arbitrator's decision were not clarified or referenced by evidence in the record. Both parties also objected to specific terms and conditions incorporated in the interconnection agreement.

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The Commission recognizes that the Arbitrator brings experience and knowledge to this proceeding which he will apply in rendering his decisions, as would this Commission if it had acted as the Arbitrator. That knowledge was considered by the parties in choosing Dr. Langin-Hooper as the Arbitrator. Furthermore, the Arbitrator reviewed the testimony of several witnesses, presided over the arbitration hearing and reviewed post-hearing briefs and submissions. Thus, the Arbitrator had ample evidence on which to base his decision. However, to fulfill its obligations under the Federal Act and this Commission's arbitration procedures, the Commission requires the Arbitrator to explain his rationale and basis for decisions with reference to record evidence, so that a meaningful review of the arbitrated decision by the Commission is possible. The Commission is concerned about the lack of supporting rationale and/or citations to the record for certain decisions made by the Arbitrator.

The Commission's policy is unclear how to proceed in this situation, therefore, we look to the parties' stipulation for guidance. The parties empowered the Arbitrator with a considerable amount of discretion in this proceeding by deviating from final offer arbitration. However, the parties crafted the stipulation to ensure that any determinations made by the Arbitrator be based upon evidence in the record. The supporting rationale from the record enables the Commission to render a proper decision as required by Section 252(e).

Section 252(e) of the Act in pertinent part states:

(e) APPROVAL BY STATE COMMISSION. --

(1) APPROVAL REQUIRED. -- Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) GROUNDS FOR REJECTION. -- The State commission may only reject --

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that --

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) 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.

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(3) PRESERVATION OF AUTHORITY. -- Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. \*\*\*

The Nebraska Administrative Procedure Act also requires agencies to render decisions based upon substantial evidence that is placed in the record. (See Neb. Rev. Stat. Sec. 84-917(6)(a)(v) (Reissue 1994)). The Commission is concerned about the lack of supporting rationale and/or citations to the record for certain decisions made by the Arbitrator (Tr- 156, 158, 164, 165, 169, 170, 178, 180, 181, 182, 188, 208, 212). Therefore, the Commission cannot accept the contract the Arbitrator has proposed. We must remand the agreement and order the Arbitrator to explain his decision more fully from evidence in the record and provide detailed reasoning for his resolution of issues with citations to evidence in the record. We recognize that the background and skills the Arbitrator brings to these arbitrations are valuable and should be utilized; however, any decision must be based, not on the arbitrator's independent knowledge and experience, but on evidence adduced in the presence of the parties.

The Commission, therefore, remands the interconnection agreement back to the Arbitrator for the purpose of more fully supporting his decisions on the following issues:

1. Regarding the determination of the avoided cost discount:
  - a. the use of interstate data instead of intrastate data;
  - b. the inclusion of US West Information Management account as an element of InterArea Rent Compensation;
  - c. the use of any avoided cost percentages which are not fully explained; and
  - d. the rationale for assignment of indirect costs that the Arbitrator believed were primarily "self-contained."
2. Regarding the calculation of the costs for unbundled network elements:
  - a. the application of 100 percent fill factors for distribution facilities;
  - b. any "economies" the Arbitrator believed US West experienced when it installed its network which formed a basis for his decision;
  - c. the application of a 13.5 percent cost of capital; and
  - d. the different prices for first and second lines.
3. Regarding the imposition of technical standards:
  - a. The evidence supporting such requirements set out in attachment 3.
4. Regarding the imposition of performance standards and business practices:
  - a. The evidence supporting such requirements set out in attachments 3, 5, 6, 8 and 11.

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In deciding these issues, the Arbitrator shall provide full explanations for his decisions that include citations to the evidence in the record. If the Arbitrator is unable to support his previous decisions, the Commission expects the Arbitrator to modify those decisions and the interconnection agreement accordingly. Such changes shall be submitted to the parties, prior to the filing of such with the Commission. The Arbitrator shall provide the Commission with this information no later than May 6, 1997. On that date, the Arbitrator shall also submit to the Commission any revised language in the interconnection agreement. In drafting the contract, the Arbitrator shall examine only those issues identified herein and shall impose terms based upon evidentiary support in the record.

# ORDER

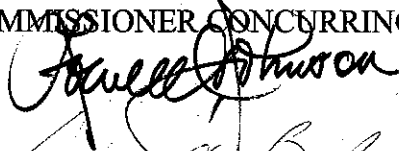
IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Arbitrator's Recommended Decision and Interconnection Agreement are remanded to the Arbitrator for the purposes described above.

IT IS FURTHER ORDERED that the Arbitrator's final decision pursuant to the remand must be submitted to the Commission for its approval or rejection pursuant to Section 252(e) of the Act on or before May 6, 1997.

MADE AND ENTERED at Lincoln, Nebraska this 8th day of April, 1997.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONER CONCURRING:

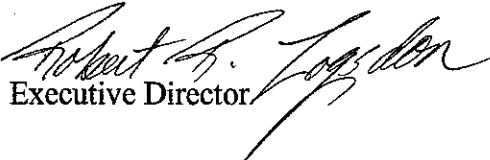


//s//Rod Johnson  
//s//Frank E. Landis  
//s//Daniel G. Urwiller

Chairman



ATTEST:



Executive Director

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

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