

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

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| In the Matter of Western Wireless Corp., |) | Application No. C-1409 |
| of Issaquah, Washington, Petitioning for |) | |
| Arbitration Pursuant to Section 252(b) |) | |
| of the Telecommunications Act of 1996 |) | Recommended Decision |
| of the Rates, Terms and Conditions of |) | Granted in Part, Rejected in Part |
| Interconnection with US West |) | |
| Communications, Inc. |) | Entered: February 28, 1997 |

APPEARANCES:

For Western Wireless:
 Gene DeJordy
 2001 N.W. Sammamish Road
 Issaquah, Washington 98027
 and
 Steve Seglin
 Crosby, Guenzel, et. al.
 134 S. 13th Street, Suite 400
 Lincoln, Nebraska 68508

For US West Communications:
 Dick Johnson
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For the Commission Staff:
 Deonne Bruning
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BY THE COMMISSION:

On March 29, 1996, Western Wireless (Western) requested renegotiation of its existing interconnection contract with US West Communications, Inc. (US West). The Telecommunications Act of 1996 (the Act) permits renegotiation of existing contracts between an incumbent local exchange carrier (ILEC) and a Commercial Mobile Radio Service (CMRS) provider pursuant to Section 251(b)(5). Pursuant to Section 252(b)(1) of the Act, Western filed a petition for arbitration with the Commission on September 6, 1996. US West filed its response to the petition, pursuant to Section 252(b)(3) of the Act on October 1, 1996. A supplemental response was filed by US West with the Commission on December 9, 1996.

On September 30, 1996, US West filed a motion to dismiss the first open issue in Western's petition (to use the FCC's default proxy rates during the course of the arbitration and until the Commission develops new interconnection rates). Western filed an opposition to the motion. Oral arguments were heard on October 23, 1996 in the Commission Library, Lincoln, Nebraska. The Commission granted US West's motion on October 28, 1996 and dismissed the first issue in C-1409 and determined it was not an open issue for arbitration.

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 attempt to select a mutually acceptable arbitrator. The parties in this docket selected the Honorable Samuel Van Pelt to arbitrate the proceeding.

Application C-1409

PAGE TWO

Western offers cellular communications in Nebraska pursuant to its Federal Communications Commission (FCC) radio license. Although Western is a provider of cellular telecommunications and not regulated by the Commission pursuant to Neb. Rev. Stat. 86-808 (Reissue 1994), Section 252(b)(1) of the Act permits any carrier or any other party to the negotiation of an interconnection agreement to petition the Commission to arbitrate any open issues that the parties have been unable to resolve voluntarily. The Act allows a party to file such petition between the 135th day and the 160th day (inclusive) after the incumbent LEC receives the request for negotiation. Western timely filed its petition with the Commission on the 159th day.

Section 251(b)(5) of the Act requires compensation agreements for transport and termination of calls which originate on the other carrier's network facilities be mutual and reciprocal with rates based on a reasonable approximation of the additional costs of terminating such calls. Under the parties' existing interconnection contract, US West does not compensate Western. Therefore, Western may renegotiate this contract pursuant to the Act.

A hearing was held before the Arbitrator on December 20, 1996. Present for Western was Gene DeJordy, Director of Regulatory Affairs. US West was represented by Richard Johnson and William Heaston. Evidence was submitted by both parties. The parties stipulated on the record to waive the existing rule that required the Arbitrator's decision to be rendered prior to December 31, 1996. Parties agreed to submit briefs on January 17, 1997 and for the Arbitrator to submit his recommended decision on or before January 31, 1997.

The Arbitrator's decision was filed with the Commission on January 31, 1997. Pursuant to the Commission's policy, all interested parties were allowed to submit written comments on the recommended decision on or before February 19, 1997. Written comments were filed by US West, Western, AT&T Communications of the Midwest and the Nebraska Independent Telephone Association.

A hearing was held on the Arbitrator's recommendations in the Commission Hearing Room on February 20, 1997 with Commissioner Rod Johnson chairing the proceeding. Appearances were made by Steve Seglin and Gene DeJordy for Western, by Dick Johnson for US West and by Deonne Bruning for the Commission staff.

DECISION

At the arbitration hearing, the parties stipulated and agreed on eight Issues for resolution as follows:

- Issue 1: US West prices for call termination and tandem switching,
- Issue 2: Western Wireless prices for transport and termination,

Application No. C-1409

PAGE THREE

- Issue 3: Which party pays termination charges for third party calls transmitting US West's network,
- Issue 4: The administrative factor to be used for reciprocal compensation,
- Issue 5: Whether the MTA is the local calling area and, if not, what local calling area should be determined and established by the Commission,
- Issue 6: Amount of traffic subject to switched access charges,
- Issue 7: Whether there is a contract or agreement before the Commission which needs to be arbitrated, or whether there are simply open issues between the parties, the resolution of which may constitute an amendment or modification to the agreement between the parties, and
- Issue 8: The effective date of the reciprocal compensation obligation.

In his recommended decision, the Arbitrator advised the Commission that the parties have stipulated and agreed to resolve the following:

- Issue 3: Parties stipulated this Issue is resolved by Issue 4.
- Issue 4: The administrative factor to be utilized for reciprocal compensation is eighteen (18) percent until July 1, 1997. Both parties agreed to conduct a study to determine a more accurate factor by July 1, 1997.
- Issue 6: Parties stipulated this Issue is resolved by Issue 4.

Section 252(e) of the Act requires state commissions to approve or reject any interconnection agreement adopted by negotiation or arbitration. Upon reviewing the negotiated terms set forth in Issues 3, 4 and 6, we find the terms do not discriminate against other carriers, are consistent with the public interest and meet the requirements set forth in the Act. Accordingly, the Arbitrator's recommended decision regarding Issues 3, 4 and 6 is approved.

Given the parties' experience in voluntarily reaching agreement, we feel it is appropriate to provide guidance in case the parties do not reach a mutually acceptable resolution by July 1, 1997. Should the parties not successfully resolve Issues 3, 4 and 6 as expected, either party may request the Commission for arbitration. Such petition for arbitration shall be filed no later than July 15, 1997. During the arbitration process and until the state commission approves the arbitrated agreement, the administrative factor of eighteen (18) percent shall continue to be used.

All other issues in the petition remain contested leaving the Arbitrator to file the following recommended decision:

- Issue 1: US West prices for call termination and tandem switching.

The Arbitrator found in favor of Western Wireless on this Issue stating US West was not entitled to recover an amount above TELRIC prices attributable to the under-depreciated embedded investment in the US West network (commonly referred to as the depreciation reserve

Application No. C-1409

PAGE FOUR

deficiency).

In its written comments and at the approval hearing, Western supported the Arbitrator's recommended decision stating historic, embedded costs should not be recovered through any additive to switching rates. Western further stated Section 252(d)(2) does not allow US West to recover the depreciation reserve deficiency through transport and termination charges. While US West debated this issue at the arbitration hearing, it did not object to the Arbitrator's recommendation in its written comments or at the approval hearing.

Although we recognize the existence of embedded costs, we find it inappropriate in forward-looking, economic cost-based pricing to recover such costs through transport and termination charges. We disagree with the testimony US West provided at the arbitration hearing that denying them the opportunity to recover the reserve deficiency in this docket would ultimately preclude them from recovering such costs. At the arbitration hearing, Al Bergman, witness for US West, admitted that the Commission has allowed the recovery of depreciation reserve deficiency in previous cases. Mr. Bergman, in acknowledging the Commission's prior action, said "(w)e finished one I think that was about \$60,000,000 in the early '90s. They (the Commissioners) have generally been fairly progressive on that." The Commission has the authority to determine whether a depreciation reserve deficiency exists and to determine the appropriate recovery period for such a deficiency. Mr. Bergman also testified at the arbitration hearing that the depreciation reserve deficiency would exist regardless of whether or not US West transported and terminated Western's traffic.

Based upon the evidence adduced at the arbitration and approval hearings, as well as the written comments, we find the depreciation reserve deficiency may exist, but that it may be recovered in other ways. We find the recommendation concerning Issue 1 to be in compliance with the Act. Therefore, we approve the Arbitrator's recommendation on this provision.

Issue 2: Western Wireless prices for transport and termination.

The Arbitrator found in favor of Western and against US West on Issue 2 for the reason that Western's switches were functionally equivalent to the US West tandem switch. The Arbitrator stated he also relied upon rulings made by other state commissions to resolve the dispute.

Western filed written comments and testified at the approval hearing that the Arbitrator's recommendation properly concluded it should be compensated at the tandem rate level based upon the geographic area served by, and functionality of, its Nebraska network. US West objected to this determination in its written comments and at the approval hearing stating Western does not provide tandem functionality, nor does it incur tandem costs.

Application No. C-1409

PAGE FIVE

While the Arbitrator stated Western's switches are functionally equivalent to the US West tandem switch, we disagree. It is difficult to determine the functional equivalence between Western's Mobile Telephone Switching Offices (MTSOs) and US West's tandems because their network architectures and technologies are different. However, the record from the arbitration hearing indicates that Western's switches are capable of performing the same functions as a tandem switch, but in fact, do not function as such. Western's switches do not provide alternate routing functions where the end office serving the called party is unknown to the originating end office.

One of the specific grounds for rejection of an agreement submitted to the Commission through compulsory arbitration is failure to meet the standards of Section 252 of the Act. Section 252(d)(2) provides guidance for determining appropriate rates for transport and termination. It states that a state commission shall not consider reciprocal compensation terms and conditions to be just and reasonable unless

...such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination of each carrier's network facilities of calls that originate on the network facilities of the other carrier . . . [and the terms and conditions] determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

US West's network consists of both end office switching and tandem switching which provides alternate routing and reliability. Failing to compensate US West for the costs of its tandem switching network would be contrary to Section 252(d). We also find that Western does not have a tandem switch and therefore, pursuant to Section 252(d), should not be allowed to charge for services it does not provide. Accordingly, the Commission rejects the Arbitrator's recommendation on Issue 2 and directs Western to be compensated for call termination at the end office termination rate, not the tandem interconnection rate.

Issue 5: Whether the MTA is the local calling area and, if not, what local calling area should be determined and established by the Commission.

The Arbitrator found in favor of Western on the basis that with the lifting of the stay by the Eighth Circuit Court of Appeals, FCC Rule Section 51.701(b) is in effect and is legally controlling on this Issue. Accordingly, the Arbitrator recommended that all traffic that originates and terminates in the same Major Trading Area (MTA) shall be subject to local interconnection rates, except for those exceptions provided under the FCC rules.

Western filed written comments and testified at the approval hearing in support of this determination. While US West did not provide written comments on this Issue, the company

Application No. C-1409

PAGE SIX

testified at the approval hearing to reject the Arbitrator's recommendation. US West conceded that the Eighth Circuit had lifted the stay on this Issue, but urged the Commission to exercise its state authority to ignore the FCC Rule. We disagree with US West's position and approve the Arbitrator's recommendation with respect to Issue 5.

While the FCC rule was originally stayed by the Eighth Circuit, the Court subsequently lifted the stay and the rule is currently in effect. FCC Rule 51.701(b) provides that local telecommunications traffic means

(2) telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined Section 24.202(a) of this chapter.

Since Rule 51.701(b) is not stayed, we believe it must be followed. However, we do not agree with the FCC's interpretation that this is an appropriate local calling area. Should the Eighth Circuit overturn this Rule in its verdict, we believe US West should be afforded the opportunity to petition for further review of this issue. Due to FCC Rule 51.701(b), we find the Arbitrator's recommendation to be in compliance with the Act. We approve Issue 5.

Issue 7: Whether there is a contract or agreement before the Commission which needs to be arbitrated, or whether there are simply open issues between the parties, the resolution of which may constitute an amendment or modification to the agreement between the parties.

No evidence was offered by the parties at the arbitration hearing as to this Issue. The Arbitrator recommends that this Issue is an implementation question which should be considered under Issue 8.

Western addressed this Issue in its written comments by stating the Commission should order the parties to file an agreement within one week of the hearing scheduled for February 20, 1997. US West did not address this Issue in its comments or in its testimony at the hearing. Procedures were developed on the record at the approval hearing which we believe resolves this Issue.

We do not find the Arbitrator's recommended decision to be a final interconnection agreement between the parties. A contract between the parties must still be drafted which complies with the terms set forth herein. The parties stipulated on the record to provide the Commission with such contract within one week from the date of this Order. Receipt of the contract will be published in the Daily Record, Omaha, Nebraska. As provided in the Commission's policy, written comments will be accepted from interested parties up to fifteen (15) days from the date of publication. The Commission may, at its discretion, subsequently conduct a hearing. The Commission will render its decision determining whether or not the

Application No. C-1409

PAGE SEVEN

contract complies with the terms set forth herein within thirty (30) days from the receipt of the contract. We find this procedure complies with the terms of the Act.

Issue 8: The effective date of the reciprocal compensation obligation.

The Arbitrator ruled in favor of US West regarding Issue 8. Consequently, the Arbitrator recommended that US West pay Western reciprocal compensation at existing contract rates effective Nov. 1, 1996, the effective date of 47 C.F.R. 51.717. Further, the Arbitrator recommended new compensation prices, established pursuant to this proceeding, be effective once a final agreement is approved by the Commission.

Western filed written comments and testified at the approval hearing that the Arbitrator erred in making this conclusion. Western contends that the effective date for US West to provide reciprocal compensation is March 29, 1996, the date Western submitted a letter to US West requesting renegotiation of its existing contract. While US West did not reply to this Issue in its written comments, it testified at the approval hearing that the Arbitrator's recommendation was correct.

We agree with the Arbitrator's recommendation with respect to this Issue. The FCC's Interconnection Order (Docket 96-98) Paragraph 1094 states:

Pending the successful completion of negotiations or arbitration, symmetrical reciprocal compensation shall apply with the transport and termination rate that the incumbent LEC charges the CMRS provider from the preexisting agreement applying to both carriers *as of the effective date of the rules we adopt pursuant to this order.*

FCC Rule 51.717, originally stayed by the Eighth Circuit, became effective November 1, 1996. Rule 51.717 provides

(b) From the date that a CMRS provider makes a request under paragraph (a) [of this section] until a new agreement has been either arbitrated or negotiated and has been approved by a state commission, the CMRS provider shall be entitled to assess upon the incumbent LEC the same rates for the transport and termination of local telecommunications traffic that the incumbent LEC assesses upon the CMRS provider pursuant to the preexisting agreement.

While Rule 51.717 clearly contradicts the Paragraph 1094, we find it reasonable to assume that the effective date of Rule 51.717, November 1, 1996, is the date which Western is able to assess upon US West rates for the transport and termination of traffic. We find that CMRS providers that request negotiation on or after November 1, 1996 are entitled to use the date which the request for negotiation was made as the date in which the CMRS provider is entitled

Application No. C-1409

PAGE EIGHT

to assess rates upon the LEC for transport and termination. In reading Paragraph 1094, we do not believe Rule 51.717 is to be retroactively applied.

We further find that the November 1, 1996 rates shall apply until the Commission approves the parties' new agreement pursuant to Section 252 of the Act. We do not find the Arbitrator's recommended decision to be a final agreement. Therefore, the November 1, 1996 rates apply until the Commission approves the interconnection agreement that is to be filed with the Commission within one week from today's date. We find the Arbitrator's recommendation to be in compliance with the Act and therefore, we approve Issue 8.

At the approval hearing, the Commission received comments from AT&T of the Midwest. While AT&T did not take a position on the Arbitrator's recommendations, it urged the Commission to determine whether or not the recommended decision was an interconnection agreement. We believe this concern has been addressed in Issue 7, described above. The Commission and both parties stipulated that an interconnection agreement would be submitted for Commission approval one week from today's date. No other comments were made by AT&T or other interested parties.

ORDER

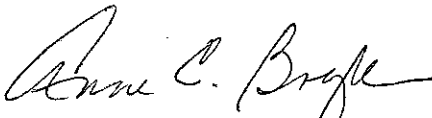
IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Arbitrator's Recommended Decision is approved in part and rejected in part.

IT IS FURTHER ORDERED that the interconnection agreement containing the terms and conditions set forth herein be filed with the Commission for approval within seven (7) days from the date of this Order.

MADE AND ENTERED at Lincoln, Nebraska this 28th day of February, 1997.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONER CONCURRING:

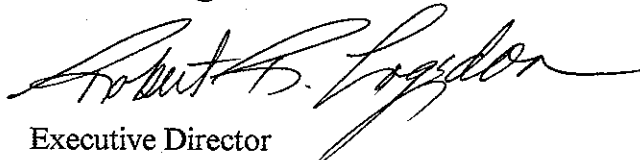


//s//Lowell Johnson
//s//Rod Johnson
//s//Frank E. Landis
//s//Daniel G. Urwiller

Chairman



ATTEST:



Executive Director