

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Western Wireless Corp.,	)	Application No. C-1410
of Issaquah, Washington, Petitioning for	)	
Arbitration Pursuant to Section 252(b)	)	Interconnection Agreement
of the Telecommunications Act of 1996	)	Granted in Part, Rejected in Part
of the Rates, Terms and Conditions of	)	
Interconnection with GTE.	)	Entered: April 1, 1997

APPEARANCES:

For Western Wireless:  
Steve Seglin  
Crosby, Guenzel, et. al.  
134 S. 13th Street, Suite 400  
Lincoln, Nebraska 68508

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

For GTE:  
Ed Warin  
McGrath, North, et. al.  
One Central Park Plaza, Suite 1400  
Omaha, NE 68102  
and  
Tracy Pagliara  
1000 GTE Drive  
Wentzville, MO 63385  
and  
Thomas Riordan  
O'Melveny & Myers, L.L.P.  
555 13th St., N.W.  
Washington, D.C. 20004

BY THE COMMISSION:

On March 29, 1996, Western Wireless (Western) requested renegotiation of its existing interconnection contract with GTE of the Midwest (GTE). 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.

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.

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

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(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.

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, GTE does not compensate Western. Therefore, Western may renegotiate this contract pursuant to the Act.

A hearing was held before the Arbitrator on December 6, 1996. The interconnection agreement was filed with the Commission on February 6, 1997. Pursuant to the Commission's policy, all interested parties were allowed to submit written comments on the recommended interconnection agreement on or before February 24, 1997. Written comments were filed by GTE, AT&T Communications of the Midwest (AT&T) and the Nebraska Independent Telephone Association. Western submitted its comments on February 25, 1997.

An approval hearing was held on the Arbitrator's recommendations in the Commission Library on February 28, 1997 with Commissioner Rod Johnson chairing the proceeding. Appearances were made by Steve Seglin for Western, by Ed Warin, Thomas Riordan and Tracy Pagliara for GTE, by Andy Pollock for AT&T and by Deonne Bruning for the Commission staff. The Arbitrator, Dr. Jerry Langin-Hooper was also present.

## DECISION

At the arbitration approval hearing (hereinafter referred to as hearing), Western stated it objected to certain provisions in the interconnection agreement, however, overall the Arbitrator's recommendations were fair and reasonable. GTE claimed in its written comments and at the hearing that two issues remained open between the parties and that the remainder of the agreement had been negotiated between the parties. GTE alleged that the parties' negotiated terms had been altered by the Arbitrator causing material changes which harmed GTE. We will first address the open issues raised by GTE. Such issues were identified as follows:

- Issue 1: The effective date of the reciprocal compensation obligation, and
- Issue 2: The percentage of local vs. non-local traffic carried on the network.

Section 252(e) of the Act requires state commissions to approve or reject any interconnection agreement adopted by negotiation or arbitration. This section provides state

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commissions are to review arbitrated terms to ensure they do not violate Sections 251 and 252(d) of the Act and that such terms are in compliance with all applicable state laws. We make the following decisions using those standards.

Issue 1: The effective date of the reciprocal compensation obligation.

The Arbitrator ruled that GTE 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, become effective January 7, 1997, the date of the Arbitrator's decision.

Western testified at the hearing that GTE should provide reciprocal compensation beginning March 29, 1996, the date Western submitted a letter to GTE requesting renegotiation of its existing contract. GTE testified at the hearing that the Arbitrator's recommendation using the November 1 date was correct, but, that new compensation prices should begin five (5) days after the Commission's Order is entered approving the interconnection agreement, not January 7, 1997.

While we approve the Arbitrator's recommendation with respect to the November 1 date, we reject the January 7, 1997 recommendation. 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. We acknowledge that 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 contradicts 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 GTE 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

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negotiation was made as the date in which the CMRS provider is entitled 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 since this Commission must approve or reject the agreement pursuant to Section 252(e) of the Act. Therefore, the November 1, 1996 rates apply until the Commission gives final approval to the interconnection agreement. We find it unnecessary and arbitrary that the new rates become effective five (5) days after the Commission enters its order. We therefore approve the Arbitrator's recommendation in part and reject in part.

#### Issue 2: The percentage of local vs. non-local traffic carried on the network

GTE urges the inclusion of interim traffic factors until the parties can develop a mutually agreeable methodology and process by which the parties identify and report the traffic that is non-local. For the interim, GTE recommends that a 95% local traffic factor be employed, with 5% of the traffic exchanged being non-local. GTE claims Western wants to report to GTE the amount of traffic that is non-local and that if it is unable to do so, then a local traffic factor would be used.

We find it appropriate to include an interim traffic factor until the parties have established a mechanism to identify and report the amount of non-local traffic exchanged. Once the parties implement such a process, it may request the Commission to review this issue and make modifications to the interconnection agreement.

#### Due Process Violations

Lastly, we address the contention by GTE that the interconnection agreement made herein is unlawful, as the Arbitrator acted beyond the scope of his authority by changing the terms and conditions of the proposed joint agreement. We note that Western supported the Arbitrator's changes and did not dispute the alterations.

This Commission directed pursuant to its Policy Statement entered in C-1128 that outside arbitrators would conduct arbitration proceedings on behalf of the Commission. In this context, Dr. Jerry Langin-Hooper was selected by the parties to carry out this function. Subsequent to the Arbitration hearings, the parties were directed by Dr. Langin-Hooper to draft an interconnection agreement pursuant to his recommended decision. An interconnection agreement was drafted by the parties and presented to Dr. Langin-Hooper on January 31, 1997.

GTE argues that this agreement is acceptable to both parties and that the Arbitrator is without authority to change it. Accordingly, GTE asks that the interconnection agreement be

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stricken in its entirety from this proceeding. Western did not admit at the hearing or in its written comments that the interconnection agreement was a negotiated agreement that was not subject to modification.

The Commission, pursuant to its authority under Section 252(e) of the Act, is to approve or reject both arbitrated and negotiated agreements. Negotiated agreements must not discriminate against other parties and must be consistent with public interest, convenience and necessity. Further, such agreements must comply with state law.

We believe it is unnecessary and excessive to strike the agreement in its entirety as requested by GTE. GTE raised only six points at the hearing and in its written comments that were objectionable due to changes made by the Arbitrator, while Western raised none. Therefore, the agreement is not stricken, however, we will examine those issues which were modified by the Arbitrator after January 31, 1997.

We believe it is essential that open lines of communication are maintained between the parties and the Arbitrator at all stages of the arbitration process. Clearly in this docket, changes were made by the Arbitrator to the interconnection agreement that were not relayed to the parties. We believe that the public interest is served if GTE and Western are allowed to review any changes made to an interconnection agreement that has been drafted prior to it being submitted to the Commission. The procedure affords the parties the opportunity to direct questions to the Arbitrator for clarification, as well as provides an opportunity for the parties to further improve the agreement.

While changes might ultimately be necessary, even in a negotiated agreement, if provisions are discriminatory or against the public interest, the parties should be apprised and informed of such modifications. Therefore, we reject every item wherein the Arbitrator modified the January 31, 1997 interconnection agreement as permitted under Section 252(e)(2)(A)(ii). The provisions of the agreement which were modified by the Arbitrator are to be reviewed by both parties and the Arbitrator. If any changes to the January 31, 1997 agreement are considered to be necessary by the Arbitrator after such meeting, the changes shall be submitted to the Commission, along with an explanation for the changes made. We therefore reject the agreement in part and order the Arbitrator to submit a proposed schedule containing a date in which the interconnection agreement will be refiled with the Commission. Such schedule shall be remitted on or before April 15, 1997.

#### 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.

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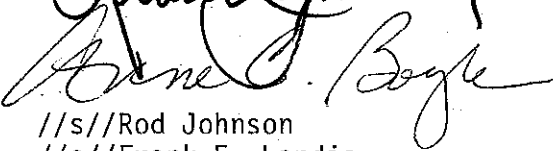
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IT IS FURTHER ORDERED that the Arbitrator shall submit a proposed schedule containing the date in which the interconnection agreement will be refiled on or before April 15, 1997.

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

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONER CONCURRING:

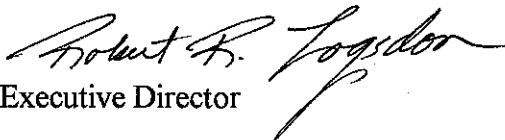
  


//s//Rod Johnson  
//s//Frank E. Landis  
//s//Daniel G. Urwiller

Chairman



ATTEST:

  
Executive Director