

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Cox Nebraska Tele-) Application No. C-1473
com, Inc.'s Petition for Arbitra-)
tion Pursuant to Section 252(b) of)
the Telecommunications Act of 1996) RECONSIDERATION ORDER
to Establish an Interconnection)
Agreement with U.S. West Communi-)
cations, Inc.) Entered: November 25, 1997

BY THE COMMISSION

On August 5, 1996, Cox Nebraska Telecom (Cox) filed a request for negotiation of an interconnection agreement with US WEST Communications Inc. (USW). Cox filed a petition for arbitration with the Commission on January 10, 1997. The parties proceeded with arbitration and the arbitrator rendered its decision on or about May 1, 1997. The Commission held a hearing on July 1, 1997, to decide whether to approve or reject the interconnection agreement set by the arbitrator. On July 15, 1997, the Commission entered an order approving in part and denying in part the proposed interconnection agreement. Pursuant to the Commission's July 15, 1997, order, a modified interconnection agreement was to be submitted on or before August 1, 1997, to become effective August 8, 1997.

On August 1, 1997, Cox and USW submitted separate interconnection agreements because the parties were unable to agree on the contents of Appendix A attached to the interconnection agreement. As a result, the Commission entered an order on August 5, 1997, granting the parties 30 days from August 8, 1997, to negotiate mutually acceptable interim wholesale discount rates for Appendix A. The parties notified the Commission on September 8, 1997, that they had been unable to reach agreement. Accordingly, the Commission held a hearing on October 1, 1997, to determine the appropriate interim wholesale discount rates for the parties' interconnection agreement.

The Commission issued its order modifying the interconnection agreement on November 18, 1997 (Modification). In that modification, we approved the majority of the Appendix A filed by USW, setting the following discount rates:

Service Groups	Discount Rates
1. Basic Exchange - Business, PBX, ISDN	14.60%
2. Toll	21.84%
3. Listings, cent. office features, info. services	25.96%
4. Basic Exchange - Residence	4.57%
5. Private Line, ACS	11.58%

O P I N I O N A N D F I N D I N G S

In the modification, we noted that the interim discount rates approved in that order differed substantially from those rates established between other telecommunications providers. We recognized further "that this disparity in discount rates may place Cox at a competitive disadvantage with other interconnectors." We went on to say that this "obvious disparity" would be "resolved . . . upon the completion of (our) Interconnection Cost Docket C-1415."

The Commission was troubled with setting a residential rate so disparate with other rates within the state and within the USW fourteen-state service area. One of the primary aims of the Federal Communications Act of 1996 (Act) was to open local telephone markets to competition. No company can legitimately be expected to compete with the incumbent if it only receives a 4.57 percent discount rate on residential services. Therefore, we reviewed the record of the proceedings yet again to determine whether a 4.57 percent discount on residential services was justified in both law and in equity. Upon close review of the record, we find that it is not supportable.

From the evidence provided by Cox, a 4.57 percent discount would be by far the lowest in the nation. Most state commissions have approved the same discount rate for business and residential services in the range of 17 to 22 percent. At the October 1, 1997, hearing, USW argued that the Commission should not consider the data from other states because they were negotiated prior to the 8th Circuit's July 18, 1997, decision in Iowa Utilities Board v. FCC. We are not convinced that the 8th Circuit ruling should have effected USW's cost studies, or their avoided costs. While this in itself is not legal grounds to retreat from our previous ruling, it is illustrative of where our rate fits in relation to other states. When considering the rates approved in other states, a 4.57 percent discount on residential services seems glaringly inappropriate. Further, during negotiations two months after the 8th Circuit's decision, USW offered to deviate from its cost model by offering Cox a single discount rate of 12 percent for both residential and business basic exchange services.

From the record, a 4.57 percent discount rate on residential services clearly and substantially diverges from the rates approved throughout USW's fourteen-state service area. This figure is also significantly lower than the rate USW was willing to accept during negotiations. However, the wholesale discount rate approved for business services, 14.60 percent, does more closely correspond with the regional trend. Upon reviewing the evidence presented by USW, we cannot find any credible support for USW's claims that a separate discount rate for business and residential services is necessary. Looking to the figures offered by Cox, the vast majority of states have approved a single discount rate for both residential and business

services. We find that a single rate is appropriate in this instance as well. The rate previously approved for business services is supported by USW's cost studies and is more consistent with basic exchange service discounts approved in other states. The record does not contain convincing evidence supporting a separate discount rate for residential and business services.

It is the role of the Commission to approve agreements that foster fair competition in the telecommunications field, while containing our review to the record before us. A 4.57 percent discount rate does not achieve this end and would have a chilling effect to competition. Neither the testimony nor the other evidence placed in the record support different rates for residential and business service. We find that the rate previously approved by this Commission for business service, 14.60 percent, is based on USW's specific Nebraska costs, is more consistent with other rates in the USW service area, and is the appropriate discount for residential services. The Commission therefore finds that the Cox/USW interconnection agreement should reflect a wholesale discount rate of 14.60 percent for both residential and business services.

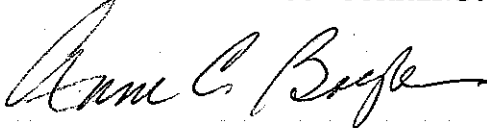
O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the interconnection agreement between Cox Nebraska Telecom, Inc. and US West Communications, Inc. which became effective August 8, 1997, and was modified by this Commission on November 18, 1997, be further modified as directed herein.

MADE AND ENTERED at Lincoln, Nebraska, this 25th day of November, 1997.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



//s//Lowell C. Johnson

//s//Rod Johnson


Chairman

ATTEST:

COMMISSIONERS DISSENTING:

//s//Frank E. Landis

//s//Daniel G. Urwiller


Executive Director

DISSENT OF COMMISSIONER LANDIS:

The majority's opinion today is arbitrary, capricious, and not based on the evidence in the record. The opinion is deficient in two areas. First, the majority chooses to rely on very technical evidence (contained in a forward-looking cost model) presented by USW to establish four very specific wholesale discount rates. However, the majority then characterizes the very same evidence as lacking in credibility when setting the remaining residential wholesale discount rate. Second, there is absolutely no evidence in the record to support the conclusion that the wholesale discount rate for residential service should be exactly the same as the wholesale discount rate for business service.

In Section 252(d)(3) of the Telecommunications Act of 1996 (Act), Congress states that "a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." These avoided costs to which the Act refers are not the coinage of our everyday experience. They cannot be determined without considering very specific information related to Nebraska, the specific company, and the specific service.

The Commission cannot base its judgement of appropriate wholesale discount rates upon some vague notion of what seems right. However this is exactly what the majority has done today. In effect, the majority has found that USW will avoid exactly the same amount of costs (i.e. billing, collection, marketing, etc.) in providing residential service in Nebraska as it will for providing business service. This conclusion is clearly suspect when considering that the discount rates for the remaining services were set with the following exactitude: Business, PBX, ISDN - 14.60%; Toll - 21.84%; Listings, central office features, info. services - 25.96%; and Private Line, ACS - 11.58%.

Upon reconsideration, the majority states "(n)either the testimony nor the other evidence placed in the record support different rates for residential and business services." However, a fair reading of the record and evidence leads one to reach an exact opposite conclusion. Dr. Robert Brigham testified at length as to the reasons that separate rates were appropriate. The documentary evidence submitted by USW further supports this conclusion. The evidence in the record clearly supports the five separate rates, including the disparate treatment of business and residential services.

These breakdowns were never challenged by direct testimony. They were never challenged by the documentary evidence submitted by Cox nor were they even raised as an issue in the cross-examinations of witnesses. Cox and Commission staff each had the opportunity to challenge these rate categories on the record. However, there is no indication in the record that these rate categories were ever the subject of dispute. Counsel for Cox even stated in his opening that Cox "won't even try to poke holes in the cost study that US West will undoubtedly go to great lengths to prove" Cox and Commission staff had ample opportunity to challenge the validity of the establishment of five separate rates, or any other evidence. It was not challenged. The majority's rejection of the only evidence that is in the record is arbitrary, capricious, and goes against all the logic contained in the rest of the Commission's finding.

The majority apparently finds that the evidence (cost model) in the record continues to be adequate to support four of the five wholesale discount rates, but the very same cost model is somehow deficient with regard to setting a rate for residential service. Its rationale for doing so is that the 4.57 percent wholesale discount rate for residential service "seems glaringly inappropriate." It was this sense of inappropriateness that caused the majority to retreat from its earlier order. This is exactly the type of decision, based on "fancy rather than a judgement or settled purpose: such a decision is apt to change suddenly . . ." that the Supreme Court had in mind when defining a capricious decision. In Re: Application of Jantzen, 245 Neb. 81 (1994).

The majority acts arbitrarily when it rejects wholesale discount rates that are unchallenged in the record. The majority extends this arbitrariness even further when it finds that this unchallenged evidence is sufficient to establish four wholesale discount rates with great exactitude, while it is insufficient for the fifth. The Commission does have the discretion to weigh the credibility of the evidence before it. Today, with good intentions, it attempted to use this discretion to reach what seemed to be a more equitable result than that contained in the November 18 decision. However, the majority must base its decision on something more tangible than a whim and a notion of justice. In order to achieve justice, parties must be treated equally and fairly. The parties in this case each had an opportunity to present the evidence they so desired. USW's evidence was uncontroverted. Under all notions of fairness, it cannot be disregarded.

The second area in which the Commission acted arbitrarily was in its selection of the 14.60 percent wholesale discount rate for residential service. This Commissioner feels somewhat at a loss in drafting this dissent, because I cannot cite portions of the record to demonstrate the lack of support for the majority's finding. How can someone prove the nonexistence of something? The majority states that it sets the discount rate on residential at 14.60 percent because that is the rate set for business service. However, as addressed above, the uncontroverted evidence in this case demonstrates that the amount of avoided costs for business service is different when compared to that for residential service. Therefore, different wholesale discount rates for these two services are appropriate and are the only legal result. The majority arbitrarily ignores this evidence and, in effect, picks a figure at random when it sets the residential wholesale discount rate at 14.60 percent.


Commissioner Frank Landis