

ISSUE DATE: November 21, 1997

DOCKET NO. P-5487/M-97-1279

ORDER REJECTING INTERCONNECTION AGREEMENT

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
Gregory Scott	Commissioner
Don Storm	Commissioner

In the Matter of an Application by Brooks
Fiber Communications of Minnesota, Inc. and
U S WEST Communications, Inc. for Approval
of an Interconnection Agreement

ISSUE DATE: November 21, 1997

DOCKET NO. P-5487/M-97-1279

ORDER REJECTING INTERCONNECTION
AGREEMENT

PROCEDURAL HISTORY

On August 25, 1997 Brooks Fiber Communications of Minnesota, Inc. (Brooks Fiber) and U S WEST Communications, Inc. (U S WEST) filed a negotiated interconnection agreement for Commission review under 47 U.S.C. § 252(e). The companies stated the agreement's terms and conditions were identical to those of an interconnection agreement between U S WEST and MFS Communications Company (MFS) that was approved by the Commission in an earlier proceeding.¹ Brooks Fiber claimed the right to adopt the contract under 47 U.S.C. § 252(i), and U S WEST concurred.

On September 4, 1997 the Department of Public Service (the Department) filed comments recommending approval of the agreement.

On November 4, 1997 the two companies filed an amendment to the proposed interconnection agreement, clarifying that it was U S WEST's contract with OCI Communications of Minnesota, Inc. (OCI) that Brooks Fiber sought to adopt, not the MFS contract. (The OCI contract was a variant of the MFS contract. OCI sought to adopt the MFS contract; the Commission rejected that request; the parties changed the contract to meet the Commission's concerns.)

On November 6, 1997 the matter came before the Commission. At that time the Department stated it concurred with a staff recommendation to reject the contract for failure to require prior notice to the Commission of assignments.

¹In the Matter of MFS Communications Company's Petition for Arbitration with U S WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, Docket No. P-3167,421/M-96-729.

U S WEST challenged the Commission's right to reject the contract. The Company claimed that, since the contract was identical to one previously approved, the Commission had to approve it under 47 U.S.C. § 252(i), as interpreted by the Eighth Circuit Court of Appeals in Iowa Utilities Board v. FCC, 1997 WL 403401 (8th Cir. July 18, 1997).

FINDINGS AND CONCLUSIONS

I. The Applicable Law

The federal Telecommunications Act of 1996 is designed to open the nation's telecommunications markets to competition, using three strategies:

- (1) requiring incumbent local exchange carriers to permit new entrants to purchase their services wholesale and resell them to customers;
- (2) requiring incumbent local exchange carriers to permit competing providers of local service to interconnect with their networks on competitive terms; and
- (3) requiring incumbent local exchange carriers to unbundle the elements of their networks and make them available to competitors on just, reasonable, and nondiscriminatory terms.

47 U.S.C. § 251(c).

Under the Act, new market entrants are to seek agreements on these issues with incumbent local exchange carriers, who are required to negotiate in good faith. 47 U.S.C. §§ 251(c); 252(a)(1); 252(b)(5). All agreements reached must be submitted to the state commission for approval. 47 U.S.C. § 252(a) and (e).

The state commission is to approve or reject these agreements, making written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Negotiated agreements may be rejected for the following reasons: (1) they discriminate against a telecommunications carrier who is not a party to the agreement; (2) implementing them would be inconsistent with the public interest, convenience, and necessity; (3) they conflict with any valid state law, including any applicable intrastate service quality standards or requirements. 47 U.S.C. § 252(e)(2) and (3).

The Act also requires local exchange carriers to provide interconnection, services, and network elements to any requesting telecommunications carrier on the same terms and conditions found in any state commission-approved agreement to which the incumbent carrier is a party. 47 U.S.C. § 252(i).

II. Commission Action

The Commission finds that it must reject the agreement at issue despite its earlier approval of an identical agreement between U S WEST and OCI. The Commission will reject the agreement on grounds that its failure to give the Commission prior notice of assignments makes implementing the agreement inconsistent with the public interest, convenience, and necessity.

The Commission will require the parties to file a new agreement correcting this deficiency or to inform the Commission that they will not do so within two weeks of the date of this Order. These actions are explained below.

A. Deficiency Requiring Rejection

The contract permits either party to assign its rights thereunder, subject to specified conditions. The Department recommends requiring 60 days notice to the Commission and rejecting the contract unless such a notice provision is inserted. U S WEST opposes the requirement, chiefly on grounds that the Commission lacks the authority to impose it under 47 U.S.C. § 252(i).

The Commission agrees with the Department that it must receive prior notice of any proposed assignment. Telecommunications services are essential to the public safety and to the everyday operation of our society and economy. The Commission cannot protect the public interest in reliable service unless it can examine the fitness of prospective assignees. The Commission will therefore reject the assignment provision as inconsistent with the public interest, convenience, and necessity.

B. Significance of Earlier Approval of Identical Agreement

U S WEST renewed its argument, rejected in earlier cases,² that the plain meaning of 47 U.S.C. § 252(i) required approval of this contract. The company also argued that the Eighth Circuit's decision in Iowa Utilities Board, *supra*, supported this claim. The Commission rejects both claims.

1. The Language and Purpose of the Federal Act Do Not Divest the Commission of its Authority to Reject this Contract

U S WEST argued that the Commission should approve this contract because it is identical to the one already approved between U S WEST and OCI. Once a contract has been approved, the company argued, all players must be able to rely on its terms being acceptable to the Commission.

²In the Matter of the Joint Application of OCI Communications of Minnesota, Inc. and U S WEST Communications, Inc. for Approval of an Interconnection Agreement, Docket No. P-5478,421/M-97-522, ORDER REJECTING INTERCONNECTION AGREEMENT (July 22, 1997); In the Matter of the Joint Application of KMC Telecom Inc. and U S WEST Communications, Inc. for Approval of an Interconnection Agreement, Docket No. P-5426,421/M-97-850, ORDER REJECTING INTERCONNECTION AGREEMENT (August 13, 1997).

Without that stability and predictability, the cost of negotiating interconnection agreements becomes unacceptably high. Every issue is potentially negotiable, costs and delays multiply, and competition is impeded. This, the company argued, is the practical reason for the Act's requirement that carriers make interconnection agreements between themselves and other carriers available to all requesting carriers.

While the Commission recognizes the importance of stability and predictability in commercial relations, the Commission does not believe insisting on correction of the deficiency in this contract will undermine that stability or predictability.

First, the Commission has rejected the provision at issue in negotiated agreements submitted after the OCI contract, and the MFS contract on which it is based, were approved.³ There is no reasonable likelihood, then, that persons negotiating interconnection agreements will have settled expectations disrupted by the rejection of this term.

Second, the deficiency at issue can be corrected without any change in rates or in the basic operating procedures established in the contract. Adjustments this minor carry no reasonable potential for derailing this transaction, destabilizing future interconnection negotiations, or traumatizing the developing competitive market.

Finally, the Commission does not read 47 U.S.C. § 252(i), which requires U S WEST to make the terms of approved contracts available to all requesting carriers, as requiring the perpetuation of policy misjudgments or oversights in earlier cases. Such a requirement could yield results in some cases inconsistent with the public interest, convenience, and necessity. Not only would that be nonsensical from a policy standpoint, it would eviscerate the Act's requirement that negotiated agreements, including § 252(i) agreements, be submitted for state commission approval. 47 U.S.C. § 252(e)(1).

The MFS contract was one of the first three interconnection agreements approved in Minnesota under the federal Act. It was approved following a contentious, complex, but fast track arbitration proceeding involving over 70 issues of first impression. It is understandable that the contract provision at issue, which was not disputed, was approved in that proceeding without discussion. It is also understandable that it was not contested or discussed in the OCI adoption proceeding, which was dominated by two major public policy and consumer protection issues. It is equally understandable, however, that after further experience with the Act and the competitive market, the Commission has struck down similar provisions in later negotiated agreements on public interest grounds. It is inconceivable that Congress intended to force the

³For example, see Orders rejecting proposed interconnection agreements in the following dockets: P-466, 421/M-96-1097; P-407, 5457/M-97-864; P-407/EM-97-910; P-407, 421/M-97-930; P-5352, 421/M-97-986; P-407, 421/M-97-987.

Commission to permit the provision to be implemented in this case because Brooks Fiber chose to adopt the OCI agreement.

Clearly, federal lawmakers recognized that approving one interconnection agreement must not deprive state commissions of the ability to respond to new developments in emerging markets or to refine their approaches to encouraging competition based on actual experience with those markets. That is why the Act requires *all* interconnection agreements, including § 252(i) agreements, to be submitted for state commission approval.

For all these reasons the Commission concludes that it can and must reject this interconnection agreement, despite its earlier approval following the OCI arbitration proceeding.

2. The Eighth Circuit Decision Does not Divest the Commission of its Authority to Reject this Contract

The Company also contended that rejecting this agreement would be inconsistent with the Eighth Circuit's reading of the Act in Iowa Utilities Board, *supra*. The Commission disagrees.

In Iowa Utilities Board the Court found that the FCC had misread the Act to require incumbent carriers to permit new entrants to construct interconnection agreements by combining individual terms from existing agreements, as opposed to adopting an existing agreement as a whole. The Court found that this interpretation would "thwart the negotiation process and preclude the attainment of binding negotiated agreements." The Court did not address the authority of state commissions to reject existing agreements sought to be adopted by new carriers.

C. Expedited Approval Process for Revised Contract

It is important that the parties be permitted to begin performance under a revised interconnection agreement as soon as possible. The Commission will therefore delegate to the Executive Secretary the authority to examine any revised interconnection agreement filed by the parties, to confirm that the deficiency identified in this Order has been corrected as recommended herein, and to issue a letter to the parties permitting the contract to go into effect as of the date of filing.

The Commission will so order.

ORDER

1. The Commission rejects the interconnection agreement between U S WEST and Brooks Fiber for the reasons set forth above.
2. Within two weeks of the date of this Order the parties shall file a new agreement correcting the deficiency discussed above or a statement explaining that they will not be making such a filing.

3. The Commission delegates to the Executive Secretary the authority to examine any revised interconnection agreement filed by the parties, to confirm that the deficiency identified in this Order has been corrected as recommended herein, and to issue a letter to the parties approving the contract as of the date of filing.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (612) 297-4596 (voice), (612) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).