

ISSUE DATE: August 25, 1997

DOCKET NO. P-421/M-97-793

ORDER REJECTING INTERCONNECTION AGREEMENT

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey
Joel Jacobs
Marshall Johnson
Don Storm

Chair
Commissioner
Commissioner
Commissioner

In the Matter of the Joint Application of
U S WEST NewVector Group, Inc. on behalf
of itself and Duluth MSA Limited Partner
d/b/a AirTouch Cellular and U S WEST
Communications, Inc. for Approval of an
Interconnection Agreement

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AGREEMENT

PROCEDURAL HISTORY

On May 28, 1997 U S WEST NewVector Group, Inc., on behalf of itself and Duluth MSA Limited Partner, d/b/a AirTouch Cellular (AirTouch) 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 terms of the agreement were identical to the terms of an interconnection agreement negotiated earlier between U S WEST and Cellular Mobil Systems of St. Cloud, Minnesota L.L.P.

On July 28, 1997 the Commission issued an Order rejecting the negotiated agreement between U S WEST and Cellular Mobil Systems.¹ U S WEST and Cellular Mobil subsequently filed a revised agreement, correcting the deficiencies identified in the Order. The revised agreement was approved.

On July 11, 1997 the Department of Public Service (the Department) filed comments recommending rejection of the U S WEST/Air Touch agreement on grounds that specified provisions were inconsistent with the public interest. Those grounds were the same grounds on which the Commission had rejected the Cellular Mobil agreement.

On July 21, 1997 U S WEST filed comments incorporating by reference its arguments in the Cellular Mobil case. That Company stated it disagreed with the Commission's decision in that case and reserved its rights under 47 U.S.C. § 252 in regard to all disputed issues. That being said, the Company urged the Commission to ensure that the final contract approved in this case and the final contract approved in the Cellular Mobil case were identical, since it was the intent of the parties to adopt a contract identical to the one approved by the Commission for Cellular Mobil, under 47 U.S.C. § 252(i).

On August 6, 1997 the Department filed comments clarifying its recommendation on Section 4.3.4 of the agreement.

¹In the Matter of the Application for Approval of the Agreement for Interconnection and Traffic Interchange between Cellular Mobil Systems of St. Cloud, Minnesota L.P. and US WEST Communications, Inc., P-421/EM-97-437, ORDER REJECTING CONTRACT (July 28, 1997) (US WEST/Cellular Mobil Order).

The matter came before the Commission on August 19, 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).

II. Summary of Commission Action

The Commission will reject the agreement on grounds that the deficiencies identified by the Department make implementing the agreement inconsistent with the public interest, convenience, and necessity. The Commission will require the parties to file a new agreement correcting these deficiencies 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.

III. Deficiencies Requiring Rejection

A. US WEST Entitlement to Additional Compensation

1. The Contract Provision

Section 2.3.1 of the Agreement provides in part as follows:

Carrier further acknowledges that USWC believes that USWC is entitled to receive additional compensation for costs of implementing various provisions of the Act, and that USWC shall seek such additional recovery through future state and/or federal regulatory proceedings.

2. Comments of the Parties

The Department argued that this language was at best superfluous and at worst inappropriate. The parties are not agreeing that US WEST is entitled to more compensation in the future; Commission acceptance of the language could be construed as acceptance of that position.

US WEST argued that § 2.3.1, as part of § 2.3--Acknowledgment of Deferred Issues--simply states that certain interconnection issues, such as universal service support, are currently being considered before the FCC and other bodies, and that the parties acknowledge that US WEST will continue to pursue its position on those issues.

3. Commission Action

The Commission agrees with the Department that this provision is contrary to the public interest because it could confuse other parties regarding the Commission's position on important issues, such as universal service obligations, which are being further developed in both state and federal proceedings. The language adds nothing substantive to the contract, so removal of the language should not harm any party. More importantly, excision of the language removes a significant public interest concern: the possibility that other parties, or other forums in which US WEST's positions are being litigated, could misconstrue Commission acceptance of the language as Commission acceptance of US WEST's litigation position.

The Commission finds that § 2.3.1 of the Agreement is inconsistent with the public interest and constitutes grounds for Commission rejection of the Agreement. The Commission notes that this deficiency could be corrected by resubmission of the contract with § 2.3.1 omitted.

B. Third Party Beneficiaries to the Contract

1. The Contract Provision

Section 21.23 of the Agreement provides as follows:

21.23 No Third Party Beneficiaries

Except as may be specifically set forth in this Agreement, this Agreement does not provide and shall not be construed to provide third parties with any remedy, claim, liability, reimbursement, cause of action, or other privilege.

2. Comments of the Parties

The Department recommended the Commission reject this provision, for the same reasons it rejected an identical provision in the original U S WEST/Cellular Mobil interconnection agreement. In that case the Commission suggested the language set forth below, which the parties incorporated into the contract ultimately approved by the Commission:

Parties recognize the MPUC as a third party beneficiary on behalf of the public. Accordingly, the parties agree to give notice to the Commission of any lawsuits or other proceedings that involve or arise under the agreement and further agree not to oppose any petitions by the Commission to intervene in any such proceedings on behalf of the public interest.

US WEST opposed the Department's proposed language, arguing the Commission's role in any further proceedings regarding this contract will be determined by the law in Minnesota or by general contract law. The company also argued that making the Commission a third party beneficiary of the contract could create conflicts of interest in further administrative or judicial proceedings. Finally, the company contended that third party beneficiary status could subject the Commission to unnecessary and burdensome involvement in administrative issues between the parties.

3. Commission Action

The Commission agrees with the Department that the contract's failure to make the Commission a third-party beneficiary compels its rejection. Under Minnesota law and the Federal Act, the Commission has a duty to protect the public interest as it is affected by interconnection agreements. This duty does not end at the time of final contract approval, but continues throughout the life of the contract, as its consequences unfold.

In order to fulfill its ongoing regulatory duty, the Commission must have notice of any further administrative or judicial or other proceeding regarding the contract, and the opportunity to intervene in the proceeding on behalf of the general public. The Commission therefore finds that § 21.23 of the Agreement is inconsistent with the public interest, convenience, and necessity, because it does not afford the Commission the necessary notice and opportunity to intervene on behalf of the public.

C. Contract Amendments

1. The Contract Provision

Section 21.26 of the Agreement provides as follows:

Carrier and USWC may mutually agree to amend this Agreement in writing. Since it is possible that amendments to this Agreement may be needed to fully satisfy the purposes and objectives of this Agreement, the Parties agree to work cooperatively, promptly and in good faith to negotiate and implement any such additions, changes and corrections to this Agreement.

2. Comments of the Parties

The Department stated that this language would allow the parties to amend the contract as they see fit, without regard for the public interest. The Department declared that any contract amendment should be approved by the Commission. To ensure this treatment, the Department recommended adding the following language, which was added to the US WEST/Cellular Mobil contract to meet Commission requirements: "Any amendment to this agreement shall be approved by the Minnesota Public Utilities Commission."

US WEST generally agreed that the contract provision should be amended to require Commission approval of future amendments. US WEST requested, however, that this amendment apply only to substantive and material changes to the contract. Without this limitation, US WEST argued, the Commission and its staff could be unnecessarily burdened by the necessity of overseeing insignificant amendments.

3. Commission Action

The Commission finds the contract's failure to require Commission approval of amendments inconsistent with the public interest, convenience, and necessity. The Commission cannot perform its duty to protect the integrity of the network, ensure high quality service, and promote a free and open telecommunications market if interconnection agreements can be amended without Commission approval.

This would not only leave the public interest unprotected, it would render meaningless the Act's requirement that state commissions review and approve interconnection agreements. For all these reasons, the Commission concludes, as it did in the US WEST/Cellular Mobil case, that it must strike the amendment provision of this contract.

Neither does the Commission agree with US WEST's suggestion that only "substantive and material" amendments be submitted to the Commission. Such a limitation would mean that the parties would decide which matters were material and worthy of the Commission's public interest oversight.

The Commission believes that this determination should not be up to the parties, no matter how well-intentioned they may be. There may be honest differences as to what constitutes a "substantive and material" change to the contract; in such an instance, the Commission should decide. The Commission therefore rejects the proposal to limit the requirement of Commission approval to substantive and material changes.

D. Reciprocal Compensation Credit

1. The Contract Provision

Section 4.9.1 of the Agreement provides as follows:

Each party will compensate the other for its traffic terminating to the other Party's subscriber. Carrier's rate for USWC's Reciprocal Compensation Credit will be symmetrical to USWC's Call Termination rate as listed in Appendix A of this Agreement. USWC will compensate Carrier for local 2-way voice traffic, not paging traffic, originated from USWC's subscribers. Both originating and terminating points for the minutes of use must be contained within the same LCA.

2. Comments of the Parties

The Department stated that this section indicates US WEST's refusal to compensate for paging traffic, a position that violates the FCC's Interconnection Order, § 1008. That section of the Interconnection Order requires local exchange carriers (LECs) "to enter reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks."

The Department recommended that, if AirTouch carries paging traffic, the provision should be modified to read: "US WEST will compensate Carrier for local traffic, including paging

traffic, originated from USWC's subscribers." If AirTouch does not carry paging traffic, the Department recommended deleting the reference to paging traffic.

US WEST stated that the Department's recommendation is misapplied, because the Agreement is only for Type 2 cellular interconnection, not paging interconnection. Furthermore, there is widespread disagreement within the industry regarding FCC rules on interconnection between LECs and paging companies.

At the same time, however, U S WEST stated that AirTouch does not offer paging services, making immediate resolution of compensation issues unnecessary.

3. Commission Action

The Commission agrees with the Department that § 4.9.1 of the Agreement, as originally proposed, is inconsistent with the public interest, convenience, and necessity, and compels rejection of the agreement. This agreement does not encompass paging interconnection. There is therefore no need for it to exclude paging interconnection from compensation, especially in light of the strong public policy favoring compensation for paging interconnection. The phrase "not paging traffic" should be deleted from this section.

E. Local Calling Area

1. The Contract Provision

Section 3.24 of the Agreement provides as follows:

3.24 "Local Calling Area (LCA)" is a geographic area defined by the MTA [Major Trading Area] within which Carrier provides CMRS services where local interconnection rates apply excluding roaming traffic as defined in FCC First Report and Order 96-325, 47 CFR § 51.701(b)(2).

2. Comments of the Parties

The Department stated that the FCC had decided in its interconnection rules not to change pre-Act arrangements determining if intra-MTA calls are subject to access charges. The Department stated that it could not support a contract that would impose access charges on intra-MTA, interstate roaming calls by wireless subscribers, absent the companies' assurance that this was their prior practice.

The Department also stated that the proposed definition was cumbersome and unhelpful. The Department proposed that the parties use the definition of "local calling area" agreed to by US WEST in the Cellular Mobil case: "a geographic area defined by the MTA within which Carrier provides CMRS services."

U S WEST opposed changing the definition. The company stated that the parties' proposed language incorporates and does not attempt to contravene FCC Rules, 47 CFR 51.701(b)(2), (along with corresponding Paragraph 1043 of the FCC's Interconnection Order), which define "local telecommunications traffic" as:

51.701(b) Local Telecommunications traffic
(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

[MTA], as defined in Sec. 24.202(a) of this chapter.

3. Commission Action

The Commission agrees with the Department that the contract's definition could be misconstrued to define the assessment of access charges--an issue beyond the scope of this definition section. The Commission agrees with the Department that the FCC's definition of local telecommunications traffic, found in 47 CFR 51.701(b)(2) and corresponding Order Paragraph 1043, reflects § 251(g) of the Federal Act, which preserves the current interstate access charge regime regarding CMRS carriers.

Specifically, § 251(g) requires LECs to comply with the access requirements applicable before the Act's date of enactment, until those requirements are "explicitly superseded" by FCC rules. The FCC Interconnection Order and Rules maintain rather than alter the requirement of § 251(g) of the Act.

The Commission finds that § 3.24 of the contract as proposed is inconsistent with the public interest, convenience, and necessity, and compels rejection of the contract. This defect could be cured by adoption of the Department's suggested language, which is consistent with the definition of "local telecommunications traffic" in the FCC Interconnection Rules, 47 CFR 51.701(b)(2), and corresponding Paragraph 1043.

F. Roaming Traffic

1. The Contract Provision

Section 4.3.4 of the Agreement provides as follows:

4.3.4 Non-Local Traffic

Non-Local traffic is the completion of Non-Local Calls based on location of Wireless subscriber and USWC landline end user traffic originating and terminating outside of the CMRS defined Local Calling Area or roaming traffic carried over Carrier's own interexchange, interstate facilities. The rates found in the applicable Switched Access Tariff, intrastate or interstate, are applicable. Relevant rates include Interconnection Charge (IC), Local Switching, Carrier Common Line, and Tandem Switched Transport.

2. Comments of the Parties

The Department's comments on this section were grounded in the same concerns as its comments on § 3.24. The agency could not support inclusion of language regarding the treatment of "roaming traffic carried over Carrier's own interexchange, interstate facilities" until the companies provide evidence that such calls are currently subject to interstate access charges. The agency pointed out that the Commission had found an identical provision in the US WEST/Cellular Mobil contract contrary to the public interest.

US WEST stated that it opposed excision of this phrase, for the same reasons it opposed the Department's proposed modification of § 3.24.

3. Commission Action

The Commission agrees with the Department that the language referring to “roaming traffic” in § 4.3.4 is inconsistent with the public interest, convenience, and necessity, for the same reasons as the language in § 3.24, and compels rejection of the contract. This deficiency could be cured by deleting language relating to “roaming traffic” from § 4.3.4 of the contract, which addresses “non-local traffic.”

The language should further adopt the definition of “local telecommunications traffic” in 47 CFR § 51.701(b)(2) and indicate that parties intend to apply the definition as consistent with the FCC Interconnection Order Paragraph 1043 and § 251(g) of the Federal Act.

G. US WEST Dex Issues

1. The Contract Provision

Section 11 of the Agreement provides as follows:

USWC and Carrier agree that certain issues, such as yellow page advertising, directory distribution, access to call guide pages, yellow page listings, will be the subject of negotiations between Carrier and directory publishers, including US WEST Dex. USWC acknowledges that Carrier may request USWC to facilitate discussions between Carrier and US WEST Dex.

2. Comments of the Parties

The Department stated that the Federal Act and prior Commission arbitration decisions have recognized the importance of directory listings and directory yellow pages in the development of local service competition. According to the Department, the Commission should require US WEST to ensure that US WEST Dex does not treat the Company more favorably than its competitors. The Department recommended inclusion of the following language adapted from the Commission’s December 2, 1996 ORDER RESOLVING ARBITRATION ISSUES in the Consolidated Arbitration Docket, P-442,421/M-96-855; P-5321,421/M-96-909; P-3167,421/M-96-729:

US WEST is an affiliate of US WEST Dex. Given this status, US WEST will ensure that it is treated in a competitively neutral manner by US WEST Dex vis a vis the Carrier. If US WEST receives a commission from US WEST Dex for placement of yellow pages advertising, the Carrier shall receive the same commission. US WEST Dex will give the Carrier the same opportunity to provide directory listings as it provides to US WEST (for example, through some type of bidding process). If the Carrier is not given the same directory listing opportunity as US WEST, the Carrier shall receive a share of the revenues (based on the percentage of lines belonging to that Carrier in the particular list) that US WEST receives from US WEST Dex. US WEST shall make its contracts with US WEST Dex available for review by the Carrier, as necessary, to ensure that the Carrier is receiving the same services at the same terms as US WEST.

US WEST stated that it is required under § 251(b)(3) of the Act to provide nondiscriminatory access to white pages listings. Minn. Rules, part 7810.2900 requires US WEST to provide a white page telephone directory to all customers served by that directory and to the Commission. US WEST satisfies the requirements of the Act and Commission rule by contracting with US WEST Dex, a separate unregulated company affiliated with US WEST, to publish and distribute the white pages directories in the areas served by US WEST.

Yellow pages, on the other hand, contain classified advertising. According to US WEST, neither the Act nor Minnesota rules impose any obligations on US WEST to distribute yellow page directories, and US WEST does not publish or distribute these directories. US WEST argued that matters related to yellow page directories are not proper subjects of arbitration and should be left to negotiations between new entrants and incumbents. In this case, the parties have successfully negotiated this issue; the Commission should not impose another result.

3. Commission Action

Although the Federal Act allows parties to negotiate agreements that depart from the mandates of § 251(b) or (c) of the Act, the Act does not remove a state commission's oversight under state law and a general public interest standard.

In the Consolidated Arbitration Docket, the Commission applied the tenets of state law to issues concerning yellow pages directories and advertising. In this context, the Commission noted that Minn. Stat. § 237.16, subd. 1(a) authorizes the Commission to establish terms and conditions to facilitate the development of fair and reasonable competition. Moreover, Minn. Stat. § 237.16, subd. 8(a)(7) contemplates Commission action to "protect against...practices harmful to promoting fair and reasonable competition."

Based on these provisions of state law, the Commission found that US WEST has an obligation to ensure that its affiliate treats US WEST in a manner that is competitively neutral between US WEST as the incumbent and a new entrant.

The Commission continues to believe that state law requires this treatment of US WEST Dex directories and yellow pages advertising. The Commission therefore finds that Section 11 of the Agreement is inconsistent with the public interest and compels rejection of the Agreement. This deficiency could be corrected by insertion of the language adopted from the Consolidated Arbitration Docket and recommended by the Department.

IV. 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 deficiencies identified in this Order have been corrected as recommended herein, and to issue a letter to the parties permitting the contract to go into effect and confirming its effective date.

The Commission will so order.

ORDER

1. The Commission rejects the interconnection agreement between U S WEST and AirTouch 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 deficiencies enumerated 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 deficiencies identified in this Order have been corrected as recommended herein, and to issue a letter to the parties approving the contract and confirming its effective date.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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