

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of AT&T Communications of
the Midwest, Inc.'s, MCImetro Access
Transmission Services, Inc.'s, and MFS
Communications Company's
Consolidated Petitions for Arbitration with
U S WEST Communications, Inc.
Pursuant to Section 252(b) of the Federal
Telecommunications Act of 1996

OAH Docket No. 9-2500-10697-2
MPUC Docket Nos.
P442,221/M-96-855;
P5321,421/M-96-909;
P3167,421/M-96-729

ARBITRATORS' REPORT

Arbitration Panel

Hon. Phyllis A. Reha, Chair
Hon. Allan W. Klein
Hon. Steve M. Mihalchick
Hon. Edward J. Schwartzbauer
Suite 1700
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November 5, 1996

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RECOMMENDATION.....

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ARBITRATORS' REPORT

The above-entitled matter was arbitrated by Administrative Law Judges Phyllis A. Reha, Allan W. Klein, Steve M. Mihalchick and Edward J. Schwartzbauer (the Panel) beginning on October 7, 1996, in St. Paul, Minnesota. The arbitration continued to October 15, 1996. The record closed on October 24, 1996, upon receipt of the reply briefs.

Appearances:

John B. Van De North, Jr., and Mark J. Ayotte, Briggs and Morgan, 2200 First National Bank Building, St. Paul, Minnesota, 55101, and Rebecca DeCook, AT&T, 1875 Lawrence Street, Suite 1575, Denver, Colorado, 80202, appeared for AT&T Communications of the Midwest, Inc. (AT&T)

Amy Klobuchar, Gregory R. Merz, and Ben Omorogbe, Gray, Plant, Mooty, Mooty & Bennett, 3400 City Center, 33 South Sixth Street, Minneapolis, Minnesota, 55402, and Philip E. Stoffregen, Attorney at Law, 1600 Hub Tower, 699 Walnut Street, Des Moines, Iowa, 50309, and Karen L. Clauson, 707 17th Street, Suite 3600, Denver, Colorado, 80202, appeared for MCImetro Access Transmission Services, Inc. (MCI).

Richard M. Rindler and Lawrence R. Freedman, Swidler and Berlin, 3000 K Street NW, Suite 300, Washington, D.C., 20007, appeared for MFS Communication Company, Inc. (MFS).

David G. Seykora, U.S. WEST, 200 South Fifth Street, Room 395, Minneapolis, Minnesota, 55402, and James A. Gallagher, Maun & Simon, 2000 Midwest Plaza Building West, 801 Nicollet Mall, Minneapolis, Minnesota, 55402, and Kathryn E.

Sheffield, U.S. WEST, 1801 California Street, Suite 5100, Denver, Colorado, 80202, appeared for U S WEST Communications, Inc. (USWC).

Ellen Gavin and J. Jeffery Oxley, Assistant Attorneys General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota, 55101, appeared for the Department of Public Service (Department or DPS).

Scott Wilensky and Eric J. Peck, Assistant Attorneys General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota, 55101, appeared for the Office of Attorney General, Residential and Small Business Utilities Division (OAG).

The Public Utilities Commission staff appearing were Dan Lipschultz, Marc Fournier, Lee Larson and Diane Wells.

PROCEDURAL HISTORY

On February 8, 1996, MFS served USWC with a request to negotiate under the Federal Telecommunications Act of 1996 (the Act). The parties failed to reach agreement on any of the issues subject to negotiation, and on June 24, 1996, MFS petitioned the Commission for arbitration pursuant to the Act. USWC was served with the petition on June 27, 1996. On July 19, 1996, the Commission issued its Order Granting Petition and Establishing Procedures for Arbitration. This Order referred the arbitration between USWC and MFS to an Administrative Law Judge (ALJ) for hearing. The Commission's Order limited party intervention in the proceeding to the Department and the OAG. The Department and the OAG subsequently intervened in the proceeding. Under the time-frame set out in the Federal Act, the Commission's Order set a November 8, 1996 deadline for a final commission decision on the arbitration.

On March 1, 1996, AT&T served USWC with a request to negotiate under the Act. The parties failed to reach an agreement on all of the issues subject to negotiation and on July 29, 1996, AT&T petitioned the Commission for arbitration pursuant to the Act. On August 9, 1996, the Commission issued its Order Granting Petition and Establishing Procedures for Arbitration. This Order referred the arbitration between USWC and AT&T to an ALJ for hearing. The Commission's Order limited party intervention in the proceeding to the Department and the OAG. The Department and the OAG subsequently intervened in the proceeding. Under the time-frame set out in the Federal Act, the Commission's Order set a December 2, 1996 deadline for a final commission decision on the arbitration.

On March 26, 1996, MCI served USWC with a request to negotiate under the Act. The parties failed to reach agreement on all of the issues subject to negotiation and on August 9, 1996, MCI petitioned the Commission for arbitration pursuant to the Act and to consolidate its arbitration with the AT&T/USWC arbitration. On August 26, 1996, the Commission issued its Order Granting Petition, Establishing Procedures for Arbitration and Granting Request for Consolidation. The Order consolidated the arbitration with that of AT&T/USWC and referred it to an ALJ for hearing. The Commission's Order limited party intervention in the proceeding to the Department and

the OAG. The Department and the OAG subsequently intervened in the proceeding. Because AT&T was not willing to waive the statutory time-frame of December 2, 1996 for a decision in its case, the Commission established December 2, 1996 as the deadline for its decision in the MCI/USWC arbitration as well.

By order dated September 13, 1996, ALJ Edward Schwartzbauer consolidated the MFS/USWC petition for arbitration with those of AT&T and MCI at the request of MFS. MFS waived its right to a determination of its arbitration by the November 8, 1996 deadline set forth at section 252(b)(4)(C) of the Act, agreeing to accept the December 2, 1996 deadline in the AT&T and MCI arbitrations with USWC.

The following parties were granted participant status in this consolidated arbitration: Frontier Telemanagement, Inc., Sprint Communications Company and United Telephone Company.

BURDEN OF PROOF

The MPUC has determined that USWC has the burden of proof in these proceedings. In its Order Granting Petition, Establishing Procedures for Arbitration and Granting Request for Consolidation in the MCI Arbitration case dated August 26, 1996, the MPUC stated:

The burden of proof with respect to all issues of material fact shall be on U S West. The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute. The ALJ should also shift the burden to the extent necessary to comply with any applicable FCC regulations regarding burden of proof.

See, also, Order Granting Petition and Establishing Procedures for Arbitration in the MFS Arbitration case, dated July 19, 1996, p. 10; Order Granting Petition and Establishing Procedures for Arbitration in the AT&T Arbitration case, dated August 9, 1996, p. 11.

The FCC has also specifically established a proof standard of clear and convincing evidence applicable to LECs who would deny an entrant's request for a method of achieving interconnection or access to unbundled elements. That is, LECs must prove to the MPUC by clear and convincing evidence that an interconnection request "would result in specific and significant adverse network reliability impacts" before it meets its burden to reject an interconnection request on network reliability grounds. 47 C.F.R. § 51.5. Similarly, the FCC requires a LEC to prove to the MPUC that an interconnection method is not technically feasible in order for the MPUC to deny an interconnection request on those grounds. 47 C.F.R. § 51.321(d). The explicit

placement of the burden of proof on USWC by the MPUC and the FCC acknowledges that USWC and other LECs have a monopoly, not only over the local exchange network but also over information about the network that is needed to make major decisions in this proceeding.

PARTIAL STAY OF THE FCC'S FIRST ORDER AND RULES

On October 15, 1996, the last day of the hearing in this proceeding, the Eighth Circuit Court of Appeals issued an Order Granting Stay Pending Judicial Review (Eighth Circuit Stay Order) of significant portions of the FCC First Order and Rules. See, Iowa Utilities Board v. Federal Communications Commission, File No. 96-3321. The Stay specifically applies to 47 C.F.R. §§ 51.501-51.515, 51.601-51.611, 51.701-51.717, 51.809 and the proxies established for line ports as set forth in the FCC's Order on Reconsideration, dated September 27, 1996. The areas of the FCC First Order covered by the Stay are the pricing and resale rules and the "pick and choose" rule.

Under the terms of the Eighth Circuit Stay Order the Panel will determine prices pursuant to state law and Section 252(d) of the Act. While the FCC's pricing rules and proxy prices are no longer mandated for use by the MPUC, they are available to be adopted by the MPUC if it so chooses. In very large part, the Panel has adopted and applied the FCC's pricing rules as the appropriate mechanism for establishing costs and prices in Minnesota.

FUTURE MODIFICATIONS TO THE ARBITRATED AGREEMENTS

The agreements arbitrated in this proceeding will need to be modified in the future for several reasons. First, the parties are continuing to negotiate as the states make their decisions. Second, as discussed more fully below, the cost and price information is not of sufficient reliability to make anything but an interim decision on those issues. Third, the technical evidence presented in this proceeding is also not fully developed in all instances. Fourth, experience will require that future decisions by the FCC and Commission be changed. Finally, the MPUC and the FCC may issue subsequent rules that affect the agreements. Indeed, the FCC Rules indicate that a party violates the duty under the Act to negotiate in good faith if it refuses "to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules." 47 C.F.R. § 51.301 (c)(3). Therefore, the Panel finds that these agreements are subject to modification by negotiation or by future MPUC order.

FINAL CONTRACT LANGUAGE

The Panel recognizes that the agreements are continuing to evolve daily as the parties continue to negotiate. Our intention is that the agreements contain the terms

negotiated by the parties, whether agreed to before, during, or after this particular proceeding and Arbitration Report. Thus, any provision agreed to by the parties supersedes any determination made below.

In the following sections of this Report, we set forth those provisions of the contracts proposed by the parties that we adopt for inclusion in the arbitrated agreements, sometimes with modifications. Except as modified by the determinations made in this Report, we adopt the "Best and Final Offer for an Interconnection Agreement with U.S. WEST Communications, Inc." submitted by AT&T on October 24, 1996, for the purposes of the AT&T and MCI agreements with USWC. For the purposes of the MFS agreement with USWC, the parties have agreed to most of the provisions and we believe the determinations made below resolve the remaining issues.

FURTHER COMMISSION PROCEEDINGS

The Commission has scheduled briefing and oral comments for Thursday, November 14, commencing at 9:00 a.m. in the Commission's Large Hearing Room.

INTERCONNECTION AND COLLOCATION

What are the required points of interconnection? (Issues No. 1 and 3)

Applicable Law

Interconnection must be provided at any technically feasible point, 47 U.S.C. §§ 251(a) and 251(c)(2); 47 C.F.R. § 51.317, and on the same terms and conditions USWC provides to itself. FCC Order, ¶¶ 218-225. The Order delineates certain minimum technically feasible points of interconnection. Order, ¶ 210. A new entrant may select for itself those points in USWC's network to which it wishes to interconnect, but must pay compensation for additional costs caused by such selection. 47 U.S.C. § 251(c)(2); Order, ¶ 209.

Decision

The choice of where, and how many, points of interconnection is up to the new entrant, not USWC. New entrants shall not be required to establish more than one point of interconnection in the markets where they operate, should not have to establish points of interconnection in the markets where they do not operate, and should not have to establish a point of interconnection for each USWC rate center. If a new entrant wants only one IP per LATA, that is acceptable. AT&T Contract, § 9.2 and Att. 3, Appendix A, § 1.3. MCI Contract, Att. IV, §§ 1.2, 1.22 and 1.22.1, and 2.4; MFS Ex. 62, p. 7.

Rationale

USWC's attempt to limit points of interconnection is contrary to the Act and the Order. The burden is on USWC to show a proposed POI is technically not feasible. There has not been any such showing so far, but specific requests may demonstrate instances of infeasibility.

How should interconnection be ordered? (Issue No. 2)

Applicable Law

A new entrant may select for itself those points in USWC's network to which it wishes to interconnect. 47 U.S.C. § 251(c)(2); FCC Order, ¶ 209. New entrants need not give USWC information regarding the projected demand for any particular facility. Order, ¶ 288.

Decision

The parties have resolved this issue. USWC Contract, § VI(G)(5).

Should two-way trunking be accommodated? (Issue No. 4)

Applicable Law

Two-way trunking requests must be accommodated where technically feasible. 47 U.S.C. § 251(c)(2); FCC Order, ¶ 219.

Decision

The parties have agreed and developed language. MCI Contract, Att. IV, § 1.1.1 and 1.1.2.

Should new entrants be permitted to select how they may interconnect with USWC end offices? (Issue No. 5)

Applicable Law

USWC must provide any technically feasible method of interconnection. 47 U.S.C. § 251(c)(2); FCC Order, ¶¶ 549-550.

Decision

The parties have agreed. AT&T Contract, Att. 3, Appendix A, § 2.4.3, but modified by MCI Contract, § 4.1.3, including the 512 CCS limitation.

Rationale

Although the parties appear to have agreed on this matter, there is a difference in language between AT&T on the one hand, and USWC/MCI on the other. AT&T talks about additional capacity being installed when overflow traffic exceeds 220,000 minutes

of local traffic per month. USWC and MCI, on the other hand, talk about 512 CCS at the busy hour. The Panel selects 512 CCS based upon the testimony of Zulevic, AT&T Ex. 17, pp. 5-6 and Tr. 3, pp. 164-65.

What types of collocation should be required? (Issue No. 6)

Applicable Law

Any requesting carrier may choose any method of technically feasible interconnection or access to unbundled elements. 47 U.S.C. § 251(c)(6); FCC Order, ¶¶ 549-550.

Decision

The parties have agreed to most of the items regarding collocation. MCI Contract, Att. V, § 2, except for those paragraphs which are not underlined, are adopted, but this is subject to decisions reached with regard to related items in Issues No. 7-13, below.

Rationale

The parties have agreed to this material.

Should USWC be permitted to impose Distance Limitations for Mid-Span Meets? (Issue No. 7)

Applicable Law

Any technically feasible method must be provided. [No distance limitations stated.] 47 U.S.C. § 251(c)(6); FCC Order, ¶ 549. Where technically feasible, USWC must modify its network to accommodate interconnection. ¶ 202. A new entrant seeking a technically feasible, but expensive interconnection must bear the cost of that interconnection, plus a reasonable profit. ¶ 199.

Decision

The parties have agreed to negotiate meet-point locations without any distance limitation.

What meet points should be permitted for access to unbundled elements? (Issue No. 8)

Applicable Law

Requesting carriers may choose any technically feasible method of access to unbundled elements. 47 U.S.C. § 251(c)(2); 251(c)(3); FCC Order, ¶ 549.

Decision

The parties have agreed. USWC Contract, § VI(B)(1 and 2).

What types of collocated equipment should be permitted? (Issue No. 9)

Applicable Law

See, 47 U.S.C. § 251(c)(6). USWC may not limit the collocation of equipment unless it proves that the equipment is not necessary for interconnection or access to unbundled network elements. Section 251(c)(6) does not require collocation of enhanced services equipment, and collocation of switching equipment is not required. FCC Order, ¶ 581. 47 C.F.R. § 51.323(c). Any equipment that is necessary in the sense that it is "used" or "useful" must be permitted. 47 U.S.C. § 251(c)(6); Order, ¶¶ 579-580. USWC has the burden to prove that such equipment is not technically feasible and not "used" or "useful". § 580.

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Decision

Remote Switch Units (also referred to as Remote Switch Modules) shall be allowed to be collocated so long as the RSU is not used to avoid paying switch access charges. New entrants may also collocate DCS, along with the ability to remotely configure DCS. AT&T Contract, Att. IV, ¶ 2.2.4 is adopted, except that a specific reference to DCS should be added.

Rationale

A continuing dispute between AT&T, on the one hand, and USWC, on the other hand, exists regarding collocation of Remote Switching Units. USWC fears that they will be used to avoid paying access charges, and cites to testimony of AT&T Witness Lynott, who stated in his Supplemental Direct Testimony that AT&T intended to use the "full capabilities" of RSUs installed in collocated space, including their switching capabilities. (Ex. 67 at 18.) However, when the subject of avoiding switched access charges was raised on cross-examination, Lynott claimed that AT&T was trying to work out a way of assuring that the units were not used for that purpose. Tr. 6, pp. 322-33. He stressed that it was not AT&T's intent to do so, and that AT&T was committed to finding some way to assure USWC that the units were not being used for that purpose.

Under such circumstances, it is appropriate to hold AT&T to its pledge, and prohibit the use of collocated RSUs to avoid switched access charges.

How should collocation premises be defined? (Issue No. 10)

Applicable Law

Premises at which USWC must permit collocation include central offices, wire centers, tandem offices, structures owned or leased by USWC, and any structures that house USWC network facilities on public rights-of-way. 47 U.S.C. § 251(c)(6) and Statement of Purpose); FCC Order, ¶ 573.

Decision

USWC must permit physical collocation (or, if impossible, then virtual collocation) at a broad variety of "premises", including central offices, serving wire centers and tandem offices, as well as any other buildings or similar structures owned or leased by USWC that house USWC network facilities. This also includes structures that house network facilities on public rights-of-way, such as vaults and environmental huts. Disputes over space constraints or technical infeasibility must be decided by the Commission.

Rationale

This matter is essentially governed by the Act and the Rules. USWC would like to limit the premises where collocation may take place, but that is not what the Act and the Rules provide.

Should interconnection with other collocators be permitted? (Issue No. 11)

Applicable Law

Collocators must be permitted to interconnect their collocated equipment with other collocators' network using incumbent's transmission equipment so long as the collocated equipment is used for interconnection with the incumbent LEC or access to the LEC's unbundled network elements. 47 U.S.C. § 251(c)(6). FCC Order, ¶ 594-95.

Decision

The parties have agreed on this item and developed contract language. See, USWC Contract, § VII(A)(2).

What ordering procedure should be utilized for collocation requests? (Issue No. 12)

Applicable Law

Collocation may be negotiated for central offices, wire centers, tandem offices, and all buildings or structures owned or leased by USWC that house network facilities, including public rights-of-way. FCC Order, ¶ 573.

Decision

The parties have agreed and developed contract language on this point. See, USWC Contract, § VII(E).

How should access to collocation space be allotted? (Issue No. 13)

Applicable Law

Space for allocation should be allocated on a first-come first-served basis. Order, ¶ 585. If USWC claims space exhaustion, it must provide the Commission with detailed floor plans of its premises and identify the space used for various purposes and the steps taken to avoid exhaustion. 47 U.S.C. § 251(c)(6); Order, ¶ 602.

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Decision

There is no dispute over this matter. USWC Contract, § VII(C)(4) and (5) resolve the matter.

EXTENT OF UNBUNDLING

What is the required extent of unbundling? (Issue No. 14)

Applicable Law

47 U.S.C. § 251(c)(3); 47 C.F.R. § 51.319. See, FCC Order, ¶ 27. Minn. Stat. § 237.16, subd. 8(3) mandates rules by August 1, 1997 which will require unbundling to "at least the level required by existing federal standards."

Decision

Except with regard to specific issues discussed below, there is general agreement with regard to the nature and extent of unbundling required under the FCC rules. AT&T (but not MCI) has agreed with USWC on a BFR process (bona fide request process) for consideration of additional network elements. See, USWC Contract, § XXIII. MCI has requested specific elements for unbundling, which are discussed below.

What types of local loops is USWC required to make available? (Issue No. 15)

Applicable Law

The local loop includes any loop type used as a transmission facility between a distribution frame or its equivalent in the central office and the Network Interface Device (NIC). This includes 2- and 4-wire, digital and analog loop facilities. 47 U.S.C. §

251(c)(3) and 47 U.S.C. § 153(a)(45); USWC must condition the loop if requested. FCC Order, ¶¶ 380, 382.

Decision

There is no disagreement among the parties with regard to this item, except for the question of who should pay for conditioning a local loop so that it can carry ISDN, HDSL, ADSL or similar services. That question of payment is dealt with at Issue No. 84.

Should the subloop be unbundled? (Issue No. 16)

Applicable Law

Subloop unbundling is not required by the Act or the Order. The states may determine whether subloop unbundling should be required. FCC Order, ¶ 391.

Decision

AT&T has reached an agreement with USWC to handle subloop unbundling via the bona fide request process outlined in section XXIII of the USWC Contract. MCI, however, has not reached such an agreement. MCI is entitled to unbundled subloop from the feeder distribution interface (FDI) to the customer premise network interface device (NID). See, MCI Contract, Att. III, § 6.

Rationale

USWC opposed MCI's request for subloop unbundling on the theory that there are too many different kinds of loops, FDIs and terminal blocks to make any blanket determination regarding the feasibility of unbundling. In addition, USWC alleged that network integrity would be threatened because MCI technicians would be accessing cross-connect boxes, and introducing moisture, dirt and general wear and tear when they did so. MCI, in response, points out that there is no evidence to suggest that its technicians are any less able to prevent moisture, dirt and other problems when they access cross-connect boxes than are USWC technicians. MCI points out that it has proposed a process whereby USWC can object to unbundling at a particular location because of unique technical problems. MCI desires to use its own loop feeder plant where available, and subloop unbundling would allow this to occur. It would avoid MCI's having to pay for a whole loop, even though it has its own facilities that could be used for a portion of it. The panel believes that USWC has failed to demonstrate good cause for requiring the BFR process in every case, and that MCI has demonstrated that its proposal is technically feasible and avoids inefficiencies and unnecessary costs for new entrants.

What NID connections should USWC make available? (Issue No. 17)

Applicable Law

Only NID-to-NID connections are required by the FCC. The states may determine whether it is technically feasible for a new entrant to connect its local loops to a USWC NID. FCC Order, ¶ 396.

Decision

New entrants may connect their own loops directly to USWC NIDs so long as the USWC NIDs have spare capacity. USWC must also install a larger NID, where required and requested, to accommodate interconnection at the NID. MCI Contract, Att. III, § 5.

Rationale

There are a number of different types of NIDs in use today. Some are located on the side of a house, and visible to the public, while others are inside a house or building and essentially invisible. There are both economic and aesthetic considerations which motivate new entrants to seek to connect their loops directly to an existing NID, rather than to add a second NID to accommodate the new loop. USWC has failed to rebut the presumption that further unbundling (beyond that mandated by the Act or the Order) is technically feasible. FCC Order, ¶ 203.

What local switching functionally must be provided? (Issue No. 18)

Applicable Law

Local switching includes all vertical features and functionality. 47 U.S.C. § 251(c)(3) and 47 U.S.C. 153(a)(45); FCC Order, ¶ 412.

Decision

New entrants should have access to all of the vertical features that a switch is capable of providing. Vertical features must be unbundled from local switching.

Rationale

The dispute here is not over whether or not vertical features will be made available, but rather whether or not they must be purchased separately. USWC simply disagrees with the FCC on this matter because it prefers to continue to sell vertical features as separate retail services, and thus have them subject to the resale provisions of the Act, rather than make them available as unbundled network elements. This is part of the "sham unbundling" issue discussed in Issue No. 25 below. The Panel concludes that the FCC Rules are appropriate in this area, and should be followed.

What access should be provided to USWC's Advanced Intelligent Network ("AIN") Triggers? (Issue No. 19)

Applicable Law

47 U.S.C. § 251(c)(2) and (c)(3). The FCC requires access to AIN call-related databases. FCC Order, ¶¶ 486, 493. Access to AIN triggers on an unbundled basis is not required. Order, ¶¶ 501-03.

Decision

The parties are in agreement regarding this issue. USWC's contract language at Section XXII should be adopted, except for item 6, which is dealt with elsewhere.

Rationale

Although there were initial requests for unbundled access to AIN triggers, those requests were withdrawn in place of an agreement with USWC that AIN triggers can be used to access USWC's databases.

Should access to digital cross-connects be required? (Issue No. 20)

Applicable Law

USWC must provide access to digital cross-connect functionality to the extent provided to interexchange carriers ("IXCs"). FCC Order, ¶¶ 444-45. 47 U.S.C. § 251(c)(3) and 47 U.S.C. ¶ 153(a)(45).

Decision

The parties are in agreement on this matter. USWC has agreed to provide access to digital cross-connect systems.

Should packet switching be unbundled? (Issue No. 21)

Applicable Law

Incumbent LEC's packet switches are not required to be unbundled as a separate network element. FCC Order, ¶ 427.

Decision

The parties have agreed on this issue. MCI is not requesting packet switching at this time, and AT&T has agreed to use the bona fide request process (USWC Contract, § XXIII) if it decides to make a request.

Should dark fiber be made available as an unbundled element? (Issue No. 22)

Applicable Law

The FCC declined to decide whether dark fiber should be unbundled. The states may determine whether dark fiber should be unbundled. 47 U.S.C. §§ 251(c)(3) and 251(c)(2); 47 U.S.C. § 153(a)(45); FCC Order ¶ 450.

Decision

"Dark" fiber must be unbundled and offered as a network element to new entrants. The Minnesota Commission does have jurisdiction to require unbundling beyond the minimum ordered by the Act and the Order, and the FCC's assertion that it (the FCC) was continuing to study unbundling of dark fiber does not prohibit the Commission from acting at this time. This decision extends only to fiber which is actually in place and installed. It does not extend to fiber which may be sitting in a warehouse, supply yard, or other storage facility awaiting its installation.

Rationale

Fiber is not different from copper in terms of its being a "network element". Copper, alone, must have electronics added to it before it can be used for communications purposes, even if those electronics are as simple as the innards of an Army field telephone. Dark fiber is fiber without the electronics, although in this case the electronics are far more elaborate and sophisticated. USWC took the position that because dark fiber is "inventory waiting to be used", rather than a plant or facility that is already in use providing telephone services today, it should be viewed more like a roll of copper wire in a warehouse than copper wire in a duct under a street. MCI and AT&T, on the other hand, argued that the dividing line to determine whether or not dark fiber should be offered as an unbundled element was drawn in terms of whether or not the dark fiber was still in storage in a warehouse, or whether it had been laid in the ground or otherwise installed. The panel accepts the AT&T/MCI position as being more compatible with the purposes of the Act than is USWC's position. There is no question regarding technical feasibility -- dark fiber may be used once the electronics are attached. There is also no question that for many purposes, fiber is superior to copper. Therefore, it is not enough for USWC to offer copper as a substitute. Once the "dark" fiber is installed, it is "fair game" for lease as a unbundled element, even though it has not yet been "lit".

Should USWC's Service Control Points (SCPs) be unbundled? (Issue No. 23)

Applicable Law

The FCC has determined that it is not technically feasible to unbundle the service control point ("SCP") from its associated signaling transfer point ("STP"). FCC Order, ¶ 485.

Decision

USWC has agreed to provide unbundled access to its signaling links, STPs, and access to its SCPs via its STPs. Tr. 2, pp. 47-54. USWC Contract, § XXVII.

Rationale

Initially, AT&T had requested unbundling of the SCP from the STP. The FCC, however, determined that it is not technically feasible to unbundle the SCP from its associated STP. AT&T has since dropped its request and has agreed to obtain access to the SCP via the STP. MCI agrees to access the SCP via the STP. Tr. 5, p. 147.

Should interconnection with other networks be permitted? (Issue No. 24)

Applicable Law

USWC must permit new entrants to use USWC's SS7 network elements to connect with third party networks on an STP-to-STP basis. 47 U.S.C. § 251(c)(3) and 47 U.S.C. § 153(a)(45); FCC Order, ¶ 483.

Decision

USWC will allow STP-to-STP activity. USWC Contract, § XXVII.

Should new entrants be permitted to combine unbundled elements? (Issue No. 25)

Applicable Law

USWC must combine elements in any manner requested, so long as the combination is technically feasible and will not undermine the ability of other carriers to access unbundled elements or interconnect with USWC. 47 U.S.C. § 251(C)(3); FCC Order, ¶¶ 289-297.

Decision

New entrants should be permitted to purchase unbundled elements, either individually or in combination, regardless of whether or not the new entrants provide any of their own facilities, and regardless of whether or not they purchase unbundled elements necessary to constitute a "service" which would otherwise be available under the resale provisions of the Act. There should be no restrictions on the combinations of unbundled elements that interconnectors may purchase.

Rationale

USWC correctly points out that there is a potential for "sham unbundling" to defeat the Act's balance between resale and unbundling. By purchasing the equivalent of a finished service through the purchase of unbundled network elements, new entrants will be able to provide a finished service but get a cheaper price than the resale price provisions would otherwise allow. The major difference is the avoidance of switched access charges which would be payable if the service were purchased on a resale basis. The long and short of the matter is that this battle has been fought before Congress and before the FCC, and USWC has lost in both forums. The Act, at section 251(c)(3) requires ILECs to provide unbundled elements "in a manner that allows requesting carriers to combine such elements in order to provide [such] telecommunications service." No limitations are placed on the ability of a new entrant to combine unbundled elements. FCC Order, ¶ 292. The FCC Rules specifically provide for a combination of unbundled network elements. 47 C.F.R. § 51.315. See also, Order, ¶ 287. This issue may be litigated again before the Eighth Circuit, and perhaps before the Supreme Court, but until a contrary decision is reached, the Panel finds no basis in law to impose the restrictions sought by USWC.

Should customized routing be made available? (Issue No. 26)

Applicable Law

Customized routing is technically feasible and should be provided as part of the functionality of the local switching element, provided the particular switch is capable of performing customized routing. 47 U.S.C. § 251(c)(3) and 47 U.S.C. § 153(a)(45); FCC Order, ¶ 418.

Decision

The parties have agreed that USWC will make customized routing available to the new entrants provided the particular switch is capable of performing it. USWC Contract, § XXXI(5)(c).

RESALE

What services should be made available for resale? (Issue 27)

Applicable Law

The Federal Act requires an incumbent LEC "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4). "Telecommunication service" is defined to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). State commissions, incumbent

LECs and resellers can determine the service that an incumbent LEC must provide at wholesale by examining the LEC's retail tariffs. FCC Order ¶ 872

Decision

USWC shall make all telecommunication services available for resale except enhanced services, and promotions of less than 90 days. Packaged services and other special offerings or arrangements for which the rates reflect certain economies, must also be offered at wholesale.

Rationale

Enhanced services constitute information services, and therefore fall outside the requirement that USWC make its "telecommunication services" available for resale.

USWC's argument that the Commission has no authority to require deregulated telecommunication services be offered for resale at wholesale discounts is misplaced. The MPUC is acting as an Arbitrator under a grant of federal authority. Congress has granted the MPUC the power to set wholesale rates for "any" telecommunication service in its role as an Arbitrator. 47 U.S.C. §§ 251(c)(4) and 252(e)(5). Deregulated services are, in fact, telecommunication services that should be available for resale as they are offered for a fee directly to the public. The standard set by Congress is clear and does not provide for USWC to select the telecommunications services it desires to provide at wholesale. USWC provided testimony to the effect that inside wire was deregulated because it could easily be self-provided or obtained from any number of competitive sources, and thus, CLEC's are not competitively disadvantaged by being required to buy this product on the market instead of USWC. However, there is insufficient evidence in the record to evaluate the availability and quality of this product. Nor is there evidence in the record to determine if other non-tariffed, or deregulated services are available on the market to provide CLECs with non-discriminatory access. USWC has failed to establish that non-tariffed or deregulated services are not telecommunication services.

The Act requires USWC to offer for resale all retail telecommunication services provided to its end user customers, except those provided to telecommunications carriers. Thus, access charges which are provided to telecommunications carriers, not end users, do not need to be offered at wholesale prices.

Attachment A lists services which are available for resale and is attached and incorporated herein by reference

What timeframe should be used for distinguishing promotional from retail services? (Issue No. 28)

Applicable Law

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There is a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. FCC Order ¶ 950.

Decision

Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates.

Rationale

USWC believes that the FCC's 90 day limit on promotions that need not be subject to the discount is too short. Excluding promotions that are offered for longer than 90 days may unreasonably hamper the efforts of new competitors that seek to enter local markets through resale. Limiting the restriction to 90 days discourages the use of promotional offerings to evade the wholesale obligation.

What restrictions on resale are authorized? (Issue No. 29)

Applicable Law

The Act imposes the duty on USWC "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on the resale of such telecommunication service . . ." with the exception of permitting prohibitions to a different category of subscribers. 47 U.S.C. § 251(c)(4)(B). State law prohibits a telecommunications carrier from imposing restrictions on the resale of shared use of its services or network functions. Minn. Stat. § 237.121(5). Resale restrictions are presumptively unreasonable except for restrictions on reselling residential services to business customers or lifeline services to ineligible end users. The presumption that resale restrictions are unreasonable may be rebutted by proving to the state Commission that the class restriction is reasonable and nondiscriminatory. FCC Order ¶¶ 948-953.

Decision

Grandparented retail services shall be available for resale but limited to existing retail customers of the service. Residential services, lifeline services, contract services, special arrangements, packaged services and discounted services and promotional offering offered for a period of greater than 90 days shall be limited to the same class of customers eligible to purchase that service from USWC. Attachment A lists the retail services available for resale and the applicable restrictions.

Rationale

The FCC has permitted restrictions on resale of residential services to business customers and lifeline services to ineligible end users. Restrictions are also justified on obsolete services that are no longer available for purchase by new USWC customers. Existing USWC customers who subscribed to the service before it became obsolete can

continue to purchase the service on a grandfathered basis. Consistent with the FCC Order ¶ 872, resellers should be subject to the same limitation as USWC by limiting the service to existing retail customers of that service. Similarly, contract services, special arrangements, services offered on individual contract bases, and other discounted services which are specifically packaged to provide volume or term discounts should be limited to the same class of customers eligible to purchase the service from USWC. This would prevent anti-competitive cross class arbitrage. 47 U.S.C. § 251(c)(4)(B). USWC has met its burden that these restrictions are reasonable and non-discriminatory.

Should USWC be required to rebrand? (Issue No. 30).

Applicable Law

- USWC must provide non-discriminatory access to operations support systems, including repair and maintenance. 47 U.S.C. § 251(c)(3) and 47 U.S.C. § 153(a)(45); FCC Rule 51.613(c); FCC Order ¶ 523.

Decision

- Where directory assistance, operator services and announcements are part of the service or service package USWC offers for resale, USWC must comply with MCI and AT&T branding requests at no additional cost to MCI and AT&T. For all other branding requests including repair and maintenance, USWC shall comply with AT&T and MCI branding requests, unless USWC lacks the capability to do so, but may recover the costs of these branding requests from AT&T and MCI.

Rationale

To the extent new entrants are unable to identify themselves as the provider of a resold service, a customer who wants to choose the carrier with the highest quality service will be unable to differentiate among providers, and make an informed decision. The benefit of brand differentiation will, thus, be diminished or lost altogether. The FCC has recognized the significance of branding in the resale market. FCC Order ¶ 971. USWC has agreed to rebrand directory assistance, operator services and announcements but seeks to recover the costs of branding from AT&T and MCI. Where these services are already a part of the service or service package USWC offers for resale, the costs of rebranding should be minimal. USWC has not proved that such costs will be "enormous". USWC Ex. 15, (Harris Direct, p. 84). However, branding requests for other services and support systems, including repair and maintenance could result in significant costs to USWC which have not been captured in wholesale pricing offsets. USWC should be permitted to recover the costs of these branding requests. Branding of these additional services is appropriate to prevent customer confusion. USWC has proven that rebranding of support systems such as repair and maintenance could result in significant cost. See, Issue No. 62.

How should wholesale rates be determined? What factors should be considered in pricing wholesale prices? (Issues No. 31 and 32)

Applicable Law

"Wholesale rates" must be determined on the basis of retail rates charged to subscribers for telecommunication service requested, excluding portions attributable to marketing, billing, collections, and other costs that will be avoided by local exchange carrier. 47 U.S.C. § 252(d)(3). An avoided cost study may not calculate avoided costs based on non-cost factors or policy arguments, nor may it make disallowances for reasons not provided for in § 252(d)(3). The language of § 252(d)(3) makes no provision for selecting a wholesale discount rate on policy grounds. FCC Order ¶ 914.

Decision

Wholesale rates are to be determined by subtracting avoided cost from retail rates. The portion of the retail rate attributable to costs that will be avoided includes all of the costs that USWC incurs in maintaining a retail, as opposed to a wholesale, business. The avoided costs are those that USWC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers. Rates should not be based on the non-cost policy to encourage the development of facilities based competition.

Rationale

In interpreting the Act, the FCC has provided guidance concerning the determination of an appropriate wholesale rate. Although the FCC's interpretation of the Act regarding wholesale rates has been stayed, it appears to be fully consistent with the language of the Act and provides useful guidance in setting the appropriate discount rate. The FCC has developed a series of presumptions regarding the cost an ILEC will avoid as a result of providing services at wholesale rather than retail. See 47 C.F.R. § 51.609; FCC Order ¶¶ 917-919. USWC's argument that rates for resold services must be set at a level that does not discourage the development of facilities based competition is inconsistent with the FCC Order, ¶ 914 which provides that non-cost or policy factors should not be considered in setting wholesale rates. The FCC's interpretation of the Act as requiring states to make an objective assessment of what costs are reasonably avoidable when an ILEC sells its service wholesale is appropriate.

Should packages of services be made available for resale? (Issue No. 33)

Applicable Law

USWC must establish a wholesale rate for all services that meet the statutory definition of "telecommunication service" and are provided at retail to subscribers who are not "telecommunication carriers." "Telecommunication Service" is defined in 47 U.S.C. § 153(46) to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

Decision

Any telecommunications service, including packaged services, which USWC makes available for retail must be provided for resale at wholesale rates.

Rationale

USWC claims that its service packages are already provided to end users with a discount and may already be priced below cost. It has agreed to offer the packaged services to resellers but requests the Panel to exempt services that already receive a volume or term discount from the Act's avoided cost discount for wholesale rates. USWC alleges that applying a wholesale discount to already discounted services would constitute a "double discount" which would place USWC at a competitive disadvantage. The Federal Act applies to "any telecommunication service" and thus, by its terms, does not exclude service packages or any other service that may be priced below cost. Interconnection Order at ¶ 956. If a service is sold to end users, it is a retail service, even if it is priced at a volume based discount off the price of another retail service. FCC Order ¶ 951. The notion of a "double discount" is misleading. Sections 251(c)(4) and 252(d)(3) taken together simply requires the ILEC to offer the CLEC whatever services it is offering to retail customers, less the costs avoided by virtue of offering such service to a new entrant rather than a retail user. Thus, USWC will avoid marketing, billing and related costs that will have to be picked up by AT&T and MCI. This is not a "discount" at all, but rather a true reflection of the cost of providing that service at wholesale.

Should residential services be available for resale? (Issue No. 34)

Applicable Law

See, Applicable Law in Issue No. 33 above.

Decision

- USWC must provide residential services at wholesale rates based on avoided cost.

Rationale

The Act requires USWC to offer residential services for resale at a wholesale discount equal to avoided retail costs even if those residential services are "below cost." The only reasonable interpretation of the statutory language is that Congress intended incumbents such as USWC to offer all of their current retail services, including local residential services, for resale at a discounted wholesale rate. Without such a discount, resellers would be unable to compete for customers of these services. The lack of a wholesale discount would place a barrier to entry into the resale market for

residential service. Such a barrier would deny residential customers the benefit of resale competition.

How should avoided costs be calculated? (Issue No. 35)

Applicable Law

Avoided costs are those that USWC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers. FCC Order ¶ 911. Direct costs of serving customers and costs for services the reseller will self provision are presumed to be avoidable. The presumption is rebutted by showing that the costs are still incurred in providing the wholesale service, or that the costs are not included in the resale price of the resold services. 47 U.S.C. § 252(d)(3); FCC Order ¶ 917.

Decision

Avoided costs should be based on an "avoidable" cost standard.

Rationale

- The portion of the retail rate attributable to costs that will be avoided "includes all of the costs that USWC incurs in maintaining a retail, as opposed to a wholesale business. The avoided costs are those that USWC will no longer incur if it were to cease retail operations and instead provide all of its services through resellers. The FCC has specifically rejected USWC's suggested approach to determining wholesale rates based upon costs that USWC will "actually avoid" in providing services at wholesale than resale. FCC Order ¶ 911. The FCC's interpretation of the Act is consistent with the language of the Act and, while stayed, provides useful guidance in setting the appropriate discount rate. The FCC rejected the argument of ILECs and others who maintain that the LEC must actually experience a reduction in its operating expenses for a cost to be considered "avoided" for purposes of § 252(d)(3). The Panel agrees with the FCC's analysis that "We do not believe that Congress intended to allow incumbent LECs to sustain artificially high wholesale rates by declining to reduce their expenditures to the degree that certain costs are readily avoidable. We therefore interpret the 1996 Act as requiring states to make an objective assessment of what costs are reasonably avoidable when an LEC sells it service wholesale." Colorado, Georgia, Illinois, New York and Ohio Commissions have all interpreted the 1996 Act in this manner.

Should there be discounts for inferior service performance? (Issue No. 36)

Applicable Law

An avoided cost study may not calculate avoided costs based on non-cost factors or policy arguments, nor may it make disallowances for reasons not provided for in § 252(d)(3). The FCC's analysis also precludes a state commission from adopting AT&T's suggestion that an increment should be added to the base discount rate to

compensate resellers for alleged deficiency in the provisioning of services. FCC Order ¶ 914.

Decision

There should be no discounts for inferior service performance.

Rationale

The service quality discounts initially proposed by AT&T were withdrawn as a formal request in this proceeding. Instead AT&T has proposed a set of DMOQ's against which to measure service quality and penalty provisions in the event those measurements are not satisfied. See, Issue No. 74.

Which avoided cost study should be adopted? (Issue No. 37 and 40)

Applicable Law

The cost study adopted must reflect the following: the direct costs of serving customers and the costs of call completion and number services are presumptively avoidable (accounts 6611-6613, 6621-6623). FCC Order ¶ 917. General support expenses, corporate operations expenses, and telecommunications uncollectibles are presumed avoided in proportion to avoided direct expenses. FCC Order ¶ 918. These presumptions are rebutted by showing that the costs are still incurred in providing the wholesale service, or that the costs are not included in the retail price of the resold service. Plant-specific and plant-non-specific expenses (other than general support expenses) are presumptively not avoidable. FCC Order ¶ 919; 47 U.S.C. § 252(d)(3).

Decision

Adopt MCI's avoided cost model with one modification to bring it into closer compliance with FCC requirements and policies of the MPUC. The appropriate discount rate for services sold to CLECs is 17.66 percent.

Rationale

The record demonstrates that avoided cost studies can produce widely varying results, depending in large part upon how the proponent of the study interprets the language of § 252(d)(3). This fact was recognized by the FCC in its Order ¶ 909. The FCC adopted a minimum set of criteria for avoided cost studies used to determine wholesale rates. The criteria were intended to leave the state commissions broad latitude in selecting costing methodologies that comport with their own rate making practices for retail services. AT&T chose the factor or methodology which yielded the highest discount whereas MCI chose factors and methodologies which would yield a more modest figure. USWC's methodology fails to capture the magnitude of the costs it will avoid and instead assures the production of the most minimal of avoidable costs. USWC also used internal company financial information with TSLRIC estimates. MCI

and FCC methodology uses ARMIS accounting data to determine an appropriate discount. USWC's cost study significantly underestimates its avoided costs. DPS Ex. 75A, p. 10. The Panel has accorded significant weight to DPS witness Grinager examination of the parties' proposed avoided cost models, and adopts his review and analysis. The MCI study provides a base, which with one modification, can be used to estimate an appropriate wholesale discount. For the most part, the MCI study follows the guidelines set forth by the FCC and does so using publicly available data. DPS Ex. 75A, pp. 16-17.

The DPS proposed one modification to the MCI study which is adopted by the Panel. This involves the final step in calculating the appropriate discount rate. At the end of its cost calculations, MCI shows the figure for total state revenues (\$854,906), total expenses (\$700,922), and total avoided costs (\$150,956). MCI Ex. 43, Appendix III. MCI divides the avoided costs by the total costs to estimate the wholesale discount. However, by using total costs in the denominator instead of total revenues, this method overstates the discount. The Act is clear that wholesale rates are to be determined by subtracting avoided costs from retail rates. 47 U.S.C. § 252(d)(3). Dividing avoided costs by total costs results in a rate that is lower than that found by subtracting avoided costs from the retail rate. DPS Ex. 75A, p. 18. The effect of MCI's calculation is to increase the discount rate from 17.66% to 21.54% which translates to a dollar difference of 33 million per year ($21.54\% - 17.66\% = 3.88\%$, $3.8\% \times 854,906,000$). MCI Ex. 43, Appendix III, p. 2. MCI's argument that it intended to use its proposed formula to estimate the return and taxes has not been established and is not accepted by the Panel.

Should USWC be permitted to collect deposits from resellers? (Issue No. 38)

Applicable Law

Neither the Federal Act, nor the FCC Rules and Order addresses deposits.

Decision

AT&T and MCI should pay a deposit to USWC consistent with standard industry practice. Adopt USWC Final Offer, § XXX.G., p. 80.

Rationale

It is appropriate for AT&T, MCI and other CLEC to make suitable deposits to be held by USWC as a guarantee of the payment of charges. USWC met its burden to establish the reasonableness of this proposed contract provision. Tr. 5, p. 65.

Should USWC be permitted to impose construction and other charges on resellers? (Issue No. 39)

Applicable Law

USWC is entitled to recover its costs of resale, interconnection and unbundling in the manner in which they are incurred. To the extent incumbent LECs incur costs to provide interconnection or access under §§ 251(c)(2) or 251.(c)(3), incumbent LECs may recover such costs from requesting carriers. FCC Order ¶ 200.

Decision

USWC should be allowed to assess construction charges if USWC must construct new facilities to service a reseller. USWC may recover such costs on a pro rata basis. Adopt USWC Final Offer of Terms § XXX, E.(7), p. 79; XXIX. Construction Charges, p. 74.

Rationale

In most cases, it is likely that resale requests will be received in areas where facilities are available. However, in some cases a reseller may request new facilities to an area not currently served, or an area with limited existing facilities. If USWC is to build facilities to such an area, it must be assured that it will be able to recover the costs of construction. Without such an arrangement, USWC and its customers could be left "holding the bag" with no way to recover the construction costs. It was not established in the record that special construction costs were factored into resale prices and costs. Specifically, special construction charges will be applicable where, at the request of the CLEC, USWC constructs a new facility or a greater quantity facility than that which USWC would otherwise construct or normally utilize.

ELECTRONIC INTERFACES

What operational interfaces should USWC be required to provide? (Issue No. 41)

Applicable Law

By January 1, 1997, USWC must provide access to its operations support systems functions for pre-ordering, order, provisioning, maintenance and repair, and billing functions under the same terms and conditions that USWC provides those services to itself or its customers. FCC Order, ¶¶ 316, 516-28.

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Decision

USWC must make pre-ordering, ordering, provisioning, maintenance and repair and billing interfaces available by January 1, 1997, or as soon thereafter as reasonably

practicable. To the extent that such interfaces are not available by January 1, 1997, USWC must file a statement with the Commission indicating what progress is being made for completion of the project. Such statements shall be filed monthly, beginning on January 1, 1997, and continuing so long as necessary. New entrants may file a responsive statement setting forth their view of the progress toward completion. The Commission shall take whatever steps it deems necessary or appropriate to move the parties toward completion. National standardization is the goal toward which all parties must strive. USWC's proposed "website" methodology is inconsistent with national standards, and is rejected. The various specific standards proposed by AT&T/MCI are the ones to be used.

Rationale

The short amount of time between the passage of the Act and actual interconnection with new entrants has required both ILECs and CLECs to scramble in an attempt to comply with the various requirements of the Act. The FCC Order sets a January 1, 1997 deadline for the ILECs to provide access to their operations support systems functioning for pre-ordering, ordering, provisioning, maintenance and repair, and billing functions. FCC Order, ¶¶ 316, 516-28. Moreover, the Order requires that these have to be provided under the same terms and conditions that the ILECs provide those services to themselves or their customers. January 1, 1997 is an ambitious goal, and the FCC itself has provided for waivers of the deadline for good cause shown. 47 C.F.R. Part 1, subp. A, section 1.3. USWC asserts that most other RBOCs will seek waivers. USWC Brief, fn. 28 at p. 84. National standardization is by far the most cost-effective manner for all parties to proceed. A variety of national standard setting committees and other forums are hard at work in the face of the January 1 deadline, and it is hoped that most of the standards needed to guide this process will be available by that date, or shortly thereafter. However, it seems clear from the testimony in the record that in a few areas, committees have only recently started their work, and will not have a final product available until December, or even later. The question then becomes what kind of interim standards should be required until the national standards are developed. The panel believes that the most economical interim standard is one which is closest to the likely national standard, thereby requiring the least modification when the national standard is finally adopted. The AT&T/MCI Proposal meets that test.

More than most other areas, this is one area where the parties need to negotiate a mutually satisfactory result. They are urged to continue their discussions with a view toward reaching an agreement between themselves, rather than have the Commission impose one upon them. But if one needs to be imposed, it is better for it to be the AT&T/MCI Proposal.

Should USWC be required to provide access that is equal in quality to its operational support systems? (Issue No. 42)

Applicable Law

See, Issue No. 41 above.

Decision

See, Issue No. 41 above.

Should USWC be required to provide billing interfaces? (Issue No. 43)

Applicable Law

None, other than No. 41, above.

Decision

The parties have agreed that billing interfaces need not be real-time, and that billing data could be transmitted once per month per account and usage data transmitted once per day. AT&T Contract, Att. 7, § 7.

What format should USWC be required to use for billing new entrants? (Issue No. 44)

Applicable Law

None.

Decision

Billing should be transmitted in billing output specification ("BOS") format through integrated access billing system ("IABS"). MCI Contract, Att. VIII, §§ 3 and 4.

Rationale

The IABS system is currently in use by AT&T for access billing for the trunks that connect the local company (such as USWC) to AT&T's long-distance network. Tr. 6, p. 84. NYNEX and PacBell are using the IABS for wholesale billing, and the industry has decided that IABS will be used for unbundled network elements. *Id.*, p. 85. USWC's existing IABS already conforms to the BOS format, and is an existing interface today in use between AT&T and USWC for exchange of interexchange access carrier billing data. Tr. 3, pp. 268-69.

How should unbundled elements be priced? (Issue No. 45)

Applicable Law

Unbundled elements, including operational support systems, must be priced at TELRIC plus a reasonable allocation of forward-looking common costs. TELRIC includes "the forward-looking cost over the long run of the total quantity of facilities and functions that are directly attributable to, or reasonably identifiable as incremental to" the element in question. 47 U.S.C. § 252(d)(3); 47 C.F.R. § 51.505(a)(b).

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Decision

USWC may charge an initial access fee to cover the labor, hardware, and software costs associated with establishing the interface. This fee must be set at TELRIC plus a reasonable allocation of forward-looking common costs. In addition, ongoing transaction fees may be set at the TELRIC cost. To the extent that the interface serves more than one new entrant, the cost may be divided on a prorated basis. See, USWC Contract, § XXXIII(E).

Rationale

USWC urged that it be allowed to charge an initial fee in order to recover the cost of constructing the interfaces. AT&T and MCI, on the other hand, urged that each party be responsible for its own costs, so that USWC would be responsible for providing its part of the interface. This interface is not something USWC already has, or would build for its own purposes. Instead, it is something USWC is being forced to build as a result of the new entrants. Therefore, it is appropriate that USWC be reimbursed for the cost. MFS, AT&T and MCI also argue that the interface will be a "two-way street", benefitting both USWC and the new entrants. While this may be the case quite a ways down the road, it is not the case today. Today, the interface benefits the new entrants almost exclusively. Therefore, it is appropriate that they bear the cost of it.

Should USWC be required to provide notice of outages; Quality? (Issue No. 46)

Applicable Law

New Entrants may request the unbundled elements be provided at a quality level superior to that USWC provides to itself, but they are required to pay the costs thereof. FCC Order, ¶ 314.

Decision

This should be handled in the same manner as other quality issues. See, Issue No. 73 below.

Should audit mechanisms be adopted? (Issue No. 47)

Applicable Law

None.

Decision

The parties have agreed that appropriate mediation mechanisms will deter improper system access and that an audit process is appropriate. MCI Contract, Part A, § 22, except that USWC shall have the right to assert that material is proprietary, and require a protective agreement prior to its disclosure (Tr. 6, p. 110-11).

Should a national gateway for operational interfaces be adopted? (Issue No. 48)

Applicable Law

Interfaces should be provided through a nationally standardized gateway. FCC Order, ¶ 527.

Decision

The parties have agreed in concept to this matter, and aside from matters discussed at Issue No. 41, there is nothing more to be decided at this point.

NUMBER PORTABILITY

Should USWC be required to provide interim number portability? (Issue No. 49)

Applicable Law

USWC has the duty to provide number portability to the extent technically feasible. 47 U.S.C. § 251(b)(2). Until permanent number portability is available, currently available number portability measures such as Remote Call Forwarding, Direct Inward Dialing and other comparable measures must be offered. FCC Order 96-286, ¶¶ 6, 130, 136.

Decision

The parties have agreed on the technical issues surrounding interim number portability. They have not, however, agreed on the cost issues (see below). With regard to the technical issues, AT&T Attachment 9 may adopted.

How should interim number portability be priced? How shall costs be allocated, and how shall access charges be split? (Issue No. 50)

Applicable Law

The costs of number portability "shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC.]" 47 U.S.C. § 251(e)(2). This requires that any cost recovery mechanism adopted must not (1) have a disparate effect on the incremental cost of competing carriers seeking to serve the same customer; or (2) have a disparate effect on the ability of competing telecommunications carriers to earn a normal return on their investment. 47 C.F.R. § 52.7(a). The terminating carrier should receive the CCL and local switching charges. Transport charges should be shared. FCC Order 96-285, ¶ 140.

Decision

AT&T's proposed formula shall be used to allocate the costs of interim number portability across all telephone numbers in a service area. AT&T Ex. 46, pp. 22-23.

The terminating carrier shall receive the CCL charge, end office charges (primarily the local switching charge), the transport interconnection charge, and some portion of the tandem switched transport element, depending on the distance from switch to switch. The tandem switching carrier shall receive the balance of the tandem switched transport element and all of the tandem switching and entrance facility charges.

Rationale

The statute directs that the cost of number portability "shall be borne by all telecommunications carriers on a competitively neutral basis". Section 251(e)(2). The FCC Order allowed the states to determine how costs should be apportioned. FCC First Report and Order (95-116) at § 130. AT&T, MCI, MFS and USWC all proposed different ways of apportioning the cost. USWC's proposal is rejected because it would put all costs on the new entrants, a position which the FCC Order flatly rejected. While that portion of the Order is stayed, the Panel agrees with the FCC's rationale -- that to do so would improperly inhibit competition. MFS has suggested a surcharge mechanism assessed to all carriers in a LATA based on a formula derived from gross revenues. The MCI and AT&T proposals fall within the solution suggested by the FCC in its First Order and meet the standard of the statute. The AT&T formula essentially allocates the charges based on market share of ported telephone numbers. This is a reasonable method.

The allocation of the various switched access charges is dictated by FCC Orders. USWC has volunteered to forward CCL charges to CLECs, but not the other charges. That position is at odds with the FCC Orders, and cannot be followed.

How should permanent number portability be implemented? (Issue No. 51)

Applicable Law

Service provider local number portability must be implemented in top 100 metropolitan service areas (MSAs) by the end of 1998. FCC Order 96-285, ¶ 70.

Decision

The parties have agreed with respect to this issue. See, USWC Contract, § VIII(B).

ACCESS TO RIGHTS OF WAY

Shall access to poles, conduits and right of way be reciprocal? (Issue No. 52)

Applicable Law

All local exchange carriers have the "duty to afford access to poles, ducts, conduits, and rights of ways of such carrier to competing providers of telecommunications services on rights, terms, and conditions that are consistent with Section 224." 47 U.S.C. § 251(b)(4).

Decision

- Each party shall provide the other party access to its poles, ducts, rights of way and conduits it controls on terms, conditions and prices comparable to those offered to any other entity pursuant to each party's applicable tariffs and/or standard agreements.

Source: Joint Position Statement of MFS and USWC (Ex. 62).

Rationale

- Reciprocal access is mandated by the Act, and is reasonable under the circumstances. Although section 224(f)(2) contains a limited exception to access requirements, it provides only that "a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way . . . where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." In that section, Congress saw fit to create a priority between electric utilities on the one hand and cable TV and telecommunication carriers on the other when there are competing demands for utilization of electric power transmission facilities. Congress did not create any such priority between ILECs and CLECs. Since section 251(b)(4) imposes access obligations on all LECs, (not merely incumbent LECs), the limited exemption found in section 224(f)(2), applicable only to electric utilities, does not detract from the section 251(b)(4) requirement of reciprocity.

To what extent may USWC reserve space on its poles, conduits and right-of-way? (Issue No. 53)

Applicable Law

The FCC declined to promulgate specific rules regarding reservation of capacity, deciding instead that space reservation concerns be determined on a case-by-case basis. See, Order, ¶ 1119 through 1170. It did interpret the Act as prohibiting an ILEC from reserving space for future needs to the detriment of the would-be entrants. ¶ 1170. However, at various places in its discussion, e.g., ¶ 1151, it seems to recognize the legitimacy of space reservations based on capacity, safety, reliability, and general engineering principles.

Decision

USWC may maintain spare capacity only as reasonably necessary for maintenance and administrative purposes, based upon generally accepted engineering principles. The AT&T Contract is adopted, except that Att. 4, sections 3.2.5 and 3.2.18 and any other provisions regarding spares shall be modified to conform to this Decision.

To what extent must USWC modify its existing facilities? (Issue No. 54)

Applicable Law

Under 47 U.S.C. § 224(f)(1), LECs have the duty to "provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." USWC must take reasonable steps to accommodate requests for access, including modifying its facilities to increase capacity. Order, ¶ 1161-64. Parties benefiting from the modifications must bear the costs. ¶ 1162.

Decision

See, "Applicable Law" above. The AT&T Contract, Att. 4 § 3.2.17 is adopted, except that USWC's obligations shall be to take "reasonable steps" to accommodate the requested modifications.

Rationale

USWC contends that it is not required to construct new facilities for the benefit of its competitors. It states that it may, under some circumstances, construct or rearrange facilities that would provide pole or conduit space for a CLEC. However, under the Act, USWC may not discriminate against CLECs; that is, it may not give lesser priority to their needs than it does to its own. Since it is customary for USWC and other ILECs to modify facilities to meet their own needs, they must also modify to meet the reasonable needs of competitors. This is the view taken by the FCC in its Implementation Order.

Must USWC exercise its power of eminent domain if necessary to accommodate a request for access? (Issue No. 55)

Applicable Law

The FCC interprets the Act to require ILECs to utilize their power of eminent domain where necessary. Order, ¶ 1181.

Decision

Since all telephone companies certified in Minnesota have the power of eminent domain, Minn. Stat. § 222.36, exercise of that power by USWC to accommodate a competitor's needs should rarely be necessary. The contract shall provide that the parties will cooperate in obtaining or expanding right-of-way suitable for the foreseeable needs of all LECs. If existing easements or licenses run in favor of USWC but not other carriers, USWC shall use reasonable efforts to assist the new entrant in expanding the

easement, as may be necessary, but the new entrant shall reimburse USWC for its costs of providing such assistance.

Rationale

USWC argues that the new entrant must approach the grantor or licensor in order to gain or expand access.. It is recognized that often USWC may lack the authority to make its right of way available to a new carrier or a new utilization of the right of way. However, the new entrant may lack the information needed to negotiate with the licensor or property owner. Therefore, cooperation is called for.

How shall the cost of modifications and maintenance be shared? (Issue No. 56)

Summary of Applicable Law

To the extent modification costs are incurred for the specific benefit of any one party, that party is obligated to assume the cost of the modification. If multiple parties seek modification, they should participate in the cost based on the rates of new space to be occupied by each. Any party later able to obtain access to a facility as a result of modification paid for by others must pay a proportionate share of the modification costs, as adjusted to reflect depreciation. Order, ¶¶ 1211-1216.

Decision

Rules concerning the sharing of modification costs are spelled out at length in the FCC Order, ¶¶ 1211-16, and are incorporated by reference herein. The only dispute of substance seems to concern costs of maintaining the ROW, conduit, etc. The AT&T Proposed Interconnection Agreement, Att. 4 §§ 3.2.21 through 3.2.24 are adopted, except that if AT&T's actions increase USWC's maintenance costs, AT&T shall pay those increased costs.

What terms and conditions shall be applicable to pole and conduit space? (Issue No. 57)

Applicable Law

Section 703 (Pole Attachments) of the 1996 Telecommunications Act amends 47 U.S.C. § 224. It sets forth criteria to govern the charges for pole attachments. These criteria apply pending the enactment by the FCC of regulations governing such charges, which regulations are to be promulgated no later than two years after the date of the Act, and are to be effective five years after the date of the Act.

Decision

- USWC may continue to charge the annual usage fee, make ready charges, labor charges and application fees it has charged under the provisions of the 1978 Pole Attachment Act, except as modified by section 703 and by future FCC regulations.

USWC may not, however, charge minimum purchase requirements to a requested carrier.

Rationale

Section 703 seems to treat charges for pole attachments differently from other charges. Although the reason for such differing treatment is not clear, it appears that pole attachment charges must be based on a fair apportionment of costs of providing usable and non-usable space. While the evidence is scanty as to whether the proposed costs are TELRIC-based, the evidence provided by USWC (Halverson pp. 288-291) is sufficient to satisfy the burden of proof, in the absence of evidence to the contrary. Minimum purchase requirements, however, should not be allowed since they would tend to inhibit the development of facilities-based competition.

DIALING PARITY AND ACCESS TO NUMBER RESOURCES

Should USWC be required to provide dialing parity for local calls? (Issue No. 58)

Applicable Law

USWC has the duty "to provide dialing parity to competing providers of telephone exchange services and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers . . . and directory listing, with no unreasonable dialing delays." 47 U.S.C. §251(b)(3).

Decision

There is no disagreement over this issue. MCI Contract, Part A, § 13.10.

Should new entrants be provided company-specific Central Office Codes? (Issue No. 59)

Applicable Law

See above.

Decision

USWC need not assign specific central office codes to individual CLECs. Until a third party is appointed to administer telecommunications numbering on an equitable basis, USWC should continue to assign codes as the Central Office Code Administrator, consistent with the Central Office Code Assignment Guidelines. This is to be done at no charge. There is no need to use a third party to compile code forecasts, or require the assignment of codes more quickly than the national guidelines. USWC must, however, handle assignment on a parity basis, including parity of timeliness.

Rationale

AT&T claims that it must have a central office code dedicated to its use in each central office. USWC responds that this would exhaust the limited number of codes available, and require premature area code reallocation. The Panel does not believe that AT&T has made a convincing case for its need in this regard, and thus declines to order it.

Should USWC be required to provide dialing parity for IntraLATA calls? (Issue No. 60)

Applicable Law

See above.

Decision

The parties are in agreement on this item. IntraLATA dialing parity has been available in USWC's area in Minnesota since early this year and it will remain available. USWC will offer dialing parity for directory assistance and operator services.

ANCILLARY SERVICES AND BRANDING

Shall USWC permit nondiscriminatory access to operator services and directory assistance? (Issue No. 61)

Applicable Law

USWC has duty to permit "nondiscriminatory access to . . . operator services, directory assistance, and directory listing, with no unreasonable dialing delays." 47 U.S.C. § 251(b)(3).

Decision & Rationale

USWC has agreed to this.

Shall USWC be required to rebrand directory assistance? (Issue No. 62)

Applicable Law

The FCC refused to make a finding on the technical feasibility of providing branded or unbranded service. Order, ¶ 537. However, the refusal to rebrand raises a presumption that the ILEC is unlawfully restricting access. 47 CFR § 51.217.

Decision

USWC shall rebrand directory assistance if such rebranding is technically feasible. USWC has the burden of showing technical unfeasibility. Costs reasonably associated with rebranding shall be borne by the party requesting it.

Rationale

USWC currently brands its directory assistance service in Arizona, Colorado, Oregon, New Mexico and Washington. In Minnesota, directory assistance is, in effect, branded through the provision of call completion service. There are certain circumstances where existing facilities do not permit rebranding of directory assistance unless modifications are made. The cost of modification of such facilities, as well as any other costs reasonably incurred by USWC for rebranding should be borne by the CLEC that requests it.

How shall directory assistance be priced? (Issue No. 63)

[See, Issue No. 77 (Pricing for Unbundled Elements) and Issue No. 31 (Wholesale Rates.)]

Should USWC be permitted to provide unbundled directory assistance through a separate trunk group? (Issue No. 64)

Applicable Law

See, "Applicable Law", Issue No. 61 above.

Decision

USWC may provide unbundled directory assistance through a separate trunk group to allow USWC to record and bill without relying upon self-reporting by new entrants.

Rationale

The parties have no substantive disagreement regarding this issue.

Shall USWC be required to unbundle call completion services? (Issue No. 65)

Applicable Law

See, "Applicable Law", Issue No. 61. The FCC has found that access to the systems supporting both operator call completion services and directory assistance is necessary for new entrants to provide local exchange service. Order, ¶¶ 539, 540.

Decision

USWC shall provide unbundled services wherever and whenever the facilities exist to do so. CLEC's who want USWC to develop the capabilities to provide such services shall pay USWC the reasonable costs thereof.

Rationale

USWC is presently willing and able to provide Call Completion services on a resale basis, at the appropriate wholesale discount. The testimony indicates that it is not presently capable of offering such services to CLECs who originate traffic from their own switches, because USWC lacks the necessary billing and recording capabilities. It states its willingness to develop such capabilities, but asks that (1) the new entrant reimburse the cost, (2) commit to the locations where they require service, and (3) provide a commitment for a reasonable volume of traffic, and a reasonable contract term. It seems that condition (2) will necessarily follow if condition (1) is met. That condition, that the new entrant pay the costs of modification to the system, is reasonable. The arbitrators are not convinced, however, that condition (3) (volume and term commitments) are necessary if the CLEC has paid for the modifications. Term and volume guarantees could inhibit facilities-based competition.

Shall USWC be required to provide access to Directory Assistance databases? (Issue No. 66)

Applicable Law

See, "Applicable Law", Issue No. 61 above. The FCC has ordered that the databases used in the provision of both operator call completion services and directory assistance must be unbundled by incumbent LECs upon a request for access by a competing provider. Order, ¶ 538.

Decision

USWC shall offer unbundled read-only access to its directory assistance databases. The CLEC that desires such access shall reimburse USWC for the reasonable costs of deploying that service.

Rationale

Once again USWC wants to impose conditions upon something it is required to do under the law. It may condition access upon reimbursement of its costs. However, it may not impose conditions such as volume and term commitments. Neither Congress nor the FCC provided for such conditions in imposing unbundling requirements.

Shall USWC be required to provide unbundled access to Busy Line Verification and Emergency Line Interrupt services without the intervention of a USWC operator? (Issue No. 67)

Applicable Law

See, "Applicable Law", Issue No. 61 above, and Issue No. 65 above. Neither the Act nor the FCC address the USWC position that busy line verification and interrupt procedures require the intervention of a USWC operator.

Decision

USWC shall provide nondiscriminatory unbundled access to BLV and ELI functions, without the intervention of a USWC operator. AT&T Proposed Interconnection Agreement, Att. 2, § 8.2.1 shall govern, except that the CLEC who requests such interconnection shall report anticipated volumes to USWC at least annually. At such time as USWC seeks BLV and ELI capabilities with respect to the CLEC's end users, the obligations of the parties with respect to price and other terms shall be mutual and reciprocal.

Rationale

The USWC suggestion that CLECs not engage in busy line verification or emergency call interruption without the intervention of a USWC operator seems unduly proprietary and cumbersome. USWC fails to advance good business reasons for its position. If the CLEC's operator is required to first communicate with a USWC operator to implement a caller's request, the perception is created that the CLEC provides inferior service.

How shall BLV/ELI services be priced? (Issue No. 68)

[See, Issue No. 77 (Pricing for Unbundled Elements) and Issue No. 31 (Wholesale Rates.)]

Shall USWC be required to provide access to customer address and number changes? (Issue No. 69)

Applicable Law

See, "Applicable Law", Issue No. 61 above.

Decision

USWC shall provide updated customer addresses and number change information on a daily basis. AT&T Proposed Interconnection Agreement, Att. 5, § 5.1 shall govern if the cost of the electronic interface is shared.

Rationale

The Arbitrators are unable to discern any meaningful difference between the positions of the parties. AT&T proposes an electronic interface (EI) to transfer and receive data. This would seem to be as beneficial to USWC as to any CLEC who participates, since all LECs will need current information from one another. Congress seems to have envisioned a "seamless interface" between the systems and facilities of competing carriers, for the benefit of the public at large.

QUALITY

Should USWC be required to meet specific performance and quality standards? (Issue No. 73)

Applicable Law

USWC must provide unbundled elements on a reasonable and non-discriminatory basis. 47 U.S.C. § 251(c)(3). 47 C.F.R. § 51.311(b) provides "To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself." The FCC Rules further provide that, if technically feasible, the quality of an element, as well as access to that element may, "upon request, be superior in quality to that which the incumbent LEC provides to itself." 47 C.F.R. § 51.311(c). Section 251(c)(4) establishes the duty of incumbent LECs not to impose unreasonable or discriminatory conditions or limitations on the resale of its telecommunication services. 47 C.F.R. § 51.603 requires LECs to make services available on a reasonable and non-discriminatory basis, and to provide those services to competitors that are, "equal in quality, subject to the same conditions and provided within the provisioning time intervals that the LEC provides the services to others, including end users."

Decision

USWC must provide interconnection, access to unbundled network elements, operations support systems and services for resale at the same level of quality that USWC provides to itself. To the extent that a CLEC desires to have higher quality service, it should submit a BFR to USWC and negotiate a contract with USWC that provides performance standards which exceed parity. USWC must meet at a minimum existing rules established by the MPUC in Minn. Rules Chapter 7810 (or subsequent rules which may be duly promulgated by the MPUC in the future). USWC must also abide by its Specified Performance Commitment to meet the Performance Criteria and Audit Process as provided in its Final Offer of Terms at § XXXII, pp. 90-91 and § XXIV, pp.68-69; See also, § VI(E), p. 19; § XXX(C)(3), p. 76.

Rationale

Under the Federal Act, USWC is required to treat new entrants not only as well as it treats other CLECs, but as well as it treats itself. This standard guarantees that AT&T, MCI, and other CLECs will have an equal opportunity to compete. The DMOQs proposed by AT&T and MCI exceed the minimum standard of parity. The rules provide that CLECs may request interconnection and unbundled elements at a quality level superior to that which USWC provides to itself. In the event a CLEC requests service quality which exceeds the same level of quality USWC provides to itself, a CLEC can

negotiate and contract with USWC for the level of service that is desired. Part of that negotiation could provide for increased performance standards. In a competitive market, performance measurements allow both parties to contract a mutually acceptable, efficiency enhancing mechanism to reduce risks and uncertainty. USWC Ex. 16, p. 15. If AT&T, MCI or other CLECs believe that USWC is discriminating against them, it has other remedies available from the MPUC, the FCC and the U.S. District Courts. CLECs can file a formal or informal complaint with the MPUC or invoke the dispute resolution process provided in the Interconnection Agreement (See, Issue No. 75.)

Should US West be required to meet specific performance standards and pay contract penalties if it fails to do so? (Issue No. 74)

Applicable Law

See, Applicable Law in Issues No. 36 and 73 above.

Decision

AT&T and MCI have dropped its request for performance penalties. See discussion in Issues No. 36 and 73.

DISPUTE RESOLUTION

Should a dispute resolution process be adopted? (Issue No. 75)

Applicable Law

47 U.S.C. § 251(c)(1) provides a general duty to negotiate in good faith the particular terms and conditions of agreements. There is no specific requirement that the negotiating parties adopt a dispute resolution process in the Interconnection Agreement.

Decision

Adopt the Alternate Dispute Resolution process proposed by AT&T and MCI in Att. 1 of AT&T's Proposed Interconnection Agreement.

Rationale

The dispute resolution process proposed by AT&T and MCI provides for an expeditious, economical, and equitable resolution of disputes between AT&T, MCI and USWC. It also provides a comprehensive resolution agreement in dealing with disputes that will arise. Parties to the Interconnection Agreement may invoke the informal and formal complaint procedures of the MPUC for any dispute arising out of an agreement, except for disputes or matters for which the Federal Act specifies a particular remedy or procedure. By mutual agreement, the parties can refer a dispute to negotiation and arbitration in lieu of the formal or informal complaint procedures of the MPUC. The

parties may initiate a binding arbitration proceeding in accordance with AAA Rules and the rules of the dispute resolution process. The rules of AAA will govern all arbitration proceedings. The Alternate Dispute Resolution process provides for informal resolution of disputes but does not mention specifically the use of mediation to resolve a dispute. However, it is the interpretation of this Panel that mediation is not prohibited if the parties agree to use a mediation process in its Informal Resolution of Disputes procedure at Att. 1, §§ 3.1 and 3.2.

Should a "loser pays" provision be adopted? (Issue No. 76)

Applicable Law

The Federal Act, FCC Rule and Order do not address this issue.

Decision

Each party shall bear its own cost of dispute resolution if the matter is resolved using the Informal Resolution of Disputes process set forth in Att. 1 to the AT&T Proposed Interconnection Agreement. If the matter is submitted to binding arbitration, the arbitrator's fees and expenses that are directly related to a particular proceeding shall be paid by the losing party. In cases where the arbitrator determines that neither party has, in some material respect, completely prevailed or lost in a proceeding, the arbitrator may apportion expenses to reflect the relative success of each party as provided in § 12.1 of AT&T's Proposed Alternate Dispute Resolution Process contained in Att. 1. Those fees and expenses not directly related to the proceeding are to be shared equally. Adopt AT&T Contract, Att. 1, §§ 12.1 and 12.2.

Rationale

- A "loser pays" provision is necessary to provide an incentive for the parties to avoid prolonging disputes for anti-competitive purposes. However, the parties can avoid the risk of these additional costs by resolving the dispute on an informal basis or through mediation.

PRICING FOR UNBUNDLED ELEMENTS, INTERCONNECTION, AND COLLOCATION

How shall unbundled elements be priced? (Issue No. 77)

Applicable Law

Determinations of just and reasonable rates for interconnection and network elements must be based on the cost of providing the interconnection or network element, but without reference to rate of return or other rate based proceeding, be nondiscriminatory, and may include a reasonable profit. 42 U.S.C. § 252(d)(1). The Commission may adopt the FCC proxy rates on an interim basis if the cost information

available to it is inadequate to support the adoption of rates consistent with the requirements of the FCC rules. FCC Rule 47 C.F.R. § 51.513.

Decision

Neither the USWC cost study nor the Hatfield Model sponsored by AT&T and MCI are sufficient to adopt in their entirety. Prices for unbundled elements shall be based upon a weighted average of the AT&T "Best and Final Offer" prices and the USWC Final Offer prices, giving the AT&T prices a weight of four and the USWC prices a weight of one. Such prices should be adopted on an interim basis to allow competition to begin and prices to be adjusted by further negotiations and subsequent Commission proceedings.

Rationale

With the exception of deaveraging, it is appropriate to follow the FCC Rules for pricing of interconnection and unbundled elements in Minnesota. Having reviewed the pricing rules at 47 C.F.R. § 51.501-51.515, and the FCC interconnection order by which they were adopted, we find the FCC analysis persuasive and agree that the pricing rules establish a structure and standards that should produce just and reasonable rates for interconnection and network elements as required by the Act. Thus, we agree that interconnection and the unbundled elements should be priced pursuant to the forward-looking economic cost of each element, which is defined as the total element long-run incremental cost of the element (TELRIC) plus a reasonable allocation of forward-looking common costs. (We note that the term TELRIC is sometimes used in this report to also include the allocation of common costs.)

In this case, the results of two cost studies are presented. USWC sponsored what it called the U.S. West TELRIC Study. Its study is actually the assembled data produced by a number of different modules, which are refinements and enhancements to USWC's previous long range incremental cost studies and which have been tailored to include data appropriate to USWC's service territory in Minnesota. Most of the modules apparently are spreadsheets written in Symphony, an older PC-based program. One of the modules only runs on USWC's mainframe computer. AT&T and MCI sponsored the Hatfield Model 2.2, Release 2. The Hatfield Model consists of several modules as well, all of which reside on Microsoft Excel spreadsheets. Excel is a PC-based spreadsheet program in very common use today. The Hatfield Model is a development and refinement of the Benchmark Cost Model (BCM). It now includes a graphical user interface and that allows easier manipulation of the model.

Both the USWC cost model and the Hatfield Model appear, from the testimony of the experts at the hearing, to be well designed studies that produce the forward looking economic costs of interconnection and unbundled elements in Minnesota. However, both suffer from a number of infirmities that detract significantly from the accuracy of the costs determined. Moreover, they are both of such recent vintage that their availability for detailed examination by the experts has been limited to the last several weeks.

Thus, complete reliance on either cannot be justified at this time. Given the biases and inaccuracies that appear even at this stage, it can only be concluded that the two studies provide the outer bounds for prices that most appropriately should be set somewhere between the two.

The USWC cost study enjoys more accurate data because only USWC has had access to its data regarding location, numbers and types of users that the Hatfield Model can only approximate through the use of publicly available data. USWC also has better access to the current prices for equipment, wire, cable and other materials necessary for the construction of a network. On the other hand, several weaknesses in the USWC cost study have been identified, including the following: Depreciation rates used by USWC are too high, especially for copper wire; the cost of capital used by USWC is too high, even recognizing some increase in risk for moving USWC to a competitive market; the fill factors used by USWC appear too low, thus oversizing the proxy network and increasing costs; a composite income tax rate rather than the Minnesota income tax rate is used (although this has the impact of slightly lowering the cost estimates); little support has been provided for USWC's figure of approximately 4 percent of TELRIC for shared common costs; USWC's estimates of "difficult placement" throughout the network appear unreasonably high.

A very significant fact that brings the USWC cost study into doubt is that the results produced are very high when compared to other studies. According to the USWC cost study, the cost of the weighted average unbundled loop is \$38.58. In June 1995, USWC prepared a long-run incremental cost study (LRIC Study) for Minnesota which placed the cost of an equivalent unbundled loop at \$17.18. The \$17.18 figure is more in the realm of other studies and makes the \$38.58 figure appear entirely unrealistic. In its initial brief, the OAG cites a number of loop costs that have been determined in various states and by the FCC. New Hampshire and Nevada have produced costs of \$6.03 and \$6.73 respectively. The OAG also points out that in establishing its proxy rates, the FCC examined a number of cost studies that had determined forward-looking loop costs that are fairly close to the FCC proxy rate for Minnesota. Those are:

<u>State</u>	<u>Cost Study</u>
Michigan	\$ 10.03
Iowa	12.58
Oregon	12.45
Florida	17.00
Colorado	18.00

It would appear that USWC, in updating its cost study, has included everything that can be justified. But cost models are imperfect approximations of reality that require a balanced, realistic approach to the values and formulas included and used. Just looking at the results, which is an appropriate method of evaluating a model, indicates that the USWC study is very biased in favor of higher costs. USWC suggests

that its study could be rerun with revised inputs for cost of capital, depreciation rates, fill factors, etc. USWC could have done so in its post-hearing submissions, but did not.

It is claimed by AT&T and MCI that the Hatfield Model is "open, verifiable, and user friendly", while USWC's cost study is a "black box". AT&T Brief at 40. Several parties, including USWC, were involved in the Hatfield Model predecessor, the Bench Mark cost model and so had a knowledge of its operation. That is not so of the later enhancements and what is now called the Hatfield Model. FCC Order ¶ 794. It was not until the graphical user interface was introduced with Release 2 in August that it could be said that the model became "user friendly". So, the Hatfield Model 2.2, Release 2, has only been "open and verifiable" a few weeks longer than the USWC cost study has been. Thus, the staff of both the DPS and the OAG have also had insufficient time to do substantial analysis of either study. The Hatfield Model was attacked by USWC as being based on unrealistic assumptions and inputs that were not substantiated in this proceeding. That is true, but USWC provided no evidence of what the correct value should be for those assumptions and inputs. It appears, without further evidence for verification, that the Hatfield Model fill factors may be unreasonably high, that construction costs in high density areas may be unreasonably low, that depreciation lives may be too long, and that there are questions about the significant changes between the results produced by Release 1 and Release 2. The Release 1 results filed in July 1996, produced an unbundled loop cost estimate of \$7.90 per month. Release 2 results, filed in this proceeding and upon which AT&T and MCI now rely, produced a cost of \$12.03. DPS Ex. 77 (Fagerlund dir.), EF-1.

The Hatfield Model Release 2 results are significantly closer to the range of other forward-looking incremental costs of these done in this state and similar states set forth above. For that reason, it is concluded that the costs it produces are a better approximation of those cost. However, there are clearly further corrections to be made that would increase the prices produced. The Hatfield Model assumption that all existing poles and ducts can be shared produces unrealistically low construction costs. The fact that Minnesota cities have recently become very vocal about imposing costs for the use of rights-of-way has not been considered. There may be some legitimacy to the other concerns that have been raised. In sum, the Hatfield Model prices cannot be adopted without modification because they appear to be too low.

The DPS recommends adopting the FCC proxy prices in lieu of either cost study. The OAG recommends adopting a price for an unbundled loop that is an average of the similar cost studies set forth above. The Panel rejects both of those suggestions and chooses to adopt a weighted average of the Hatfield Model prices and the USWC cost study prices. To do so, in fact, relies upon the cost studies presented to a significant extent and determines an appropriate weight to be given to them. In this case, applying a weight of four to the Hatfield Model and a weight of one to the USWC cost study produces an unbundled loop price of \$17.34. (The sum of $\$12.03 \times 4 + \38.58×1 divided by 5.) We recognized that weighting produces a price almost \$3.00 greater than the prices recommended by the DPS and the OAG, but believe it is justified by the cost studies presented and provides a reasonable estimate of the incremental

cost to build that element. We also choose to adopt the weighted average methodology because there are several elements other than the unbundled loop for which pricing must be determined. We direct that the methodology be applied to all prices for interconnection, unbundled elements and collocation for which there are Hatfield Model and USWC cost study figures.

Shall unbundled elements be geographically deaveraged, and if so, how? (Issue No. 78)

Applicable Law

Deaveraging is not specifically required by the Act. However, 47 C.F.R. 51.507(f) requires state commissions to establish a minimum of three geographically deaveraged pricing zones for interconnection unbundled network elements. That provision is subject to the 8th Circuit stay.

Decision

Geographic deaveraging shall not be established at this time, but should be established in subsequent proceedings. AT&T Contract, Schedule 2, pp. 5-8 contains density zone pricing for unbundled loops and subloop elements on both a six-zone and three-zone basis. The zone pricing shall not be applied at this time.

Rationale

Both cost studies in evidence indicate a higher cost for providing service in lower density areas. The FCC required deaveraging because it concluded that deaveraged rates more closely reflect the actual cost of providing interconnection and unbundled elements. FCC Order ¶ 765. It is correct that more and narrower categories of elements and identification of cost to those categories make the prices more specific. But, having one overall price for a more broadly defined category does not mean that the rate for that category is not based on its cost. Having just one price for an element still complies with the Act.

MFS strongly encourages deaveraging and suggests that it be done on the basis of average loop length. MFS Brief at 16-18; MFS Reply at 7. MFS, and other new entrants who concentrate their efforts in the urban business market, will tend to have a large proportion of their loops fall within the lowest price zones. Tr. 6, p. 221-222 (Porter cross). They and urban and business customers would benefit the most from immediate deaveraging. Not deaveraging will temporarily limit the competition such new entrants would bring.

Moving toward some level of deaveraging is appropriate, because it more accurately reflects costs, but immediate deaveraging will have a large negative impact

upon rural residential customers in the state. The prices paid currently by those customers are subsidized by urban and business customers throughout the USWC network. Not deaveraging will allow that subsidization to continue temporarily until subsequent proceedings specifically address the issue. Such proceedings are imminent.

May USWC recover any costs incurred in unbundling network elements or interconnection? (Issue No. 79)

Applicable Law

The Act at 47 U.S.C. § 252(d)(1) requires that rates for interconnection and network elements must be based on cost of providing the interconnection or network element and may include a reasonable profit. Under the FCC Order ¶ 200, incumbent LECs may recover costs incurred to provide interconnection or access from requesting carriers.

Decision

USWC may recover separately non-recurring costs incurred to provide interconnection or unbundling where such costs are not included in the TELRIC of such interconnection or network element. AT&T Contract § 41, which describes the general principles for pricing must be modified to include a provision that so states.

Rationale

In general, USWC is entitled to recover its cost of providing unbundled network elements and interconnection. Usually, we would expect the cost to be reflected in the prices determined by the TELRIC cost studies for of those interconnections or network elements. There may, however, be cases where they are not, particularly in the case of nonrecurring costs incurred to establish an interconnection or unbundle a network element. However, the prices for these services must also be determined on a TELRIC basis. We agree with the provisions of 47 C.F.R. § 51.507 on the general rate structure standard. It requires that recurring costs should be recovered through recurring charges and nonrecurring costs should generally be required through nonrecurring charges except that nonrecurring charges may, where appropriate, be recovered through recurring charges over a reasonable period of time. We are unable to resolve this issue beyond stating general principles because the parties have provided few specifics. AT&T argues that both recurring and nonrecurring costs are reflected in the ARMIS data used in the Hatfield Model, and that therefore no additional nonrecurring costs should be assessed. AT&T Brief at 34. USWC provides no specific argument on the issue, but does list several nonrecurring prices in its price list. USWC contract, Append. A.

There may well be nonrecurring costs associated with the unbundling of elements for new entrants that are not reflected in the cost studies because the cost studies estimate the cost of building the network and the incremental cost of each of the

elements. However, we are unable to accept USWC's prices for nonrecurring costs because we are unable to accept the prices determined by the USWC cost studies as discussed above.

What additional charges, if any, may USWC recover for physical and virtual collocation? (Issues No. 80, 81 and 82)

Applicable Law

USWC may recover forward-looking costs directly attributed to the specified element. 47 U.S.C. § 252(d); FCC Order ¶ 682. USWC must allocate non-recurring charges among all requesting carriers. 47 C.F.R. § 51.507(e).

Decision

USWC may apply additional charges related to physical or virtual collocation for the following: "Preparation, Expanded Interconnection Channel Termination (EICT), Entrance Facility, Fiber Splicing, 48 Volt Power and Cable, and Inspector Labor when the ILEC requires access. For physical collocation only, USWC may apply charges for Cage/Hardwall Enclosure and lower space rental. For virtual collocation only, USWC may apply charges for Equipment Bay, Engineering Labor, Installation Labor, and Training Labor.

The foregoing charges must be priced at TELRIC plus a share of reasonable common cost. USWC has provided prices based upon a cost study for the foregoing items. AT&T Ex. 2, Ex. S, and AT&T Contract Sched. A. AT&T and MCI have provided proposed prices for some of the items. AT&T Contract Sched. 2; MCI Contract Attach. 1, Table 1. Where there are corresponding prices from both AT&T and USWC, the price shall be determined by the four to one witted methodology set forth above. Where there is not a corresponding AT&T price proposal, the price shall be the lower of USWC's proposed price or the proxy price set forth in USWC Ex. 2, Ex. S.

The parties have agreed that the following additional charges may be applied for physical or virtual collocation: Preparation fee, expanded interconnection channel termination, entrance facility, fiber splicing, 48 Volt and power cable, and inspector labor when AT&T requires access. It is agreed that these elements should be priced at TELRIC.

Rationale

There is extremely little support offered by the parties to support their proposed prices. USWC is entitled to recover an appropriate charge for the cost it incurs in providing collocation and the prices established here do that on the best information available at this time. In order to ensure that they are not excessive, they are limited to USWC's proxy rates derived from its existing interstate virtual collocation practices.

How shall unbundled elements not mandated by the FCC be priced? (Issue No. 83)

Applicable Law

The pricing of unbundled elements should be based on TELRIC. FCC Order ¶¶ 672 and 679.

Decision

The pricing of unbundled elements not mandated by the FCC must be based on TELRIC as are FCC mandated unbundled elements.

Rationale

No distinction appears in the Act between pricing for unbundled elements required to be provided by the FCC and unbundled elements beyond those so required.

Shall USWC be permitted to charge for loop conditioning? (Issue No. 84)

Applicable Law

A network element is defined to include all logical features, functions and capabilities provided by software located in the physical facility. 47 U.S.C. § 153(a)(45); FCC Order ¶ 260. The FCC Order also provides that a new entrant requesting loop conditioning must "bear the cost of compensating the incumbent LEC for such conditioning." FCC Order ¶ 382.

Decision

USWC should not be permitted to impose extra charges for loop conditioning.

Rationale

The cost of conditioning is included in the TELRIC price of the loop element being purchased. TELRIC pricing requires determining the cost of elements that are technically feasible. A "technically feasible" loop would not require loop conditioning. Therefore, the fact that USWC may have some copper loops that require conditioning is irrelevant. Allowing USWC to charge for loop conditioning would be equivalent to allowing it to recover embedded costs.

TRANSPORT AND TERMINATION PRICING

Shall USWC be permitted to establish separate charges for transport? (Issue No. 85).

Applicable Law

Under Section 251(b)(5) of the Act, each LEC has the duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Under Section 252(d)(2)(A) reciprocal compensation is not just and reasonable unless it "provide[s] for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." The FCC has treated the functions of call transport, call termination and call transit as three separate functions, see, Order ¶¶ 1039, 1040, 1060, 1061, 1062, and has promulgated general criteria for pricing. See Id. and ¶¶ 1063-1068; 1085-1118.

Decision and Rationale

Any rates established under section 251(b)(5) of the Act will be reciprocal -- that is, USWC will pay the CLECs at the same rate as they pay USWC for performing the same function. Transport and termination on a local level generally involves two carriers - the carrier whose customer originates the call and the carrier whose customer receives it. The term "transport" refers to the transmission of a message from the interconnection point between carriers to the terminating carrier's end office switch that directly serves the person called. The term "termination" refers to the delivery of a message from the terminating carrier's end office switch to the premises of the person called. The term "transit" refers to a kind of transport involving three or more carriers and refers to the transmission of a message between two carriers by some other carrier. With respect to call transit, the connecting carrier lacks a consumer who can be billed for the call. These different functions implicate different technology. Transit or transport may be handled by a direct trunk. Transport may also be handled through tandem switching. Call termination involves the terminating carrier's end office switching and delivery of traffic from the end office switch to the call's destination. Although USWC states that its actual costs of call termination may be higher because its competitors may have state-of-the-art equipment, it has agreed to reciprocal compensation, as the Act requires. Since the facilities utilized and the billing opportunities are different for each function, separate charges shall be established for each.

How shall termination of traffic be priced? (Issue No. 86)

Applicable Law

See, "Applicable Law", Issue No. 85.

Decision

"Bill and Keep" is an arrangement whereby monetary compensation does not pass from carrier to carrier; rather each carrier bills its own retail customer a rate that will provide for recovery of its costs in terminating calls originated on the system of its competitors. While AT&T and MCI propose Bill and Keep arrangements for transit, transport and termination, MFS does not. The Arbitrators are persuaded that Bill and Keep does not ensure that LECs will be fully compensated for their additional costs of terminating calls that originate on a competitor's network. The symmetrical rate to be paid by all LECs for call termination is shown on Appendix A to the USWC-MFS Joint Position Statement, Ex. 62 (as revised 10-21-96). For these purposes, the MFS and MCI switches presently in place are not considered tandem switches.

Rationale

The FCC has found that carriers incur costs in terminating traffic that are not de minimis, and consequently, "bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs." Order, ¶ 1112. In addition, the FCC has found that "as long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient because they distort carriers' incentives, encouraging them to overuse competing carriers' termination facilities by seeking customers that primarily originate traffic." *Ibid*. Examples that might have been given by the FCC to illustrate the latter point are carriers who serve internet providers, telemarketing firms, pay telephones or wireless providers, where most calls are originated, not terminated. While AT&T and MCI protest that this is not their business plan, the "most favored nation" provisions of the now-stayed FCC rules would permit any carrier to select that methodology if it were found in any other carrier's contract. It also seems likely that for the immediate future, at least, CLECs will concentrate on the easiest markets to penetrate—business and urban-area customers, where the costs of termination are less because of shorter distances. AT&T claims (Initial Brief p. 50) that FCC rules "allow the presumption that traffic from one network to another will be in balance." However, this is ascribing to the rule a mandate that it does not actually convey. The Rule cited, 51.711 is not in point. And Rule 51.713 merely provides that "nothing in this section precludes a state commission from presuming that the amount of local telecommunications traffic from one network to another is roughly balanced with the amount of local traffic flowing in the opposite direction and is expected to remain so. . . [emphasis supplied]. The question remains whether such a presumption squares with common sense. For the reasons noted, it does not. Nor does it square with the FCC observation in ¶ 1112 of its Order.

It should be noted that bill-and-keep procedures were born in a regulated marketplace, for convenience. Since each regulated carrier would be made whole through operation of the requirement of reasonable revenues, there was little motivation for carriers to ensure that traffic was in balance. It should also be noted that the Illinois Commerce Commission and the Connecticut Department of Utility Control rejected

arguments by new entrants that bill-and-keep agreements would result in adequate compensation for additional costs.

The best argument for imposing bill-and-keep arrangements is that they avoid the necessity of measuring traffic. And the necessity to measure could place the incumbent LEC in a position to create a barrier to competition by forcing a new entrant to develop new, untested and very expensive techniques of measurement. MCI witness Nina Cornell points out, Ex. 56, pp. 27-32 that the costs of new systems of measurement are likely to fall disproportionately on new entrants. The record, however, does not satisfactorily address the question of the USWC-proposed methodology of measurement. USWC merely points out that ". . . US West is prepared to measure traffic, and . . . appropriate TELRIC studies have been completed." Ex. 1 (Halvorson) pp. 179. Since other factors discussed below indicate that the USWC proposed prices are within the range of reasonableness, the Panel is hesitant to impose bill-and-keep over USWC's objections merely on the basis of a possibility that measurement systems themselves will stifle competition.

This is not an area of controversy where the Panel is called upon to resolve conflicting claims with respect to modeling. For AT&T has not proposed specific pricing, relying instead on its arguments for Bill-and-Keep. USWC's proposed rates are within the range of the judicially-stayed FCC proxy rates. For example, the FCC recommended a range of 0.2 to 4.0 cents per minute for termination, ¶ 1160, while the USWC-MFS agreement calls for 0.3294 cents per minute for this function.

Since AT&T has not proposed prices for call termination, and MCI's proposed prices are not based on TELRIC studies, the best evidence in the record appears to be the prices negotiated at arm's length between USWC and MFS. These prices are shown in Appendix A to Ex. 62 (as amended October 21, 1986).

We also note that since the rates chosen will be applied symmetrically, the FCC has recommended that the incumbent LEC's transport and termination prices be adopted as a presumptive proxy for other carriers' added costs. This consideration of symmetry also prompts the observation that the prices proposed by the incumbent LEC for these functions are likely to be reasonable, since they will apply to traffic flowing in both directions.

One reciprocal price issue not resolved by negotiations between USWC and MFS is whether the MFS switch is eligible for tandem rate treatment. The MFS position is that if its switch can be considered the functional equivalent of USWC's tandem switches, it will agree to USWC's price of \$0.003294 per MOU. However, if the switch is not considered a tandem switch, it proposes the price for both end office switching and tandem switching should be higher (\$0.004 and \$0.005, respectively).

Under the FCC Order, ¶ 1090, arbitrators and state commissions may establish transport and termination rates that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. This is because the

additional costs incurred are dependent on the kind of switching made necessary. But in doing so, states must consider whether new technologies, such as fiber ring networks, perform functions similar to those performed by an ILEC's tandem. Ibid. Where the switch of the new entrant serves a geographic area comparable to that served by the ILEC's tandem switch, the appropriate proxy for the new entrant's switch is the tandem interconnection rate. Thus, the focus is on function and area served rather than on nomenclature.

It is in this context that we compare the USWC tandem switches with the switches in place owned by MFS and other parties. The function of a tandem switch is to connect multiple end offices, to provide alternative "safety net" routing options for overflow traffic. When direct trunk transmission between end offices is impossible because the trunk is fully utilized, a call will be switched to another available trunk by the tandem switch. A tandem switch does not have many features that are found in a local switch, and it does not perform line-to-line or line-to-trunk switching. The CLEC switches, on the other hand, connect the end user loop to the network and provide functions such as dial tone, call processing and call switching. The witnesses seemed to acknowledge that the MCI switch does not meet the technical specifications for a tandem generally recognized in the industry. AT&T does not have a switch for local, as distinguished from long distance, traffic, in Minnesota. The fiber networks in place in Minnesota and owned by MCI and MFS really function like the feeder and distribution plant that connect end user telephones to the local end office rather than like the trunk-to-trunk arrangements that relate to a tandem switch function. Moreover, the fiber facilities in place and the local switches that are a part of them do not serve a geographical area comparable to a tandem. USWC's local tandem switch interconnects on a trunk-to-trunk basis with 89 local offices in the metropolitan area and serves 1.5 million customers in a geographic area of approximately 4,500 square miles. By contrast, the MCI switch serves only a small, high density "core" metropolitan area. Without building an infrastructure similar in scope to USWC's, the same geographic area could not be served by MCI without the use of USWC's tandem network. See, Zulavic testimony, Ex. 17 and 18.

In their testimony and their briefs, MFS and MCI ignore the functionality requirement of the Order, concentrating only on service areas. They contend that with a single switch they could serve the same territory as USWC. However, they cannot do that without using USWC's tandem network. As the FCC has concluded and recommended, ". . . states may establish transport and termination rates that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch . . . [and] shall also consider whether new technologies . . . perform functions similar to those performed by an incumbent LEC's tandem switch" Order, ¶ 1090. The weight of the evidence is that the MCI and MFS switches should not be considered as tandem switches. And it seems logical in estimating costs to consider the facilities utilized as well as area served.

While USWC stated its willingness to waive charges for termination if traffic in a given month is reasonably balanced, i.e., within five percent, we do not impose this

requirement because it seems the offer was not accepted. Obviously, the parties are free to agree to such a provision if they desire.

Shall call termination be symmetrical? (Issue No. 87)

See, Applicable Law, Decision and Rationale for Issue No. 86.

Shall Bill and Keep be implemented for call termination? (Issue No. 88)

See, Applicable Law, Decision and Rationale for Issue No. 86.

Shall the rates for call termination be deaveraged? (Issue No. 89)

Applicable Law

The FCC declined to make a finding as to whether rates for transportation and termination should be different during peak periods because the decision would depend on purely local conditions. It neither required nor forbade states from adopting rates that reflect peak and off-peak costs. Order, ¶ 1064.

Decision and Rationale

The record before us is not sufficient to permit a decision. Accordingly, the rates specified in Appendix A of Ex. 62 will apply to both peak and off-peak periods until such time as the Public Utilities Commission determines otherwise.

How shall transport services be priced? (Issue No. 90)

Applicable Law

The charge for any one element must be based on the TELRIC for that particular element. order, ¶ 682.

Decision

As with call termination, Bill and Keep arrangements shall not be utilized. The rates agreed upon by USWC and MFS, Ex. 62, App. A (revised 10-21-96) are based on the functions performed, e.g., (1) direct trunk transport, (2) tandem switching, and (3) tandem transmission, and shall apply to all parties.

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Rationale

Bill and Keep is wholly inappropriate for call transit, since the intermediate, connecting carrier has no benefited end user amongst its customers. Bill and Keep in this context would amount to a free call transit service. The considerations with respect

to transport involving two carriers are similar to those discussed above with respect to call termination, except that prices vary depending on functions performed.

Should USWC be permitted to recover implementation costs? (Issue No. 91)

Applicable Law

See, "Applicable Law", Issue No. 85. The FCC has found that carriers requesting modifications in existing systems shall bear the cost of such modifications. Order, ¶¶ 209, 382, 1162.

Decision

To the extent that existing facilities must be modified in order to establish a network of two-way trunks or other new capabilities, the parties who benefit shall share the costs in proportion to each party's traffic. Where a CLEC requests that a specific element be developed for its benefit, the requesting CLEC shall reimburse USWC for its development costs.

Rationale

MFS urges us to find that a proper estimate of total long-run incremental costs would include construction costs associated with a particular element (See, MFS Initial Brief at 24). It argues that to allow additional construction costs would result in a double charge for the same item. The Panel does not have details of USWC's cost studies sufficient to demonstrate whether the costs of elements not yet constructed were included. Our reading of the Act and the FCC Order, however, is that they should not have been. While section 252(d)(1)(A) seems to require consideration of the hypothetical costs of an efficient provider (since it mandates a disregard of rate-of-return or other rate-based approaches), these hypothetical costs seem to apply only to existing facilities. The FCC has concluded that the proper benchmark for reimbursement of costs of new systems is a combination of ". . . forward-looking cost and existing network design . . ." Order, ¶ 685.

How shall tandem switching with transport costs be recovered? (Issue No. 92)

Applicable Law

The cost of shared facilities should be recovered in a manner that efficiently apportions costs among users. Order, ¶ 755. The FCC has suggested methods of apportionment. ¶¶ 755-57.

Decision and Rationale

The parties have reached agreement that the general approaches suggested by the FCC in ¶¶ 755-57 shall be followed:

Has USWC performed proper TELRIC cost studies with respect to call termination, call transport and call transit? (Issue No. 93)

See, discussion under Issue No. 86.

Shall USWC be permitted to recover a universal service charge? (Issue No. 94)

Decision

USWC is not seeking a universal service charge in this proceeding.

RECOMMENDATION

The Panel recommends that the Minnesota Public Utilities Commission:

1. Approve final arbitrated agreements between AT&T, MCI, and MFS and USWC containing prices, discounts, terms, and conditions determined in this Report.
2. Require that the parties sign the arbitrated agreements within a reasonable time after the Commission's Order.
3. Require that the parties begin implementation within 30 days after final approval of the arbitrated agreements.

Dated this 5th day of November 1996.

PHYLLIS A. REHA
Administrative Law Judge

EDWARD J. SCHWARTZBAUER
Administrative Law Judge

ALLAN W. KLEIN
Administrative Law Judge

STEVE M. MIHALCHICK
Administrative Law Judge

ATTACHMENT A

RESALE SERVICES

Retail Telecommunications Services Available at the Avoided Cost Discount

800 Pageline Service
800 Service
800 ServiceLine Service
800 Termination on CENTRON I
Adjacent Exchange Service
Alternate listings
Answer Supervision - Line Side
ATM Cell Relay Service
Auto intercept
Billed Number Screening
Busy Line/Interrupt Service
Call forwarding services - Busy line (in firm, intra office or interoffice)
Call forwarding services - Don't answer (intra office or interoffice)
Call forwarding services - Busy line (programmable)
Call forwarding services - Don't answer (programmable)
Call rejection
Call trace
Call transfer
Call Waiting
Call Waiting Deluxe
Caller ID - Name & Number
Caller ID - Name
CCMS/CENTRON I
Command-a-link
Complete-a-call
Connections of Terminal Equipment & Communications Systems
Connections of Premises Equipment to Exchange Services
Contingency Plan Service
Continuous Redial
Custom Calling
Custom Ringing
Custom Solutions
Customized numbers
CustomNet
DID 2-way Call Transfer
DID 2-way Trunk Circuit Terminations
DID CO terminations for 2-way 4-wire trunk
DID Expanded Answer

DID for 2-way 4-wire PBX trunk
DID service - for in-only PBX trunks
DID Trunk Queuing
Digital Switched Service
Direct customer access
Directed call pickup
Directed call pickup with barge-in
Directory Listings
 Cross reference, regular and temporary listings
 Foreign exchange listings
 Semi-private directory service
Distinctive alert
Foreign exchange service - 4 wire termination arrangement
Frame Relay Service
Hotel PBX message rate w/ & w/o guest dialing
Hot line
Intercept Service
Intracall
ISDN (Single line & primary rate)
Joint User Service
Last call return
Local service - Business
 One party local telephone service (priced flat rate or measured)
 Two party local telephone service (priced flat rate or message rate)
 PBX trunks (flat rate or message rate)
Market expansion line
Message Delivery Service
Message Telecommunications Service (intraLATA toll)
Message Waiting Indication - Audible and Visual
Night, Sundays and Holiday Service Listing
Power Failure Transfer
Priority call
Private Directory Service
Private switch - automatic location identification
Remote access forwarding
Resale of CENTRON Service Listing
Scheduled call forwarding
Select Call Routing Service
Selective call forwarding
Selective Carrier Denial
SingleNumber Service
Special Reverse Charge Toll Service
Speed Call 8
Speed Call 30
Stand-By Line Service
SwitchNet 56 Service - digital

Three way calling
Toll Diversion
Touch Tone
Transparent LAN Service
U S WEST Complete-A-Call Service
Versanet alarm access line
Warm line
WATS

-
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Retail Telecommunications Services

Also Available at the Avoided Cost Discount

**But Limited to the same class of customers eligible to purchase the service from
USWC**

Residence Basic Exchange
 One party local telephone service (priced flat rate or measured)
 PBX trunks (flat rate or message rate)
 Combined main line service
 Classroom service
CENTRON (Pending outcome of Docket P421/EM-96-471)
Optional Calling Plans
Volume Discount Plans
ICB Negotiated Contracts
Discounted Feature Packages
Public Access Line (PAL) Service (See FCC Order ¶ 876)

Grandparented Retail Services

**Available for Resale at Avoided Cost Discounted Rates
But Limited To Existing Retail Customers of the Service**

These services have been grandparented and are no longer generally available to retail customers. See 47 C.F.R. § 51.615; FCC Order at ¶ 968.

Exchange and Network Services Price List

Apartment Door Answering Service
Automatic Call Distributor Service
Automatic Identified Outward Dialing
Call Management Systems
Caroline Service
CENTREX Service
Dial Switching Systems
Extension and Private Branch Exchange Station Lines
Group Use Exchange Service

Hotel Branch Exchange Service
Message Rate Trunks
Mileage Charges
Miscellaneous Switching Arrangements
Obsolete Central Office Services
Obsolete Telephone Answering Bureau Service
Private Branch Exchange (PBX) Service
Special Needs Customer Premises Equipment
Specialized Customer Premises Equipment
SWITCHNET 56 Service--analog
Telephone Answering Service Bureau Service
Two Party Telephone Service

Private Line Transport Services Price List/Tariff

Alarm Services
Automatic Type Ringing
Connecting Equipment
DATAPHONE Select-A Station Service
DC Channel
Direct Routed Channels
Foreign Exchange Service
High Voltage Environment Protection Arrangement
Information Distribution Service
Special Routing of Channels
Switching Arrangement

Advanced Communications Services Price List

Switched Multi-Megabit Data Service

Wholesale Services
Available For Resale At Current Tariffed Rates

These services are sold to other telecommunications companies rather than retail customers. See 47 U.S.C § 251(c)(4)(A); FCC Order at ¶¶ 872, 873, 874, and 875.

Switched Access Service

All

Special Access/Private Line Transport Services

All

Exchange and Network Services Tariff

Directory Assistance Service (intraLATA toll and local)
Operator Assisted Directory Assistance
Local person-to-person operator service
Local station-to-station operator service

Enhanced Services

**These are not telecommunications services,
and therefore are not subject to a wholesale discount.**

These are not telecommunications services and are not subject to the obligation to provide for resale at wholesale rates. See 47 U.S.C. §§ 153(48), (51), and 251(c)(4)(A).

Enhanced

Conferencing Service
CPE
Enhanced Fax
Protocol Conversion
Voice Messaging

Non-Tariffed and Deregulated Services

**These are telecommunications services,
and therefore are available for resale at the avoided cost discount .**

***Deregulated**

Inside Wiring
Linebacker/Linebacker Plus
UNISTAR
Versanet

* This list is not intended to be exclusive of other non-tariffed services which might also fit within this category of services which shall be available for resale at the avoided cost discount.
