

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

In the Matter of the Request for
Arbitration of Interconnection Agreements
by Certain Independent Telephone
Companies with Qwest Wireless LLC and
TW Wireless LLC

ARBITRATOR'S RECOMMENDED
DECISION

Administrative Law Judge Beverly Jones Heydinger arbitrated this matter based on a Stipulation of Facts submitted on January 29, 2004, and briefs submitted on February 2 and February 5, 2004.

M. Cecilia Ray, Attorney at Law, Moss & Barnett, 4800 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-4129, appeared on behalf of the Minnesota Independent Telephone Companies (LECs). Jason D. Topp, Attorney at Law, 200 South Fifth Street, Room 395, Minneapolis, MN 55402, and Larry Espel, Attorney at Law, Greene Espel PLLP, 200 South Sixth Street, Suite 1200, Minneapolis, MN 55402, appeared on behalf of Qwest Wireless LLC and TW Wireless LLC ("Wireless Companies"). Linda S. Jensen, Assistant Attorney General, 445 Minnesota Street, Suite 1400, St. Paul, MN 55101-2131, appeared on behalf of the Department of Commerce.

Issues

The right of reciprocal compensation arises on the date that interconnection agreements were requested. Ordinarily, the request is made by a telecommunications carrier seeking to connect to a LEC. In this case, because of the Wireless Companies relationship with Qwest Corporation, the request for interconnection agreements came from the LECs and it was made on June 18, 2002.

The primary issue for arbitration is, under the federal law governing negotiation of interconnection agreements, must the Wireless Companies pay reciprocal compensation for traffic with the LECs that occurred prior to the Commission's approval of the interconnection agreements, and, if so, for what time period? The Arbitrator recommends that reciprocal compensation be paid back to June 18, 2002. ^[1]

Also at issue is whether payment for prior traffic is properly a subject for arbitration. The Arbitrator finds that it is because compensation for that traffic was an issue throughout the negotiation of the interconnection agreements, even though the

Wireless Companies continuously maintained their position that no compensation was due.

Arbitrator's Authority

The Commission has jurisdiction over this proceeding under Section 252(b) of the Telecommunications Act of 1996 and Minn. Stat. §§237.16 and 216A.05. Section 252(b) of the Telecommunications Act provides for state commission arbitration of unresolved issues related to negotiations for interconnection, resale and access to unbundled network elements. Specifically, it authorizes the state commission to “resolve each issue set forth in [an arbitration] petition and the response, if any, by imposing appropriate conditions...”^[2] In resolving the open issues and imposing appropriate conditions, the commission must ensure that the resolution meets the requirements of Section 251 of the Telecommunications Act, including the regulations adopted pursuant to that section.

On November 26, 2003, the LECs filed a request for arbitration of unresolved issues relating to interconnection negotiations between themselves and the Wireless Companies. On December 15, 2003, the Wireless Carriers filed their response, a motion to dismiss. Pursuant to Order Denying Motion to Dismiss, Granting Arbitration and Assigning Arbitrator, issued December 22, 2003, the administrative law judge was appointed by the Commission to arbitrate this matter.

Burden of Proof

The burden of proof in this interconnection arbitration proceeding is on the LECs to prove all issues of material fact by a preponderance of the evidence. In addition, the arbitrator may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute. The arbitrator may also shift the burden of proof as necessary to comply with applicable FCC regulations regarding burden of proof.^[3] In this proceeding, the parties entered into a Stipulation of Facts, dated January 27, 2004.

Background and Positions of the Negotiating Parties

The Wireless Companies are commercial mobile radio service (“CMRS”) providers. They are affiliates of Qwest Corporation, an incumbent local exchange carrier and intraLATA interexchange provider in Minnesota.

In 1998 and 1999, the Wireless Carriers entered into agreements with Qwest Corporation that allowed the Wireless Carriers to interconnect their wireless networks with tandem switches owned and operated by Qwest Corporation in Minnesota. Using these tandem switches, the Wireless Carriers were able to terminate their telecommunications traffic to each of the LECs over trunk facilities interconnecting the LECs’ networks to the Qwest Corporation tandem switches. Thus, the Wireless Companies were able to get interconnection with the LECs without requesting interconnection agreements with them.

The Wireless Companies were aware that traffic that originated on their wireless networks would be terminated to any LECs that were connected to Qwest Corporation's tandem switches. Similarly, the LECs were aware that traffic originating on their networks and routed through certain toll and extended area service calling areas would be terminated to the Wireless Carriers. For the purpose of this proceeding, the Wireless Carriers do not dispute that they terminated telecommunications traffic to each of the LECs during the time periods and in the volumes (measured in minutes of use, or "MOUs") set forth in Exhibit 3. During the time periods identified in Exhibit 3, the ratio of each of the LECs'-originated traffic terminating to the Wireless Carriers, as compared to the Wireless Carriers'-originated traffic terminating to each of the LECs was 15:100 (or .15).

For the purpose of this proceeding, the parties have agreed that Exhibit 5 reflects the billings and invoices that the LECs sent to and were received by the Wireless Companies.^[4] The rates that the LECs charged the Wireless Companies reflected either the Intrastate Access Services Tariff or the rate charged by the LECs to other wireless companies, pursuant to negotiated agreements approved by the Commission. The Wireless Companies did not pay any of the billings.

The LECs as a group requested interconnection agreements with the Wireless Companies as early as June 18, 2002.^[5] At least one, TDS Telecom (on behalf of three telephone companies), requested an interconnection agreement in October, 2001. Scott-Rice Telephone requested an agreement on March 6, 2002, with similar result.^[6] As of September, 2002, the Wireless Companies had not identified the person to negotiate on their behalf.

In August 2002, the Wireless Companies sent letters to some of the LECs acknowledging receipt of their invoices.^[7] The Wireless Companies first denied any legal duty to pay the charges in letters sent in June, 2003.^[8] These letters stated the Wireless Companies' willingness to enter into interconnection negotiations pursuant to Section 252 of the Telecommunications Act. The Wireless Companies' letter stated: "Under Section 252 of the Act, reciprocal compensation obligations exist only under an interconnection agreement negotiated between the parties, to provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network of the calls that originate on the network facilities of the other carrier."

The letter also stated: "Please note, however, that Qwest Wireless is willing to negotiate an interconnection agreement under the Act's good faith negotiation process to replace the existing de facto bill-and-keep arrangement."

On June 23, 2003, the LECs and Wireless Companies began formal negotiations of interconnection agreements. The terms of the interconnection agreement have been resolved, except for the issue of compensation for the exchange of traffic prior to the Commission's approval of the interconnection agreement.

The Position of the Wireless Companies

The Wireless Companies assert that the Commission's authority to compel payment pursuant to Section 252 of the Telecommunications Act, governing interconnection agreements arrived at through arbitration, is limited. The Wireless Companies contend that interconnection agreements are "forward looking" and that the Wireless Companies cannot be compelled to include provisions to compensate LECs for usage prior to the Commission's approval of the interconnection agreements with those companies. The Wireless Companies characterize the issue as whether the interconnection agreements can be "backdated" to cover a period of time prior to the Commission's approval of the interconnection agreement.^[9] They argue that the Federal Communications Commission (FCC) regulations allow for terms and conditions prior to the approval of the interconnection agreement in two specific instances, and neither one applies to the facts of this negotiation.

The Wireless Companies also claim that past compensation was not an issue in the negotiation of the interconnection agreements, and, thus, is not a proper subject for arbitration. Accordingly, the Wireless Companies request that the arbitration be dismissed.

In the alternative, the Wireless Companies argue that if there is any authority to order compensation for usage prior to the approval of the interconnection agreements, that authority extends back only so far as the formal agreement by the parties to negotiate an interconnection agreement, June 23, 2003, rather than the date a year earlier that the LECs requested negotiation..

Finally, the Wireless Companies assert that the LECs' claims are barred by a two-year statute of limitations.^[10]

The Position of the LECs

The LECs contend that they are entitled to reciprocal compensation throughout the period that traffic with the Wireless Companies was actually moving back and forth to the LECs. The LECs assert that the Wireless Companies were able to avoid requesting interconnection agreements because of the Wireless Companies' arrangements with Qwest Corporation ("Qwest") to route traffic through Qwest's switches to the LECs, but that the Wireless Companies should pay for the service provided because they knew about the traffic and obtained the benefit of interconnection. The LECs contend that reciprocal compensation follows from actual interconnection, regardless of whether a request to negotiate an interconnection agreement had been made. Their position rests, first, on the language of the federal law, and second, on implied contract, or "quasi-contract."

The LECs also contend that the issue of compensation for periods prior to Commission approval of their interconnection agreements has been "an important and fundamental topic of negotiations." They deny that the two-year statute of limitations applies to this dispute.

The Department of Commerce

The Department asserts that the LECs and CMRS carriers have an obligation to pay reciprocal compensation to one another. In support it cites 47 C.F.R. § 20.11 and 47 U.S.C. § 252(d)(2)(A). Such obligations arise when a telecommunications carrier requests the incumbent LEC to provide transport and termination under an interim arrangement, pending resolution of negotiation or arbitration of the interconnection agreement.^[11] The Department agrees with the LECs that the two-year statute of limitations does not apply. It takes no position on the date from which reciprocal compensation is due.

Decision and Rationale

This arbitration arises from an Order of the Public Utilities Commission, directing resolution of the following issue: What is the effective date of the interconnection agreement?

Based upon review of the submissions of the parties and the applicable law, the issue is more accurately whether the Wireless Companies must compensate the LECs for traffic exchanged prior to the date the Commission approves the interconnection agreement.

It is undisputed that the Wireless Companies were using the LECs' networks to terminate the Wireless Companies' traffic. It is also clear that the LECs attempted to get compensation for that traffic but that the Wireless Companies did not pay them. However, one must address whether the dispute is properly a subject of this arbitration, and, if so, what result is appropriate under the Telecommunications Act.

The scope of the arbitration under Section 252 is clearly set forth in *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*^[12] That case established that parties may request arbitration of any issue raised in negotiations of the interconnection agreement, even if the issue was not a required element of the interconnection. Coserv requested an interconnection agreement with Southwestern Bell Telephone (SWBT) and the parties proceeded with voluntary negotiations pursuant to 47 U.S.C. § 251. The obligations of incumbent carriers and competitors are listed in Section 251(b), and additional duties are placed on the incumbent carriers in Section 251(c). The incumbent carrier's duty to negotiate is limited in scope to "the particular terms and conditions of agreements to fulfill the duties described in [Section 251(b) and (c)]."^[13] But the parties are free to negotiate other issues that may be related. The applicable section states:

"an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsection (b) and (c) of section 251 of this title."^[14]

In the event that negotiations fail, the Fifth Circuit held that any issue that was raised as part of the negotiations between the incumbent carrier and the competitor may be subject to the arbitration provisions. In Coserv, the court concluded that

“compensated access” was not among the topics covered by the duty to negotiate, and that SWBT had consistently refused to negotiate compensated access with Coserv. Since SWBT had consistently refused to include the topic in its negotiations, it was not subject to arbitration of the issue.

The Fifth Circuit’s reasoning is persuasive and is based upon a logical reading of the applicable provisions of the Telecommunications Act. Its analysis is consistent with *US West Communications, Inc., v. Public Utilities Commission*.^[15] In that decision, the Court found that the parties participating in negotiations have a duty to negotiate certain issues, but that they are not limited to those or bound by the directives of Section 251 (b) or (c). If the parties are not able to resolve any of the open issues that formed the subject of their negotiations, a party “to the negotiation may petition a State commission to arbitrate any open issues.”^[16] The parties are not limited to issues enumerated in Section 251, “but rather are limited to the issues which have been the subject of negotiations among themselves.”^[17]

The State commission has the authority to resolve each such issue set forth in the petition for arbitration and the response to it. Section 252 (b)(4)(C) states that “[t]he State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section. ...”

In resolving the issues raised, the state commission must assure that the requirements of section 251 are met, but the resolution is not confined only to those issues. In order to be subject to arbitration, the issue must have been raised in the course of negotiations, and its resolution may not violate or conflict with section 251.^[18]

The facts of this case show that, although the Wireless Companies have refused to pay for traffic, their obligation to do so has been an issue throughout the negotiation. It was not until June, 2003 that the Wireless Companies asserted that there was no right to payment, and that it would not pay compensation at all until an interconnection agreement was negotiated. Prior to that time, the LECs had never received a definitive statement that payment would not be made, or that the Wireless Companies would treat the exchange of traffic under the provisions of “bill and keep.”

The LECs’ request in June 2002 for interconnection agreements was in part an attempt to break the impasse surrounding the compensation for prior traffic. A letter from William J. Batt, December 2, 2003, on behalf of the Wireless Companies specifically stated that past termination charges were a stumbling block to resolution of the model interconnection agreement, and offered a lump sum to the LECs to resolve the issue, to be divided among the coalition members as they choose.^[19] Thus, past compensation is appropriate for arbitration because it has been an issue between the parties throughout the negotiation of the interconnection agreements.

Although the issue of compensation for past traffic is within the scope of the arbitration, that scope is limited. This is an arbitration arising under the

Telecommunications Act, and its purpose is to interpret the terms of the Act and apply them to the facts presented. It is not to go beyond the Telecommunications Act to apply other state or federal laws, or other state law theories that might serve as an independent basis for recovery.

Section 252 grants state commissions authority to resolve disputes that arise under the interconnection agreements and negotiations concerning them. The standards for arbitration are to ensure that resolution meets the requirements of Section 251 of the Act, governing interconnection, including the regulations prescribed by the FCC.^[20] There is nothing to suggest that the scope is so broad that any related state law claim between the same parties may also be addressed in the arbitration. As discussed above, any issue related to the interconnection agreement that has been the subject of negotiation may be raised, but the boundaries of the arbitration are tied to the “negotiation, arbitration and approval” of the interconnection agreement.^[21] Thus, the LECs cannot assert in this proceeding a request for compensation that predates their first requests for interconnection agreements.

The Public Utilities Commission has previously approved interconnection agreements that include compensation prior to the approval date, but those agreements included net dollar amounts voluntarily agreed to by the LECs and CMRS providers that were parties to those agreements.^[22] Section 252(e) of the Telecommunications Act provides limited reasons for rejecting a voluntarily negotiated agreement. The Commission has not considered the merits of the issue presented, whether it has the authority to order compensation for prior traffic, and if it does, how far back that authority extends.

Federal law requires that an incumbent local exchange carrier must interconnect with any requesting telecommunications carrier.^[23] Ordinarily, such a request would be necessary in order for interconnection to occur. Here, the Wireless Companies were able to gain interconnection without making such a request. Thus, it was the LECs, and not the Wireless Companies, who first requested interconnection agreements. The switch in roles should not affect the application of the governing federal law. The clear intent of the law is to clarify the nature of the interconnection relationship from the time that the interconnection request is made.^[24] It is from this date that the obligations of the federal law arise.^[25] There is a duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications exchanged between the interconnected networks from the date that an interconnection agreement is requested.^[26] In this case, that date is June 18, 2002, the date the LECs requested interconnection agreements.^[27]

The Wireless Companies cannot rely on the later date that formal negotiations actually began to limit their compensation obligations. Their delay in identifying an individual to undertake the negotiation of interconnection agreements, or other delays that postponed formal negotiations, should not limit the rights of the LECs to recover compensation from the date that an interconnection agreement was requested.

The Wireless Companies' claim that "bill and keep" arrangements should apply cannot be squared with the regulations requiring reciprocal compensation from the date that interconnection was requested. The parties have stipulated that the traffic is not balanced, and one cannot conclude that the traffic exchanged is *de minimis*.^[28] In addition, *de facto* "bill and keep" is not a "preexisting arrangement" that affects the application of the "interim arrangements" that are required when an interconnection agreement is requested.^[29] Where interconnection agreements have been requested, "bill and keep" is not appropriate.

However, the LECs have no basis under the arbitration provisions to request compensation that precedes the request for interconnection agreements. The LECs contend that the language of 20 C.F.R. § 20.11 compels mutual "reasonable compensation" from the date that interconnection actually occurred, and justifies compensation as far back as the LECs submitted bills to the Wireless Companies. However, that claim goes too far. First, it cannot be readily ascertained when interconnection first occurred. Second, there are alternate methods for compensation and it is the request for an interconnection agreement that triggers the requirement of "reciprocal compensation." Also, the language of the cited section refers to "reasonable compensation," and states that the LECs and CMRS providers shall comply with 47 C.F.R. Part 51.

There is an equitable argument to be made for ordering reciprocal compensation back to the date that traffic began between the Wireless Carriers and LECs. But the LECs were aware that they did not have interconnection agreements, and they allowed the situation to continue for some time. There were alternatives available for collection, but the LECs took no action that would trigger the application of Section 252 until they made their request for interconnection agreements. Although the LECs may have a claim under implied contract or quasi-contract theory, the scope of arbitration under the Telecommunications Act is not so broad as to extend to such state law claims.

Recommendation

The right of reciprocal compensation arises on the date that interconnection agreements were requested. In this case, because of the Wireless Companies relationship with Qwest Corporation, the request for interconnection agreements came from the LECs on June 18, 2002. Payment for traffic occurring before the Commission approves the interconnection agreements is properly a subject for arbitration because compensation for that traffic was an issue throughout the negotiation of the interconnection agreements, even though the Wireless Companies maintained their position that no compensation was due. The arbitrator reaches no decision on whether the LECs may have a remedy under state law for compensation prior to the date that interconnection agreements were requested. Accordingly, the Arbitrator recommends that reciprocal compensation be paid back to June 18, 2002.^[30]

Dated this 17th day of February, 2004.

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

^[1] Although the LECs have proceeded together in this proceeding, there is some evidence, as specified more fully below, that a few of the LECs requested interconnection agreements prior to June 18, 2002. Since those facts are not in dispute, those LECs are entitled to compensation from the respective dates of their requests.

^[2] 47 U.S.C. §252(b)(4)(C).

^[3] Minn. R. 7812.1700, subp. 23.

^[4] A few invoices were submitted in 1998 and 1999. The numbers increased in 2000 and thereafter. Some of the LECs submitted no invoices.

^[5] Ex. 14.

^[6] Ex. 13.

^[7] Exhibit 10.

^[8] Exhibit 11.

^[9] Wireless Companies Reply, Dec. 22, 2003, at 3.

^[10] 47 U.S.C. § 415(a).

^[11] 47 C.F.R. § 51.711(a).

^[12] 350 F.3d 482 (5th Cir. 2003).

^[13] *Id.*, at 485.

^[14] *Id.*, at 487, quoting 47 U.S.C. § 252.

^[15] 55 F. Supp.2d 968 (D. Minn. 1999).

^[16] 55 F. Supp. 2d at 985, quoting 47 U.S.C. § 252 (b) (1).

^[17] 55 F. Supp. 2d at 985.

^[18] 55 F. Supp. 2d at 985-986.

^[19] Ex. 19.

^[20] 47 U.S.C. § 251(c).

^[21] 47 U.S.C. § 252.

^[22] *In the Matter of the Request to Approve the Interconnection Agreement between Mankato Citizens Telephone Company and Qwest Wireless, LLC*, PUC Docket No. P414, PT6250/IC-03-1892; *In the Matter of the Request to Approve the Interconnection Agreement between Mid-Communications Inc. and Qwest Wireless, LLC*, PUC Docket No. P416, PT6250/IC-03-1891; *In the Matter of the Request to Approve the Interconnection Agreement between Crystal Communications, Inc. and Qwest Wireless, LLC*, PUC Docket No. P5508, PT6250/IC-03-1890.

^[23] 47 U.S.C. § 251(a); 47 C.F.R. § 51.715 (“Upon request from a telecommunications carrier without an existing interconnection arrangement with an incumbent LEC, the incumbent LEC shall provide transport and termination of telecommunications traffic immediately under an interim arrangement, pending resolution of negotiation or arbitration regarding transport and termination rates and approval of such rates by a state commission under section 251 and 252 of the Act.”)

^[24] 47 U.S.C. § 251 (c)(1) and (2) establishes the duty of the incumbent LEC to negotiate, and “the requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.”

^[25] 47 C.F.R. § 51.715 (a)(2).

^[26] 47 U.S.C. § 251 (b)(5).

^[27] Ex. 14.

^[28] 47 C.F.R. § 51.713 (b); *see also First Report and Order*, In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Dockets 96-98 and 95-185, 11 FCC Rcd. 15499, para. 1111-1112.

^[29] See 47 C.F.R. § 51.715.

^[30] As more fully explained above, some LECs may be entitled to compensation from the respective dates of their earlier requests for interconnection agreements.