

USWC also noted that the Minnesota Commission has rejected the pick and choose rule in the Consolidated Arbitration Proceeding, Docket Nos. P-421/M-96-729, 855, 909.

### 3. The Department

The Department analyzed the Federal Act, FCC Rules and Orders, and the Commission's earlier decision in the Consolidated Arbitration Proceeding. The Department noted that the FCC's rules which would have permitted AWS to "pick and choose" terms from other agreements, has been stayed in Federal Court. The Department further noted that in its earlier ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT in Docket Nos. P-421/M-96-729, 855, 909, the Commission directed that the following language be added to the Agreement:

The Parties agree that the provisions of Section 252(i) of the Act shall [\*39] apply, including final state and federal interpretive regulations in effect from time to time.

The Department recommended that this language also be required in the agreement between AWS and USWC because of the unsettled nature of the law.

### 4. The ALJ

According to the ALJ, the applicable law is Section 252(i) of the Act which provides:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The ALJ noted that in 47 C.F.R. § 51.809, the FCC interpreted Section 252(i) to require local exchange carriers to make available

... any individual interconnections, service or network element arrangement contained in any agreement to which it is a party that is approved by a State Commission pursuant to section 252 of the Act, upon the same rates, terms and conditions as those provided in the agreement.

However, the ALJ also noted that on October 15, 1996, the Eighth Circuit Court of Appeals stayed 47 C.F.R. § 51.809, the so-called "pick [\*40] and choose" rule at issue. Accordingly, the ALJ recommended that the parties include in their agreement a recognition that the law on this issue is unsettled, as was ordered in the Commission's March 17, 1997 Order after reconsideration in the Consolidated Arbitration Proceeding.

### 5. Commission Action

For the reasons articulated above by the Department and the ALJ, the Commission finds it appropriate to direct the parties to include in their agreement language adopted by the Commission in the consolidated arbitration that recognizes the unsettled state of the law on the application of section 252(i).  
n3 The specific language is:



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The parties agree that the provisions of section 252(i) of the Act shall apply, including final state and federal interpretive regulations in effect from time to time.

-Footnotes-

n3 In making their recommendations, both the Department and the ALJ noted that the Eight Circuit Court of Appeals had stayed 47 C.F.R. § 51.809, the so-called "pick and choose" rule. The fact that subsequently the Eighth Circuit Court of Appeals has issued a final order striking down the "pick and choose" rule (July 18, 1997) strengthens their recommendations and the further demonstrates the reasonableness of the Commission's decision on this issue.

-End Footnotes-

[\*41]

#### K. Points of Interconnection

The parties could not agree on which of them should determine the points of interconnection.

##### 1. AWS

AWS argued that it is entitled to interconnection at whatever point it believes is technically feasible subject to the same reasonable space and equipment limitations that are imposed on other LECs and incumbent LECs. AWS also claimed that it entitled to physical collocation for remote switching units (RSUs) and digital loop carriers (DLCs) or virtual collocation. AWS cited Federal Act Sections 251(c)(2) and (6), FCC Rule 51.305, and FCC Order, Paragraphs 212 and 573, in support of its positions.

AWS also argued that USWC is not entitled to select points of interconnection. AWS stated that the burden was on USWC to demonstrate with clear and convincing evidence that a requested point of interconnection is not technically feasible and alleged that USWC has not demonstrated any infeasible interconnection in this proceeding.

##### 2. USWC

USWC stated that it would offer the choice of virtual collocation, physical collocation, or mid-span meet arrangements as the points of interconnection if they are technically feasible. Additional points of interconnection [\*42] must be requested via the bona fide request process.

##### 3. The Department

The Department supported AWS' right to determine where to interconnect subject to interconnection points being technically feasible for USWC. The Department cited the Commission's decision in its ORDER RESOLVING ARBITRATION ISSUES issued December 2, 1996 in the Consolidated Arbitration Case. In that Order, the Department noted, the Commission required USWC to allow interconnection at any technically feasible point on its network requested by the CLEC.



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## 4. The ALJ

The ALJ agreed with the Department that the Commission/ should adopt language similar to what it adopted in the Consolidated Arbitration Order, providing that AWS should be entitled to interconnect its network with USWC at any point that is technically feasible subject to space and equipment limitations.

## 5. Commission Action

The Federal Act and FCC rules are clear. AWS has the right to interconnect and USWC will be required to allow interconnection at any technically feasible point on the network that AWS requests.

## L. One-Mile Distance Mid-Span Meet Point

## 1. USWC

USWC proposed that a limit be placed on the length of facilities [\*43] that USWC must construct to establish a mid-span meet point arrangement. USWC stated that a reasonable standard would be to limit USWC's construction obligation to no more than one mile of facilities and no more than one-half the distance of jointly provided facilities. USWC also recommended that direct trunks should be established when traffic between USWC and AWS exceeds 512 CCS. USWC explained that the reason for this recommendation is to ensure an efficient mix of direct trunk transport and tandem switching.

## 2. AWS

AWS objected to USWC's proposal, arguing that the Federal Act and FCC Order allow AWS to select any technically feasible method of interconnection and access to unbundled network elements with no limitation on distance.

AWS noted that USWC's proposed one mile limitation for meet points is contrary to what USWC agreed to in the consolidated arbitration proceeding and argued that USWC should not be permitted to discriminate against AWS in this proceeding by arbitrarily imposing a distance limitation which shifts the costs of interconnection to AWS.

AWS proposed that the companies negotiate meet points and each party should be responsible for costs to construct [\*44] facilities to the meet points.

## 3. The Department

The Department cited the Commission's ORDER RESOLVING ARBITRATION ISSUES issued December 2, 1996 in which the Commission noted that USWC agreed to negotiate mid-span meet points of interconnection without any preset distance limitation. The Department recommended a similar determination in this proceeding that no distance limit be set.

## 4. The ALJ

The ALJ recommended the same treatment in this docket as the Commission adopted in the Consolidated Arbitration Proceeding, i.e. to not limit the distance for meet points.



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### 5. Commission Action

The Commission finds that the Federal Act and FCC Order allow AWS to select any technically feasible method of interconnection and access to unbundled network elements with no limitation on distance. Accordingly, the Commission will not accept USWC's proposal and will adopt AWS' no limit midspan meet point recommendation.

#### M. Collocation of AWS' RSUs and DLCs

##### 1. AWS

AWS sought authority to collocate remote switching units (RSUs) and digital loop carrier systems (DLCs) at USWC premises. AWS argued that USWC's opposition to collocation of any equipment that is not "transmission [\*45] equipment" is contrary to FCC and Minnesota Commission decisions. AWS acknowledged that the FCC stated that it would not immediately require an ILEC to permit collocation of switching equipment. However, AWS stated that the FCC also left it to State Commission's to determine whether particular equipment is used for interconnection or access to unbundled elements and noted that the Minnesota Commission determined in the Consolidated Arbitration Proceeding that collocation of RSUs and DLCs equipment is required.

Furthermore, according to AWS, USWC witness Londgren agreed to allow collocation of RSUs and DLCs consistent with the Commission's limitations determined in the consolidated arbitration proceeding.

##### 2. USWC

In its Brief, USWC withdrew its objection to collocating RSUs based on the Commission's decision in the Consolidated Arbitration Proceeding. USWC acknowledged that the Commission has adopted AWS' position on collocating in other arbitration proceedings but noted that those decisions have been appealed. Pending the results of the appeal, USWC agreed to collocate RSUs in its end offices.

##### 3. The Department

The Department noted that the Federal Act and FCC Rules [\*46] had been interpreted by the Commission in its decision in the Consolidated Arbitration Proceeding. The Department stated that there was no reason to change or modify the Commission's earlier decision to allow collocation of RSUs and DLCs.

##### 4. The ALJ

The ALJ stated that the Commission has explicitly ordered that U S WEST permit RSUs and DLCs to be collocated. Consolidated Arbitration Order at 16. The Commission found that collocated equipment need not be exclusively used for interconnection or access to unbundled network elements. According to the ALJ, AWS should be entitled to physical collocation of equipment necessary for interconnection or access to unbundled network elements, including RSUs and DLCs.



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## 5. Commission Action

Consistent with its reasoning and action in the Consolidated Arbitration Order, the Commission will allow the collocation of RSUs and DLCs on USWC's premises. It is understood that, as stated in the Consolidated Arbitration Order, RSUs are not to be used to avoid toll access charges by USWC.

## N. Definition of "Collocated Premises"

## 1. USWC

USWC argued that the definition of "collocated premises" should be restricted to USWC's central offices [\*47] and tandems, in which event requests for collocating on premises other than tandem and end office switching facilities would not be automatically granted but would be based on a bona fide request process.

## 2. AWS

AWS disagreed with USWC's proposed definition of "collocated premises." AWS argued that the Federal Act, Section 251(c)(6) obligates ILECs to provide nondiscriminatory access to collocated space at its "premises." AWS contended that the FCC has determined that premises include a broad range of facilities including central offices, wire centers, tandem offices, structures owned or leased, and any other structures which house network facilities and public rights-of-way. AWS asserted that USWC's proposed restriction contradicts the FCC's determination that collocation can only be limited if the ILEC demonstrates that a particular location is technically infeasible. AWS noted that USWC has not presented any evidence of infeasibility of locations at which AWS seeks collocation.

AWS urged that its contract language should be adopted since (according to AWS) it is consistent with FCC Rules and the Minnesota Commission decisions in the Consolidated Arbitration Proceeding. [\*48]

## 3. The Department

The Department stated that the Commission adopted the FCC's position that collocation must be permitted at LEC central offices, serving wire centers, and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities. The Department stated that there is no reason to modify or change the Commission's decision on collocation in this proceeding.

## 4. The ALJ

The ALJ recommended the same treatment in this docket as the Commission adopted in the Consolidated Arbitration Proceeding. According to the ALJ, "collocated premises" should be broadly interpreted to include all buildings and other structures that contain network facilities.

## 5. Commission Action

Consistent with its reasoning and action in the Consolidated Arbitration Order,



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the Commission will not restrict the definition of "collocated premises" to central offices and tandems as urged by USWC.

O. Determination of Exhausted Space

1. USWC

USWC proposed to condition physical and virtual collocation on space availability. The only party to address USWC's proposal was AWS.

2. AWS

AWS noted that the FCC and the Minnesota [\*49] Commission mandated that space for collocation be allocated on a first-come, first-served basis. FCC Order P 585; Consolidated Order, p. 17. AWS stated that while the FCC permitted ILECs to retain a "limited amount of floor space for defined future uses," ILECs were not permitted to reserve space for future use on terms more favorable than those applicable to other telecommunications carriers seeking space for their own use. FCC Order PP 585, 602, 604.

AWS asserted that to the extent USWC proposed to reserve space for its own use that exceeds the limitations imposed by the FCC its proposal must be rejected. AWS stated that if USWC denies AWS collocation space due to space exhaustion, the Commission should require USWC to provide detailed floor plans and explain the uses of its space and steps taken to avoid space exhaustion.

3. Commission Action

Consistent with its reasoning and action in the Consolidated Arbitration Order (page 17), the Commission will require USWC to explain and demonstrate the uses of its space if it denies AWS access due to space exhaustion.

P. Nondiscriminatory Access to Unbundled Network Elements

1. AWS

AWS asserted that USWC is required by [\*50] the Federal Act, Section 251(c) (3) to provide nondiscriminatory access to unbundled network elements at any technically feasible point. According to AWS, USWC must negotiate in good faith for any special unbundling required for a wireless application.

AWS noted that FCC Rule 51.319 lists the following network elements that U S WEST must make accessible: local loop, network interface devices, local and tandem switches, interoffice transmission facilities, signaling networks, call-related databases, operational support systems functions, and operator services/directory assistance facilities. AWS noted that the FCC also stated that State Commissions could require the unbundling of additional network elements. (FCC Order, P 366).

AWS recommended that the Commission require USWC to negotiate and make available other unbundled elements that are necessary for wireless applications.

2. USWC



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USWC asserted that it complies with all FCC requirements for providing unbundled network elements and that there is no dispute on this issue. USWC, in accordance with FCC rules, will negotiate with other carriers to make additional network elements available. USWC stated that AWS has not identified [\*51] any specific additional network elements which it seeks to unbundle.

### 3. The Department

The Department noted that the FCC requires that an ILEC must make available at least seven network elements and allows state commissions to require further elements to be unbundled. The Department supported AWS' request that the Commission require the parties to negotiate for additional unbundled network elements rather than a requirement that AWS follow the bona fide request process suggested by USWC.

### 4. The ALJ

According to the ALJ, 47 U.S.C. § 251(c)(3) requires an incumbent LEC to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point. The FCC's rule requires the ILEC to unbundle the following elements: network interface device, local loop, switching capability, interoffice transmission facilities, signaling networks, call-related data bases, operational support systems, and operator services and directory assistance. 47 C.F.R. § 51.319.

The ALJ found that USWC's proposed bona fide request (BFR) process for each unbundled element is inconsistent with the FCC rules and should not be allowed. The ALJ stated that USWC is required [\*52] to provide nondiscriminatory access to unbundled network elements at any technically feasible point. A network element is considered technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier. The ALJ stated that if AWS determines that another aspect of unbundling is required for a specific wireless application, USWC must negotiate with AWS in good faith for such application. Such an element must be provided unless USWC demonstrates it is not technically feasible.

### 5. Commission Analysis and Action

In the Consolidated Arbitration ORDER AFTER RECONSIDERATION, the Commission rejected USWC's request for a BFR process for each request for subloop access. The Commission stated:

U S WEST's request for a BFR process for each request for subloop access reverses the thrust of the Act and the FCC rules and the burden of proof established in the Commission's own procedural order." (Reconsideration Order at 16).

The Commission finds that this reasoning should apply with equal force to this case. The Commission will require unbundling of additional elements on a case-by-case basis if it is technically feasible. [\*53] 47 C.F.R. § 51.317. Under the burden of proof established for this proceeding, USWC will have the burden of proving the unavailability of particular unbundled network elements. Absent such a showing, USWC must provide nondiscriminatory access to unbundled network elements, including specific wireless applications, through negotiation.



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### Q. Access to Operational Support Systems

Operational support systems (OSS) include a variety of computer databases and systems which support network operating services. The parties did not agree whether USWC should be required to develop and implement electronic interfaces for access to its operational support systems for ordering, provisioning and maintenance/repair functions.

#### 1. AWS

AWS complained that USWC has denied its legal obligation to provide nondiscriminatory access to its support systems, arguing that its legal obligation under 251(c) is mutually exclusive. According to AWS, USWC has separate and independent duties to: (1) negotiate in good faith; (2) interconnect facilities and equipment; (3) provide nondiscriminatory access to network elements on an unbundled basis; (4) offer telecommunications services for resale at wholesale [\*54] rates; and (5) provide physical and virtual collocation.

AWS argued that without greater specificity in an agreement, it will not be guaranteed the same access to information as is available to USWC. AWS' proposed Interconnection Agreement Section 3 contains terms for the provision of an interface for transferring and receiving Order Confirmation, Completion Notices, and other information. Section 5(c) contains AWS' proposal for the provision of maintenance/repair interface including the implementation of uniform industry standards being developed by the Order and Billing Forum.

#### 2. USWC

USWC countered that AWS did not raise this issue in its petition and therefore the Arbitrator need not consider it. According to USWC, the Federal Act limits the Commission's consideration of issues to those that are raised in the petition and in the response. USWC stated that it has not received a proposal from AWS on electronic access and without knowing AWS' requirements, it cannot formulate a response. USWC stated that AWS and U S WEST have only had limited negotiation of system access and that it (USWC) is willing to continue negotiations on this issue.

USWC argued that neither the Federal [\*55] Act nor the FCC Order requires unbundled access to OSS for interconnection. USWC stated that the requirements stated in FCC Rules P51.305 are extensive and detailed and do not include access to operational support systems. Because both of the interconnecting companies maintain all facilities required to service their end use customers, there is no need to access the other carrier's OSS. USWC stated that it will evaluate any request from AWS to determine if it is achievable, the timing and the cost.

#### 3. The Department

The Department recommended granting AWS' request for real time, electronic interfaces (access) to USWC's OSS services: ordering, provisioning, and maintenance systems. The Department stated that FCC Rule Section 51.319(f) specifically requires LECs to unbundle and provide nondiscriminatory access to the network operations support systems functions of pre-ordering, ordering,



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provisioning, maintenance and repair, and billing functions. The Department also noted that in the Consolidated Arbitration Proceeding, the Commission interpreted the FCC First Order and refused to restrict how a purchaser of unbundled network elements might use those unbundled elements.

4. [\*56] The ALJ

The ALJ noted that USWC's operational support system is a network element. The ALJ reasoned that because USWC's operational support system is a network element, both the Act and FCC mandate access on a nondiscriminatory basis. To meet the Act's and the FCC's requirements, the ALJ stated, USWC must provide access to AWS at least equal in quality to that enjoyed by USWC. Because the record is void of any proposal by USWC to provide such parity, the ALJ concluded, it is reasonable to apply the electronic interfaces proposed by AWS.

5. Commission Action

The Commission finds that OSS is a network element. As required by the Act and FCC, therefore, the Commission will direct USWC to grant AWS access to these services on a nondiscriminatory basis. This decision is consistent with the Commission's refusal in the Consolidated Arbitration Proceeding to restrict how a purchaser of unbundled network elements might use those unbundled elements. It is also consistent with the Eighth Circuit Court of Appeals' July 18, 1997 order on petitions for review of the FCC's rules implementing the Telecommunications Act of 1996.

R. Remedies for Service Quality Violations

1. AWS

[\*57] AWS recommended standards relating to network reliability, network interface specifications, error performance, operations, and administration of outages. AWS stated that its proposed service quality standards should be met by USWC and specific remedies imposed if not met.

2. USWC

USWC recommended that service quality standards be determined in a separate proceeding similar to how costs are being addressed. Although no current pending service quality case includes AWS, the standards determined in Docket No. 421/M-96-729, 855,909-Merged could be applied to the U S WEST-AWS relationship.

Regarding performance credits, USWC objected to AWS' attempt to enforce penalties on USWC for not meeting AWS' requested performance standards. USWC asserted that penalties are illegal, unwarranted and unrelated to any harm that AWS may suffer. USWC argued that there is no evidence in the record that these penalties are appropriate nor does the Act or FCC rules permit them in the context of an arbitrated proceeding. USWC concluded that if AWS believes it is being illegally discriminated against it can seek remedies from the Commission, the FCC or the courts.

3. The Department

The Department [\*58] stated the Federal Act requires that the quality of an



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unbundled element and the access to such unbundled element shall be at least equal in quality to that which the incumbent LEC provides to itself. The Department further noted that the FCC stated in its rules that if technically feasible the quality of an element and access to that element may "upon request, be superior in quality to that which the incumbent LEC provides to itself." The Department noted that competitors purchasing unbundled elements have a legitimate interest to ensure that their customers receive high quality service. Without specific service quality or performance standards a competitor may be unable to ensure the quality of service it expects. The Department stated that if USWC does not provide a sufficient level of service quality for its own customers, competitors should not be limited to that standard.

The Department noted that the Commission's service quality rules set broadly defined minimum standards. As such, they should not be the basis for setting service quality standards for competitors. The Department stated that AWS's proposal, including penalty provisions, reasonably addressed its needs as a [\*59] competitor using USWC's network elements and services.

#### 4. The ALJ

The ALJ noted the importance of service quality standards in the provision of wireless services. Over the years, the ALJ observed, AWS has experienced problems with USWC in terms of provisioning delays, service outages and blocking. The ALJ stated that AWS has drafted detailed quality and performance standards which relate directly to the functions of Network Reliability, Network Interface Specifications, Error Performance, Operations and Administration of Outages. The ALJ found that each of the proposed quality and performance standards is based on specific industry standards, reliability objectives and performance specifications.

By contrast, the ALJ found, USWC has failed to present evidence regarding its internal quality or performance standards to assure that its customers receive the quality of service to which they have become accustomed. The ALJ concluded that the service quality standards and performance credits proposed by AWS should be approved.

#### 5. Commission Action

The Commission will adopt the ALJ's recommendation and reasoning and require U S WEST to meet the service quality standards proposed [\*60] by AWS and be liable for specific remedies if those standards are not met.

#### S. Access to Poles, Ducts, Conduits and Rights of Way

The parties agreed that USWC must provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way, but disagreed as to what extent USWC must accommodate AWS needs and whether USWC should be able to reserve 15 percent of capacity for maintenance and administrative purposes.

#### 1. AWS

AWS argued that USWC must provide nondiscriminatory access to its poles, ducts, conduits, and rights-of-way in the same fashion and on the same rates, terms and conditions as it provides itself or other third party. According to AWS, this



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access must accommodate AWS' technological needs, including the use of alternative technologies such as micro-cell technology. U S WEST must take reasonable steps to provide access even to the extent of modifying its facilities to increase capacity. AWS stated that USWC should be allowed to reserve space only to the extent necessary for required maintenance and administrative purposes based on generally accepted engineering principles.

AWS objected to USWC's plan to reserve 15 percent spare capacity in its conduits and [\*61] ducts for itself while denying access to facilities by AWS. AWS clarified that it does not object to USWC retaining a reasonable amount of necessary capacity for maintenance and administrative purposes. However, AWS asserted that a 15 percent reserve capacity was not supported in the record and should not be the standard authorized level of capacity reservation. AWS noted that the FCC, in its order at Paragraph 1170, does not allow an ILEC to favor itself by reserving capacity for some undefined future need. AWS noted that the Commission in the Consolidated Arbitration Proceeding (Consolidated Order, pp. 43-44) also recognized the need for USWC to reserve capacity for maintenance and administrative purposes according to generally accepted engineering principles.

AWS objected to USWC's claim that access requirements are reciprocal for AWS. AWS argued that this position is contrary to the FCC Order that determined that CMRS providers are not LECs for purposes of the Federal Act. Furthermore, AWS stated, the Commission in the Consolidated Arbitrated Proceeding did not place reciprocal obligations on carriers other than USWC and recommended that this position should be rejected in this [\*62] proceeding also.

## 2. USWC

USWC stated that it will provide nondiscriminatory access to its poles, conduits, innerduct rights-of-way, on a first come, first served basis, as long as capacity exists. USWC acknowledged that the Federal Act Section 251(b)(4) obligates all local exchange carriers to provide access to competing telecommunication providers but asserted that this would include AWS not just ILECs such as USWC. USWC argued that contract provisions must be reciprocal for both parties not just the incumbent. USWC claimed that it should not be required to construct or rearrange facilities for another carrier and should be allowed to keep 15 percent of available capacity for maintenance and repair purposes.

Regarding AWS's reference to its micro-cell devices, USWC testified that placing these devices on the tops of poles may cause network reliability concerns. USWC also objected to AWS seeking to place the burden on USWC to obtain authority for rights-of-way on behalf of AWS. USWC noted that it acquired its existing rights through specific permits, licenses, or easements from public and private parties. USWC argued that it has no authority, under Minnesota law, to extend [\*63] its easement rights that it has acquired from some other party, to AWS. USWC suggested that AWS should seek authority from the granting authority directly for its own use.

## 3. The Department

The Department recommended following the decisions in the Consolidated Arbitrated Proceeding and require USWC to make reasonable efforts to accommodate access by AWS and provide that any disputes should be resolved by the



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Commission.

Regarding the 15 percent reserve capacity issue, the Department stated that USWC should be required to show that it is reserving capacity only for maintenance and administrative purposes in accordance with generally accepted engineering principles.

#### 4. The ALJ

The ALJ noted that Section 251(b)(4) of the Act places the duty on USWC to

afford access to poles, ducts, conduits, and rights of way . . . to competing providers of telecommunications on rates, terms, and conditions that are consistent with section 244.

Section 244(f)(1) requires utilities to provide "nondiscriminatory access to any pole, conduit, or right of way owned or controlled by it". The ALJ noted that this language is repeated in 47 C.F.R. § 1.1403 and that Paragraph 1163 of the [\*64] FCC's First Order requires

utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the parties seeking access.

The ALJ cited the Commission's Order in the Consolidated Arbitration Proceeding in which the Commission held that U S WEST could

maintain spare capacity only as reasonably necessary for maintenance and administrative purposes, based upon generally accepted engineering principles.

Consolidated Arbitration Order at 44.

The ALJ found that USWC failed to prove in this proceeding that generally accepted engineering principles require it to reserve 15 percent of the capacity of ducts and conduits for maintenance and administration. Therefore, the ALJ concluded, USWC must make reasonable efforts to accommodate access by AWS to U S WEST facilities in accordance with applicable law. Disputes over whether a reasonable accommodation has been made should be submitted to the Commission.

Regarding the rights of way dispute, the ALJ stated that AWS should be afforded nondiscriminatory access to USWC's rights [\*65] of way and related facilities on the same terms and conditions which USWC provides to itself or a third party in accordance with section 251(b)(4) of the Act. According to the ALJ, such access must accommodate the different technological needs of AWS as a CMRS provider to the extent technically feasible.

#### 5. Commission Action

Following the reasoning and recommendations of the ALJ and the Department and consistent with the Commission's Order in the Consolidated Arbitration Proceeding, the Commission will require USWC to make all reasonable efforts to provide access to its poles, ducts, conduits and rights-of-way.



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## T. Evaluation of Proposed Contracts

### 1. AWS

AWS argued that its agreement should be adopted because it is clear and complies with federal law covering all issues necessary for a procompetitive interconnection agreement. AWS asserted that USWC's agreement is ambiguous, internally inconsistent and incomplete. AWS also objected that USWC's agreement also defers too many issues for future negotiation.

### 2. USWC

USWC stated that its Type 2 template agreement should be adopted because it has been reviewed and approved by nine state commissions and complies with [\*66] Sections 251 and 252(d) of the Federal Act. While AWS claims its proposed agreement is superior, USWC argued that a review of both agreements shows the topics are virtually identical and language of specific provisions governing general terms and conditions are similar. Where language is different, USWC stated, USWC's proposed agreement is fair while AWS' agreement tends to favor AWS.

USWC denied AWS' claims that USWC's agreement is repetitive, ambiguous, and internally consistent. USWC cited various examples where its language is more specific and effectively addresses the parties obligations according to law. USWC claimed that AWS' proposed agreement places a number of contractual obligations on USWC that is covered by existing law. To the extent that AWS' contract goes beyond what the law requires, USWC argued, it is improper and unfair.

### 3. The Department

The Department noted that the Commission has the authority to select either parties' contract in this arbitration but favored the AWS contract because, it stated, the USWC contract leaves issues open to be resolved in a separate agreement including collocation, unbundled elements and rates, and terms for ancillary services. [\*67] The Department advised that USWC's approach left too many issues unresolved contrary to the intent of the arbitration process.

### 4. The ALJ

The ALJ recommended that AWS' proposed interconnection agreement should be adopted as the agreement of the parties except as otherwise modified or limited by the decisions in this arbitration.

The ALJ found that the Act requires that a party petitioning for arbitration is required to provide the State Commission with

... all relevant documentation concerning (i) the unresolved issues; (ii) the position of each party with respect to those issues; and (iii) any other issue discussed and resolved by the parties.

47 U.S.C. § 252 (b) (2) (A).

The ALJ noted that a State Commission is then empowered to impose appropriate



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conditions upon the parties to the agreement. 47 U.S.C. § 252(b)(4)(C). The ALJ stated that the Act contemplates an actual contract emerging from the arbitration. 47 U.S.C. § 252(e)(2)(B).

The ALJ found that the AWS contract more comprehensively addresses technical interconnection matters and contains general terms and conditions customarily contained in standard commercial agreements. The ALJ also found that the AWS [\*68] contract more comprehensively addresses issues that, if not addressed, might delay or prevent the parties' achievement of an interconnection agreement.

By contrast, the ALJ noted, the USWC proposed contract deals with several crucial areas by setting them aside for resolution by a separate agreement. The ALJ noted that setting issues aside without the agreement of the parties could delay implementation and achievement of an interconnection agreement. The ALJ did not find the fact noted by USWC, that USWC's proposed contract has been selected as the template by other State Commissions persuasive. The ALJ noted that the Commission has rejected USWC's proposed contract in favor of AT&T's proposed contract language in the Consolidated Arbitration Proceeding. (Consolidated Arbitration Order at 7).

#### 5. Commission Action

Contrary to USWC's claim that the Commission has no authority to choose one of the agreements, the Commission believes that it must choose, as it did in the Consolidated Arbitrated Proceeding, in order to facilitate an orderly implementation of the arbitrated agreement. In the Consolidated Arbitration Order, the Commission stated at page 8:

The Commission sees [\*69] no impediment in the Act to incorporating provisions of that contract or any other into its final decision. Indeed, the Act contemplates actual contracts emerging from these arbitrations, providing for subsequent State commission review of "an agreement adopted by arbitration . . . (emphasis added)." 47 U.S.C. § 252(e)(2)(B). In adopting specific contractual language, the Commission is merely imposing terms and conditions under authority of the Act. See 47 U.S.C. § 252(b)(4)(C).

Having reviewed both proposed contracts and the arguments of the parties, the Commission finds that AWS' proposed interconnection agreement complies with federal law and more comprehensively addresses the contract issues.

For these reasons and others stated by the ALJ and the Department, the Commission finds that AWS' proposed contract offers the best alternative among the competing proposals submitted in this proceeding. Therefore, the Commission will adopt it as a template for an agreement between the parties, except as modified or limited by the decisions in this arbitration.

#### U. Arbitration Costs

Based on the 421 company code number portion of the docket number assigned [\*70] to this proceeding, all costs of this arbitration would be borne by USWC. AWS was not assigned a company code number and that number had not been made part of the docket number because it was presumed, at the time that docket number was assigned, that the public agencies (the Commission, the Office of Administrative Hearings, and the Department) did not have the authority to bill



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AWS.

On May 12, 1997, USWC notified the Commission that it objected to bearing all costs associated with this docket and on June 2, 1997, the Commission requested interested parties file comments and reply comments.

Subsequently, AWS voluntarily agreed to share equally with USWC concerning the costs in this arbitration proceeding. AWS clarified, however, that it does not believe that the Commission has authority, under Minnesota statutes or the Act, to assess costs of this arbitration proceeding against AWS. AWS stated that its willingness to share the costs of the arbitration should not be construed in any way as subjecting AWS to future assessments under Minn. Stat. § 237.295.

The Commission acknowledges AWS' agreement to share equally the costs of this arbitration (P-412/EM-97-371) with USWC. These [\*71] costs include the costs of the Department, the Office of Administrative Hearings, and the Commission. The Commission understands that AWS' willingness to share the costs of this arbitration does not necessarily imply that AWS is subject to future assessments under Minn. Stat. § 237.295. In light of AWS' agreement to share equally in the costs of this arbitration with USWC, it is not necessary for the Commission to determine in its Order whether it has the authority and obligation to assess costs against AWS.

#### ORDER

1. That the Commission take administrative notice of the FCC's First Report and Order, In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, dated August 8, 1996.
2. The Commission decides the arbitrated issues as set forth in the body of this Order, including the following:
  - . that the agreement expressly provide for future modification; and
  - . that the agreement expressly state that any future modifications or amendments will be brought before the Commission for approval.
3. Minn. Rules, Part 7829.3000, subp. 1 is varied and the parties are directed to file any petitions for rehearing [\*72] or reconsideration within 10 days of the issuance of the Order from this meeting.
4. If a party files for reconsideration, the party shall submit alternative contract language to implement its proposed resolution of the issue(s) that it wants the Commission to reconsider.
5. USWC and AWS shall submit a final contract, containing all the arbitrated and negotiated terms, to the Commission for review pursuant to 47 U.S.C. § 252(e) no later than 30 days from the service date of the Commission Order in this proceeding. If a party objects to any language in the contract, the party must indicate the basis for that objection as part of the filing of the contract, and the party must submit proposed alternative contract language.
6. The contracting parties shall serve their contract on the service list provided by the Commission. The contract must be served on the date the contract



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is submitted to the Commission.

7. The parties, participants and interested persons shall have 10 days from the date the parties submit their contract to the Commission to file comments regarding the contract.

8. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION



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