

*Space Reservation.* AWS contends that the appropriate mechanism for determining access priority consistent with §251(b)(4) of the Act is first come, first served. USWC has attempted to condition AWS's access to poles, conduits, and other rights of way on USWC's ability to reserve excess capacity. AWS maintains that the FCC Order ¶1170 explicitly provides that the Act does not permit the pole or conduit owner to favor itself by reserving space to meet some undefined future need.

AWS does not oppose USWC maintaining spare capacity in conduits and ducts for maintenance and administrative purposes, but argues that USWC should not be permitted to maintain spare capacity for other reasons. This position is consistent with the Commission's determination in ARB 3/6 that USWC may reserve space reasonably necessary for maintenance and administrative purposes based on a bona fide development plan (Order No. 97-003 at 5-6).

*Modification of Facilities.* AWS argues that the FCC Order ¶¶1161-1164 requires incumbent LECs to take reasonable steps to expand the capacity if necessary to accommodate access to rights of way, just as the incumbent LEC would do to accommodate its own increased needs. To implement this requirement, AWS contends, USWC must prove that additional access requested is not technically feasible. If necessary, USWC must exercise its powers of eminent domain to expand an existing right of way over private property to accommodate a request for access (FCC Order ¶1181). Accordingly, AWS argues that the Commission should require USWC to expand capacity when it is not currently available. Such a result, AWS contends, is consistent with the arbitrated decision between USWC, MCI, and AT&T, ARB 3/6, Order No. 97-003 at 25.

USWC argues that §251(b)(4) of the Act obligates all local exchange carriers, including AWS, to provide access to poles, ducts, conduits, and rights of way to competitors. Accordingly, USWC requests that any contract provision concerning access to poles, ducts, and conduits must be reciprocal.

USWC agrees to provide nondiscriminatory access to its poles, etc., on a first come, first served basis, as long as sufficient capacity exists. USWC argues, however, that it must keep a certain level of spare capacity for maintenance and administrative purposes, and identifies that level of spare capacity as 15 percent.

USWC does not believe that it should be required to construct or rearrange facilities for another carrier.

***Resolution: Duty to afford access to poles, ducts, conduits, and rights of way is reciprocal; USWC may keep spare capacity for maintenance and administrative purposes based on a bona fide development plan; USWC must take reasonable steps to expand capacity where necessary.***

The language of §251(b)(4) applies to all local exchange carriers. It is not limited to incumbents. Therefore, the obligation to grant access to poles, etc., is reciprocal. Both

carriers shall provide access to their poles, etc., under terms and conditions as favorable as they would provide themselves.

USWC is to allocate space on its poles, etc., in a nondiscriminatory way, on a first come, first served basis. USWC may reserve reasonable space for its maintenance and administrative needs, in accordance with a bona fide development plan.

When space is not sufficient to afford access to poles, etc., USWC shall take reasonable steps to expand capacity. These steps include exercising its power of eminent domain. FCC Order ¶1181. *See also* Order No. 97-003 at 25.

USWC is to take reasonable steps to accommodate the differing technological needs of AWS as a CMRS provider. For instance, AWS shall be permitted to use microcell technology in its access to the required USWC rights of way.

#### **Issue F. Contract Language**

AWS requests the Commission to adopt its proposed language in the Interconnection Agreement submitted to the Commission as AWS/17. AWS maintains that its proposed language complies with federal law and should be adopted as the agreement of the parties in this arbitration, after it is modified to reflect the substantive decisions of the Arbitrator. Besides specific provisions addressing technical interconnection matters, the AWS proposed Interconnection Agreement contains appropriate general terms and conditions (term, termination, covenants and warranties, indemnification, confidentiality, alternative dispute resolution procedures, force majeure and successors and assigns). The general terms and conditions set forth in AWS's contract on these standard commercial issues are reasonable, necessary, and workable.

AWS contends that the form of the agreement, including general terms and conditions, is a disputed issue to be resolved in this arbitration. If the Commission were to issue a decision that did not order a comprehensive agreement between the parties on the theory that details could be negotiated later, AWS maintains, the purpose of the Act would be undermined and the Commission would invite further delay.

AWS argues that USWC's proposed agreement is highly repetitive, often discussing the same issue in multiple sections. This renders the USWC agreement confusing, AWS asserts, because obligations are repeated and stated in different ways. The USWC form agreement is also ambiguous in many of its terms, AWS contends. AWS cites the following example: Section 5.3 purports to address virtual and physical collocation under terms and conditions "described in Section 6 herein." Section 6 then provides, "the parties will enter into a separate Collocation Agreement." This ambiguity, AWS contends, creates uncertainty about the rights and obligations of the parties and would require further negotiations outside of this proceeding.

AWS argues that the USWC form agreement is also internally inconsistent. For instance, Section 20 suggests that USWC will meet certain service standards, but Section 20.3

provides that "if USWC fails to meet the performance criteria, USWC will use its best efforts to meet the Performance Criteria for the next Specified Review Period." AWS maintains that the fact that other states have adopted USWC's template agreement does not cure its deficiencies. This Commission, in previous arbitration proceedings, opted not to use USWC's form agreement. *See, e.g.*, Order No. 97-021; 97-003. AWS urges the Commission to adopt the general terms and conditions as proposed by AWS in this proceeding, subject to any modifications based on the Commission's decision in this docket.

USWC argues that the Arbitrator cannot make findings based on proposed contract language otherwise unsupported by evidence in the record. USWC objects to AWS's proposed contract in part because the agreement seeks to impose terms and conditions outside of the requirements of the Act. AWS did not identify with specificity all the terms and conditions of its proposed interconnection agreement as disputed issues. Accordingly, USWC argues that those issues lacking substantial evidentiary support are not properly before the Arbitrator.

Moreover, USWC contends that AWS's proposed interconnection agreement includes terms and conditions that do not fall within §§251, 252(d), or the establishment of an implementation schedule, to which §252 of the Act limits the matters at issue in arbitration. For that reason, the Arbitrator lacks authority to impose contractual language relating to those subjects.

**Resolution:** *AWS to submit contract to USWC; USWC to execute within 15 days.*

While I favor the greater specificity of AWS's proposed interconnection agreement, I am persuaded by USWC's argument that it contains matters beyond the scope of my authority as Arbitrator to adopt. Therefore, I direct AWS to prepare a contract that is within the scope of what is contemplated by the Act and the FCC Order, and to incorporate into it the decisions in this arbitration. AWS is to submit the contract to USWC, and USWC is to execute it within 15 days. I am hopeful that the 15-day window will give the parties time to work out any differences about contract language that might remain after the decision in this matter has issued. I also encourage the parties to collaborate in the contract drafting process to the extent possible.

#### **Issue G. Service Quality Issues**

**AWS: Performance Standards.** AWS believes that service quality standards are extremely important in provisioning its wireless services. AWS has had problems with USWC in terms of provisioning delays, service outages, and blocking.

Section 251(c)(3) of the Act requires that unbundled elements be provided on a reasonable and nondiscriminatory basis. The FCC Order also requires:

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.

AWS also cites to FCC Rule 51.311(b) for the same principle. AWS argues, contrary to USWC's position, that the FCC does not limit performance levels to those which the incumbent provides to itself. See Rule 51.311(c); FCC Order ¶¶55, 970.

AWS argues that each of the quality and performance standards it has proposed is based on specific industry standards, reliability objectives, and performance specifications, as detailed in the AWS proposed Service Level Agreement sponsored by AWS's technical witness, Russell Thompson. According to AWS, in negotiations USWC refused to give AWS any information regarding its own internal quality or performance standards.

AWS urges the Commission to reject USWC's proposal to monitor data rather than comply with specific performance standards. In the arbitration between AT&T, MCI, and USWC, the Commission recognized the need for the development of quality standards and adopted the arbitrator's decision to require USWC to prepare detailed specifications showing its existing service quality and performance standards. Order No. 97-003 at 10. AWS urges the Commission to recognize here, as it did in that order, that the Act, the FCC Order, and state law require the incumbent to provide services and facilities at least at parity with the services and facilities it provides itself.

*Performance Credits.* AWS also argues that the Commission should approve a system of performance credits resulting from USWC's failure to meet the service quality and performance standards set forth in its Interconnection Agreement. AWS maintains that the performance credits are necessary to give effect to the quality standards in the Agreement. They will create an incentive to comply with the standards and compensate AWS for unascertainable losses resulting from USWC's noncompliance. Accordingly, AWS contends that the Commission should not only require USWC to satisfy explicit performance and quality standards such as those AWS proposes, but also approve AWS's proposed performance credits described in Section 6 of its proposed Interconnection Agreement as a remedy for USWC's failure to comply.

USWC argues that the Act obligates it to provide facilities and equipment at least equal in quality to that provided by the LEC to itself (§251(c)(2)(C)). The Act does not require particular levels of service quality from incumbent LECs, however, nor does it give the Commission authority to impose such standards. USWC opposes AWS's performance standards because AWS has given no evidence of what these standards entail, nor of their reasonableness. USWC also argues that the penalties AWS proposes are illegal and bear no relationship to any potential harm that failure to meet a specific standard might cause. USWC argues that there is insufficient evidence in the record to support adoption of these standards.

**Resolution: *No service quality standards imposed.***

The service quality standards requested by AWS in its interconnection agreement are quite detailed and the record lacks sufficient evidence to adopt them. Moreover, the

Commission is currently conducting a service quality docket for high end telecommunications services (AR 324). One purpose of that docket is to set service quality standards that will meet most of AWS's concerns. As USWC points out in its brief, AWS has other avenues of recourse available to it if USWC's service quality is deficient: the dispute resolution procedures in the arbitration agreement, a formal or informal complaint filed with the Commission, or recourse to FCC and the United States District Courts.

#### Issue H. Access to Service Arrangements ("Pick and Choose")

**AWS:** AWS seeks inclusion of a "most favored nations" provision in the Interconnection Agreement to require USWC to make available to AWS any interconnection, service, or network element set forth in an agreement between USWC and another carrier at the same rates, terms, and conditions. AWS argues that the plain language of §252(i) supports a requesting carrier's ability to choose among individual provisions contained in publicly filed interconnection agreements. The language requires an incumbent to make available "any interconnection, service, or network element provided under an agreement approved under [§252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

AWS argues that a most favored nations clause does not undermine the negotiation process. Instead, AWS asserts, allowing a carrier to choose among contract provisions will facilitate the process and avoid relitigation of issues previously determined by the Commission. It will also enable smaller carriers, who lack bargaining power, to obtain favorable terms and conditions negotiated by larger carriers. AWS is aware that the Eighth Circuit Court of Appeals has stayed FCC Rule 51.809, but believes that the most favored nations mandate arises from §252(i) of the Act.

**USWC:** USWC opposes AWS's contention that it should be allowed to pick and choose individual provisions of other agreements. The Eighth Circuit has stayed the FCC's pick and choose rule. The Court stated that the pick and choose rule would operate to undercut any agreements that were actually negotiated or arbitrated (Order Granting Stay Pending Judicial Review, p. 17). Moreover, USWC notes that the Commission previously decided this issue in Arbitration Order Nos. 97-052, 97-053, and 97-150. In those cases, the Commission rejected similar requests to allow companies to pick and choose portions of different agreements. USWC urges that the Commission should maintain consistency with its previous decisions on this point.

**Resolution:** *The contract should not contain a "pick and choose" clause.*

In response to AWS's argument that the Act, not the FCC Rules, give rise to the right to pick and choose among various contract provisions, I find the language of §252(i) vague as to how a carrier gains access to the terms of other agreements. Therefore, I give considerable weight to the Eighth Circuit's stay of the FCC rule.

In granting the stay of the FCC "pick and choose" provisions, the Eighth Circuit acknowledged that potential competitors will be inconvenienced by having to renegotiate the

terms of their agreements with incumbent carriers if the FCC's rules are subsequently upheld. Nevertheless, the Court found that "it would be easier for the parties to conform any variations in their agreements to the uniform requirements of the FCC's rules if the rules were later upheld than it would be for the parties to rework agreements adopted under the FCC's rules if the rules were later struck down." The Court further concluded that any harm that potential competitors may endure as a consequence of the stay is outweighed by the irreparable injury that the incumbent carriers would sustain in absence of a stay.

The FCC's interpretation of §252(i) should not be incorporated in the AWS/USWC interconnection agreement. If the FCC's "pick and choose" rule is ultimately upheld, it will apply to the contract. In that event, AWS will be able to renegotiate the terms of its agreement to include the rates, terms and conditions incorporated in other interconnection agreements executed by USWC.

### Issue I. Admissibility of Exhibits AWS 7-14

AWS argues that the Commission should admit Exhibits AWS 7 through 14 because they impeach the testimony of USWC that the 1994 interconnection agreement has not expired, by showing the parties' signed acknowledgment of the expiration date. These documents also show that USWC's position in this case regarding the FCC-required reciprocal compensation arrangement between January 1, 1997, and the final order in this case is contrary to prior agreement of the parties. Any language in these documents expressing agreement between the parties to exclude such documents from any arbitration proceeding has been voided by USWC's breach of its other obligations in those agreements.

One issue in this proceeding concerns the termination date of the 1994 agreement between AWS and USWC. FCC Rule 51.717(b) states that reciprocal compensation prior to the execution of an arbitrated agreement shall be based on the parties' preexisting arrangement. For the period from January 1, 1997, on, that preexisting arrangement is the parties' Interim Agreement, AWS Exhibit 9. AWS contends that the 1994 agreement had expired on December 31, 1996. The parties stipulated that Exhibits AWS 7 through 14 would be introduced as proprietary and confidential, subject to the protective order in this docket.

AWS argues that these exhibits are relevant and should be admitted because USWC advocates a position contrary to the Interim Agreement, AWS Exhibit 9. According to AWS, the confidentiality provision of the Interim Agreement has been obviated by USWC's breach of the other agreements found in Exhibits 7 through 14. AWS urges the Commission to decide that the 1994 agreement had been terminated and that the Interim Agreement governs their relationship prior to the outcome of this arbitration.

USWC: USWC believes that this dispute is not properly before the Commission and asks the Arbitrator not to include the issue in his decision. USWC believes that the Commission does not have jurisdiction over the 1994 agreement, because it preexists the Act. The Act does not authorize state arbitration of preexisting contracts, and the Commission has no statutory basis to allow it to resolve such disputes. USWC urges that the parties should

resolve their dispute as a private contractual dispute, using the civil remedies available to them.

**Resolution: *The Commission has no jurisdiction over the 1994 Agreement.***

I agree with USWC that the Act does not confer on state commissions jurisdiction over preexisting agreements. Moreover, the status of the 1994 agreement was not identified as an issue in AWS's petition for arbitration or in USWC's reply. Under §252(b)(4) of the Act:

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

As I read this section, I may not consider the status of the 1994 agreement in this arbitration. Because I have no jurisdiction over the 1994 agreement, it is not necessary to rule on the admissibility of AWS Exhibits 7 through 14.

**Other Issues**

In its brief, USWC identified two other issues that AWS did not brief: Balance of Traffic and Physical Interconnection and Collocation.

AWS's petition identifies the balance of traffic issue as follows: "Should the parties engage in bill and keep compensation when traffic is balanced in a particular market or cellular geographic service area (CGSA) or only when it is balanced on a full-state basis?" AWS did not address this issue in testimony, and I consider it no longer part of the case.

*Physical Interconnection.* AWS proposed negotiated meet points for interconnection and traffic exchanged via two way trunk groups. USWC agrees that mid-span meet arrangements and points of interconnection should be negotiated. However, USWC recommends that the Arbitrator establish a reasonable limit on the length of facilities USWC must construct as part of a mid-span meet arrangement and also ensure USWC is adequately compensated for any such arrangements. USWC proposes that a reasonable standard would be to require USWC to build no more than one mile of facilities to the meet point but in any case no more than one half the distance of the jointly provided facilities.

USWC advocates that the interconnection agreement should also provide for the establishment of direct trunks when traffic between a USWC end office and the AWS switch exceeds 512 CCS. USWC argues that this is necessary to ensure an efficient mix of direct trunk transport and tandem switching.

*Collocation.* USWC and AWS have agreed on most collocation issues but do not agree on AWS's request for collocation of remote switching units (RSUs). USWC has opposed collocation of remote switching units in its end offices. USWC notes that the FCC has required an incumbent LEC to collocate only transmission equipment (FCC Order ¶581). An RSU is switching equipment, not transmission equipment, which will be used not

primarily for interconnection or access to unbundled elements but for interconnection with other collocated CLECs. USWC recognizes, however, that the Commission has previously allowed collocation of RSUs (Order No. 97-003). If the Commission orders collocation of RSUs in this proceeding, the restrictions on the use of RSUs found in Order No. 97-003 should apply.

**Resolution:**

**Physical Interconnection:** *Parties to negotiate mid-span meet arrangements and points of interconnection; limit imposed on length of facilities USWC must construct; compensation necessary; direct trunks to be established when traffic between a USWC end office and the AWS switch exceeds 512 CCS.*

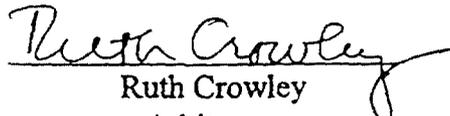
The parties should negotiate meet points for interconnection and traffic exchanged on two-way trunks. I adopt USWC's proposed reasonable standard for length of facilities it must construct as part of a mid-span arrangement, as well as USWC's proposal to establish direct trunks when traffic between its end office and the AWS switch exceeds 512 CCS.

**Collocation:** *AWS may collocate RSUs subject to the restrictions on use of RSUs found in Order No. 97-003.*

**Arbitrator's Decision**

1. Within 30 days of the Commission's final order in this matter, AWS shall submit to USWC an executed contract incorporating the Commission's findings. USWC shall execute the contract within 15 days of receipt and deliver copies to the Commission. The fully executed contract shall be effective immediately.
2. Consistent with the policy adopted by the Commission, any member of the public may submit written comments on this decision. Comments must be filed with the Commission no later than July 14, 1997.

Dated this 3<sup>rd</sup> day of July, 1997 in Salem, Oregon.

  
Ruth Crowley  
Arbitrator

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1997 Minn. PUC LEXIS 118 printed in FULL format.

In the Matter of the Petition of AT&T Wireless Services, Inc. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b)

DOCKET NO. P-421/EM-97-371

Minnesota Public Utilities Commission

1997 Minn. PUC LEXIS 118

July 30, 1997

PANEL:

[\*1] Edward A. Garvey, Chair; Joel Jacobs, Commissioner; Marshall Johnson, Commissioner; Don Storm, Commissioner

OPINION:

ORDER RESOLVING ARBITRATION ISSUES

PROCEDURAL HISTORY

On October 3, 1996, AT&T Wireless Services, Inc. (AWS) served U S WEST Communications, Inc. (USWC) with a request to negotiate under the Telecommunications Act of 1996, 47 U.S.C. § 251. The parties failed to reach an agreement on the issues subject to negotiation.

On March 7, 1997, AWS petitioned the Commission for arbitration of all unresolved issues pursuant to the Act.

On April 17, 1997, the Commission issued its ORDER GRANTING PETITION, ESTABLISHING PROCEDURES FOR ARBITRATION. This Order referred the arbitration between AWS and USWC to the Office of Administrative Hearings (OAH) for a contested case hearing before an Administrative Law Judge (ALJ). The Commission's Order limited party intervention in the proceeding to the Minnesota Department of Public Service (the Department) and the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG/OAG/RUD). The Department and the RUD/OAG subsequently intervened in the proceeding.

The arbitration hearing began on May 6, 1997 [\*2] and continued on May 7, 1997. The arbitration record closed on May 23, 1997, when reply briefs were received.

On June 6, 1997, the ALJ issued the Arbitration Decision in this matter. AWS and USWC filed exceptions on June 11, 1997.

On June 30, 1997, the Commission heard oral argument by the parties and on July 2, 1997, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

I. Preliminary Matters



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## A. Administrative Notice

Minn. Stat. § 14.60, subd. 4 provides:

Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified in writing either before or during hearing, or by reference in preliminary reports or otherwise, or by oral statement in the record, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence in the hearing record.

Pursuant to this statute, the Commission will take administrative notice of the stayed rules in Appendix B of the FCC [\*3] order, as well as the related explanatory paragraphs in the First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98. The Commission has given notice at the hearing on this matter that it intends to do this and has given parties an opportunity to respond in oral argument. Certain portions of the order have already been made a part of the record of the arbitration.

As a result of its action in taking administrative notice of the items noted, the FCC methodologies have become part of the record in this matter and the Commission considers them as it would other evidence in the case.

## B. Clarifying the Effect of the Stay

The Commission has no legal obligation to apply the methodologies, proxies or other directives contained in the stayed portions of the FCC's order. However, most of the FCC order has not been stayed and the Commission may not disregard these portions on the basis that it finds them illegal or unconstitutional.

The Commission, unlike a court, does not have the authority to declare a statute unconstitutional on its face. *Nealand v. Clearwater Hospital*, 257 N. W. 2d 366, 368 (Minn. [\*4] 1977). Likewise, the Commission does not have the authority to declare a federal rule invalid. The federal courts of appeals have exclusive jurisdiction

to enjoin, set aside, suspend (in whole or part) or to determine the validity of... all final orders of the Federal Communications Commission made reviewable by section 402 (a) of title 47.

28 U.S.C. § 2342 (1).

While the Commission has challenged the statutory authority of the FCC to regulate the pricing of intrastate telephone services, it has done so properly by intervening in a lawsuit before a federal court of appeals, not by declaring portions of the rule invalid.

## C. Burden of Proof

In its April 17, 1997, ORDER GRANTING PETITION, ESTABLISHING PROCEDURES FOR



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ARBITRATION in this matter, the Commission determined that USWC has the burden of proof in these proceedings. The Commission 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.

[\*5]

The Commission's decision is consistent with the FCC's August 8, 1996 Order in CC Docket No. 96-98 in which the FCC specifically established a proof standard of clear and convincing evidence applicable to local exchange companies (LECs) who would deny an entrant's request for a method of achieving interconnection or access to unbundled elements.

The explicit placement of the burden of proof on U S WEST by the Commission 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.

#### D. Agreements Subject to Modification, Commission Approval

The agreements arbitrated in this proceeding may need to be modified in the future for several reasons. First, the parties may continue to negotiate as the states make their decisions. Second, some decisions may have to be made on an interim basis subject to later amendment in future proceedings. These future FCC and Commission decisions, including rulemakings, may need to be incorporated in these agreements. Indeed, the FCC Rules indicate that a party violates the duty under the Act to negotiate [\*6] 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 CFR § 51.301 (c) (3).

Therefore, the Commission hereby clarifies that the agreements it approves in this Order are subject to modification by negotiation or by future Commission direction. Any future modifications or amendments should be brought to the Commission for approval.

#### E. Timeframe for Reconsideration and Final Contract Language

Minn. Rules, Part 7829.3000, subp. 1 establishes a 20 day timeframe for filing petitions for reconsideration. The Commission believes that a shorter timeframe is desirable in this case to act efficiently to promote the goals of the Federal Telecommunications Act. In considering whether a variance to allow parties to file a petition for rehearing or reconsideration within 10 days of the issuance of the Order is appropriate, the Commission notes that it may vary its rules pursuant to Minn. Rules, Part. 7829.3200 when:

... enforcement of the rule would impose an excessive burden upon the applicant or others affected by the [\*7] rule;



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- . granting the variance would not adversely affect the public interest; and
- . granting the variance would not conflict with standards imposed by law.

Applying these standards, the Commission finds that granting such a variance is warranted and will do so. First, varying the time frame for petitions for reconsideration from twenty days to ten will not impose an excessive burden upon the parties to this proceeding as it provides parties sufficient time to prepare their petitions and allows adequate time for the Commission to carefully and thoughtfully analyze the petitions for reconsideration. It will also allow the Commission to act efficiently to promote the goals of the Federal Act. Second, varying the time frame for the filing of petitions for reconsideration will not adversely affect the public interest, but instead will allow an orderly, efficient processing of this matter. Third, granting the variance would not conflict with standards imposed by law.

The Commission notes that it is not changing the 10 day time period allowed for answers to petitions for reconsideration. Minn. Rules, Part. 7829.3200, subp. 4.

Since the Commission desires to coordinate consideration [\*8] of the final contract language with its review of the petitions for reconsideration, this Order will give the parties 30 days from the issuance of this Order to file final contract language. Interested parties and participants will have 10 days to file comments on the submitted final contract language.

## II. Disputed Issues: Analysis and Action

### A. Bill & Keep

Under 47 U.S.C. § 251(b)(5), each LEC has the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. "Bill & Keep" is a compensation agreement where two interconnected carriers terminate each others traffic without billing each other. This method reduces the use of resources devoted to measuring traffic and billing.

#### 1. AWS

AWS proposed that the companies be allowed to "bill & keep" in this case because, it argued, the amount of compensation to be exchanged between parties will be "equivalent". AWS explained that although the traffic between AWS and USWC is substantially unbalanced, AWS' higher costs to terminate traffic (more than 4 times USWC's cost) mean that in net, the dollar value of the compensation owed each other may be in balance.

AWS asserted [\*9] that USWC has not presented any evidence regarding its own costs or AWS' costs, while AWS has provided evidence to indicate that its costs are substantially higher than the costs of USWC. AWS stated that it is prepared to waive full cost recovery to gain the advantages of "bill & keep".

#### 2. USWC

USWC argued that the Commission should reject "bill & keep" as a compensation mechanism for transport, termination, and transit. USWC stated that the FCC



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concluded that bill & keep could be imposed by a state only if traffic is roughly balanced in two directions, is expected to remain so, and neither carrier has rebutted the presumption of symmetrical rates. USWC stated that traffic flows between it and AWS will rarely, if ever, reflect a stable pattern of balanced traffic because AWS will choose to serve particular types of customers and will target non-random groups, while USWC must serve all comers.

USWC noted that in many of its existing agreements with CMRS providers the traffic is significantly unbalanced, e.g. land-to-mobile traffic is typically less than 25 percent of total traffic.

### 3. The Department

The Department recommended that "bill & keep" be rejected as a compensation [\*10] mechanism for transport and termination. The Department rejected AWS' and USWC's cost studies as unreliable. The Department noted that AWS' evidence was extremely sketchy and USWC's cost studies were seriously flawed. Furthermore, the Department argued that the record is unclear as to what degree traffic between the parties is out of balance. Given the uncertainty regarding actual costs and actual traffic flows, the Department did not believe there is enough evidence to find that "bill & keep" will fully compensate both parties.

### 4. The ALJ

The ALJ did not explicitly address the issue of "bill & keep" but did make an explicit recommendation regarding the prices to be implemented in this proceeding. It appears that the ALJ's decision to recommend prices implies that it is not recommending "bill & keep".

### 5. Analysis and Action

Under 47 U.S.C. § 252(d)(2)(A) reciprocal compensation is not just and reasonable unless it

. . . provides 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 [\*11] conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

Given the uncertainty regarding actual costs and actual traffic flows, the Commission does not believe there is enough evidence in this record to find "bill & keep" will compensate both parties. Therefore, the Commission finds that "bill & keep" is not an appropriate compensation mechanism for transport, termination, and transit.

### B. Interim Prices

All parties and the ALJ agreed that permanent rates for exchange of traffic should not be set in this proceeding and should be set in the Commission's generic cost docket (P-442, 5321, 3167, 466, 421/CI-96-1540). At issue here is what interim rates will be established that will be subject to a true-up when permanent rates are set in the generic cost docket.



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## 1. AWS

AWS sponsored proposed interim rates based on its modification of a USWC cost study, making adjustments to the cost of capital and depreciation rates. AWS proposed the following interim rates based on the cost study it submitted in this proceeding:

Type 2B (end office termination)	\$ .0025 per minute of use
Type 2A (tandem switching and transport)	\$ .0020 per minute of use
Transit (tandem switching and transport)	\$ .0020 per minute of use

[\*12]

## 2. USWC

USWC proposed two alternatives for interim prices:

## 1. The rates set in the March 1, 1994, agreement between the parties:

Type 2B (end office termination)	\$ .0206 per minute of use
Type 2A (tandem switching and transport)	\$ .0245 per minute of use
Transit (tandem switching and transport)	\$ .0245 per minute of use

or

## 2. The interim rates set in the U S WEST Consolidated Arbitration docket:

Type 2B (end office termination)	\$ .00260 per minute of use
Type 2A (tandem switching and transport)	\$ .00556 per minute of use
Transit (tandem switching and transport)	\$ .00556 per minute of use

## 3. The Department

The Department stated that neither party has submitted sufficient information to determine permanent rates for transport and termination. According to the Department, USWC has not supported the use of any cost study including the study it provided to AWS at AWS' request.

The Department noted that the cost study relied on by AWS on this subject is not based on TELRIC principles and was rejected in the Consolidated Arbitration. The Department further stated that AWS' modification of the USWC cost study is not sufficient to make that study [\*13] appropriate.

The Department recommended that the Commission adopt the interim rates determined in the Consolidated Arbitration docket at this time and establish permanent rates with the guidance of the USWC's Generic Cost docket. The Department further recommended that the interim rates which would prevail at the conclusion of this proceeding, through to the conclusion of the Generic Cost docket, should be subject to true-up as was ordered in the Consolidated Arbitration.

## 4. The ALJ

The ALJ stated that it is appropriate to adopt as interim rates in this



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proceeding the interim rates for transport and termination ordered by the Commission in the Consolidated Arbitration Proceeding. The interim rates should prevail from the conclusion of this proceeding to the conclusion of the generic cost docket. The interim rates should be subject to true-up based on the permanent rates established in the Generic Cost proceeding.

#### 5. Commission Action

Section 252(b)(4)(A) of the Act states:

The State commission shall limit its consideration of any petition under paragraph (1) [Arbitration] ... to the issues set forth in the petition and in the response, if any, filed under paragraph [\*14] (3).

Since the cost studies supporting the rates set in the USWC Consolidated Proceeding are not part of the record in this proceeding, they may not be relied on as the best evidence available. Those rates were based on Hatfield 2.2.2 which is not part of the record evidence.

The contract rates in the March 1994 contract between USWC and AWS were approved by the Commission in 1994. However, these rates were not cost-based and were approved under a different regulatory structure. As such, they are unsuitable for adoption as interim rates in this case.

As between USWC's cost study as is and its cost study as modified by AWS, the Commission finds that USWC's unmodified cost study is preferable because the Commission has approved the 13-year depreciation life used in that study. Hence, the Commission finds that the best evidence in the record is USWC's unmodified cost study.

The resulting rates are:

End Office Termination:	.001994
Tandem & Transport:	.001114
End Office Termination and Tandem & Transport:	.003108
Transit:	.001114

These rates do not include an amount of depreciation reserve deficiency (.00130), as originally requested by USWC. USWC subsequently withdrew [\*15] its request to recover the depreciation reserve deficiency in the rates set in this Order, stating that the depreciation reserve deficiency should be established for all ILECS in a separate study. In these circumstances, the Commission finds that the absence of an amount of depreciation reserve deficiency in the rates established in this Order do not render such rates unreasonable. In so finding, the Commission is not determining that the rates ultimately adopted as a result of the generic cost proceeding will or will not contain an amount of depreciation reserve deficiency. The Commission notes, however, that depreciation reserve deficiencies have never been approved by this Commission.

#### C. Compensation to AWS From Third Party Carrier

The parties could not agree on what termination charges would be owed to AWS by



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third party carriers for calls originating with a third party carrier, transiting U S WEST's network, and terminating on AWS' network. Nor could the parties agree on USWC's role in facilitating the collection of these charges by AWS in the interim period when AWS has not developed agreements with third party carriers.

1. AWS

AWS argued that until it can arrange [\*16] agreements with third party carriers, USWC should not bill or collect termination charges for carriers using its facilities for transited traffic unless those carriers have a reciprocal arrangement themselves. According to AWS, third party carriers and AWS should originate and terminate their own traffic, vis-a-vis each other, on a "bill & keep" basis.

2. USWC

USWC asserted that it is not responsible for the monetary arrangement between originating and terminating carriers. USWC argued that it is not required to negotiate transiting arrangements and to bill for them on behalf of AWS and that AWS' relationships with third party carriers have nothing to do with this proceeding between USWC and AWS.

3. The Department and the ALJ

Neither the Department nor the ALJ commented on this issue.

4. Commission Action

The Commission finds that it is consistent with the Act that USWC be required to make its recording and billing services available to AWS to facilitate AWS' collection of termination charges owed it by third party carriers. Of course, if AWS does use USWC's recording and billing services it must compensate USWC at a reasonable rate.

D. Compensation for Traffic [\*17] Terminated at AWS' MSCs

The parties could not agree whether AWS should be compensated for its Mobile Switching Center (MSC) at the same rate USWC is compensated for its tandem switch or at the lower, end office rate.

1. AWS

AWS argued that it should be compensated at the higher tandem switch rate for use of its MSCs. AWS stated that its MSC can and does terminate calls to any physical location to which USWC's tandem can terminate calls and performs functions remarkably similar to a USWC tandem switch.

AWS referred to the Commission's decision in the Consolidated Arbitration where the Commission stated that competing local exchange company (CLEC) switches perform the same function as the incumbent's tandems in that they both route and carry the calls of the other carrier's subscribers. AWS argued that there is no demonstrable difference between a CLEC switch, AWS' MSC, and USWC's tandem.



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## 2. USWC

U S WEST's position is that AWS' switched network does not perform a tandem switching function and, therefore, does not qualify for higher tandem switching rates. USWC argued that AWS' switch functions as an end office switch, that AWS provides only a single switching function, [\*18] and that AWS does not incur the costs that USWC does in performing two switching functions.

USWC also rejected AWS' argument that USWC should pay tandem rates, as opposed to end office rates, simply because AWS claims to have higher costs. The key factor, according to USWC, is that AWS' MSC does not perform a tandem function, that even though AWS may employ an IS41 Tandem switch, that equipment is not used to perform a tandem switching function.

## 3. The Department

The Department supported the position taken by AWS, that AWS's MSCs should receive compensation at the tandem switch rate. Citing the FCC Order at Paragraph 1090, Department stated that state commissions are directed to consider the functionality and the geographic area to be served by a competitor's switch in comparison to the LEC's switch. The Department noted that AWS' MSC switches appear to function in both end office and tandem capacities, that AWS' cell site control switch and cell sites work together to perform end office functions. Additionally, the Department noted that AWS' MSCs perform transit functions by routing calls to other wireless carriers.

## 4. The ALJ

The ALJ noted that Paragraph 1090 of the [\*19] FCC's First Order directs that states consider the functionality and geographic area to be served by a competitor's switch in comparison to the LEC's switch. The ALJ found that AWS' MSC switches appear to function in both end office and tandem capacities, that AWS' cell site control switch and cell sites work together to perform end office type functions, and that AWS' MSCs perform transit functions by routing calls to other wireless carriers to complete the roaming calls of its customers. The ALJ further noted that by virtue of the MSCs' technical capabilities and interconnections with other networks and AWS's roaming agreements with other wireless carriers, AWS subscribers can place and receive calls for out-[state] Minnesota. The ALJ concluded, therefore, that AWS' MSCs are comparable to USWC's tandem switches and, as such, warrant compensation at USWC's tandem rate for USWC traffic terminated at AWS's MSC.

The ALJ expressed surprise that several other State Commissions have determined that a wireless network does not qualify to be compensated at the tandem rate, in light of the quantum of proof imposed on a LEC on this type of issue and the Act's focus on competition and accommodation [\*20] to new technologies. In any event, the ALJ noted, the Minnesota Commission addressed this issue as it relates to Minnesota competing local exchange carriers who do not have wireless networks in the Consolidated Arbitration Proceeding Order. See Order, pages 70-72. In that Order, the Commission stated that it was inappropriate to focus on "certain technical and functional differences between U S WEST's tandems and typical CLEC switches". The ALJ stated he was unpersuaded that the technical differences between AWS's MSC warrants treating AWS's MSC like a USWC end office and concluded that USWC failed to prove that the difference justifies different



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compensation in rates.

5. Commission Analysis and Action

Paragraph 1090 of the FCC's Order states, in part:

States shall also consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area [\*21] comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate. (emphasis added.)

The Commission has considered the functionality and geographic factors cited by the FCC and concludes that some but not all of the calls terminating on AWS' network should be priced at the same rate USWC is compensated for its tandem switch.

All the parties and the ALJ acknowledged that AWS' MSC switches function in end office capacities for some calls and in tandem capacities for others. The Commission finds that actual performance of the switch on a given call, rather than the capacity to perform with respect to that call is the critical question. n1 The Commission finds, therefore, that it would be appropriate to compensate AWS at the higher tandem rate for calls that require its switch to perform tandem switching functions and to be compensated at the lower end office rate for calls that simply require end office function.

-----Footnotes-----

n1 If the FCC paragraph meant that all calls terminated on a switch that had the capacity to perform tandem switch functions should be compensated at the tandem switch rate, the FCC's reference to the Commission determining whether "some or all" of the calls should be so compensated would have no meaning. To give meaning to the "some or all" language, actual performance of the switch on an given call, rather than abstract capacity to perform, is the key to the rate at which the terminating switch function should be compensated on such a call.

-----End Footnotes-----

[\*22]

The Commission will direct USWC to work out, in conjunction with AWS, an appropriate means to identify the functions actually performed with respect to the USWC calls terminated at AWS's MSC and to compensate AWS accordingly.

E. Access Charges for Intra-MTA n2 Roaming Calls

-----Footnotes-----

n2 MTA refers to the Major Trading Area, which is the geographical area considered by the FCC to be the local calling area of a CMRS provider, such as AWS. Roaming areas are much smaller geographic areas defined either by the signal reach of a cell site or by marketing practices which may aggregate



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several cell sites into a single roaming area for billing purposes. As such, a CMRS subscriber may make a call within the MTA, that is subject to roaming charges, and that crosses a state boundary.

- - - - -End Footnotes- - - - -

The Major Trading Area (MTA) is the geographical area considered by the FCC to be the local calling area of a CMRS provider, such as AWS. The MTA relevant to AWS in this proceeding covers a large area: almost all of Minnesota, all of North Dakota, over [\*23] half of South Dakota, a significant portion of Wisconsin, and a small portion of Iowa. The parties could not agree on the compensation for calls that 1) originate and terminate within the MTA and 2) cross state boundaries.

1. ASW

AWS asserted that the MTA is the appropriate definition of its local service area and, as such, calls originating and terminating within the MTA should be subject to transport and termination charges, not interstate or intrastate access charges.

2. USWC

USWC argued that intra-MTA traffic that transits interstate facilities is subject to interstate access charges and that AWS should be responsible for identifying such traffic. USWC argued that it charged AWS access charges under the 1994 pre-existing agreement and, therefore, it is entitled to continue to collect those charges. USWC claimed that under the pre-existing agreement access charges were not differentiated, but were included in a single "blended rate" that included toll charges. USWC asserted that it is unnecessary to find that access charges were explicitly delineated under the pre-existing contract in order to find that the current payment of charges by AWS is appropriate.

3. The [\*24] Department

The Department cited Paragraph 1043 of the FCC Order to show that the FCC seeks to maintain the status quo ante with respect to access charge payments for interstate roaming traffic. The Department argued that USWC has not met its burden of proof on this issue, i.e. that it has not provided evidence that it has been collecting interstate access from AWS in the past under the parties' 1994 agreement. Therefore, the Department argued, USWC is not entitled to collect interstate access charges with respect to intra-MTA roaming calls.

4. The ALJ

The ALJ recommended that USWC not be allowed to assess AWS interstate access charges for intra-MTA roaming. The ALJ noted that Paragraph 1043 of the FCC's First Order specifically refers to interstate roaming traffic, and states in part:

...the new transport and termination rules should be applied to LECs and CMRS providers, so that CMRS can continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.



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Based on this language, the ALJ concluded that the FCC is seeking to maintain [\*25] the status quo ante with respect to access charge payments for interstate roaming traffic. The ALJ found that USWC has failed to prove that AWS' originating intra-MTA roaming traffic was subject to access charges prior to the FCC's First Order and therefore was not entitled to apply such charges to such traffic now.

#### 5. The Commission's Analysis and Action

In the Commission's view, the FCC Order (Paragraph 1043) seeks to maintain the status quo ante regarding intra-MTA roaming charges. The Commission finds that USWC has failed to prove that such traffic was subject to interstate access charges prior to the FCC's Order. Therefore, the Commission concludes that USWC must not assess AWS interstate or intrastate access charges for intra-MTA roaming traffic.

#### F. Compensation for Terminating Paging Calls

The parties could not agree whether AWS was entitled to receive compensation from USWC for terminating paging calls originating in USWC's service area.

##### 1. AWS

AWS argued that it is entitled to be compensated for the termination of paging traffic originated by USWC, and that AWS need not compensate USWC for facilities used to deliver such calls because USWC is the originator [\*26] of such calls. Regarding USWC's claim that AWS has the duty to provide reciprocal compensation, AWS references Paragraph 1008 of the Order which states, in part:

Accordingly, LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, ...

AWS also cited Paragraph 1092 of the Order which states, in part:

Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers' networks ...

##### 2. USWC

USWC argued that AWS is not entitled to receive compensation from USWC for terminating paging calls originating in USWC's service area. USWC acknowledged that the duty to provide reciprocal compensation for transport and termination arises under § 251(b)(5) but argued that reciprocal compensation is inappropriate for AWS' paging services because paging services are one-way communication, i.e. no [\*27] calls originate on AWS' facilities to be terminated by USWC.

##### 3. The Department



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The Department agreed with AWS. The Department contended that it has seen no legal authority offered in this proceeding to permit the ALJ to depart in this instance from the general rule that each party pays for calls originating on their own network (Initial Brief, pp. 16-17). Referencing the FCC First Report and Order, Paragraphs 1008, 1042, and 1092, the Department argued that (i) paging providers are considered to be telecommunications carriers, (ii) LECs are prohibited from charging paging providers for calls originating on other carrier's networks, and (iii) parties that terminate page calls must be compensated by the company upon whose network the page call originated.

#### 4. The ALJ

The ALJ recommended that AWS not be required to pay for the termination of any USWC originated calls through direct termination charges. The ALJ found that AWS is allowed to charge for the termination of USWC originated paging calls based on the outcome of the FCC's future review of this issue that is provided under the FCC Order.

#### 5. Commission Analysis and Action

Paging providers are defined in the FCC [\*28] Order as "telecommunications carriers," and under the Act, all telecommunications carriers are entitled to reciprocal compensation from incumbent LECs. (47 U.S.C. § 251(b)(5)). The FCC Order states the rule clearly:

Accordingly, LECs are obligated, pursuant to section 251(b)(5) and the corresponding pricing standards of section 252(d)(2), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, . . . . (FCC Order, P 1008)

The FCC has reiterated this rule as follows,

Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, . . . . (FCC Order, P 1092).

The Commission finds no exclusion in the Act or the FCC Order that would prevent application of the clear rule that AWS should be compensated by USWC for terminating paging calls originating in USWC's service area.

#### G. Dedicated Paging Facilities

The parties could not agree whether AWS should be required to pay for facilities required to connect AWS' dedicated paging facilities to USWC's network.

##### 1. AWS

With respect [\*29] to charges for paging facilities, AWS relied on paragraphs 1092 and 1042 which state, respectively, in part as follows:

Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers'



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networks . . . .

and

We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

AWS argued that by trying to impose facilities charges on AWS, as it has done in the past, USWC is trying to circumvent this rule.

## 2. USWC

USWC proposed that AWS should be required to pay for facilities required to connect AWS' dedicated paging facilities to USWC's network. USWC noted that Southwestern Bell requested clarification from the FCC regarding its rules for interconnection between LECs and paging carriers and that on May [\*30] 22, 1997, the FCC established a pleading cycle to receive comments on Southwestern Bell's request. USWC asked that any Commission decision should be designed to accommodate later action by the FCC.

## 3. The Department

The Department stated that no legal authority has been offered in this proceeding that would justify permitting the ALJ to depart from the general rule that each party pays for calls originating on their own network. The Department argued that USWC benefits from the facilities used to transport paging traffic because those facilities permit USWC's customers to place paging calls. Additionally, the Department noted that paging calls that originate from USWC customers generate return calls to USWC's network for which USWC is compensated for termination.

## 4. The ALJ

The ALJ recommended that the AWS should not be required to pay USWC for any usage of facilities associated with the delivery of paging services. The ALJ noted that the FCC expressly prohibits the imposition of charges as they had been applied in the past, stating at Paragraph 1042 of its Order:

We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently [\*31] impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge. (FCC Order, Paragraph 1042) (emphasis added).

The ALJ cited Paragraph 1042 of the FCC Order and stated that the requirement that paging providers be compensated for the termination of LEC-originated traffic similarly requires that they not be charged for the facilities used to deliver such traffic. Consequently, the ALJ reasoned, the facilities used for the delivery of such traffic must also be paid for by USWC.



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### 5. The Commission's Analysis and Action

The FCC Order Paragraph 1042 quoted above clearly states that incumbent LECs must provide traffic to the CMRS provider without charge. FCC Rule § 51.703 (stay lifted) states:

A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.

As a result, the Commission finds that AWS is not required to compensate U S WEST for the facilities used to deliver [\*32] paging traffic to AWS' paging network.

#### H. Effective Date for Reciprocal Compensation

The parties agree that reciprocal compensation is required by FCC rules, but disagreed as to the date when reciprocal compensation should begin.

##### 1. AWS

AWS argued that the effective date for reciprocal compensation should be October 3, 1996, the date when AWS submitted its request for interconnection to USWC.

##### 2. USWC

USWC argued for a November 1, 1996 effective date because that was the day the 8th Circuit Court lifted the stay of the FCC rules.

##### 3. The Department

The Department argued that the effective date should be October 3, 1996. The Department argued that in lifting the stay, the Court determined that incumbent LECs, such as USWC, were not entitled to protection from FCC rule 51.717. Consequently, the Department reasoned, USWC should not receive a benefit that the Eighth Circuit has determined the Company is not entitled to have.

##### 4. The ALJ

The ALJ recommended an October 3, 1996 effective date. The ALJ reasoned that an order of an administrative agency, such as the FCC, that is initially stayed and then allowed to go into effect is effective as of its initial issuance [\*33] date. The ALJ noted although the Eighth Circuit Court of Appeals temporarily stayed the effectiveness of FCC Rule 51.717(b), the Court lifted the stay on November 1. Thus, the Rule went into effect permitting reciprocal compensation from the original submission of an interconnection request. In this case, the ALJ found, lifting of the temporary stay rendered the Rule effective on October 3, the day AWS submitted its request for interconnection.

The ALJ stated that if AWS does not receive reciprocal compensation from the original effective date of the FCC Order, AWS will be denied the benefit which it had been unjustly restricted from receiving due to the erroneous entry of a stay.

##### 5. Commission Action



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The Commission is persuaded by the arguments presented by AWS, the Department and the ALJ and finds that the effective date for beginning reciprocal compensation is October 3, 1996.

#### I. Rates Pending Order

The parties disagreed over the level of reciprocal compensation rates should apply between the commencement of reciprocal compensation until an Order is issued in this proceeding.

##### 1. AWS

AWS argued that the March 1994 contract expired on December 31, 1996, so the [\*34] contract rates set by that contract cannot be used for reciprocal compensation. AWS stated that the Amendment (Exhibit 14) provides for a true-up for the remaining months of 1996 after the 1994 contract expires and the Interim Agreement (Exhibit 13) provides for a true-up for the period beginning January 1, 1997, to the "results" of this arbitration.

##### 2. USWC

USWC argued that the March 1994 contract contained an "evergreen clause" which provided that after December 31, 1996, the contract would remain in effect on a month by month basis until written notice was given by one of the parties. USWC claimed that the Exhibits relied on by AWS clearly indicate that the parties contemplated that the March 1994 contract would remain in effect until the resolution of the dispute through negotiation and/or arbitration. USWC characterized the good faith lump sum payments (provided for in the Amendment and the Interim Agreement) as an expedient to allow the parties to continue their business relationship without interruption of service.

##### 3. The Department

The Department took no position on whether the subsequent agreements between the parties have supplanted the March 1994 agreement but [\*35] noted that the 1994 rates should prevail unless the Commission determines that the amendment and interim agreements are binding.

##### 4. The ALJ

The ALJ found that the record did not conclusively establish whether that agreement was terminated on December 31, 1996 or continued in effect after this date. To determine the intention of the parties, the ALJ applied that parole evidence rule and considered the language contained in the pertinent agreements, Exhibits 13, 14 and 15. Upon review of these exhibits, the ALJ concluded that the 1994 contractual relationship between the parties continued and that the parties intended to clarify compensation issues.

According to the ALJ, Exhibits 13, 14 and 15 show that AWS and USWC had substantial, dynamic disagreements over their compensation relationship and that these parties intended to change their compensation relationship. The ALJ found that USWC has failed to prove that the parties intended to continue the 1994 compensation rates after December 31, 1996. The ALJ indicated that the parties



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should honor the agreements identified in Exhibits 13, 14 and 15, but noted that the exhibits focus primarily on true-ups and do not clearly state [\*36] what rates apply.

#### 5. The Commission's Analysis and Action

The question whether the parties modified the March 1994 contract is a red herring in this proceeding that the Commission will not pursue. Whether the contract terminated or not is not relevant to the Commission's decision in this proceeding. Any changes to this agreement, subsequent to AWS' request for renegotiation, are a contractual dispute between two private parties and not a matter that need concern the Commission.

FCC Rules § 51.717 set the initial reciprocal compensation rate at that rate prevailing in the pre-existing agreement until the state commission approves a different rate. The parties agree as to the rates set by their March 1994 contract and the Commission has not approved any rate agreement other than the going-forward rates set in this Order. See above at Section B on pages 6-9. The rates in existence at the beginning of reciprocal compensation were set by Commission approved tariff. No other rates have been approved by this Commission since then. Whatever the parties arranged between themselves subsequently does not alter the fact that the Commission has approved no other rates than those in the [\*37] March 1994 contract.

Accordingly, the Commission will make no decision regarding the status of the parties' interim agreements (Exhibits 13, 14, and 15) and direct the parties to seek resolution of their dispute on this issue in another forum. The rates which shall prevail from the commencement of reciprocal compensation until an arbitration order is issued in this proceeding are the rates set by the parties March 1994 agreement. No true-up is warranted.

#### J. Pick and Choose Option

##### 1. AWS

AWS claimed that USWC must make available to AWS any rates, terms, and conditions that have been approved in agreements between USWC and other telecommunications carriers. AWS cited Federal Act Section 251(i) as obligating USWC to make available any interconnection, service, or network element provided under an agreement approved under Section 252 to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

AWS argued that the Federal Act and FCC Rules support the interpretation that individual provisions of publicly filed interconnection agreements can be selected by a requesting carrier.

##### 2. USWC

[\*38]

USWC argued that the Commission should reject AWS' recommended pick and choose provision in this case. USWC noted that the FCC Rules and Orders allowing a pick and choose provision were stayed by the Eighth Circuit Court of Appeals. USWC further noted that in staying the rule, the Court stated that such a provision would operate to undercut any agreements that were negotiated or arbitrated.



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