Arent Fox
ATTORNEYS AT LAW

Arent Fox Kintner Plotkin & Kahn, PLLC
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
Phone 202/857-6000
Fax 202/857-6395
www.arentfox.com

Douglas G. Bonner
Member
202/857-6293
bonnerd@arentfox.com

Sana D. Coleman
Associate
202/775-5753
colemans@arentfox.com

DOCKET FILE COPY ORIGINAL

June 2, 2000

RECEIVED
JUN - 2 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Comments of VoiceStream Wireless Corporation in CC Docket Nos. 96-98, 95-185 and WT Docket No. 97-207**

Dear Ms. Salas:

Subsequent to our timely electronic filing of June 1, 2000, VoiceStream Wireless Corporation is now filing a hard copy of its Comments and attached exhibit in the above-captioned dockets.

Please date-stamp the enclosed copy of this transmittal letter upon receipt and return it to the courier. Should you have any questions, please contact the undersigned.

Respectfully submitted,

Sana D. Coleman

Douglas G. Bonner
Sana D. Coleman

Counsel for VoiceStream Wireless

cc: Ms. Stacy Jordan (hand delivery)
Ms. Wanda Harris (hand delivery)
Mr. Jonathan M. Chambers (via facsimile)

Arent Fox
ATTORNEYS AT LAW

Arent Fox Kintner Plotkin & Kahn, PLLC
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
Phone 202/857-6000
Fax 202/857-6395
www.arentfox.com

DOCKET FILE COPY ORIGINAL

Douglas G. Bonner
Member
202/857-6293
bonnerd@arentfox.com

Sana D. Coleman
Associate
202/775-5753
colemans@arentfox.com

June 1, 2000

RECEIVED
JUN - 2 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Comments of VoiceStream Wireless in CC Docket Nos. 96-98, 95-185 and WT Docket No. 97-207**

Dear Ms. Salas:

Enclosed for filing are an orignal plus four copies of VoiceStream Wireless' Comments in the above-referenced dockets. Please date-stamp the enclosed copy of this transmittal letter upon receipt and return it to the courier.

Should you have any questions, please contact the undersigned.

Respectfully submitted,

Douglas G. Bonner
Sana D. Coleman

Counsel for VoiceStream Wireless

cc: Ms. Stacy Jordan (hand delivery)
Ms. Wanda Harris (hand delivery)
Mr. Jonathan M. Chambers (via facsimile)

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission

RECEIVED
JUN - 2 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185
	)	
Calling Party Pays Service Option in the Commercial Mobile Radio Services	)	WT Docket No. 97-207

COMMENTS OF VOICESTREAM WIRELESS CORPORATION

I. Introduction.

VoiceStream Wireless Corporation ("VoiceStream"), by its undersigned attorneys, hereby submits these Comments in response to the Commission's May 11, 2000 Public Notice in the above-captioned dockets.

VoiceStream supports the request of Sprint PCS to the extent that the Commission must clarify that CMRS providers are entitled to reciprocal compensation for the transport and termination of land-to-mobile calls based on a reasonable approximation of additional costs incurred. Absent such clarification by the Commission, CMRS entrants who seek non-discriminatory conditions will continue to have to choose between the lesser of two evils – to undergo lengthy and expensive arbitration and other litigation proceedings or opt-in to pre-existing arbitrated agreements that may require them to also agree to other less desirable terms.[1/]

[1/] The FCC's pick and choose rules are no safer harbor under the latter option, as ILECs in VoiceStream's experience are also obstructing or delaying the "pick and choose" rule promulgated by the Commission in 47 CFR §

Commission guidelines will solidify a national framework, which in turn, will promote entry by CMRS carriers into local markets on economically competitive bases. Accordingly, VoiceStream urges the Commission to clarify that incumbent local exchange carriers ("ILECs") cannot continue, on a state-by-state and case-by-case basis, to exploit their monopolistic position to refuse to provide on a consistent basis previously arbitrated symmetrical reciprocal compensation rates between ILECs and CMRS providers.

II. **Background**.

VoiceStream and its affiliates construct and operate PCS systems using Global System for Mobile Communications ("GSM") technology throughout the United States.[2/] VoiceStream, as successor-in-interest to Aerial Communications, Inc., is currently defending an appeal in an arbitrated interconnection appeal before the Eighth Circuit.[3/] In this case, US West Communications, Inc., is appealing the U.S. District Court for the District of Minnesota's affirmation in its 47 U.S.C. §252(e)(6) review of the Minnesota PUC's determination, among several other things, that calls originated on US West's network and terminated at Aerial's Mobile

---

51.809, as reaffirmed by the Supreme Court in *AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. 721 (1999).

[2/] On February 14, 2000, the Commission granted the transfer of control applications filed by VoiceStream and Omnipoint, transferring control of Omnipoint's licenses and authorizations to VoiceStream. *In re Applications of VoiceStream Wireless Corporation or Omnipoint Corporation, Transferors, et al.*, File Nos. 0000016354, *et al.* DA 99-1634 (rel. Feb. 15, 2000). On February 24, 2000, the shareholders of VoiceStream and Omnipoint approved the mergers between VoiceStream and Omnipoint, and between VoiceStream and Aerial. On March 30, 2000, the Commission granted the transfer of control applications filed by VoiceStream and Aerial, transferring control of Aerial's licenses and authorizations to VoiceStream. *In re Applications of Aerial Communications, Inc., Transferor, and VoiceStream Wireless Holding Corporation, Transferee, et al.*, WT Docket No. 00-3, File No. CWD 98-89 (rel. March 31, 2000). On May 4, 2000, the shareholders of VoiceStream and Aerial approved the merger between VoiceStream and Aerial. With the completion of these two mergers, VoiceStream and its affiliates will own licenses to provide service to an addressable market of 220 million people, and will be one of the largest GSM operators worldwide.

[3/] *US West v. Minnesota Public Utilities Commission, and Aerial Communications, Inc.*, File Nos. 99-3080 MNMI and 99-3224 MNMI (8th Cir., 2000).

Switching Center ("MSC") should be compensated to Aerial at a tandem rate. In this one instance alone, Aerial, for over three years, has expended a significant amount of time and financial resources to litigate this matter.

In VoiceStream's own direct experience, an ILEC (which cannot be identified due to nondisclosure restrictions), has refused to offer VoiceStream previously arbitrated tandem, symmetrical rates in a multistate interconnection agreement. The time and expense that VoiceStream has incurred in hearings to conclude interconnection agreements with this particular RBOC in multiple states is completely contrary to the competitive entry regime envisioned by the 1996 Act. Uncertain symmetry of reciprocal compensation at the state level only exacerbates the problem, as this issue must be relitigated by each CMRS carrier even in states that have already arbitrated the issue once, and certainly in states in which the issue has not been arbitrated at all. This puts a substantial cost burden upon new entrants while resulting in inconsistent state PUC interpretations of the FCC's *Local Competition Order* as it applies to CMRS carrier entitlement to tandem rate reciprocal compensation. Thus, as discussed below, Commission guidance is imperative on this issue.

III. Discussion.

A. The FCC Must Confirm that Where a CMRS Carrier's Mobile Switching Center ("MSC") Serves a Geographic Area Comparable to that Served by the ILEC's Tandem Switch, the Appropriate Proxy for the New Carrier's Costs is the LEC Tandem Interconnection Rate

Section 252(d)(2) of the Act provides that the terms and conditions of reciprocal compensation are just and reasonable only if they provide for recovery for each carrier of a

"reasonable approximation of the additional costs" for it to terminate calls.[4] In its Local Competition Order, the Commission found that the "additional cost" will vary depending on whether or not a tandem switch is involved.[5] The Commission concluded, therefore, that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch.[6] However, the Commission also concluded that a LEC's reciprocal compensation obligation under Section 251(b)(5) applies to all local traffic transmitted between LECs and CMRS provides.[7] The FCC determined further that "[w]here the interconnecting carrier's switch serves a geographic area comparable to that served by the ILEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate."[8] As Sprint PCS explains, the Commission did not perform a similar "additional cost" analysis with respect to CMRS networks which have fundamentally different cost structures.

The U.S. District Court in the District of Minnesota has accurately assessed the appropriate analysis for CMRS carriers. In affirming the Minnesota PUC, the court primarily considered a geographic test, rather than the "apples to oranges" functional equivalency

---

[4] 47 U.S.C. § 252(d)(2).

[5] *In the Matter of Implementation in the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCCR 15499, CC Docket No. 96-98 (Aug. 8, 1996) ("*Local Competition First Report and Order*").

[6] *Id.*

[7] *Id.* at 1041.

[8] *Id.*

approach, to determine whether a CMRS carrier's MSC operates more like a tandem switch rather than an end-office switch. The court found:

> While there may be no exact corollaries between the wireless and landline systems, there is evidence to suggest that the MSC has capabilities and reach that are of a certain equivalence to a tandem switch. The evidence also indicated that the MSC covers an area comparable to or larger than the tandem switch. Pursuant to FCC rules, this alone provides sufficient grounds for finding that the appropriate rate for the MSC is the tandem switch rate. [9]

VoiceStream urges the Commission to definitively rule that CMRS mobile switching centers are comparable in functionality to an ILEC tandem switch, consistent with the Minnesota District Court's decision.

It is important to note that a CMRS carrier's MSC need not cover the exact geographical areas served by an ILEC's corresponding tandem switches. Moreover, in applying the functional equivalency approach, the Commission must clarify that a CMRS provider's MSC need not operate in precisely the same manner as an ILECs tandem switch. Rather, as the Michigan Public Service Commission has concluded, they need only perform functions similar to or comparable to those performed by the ILEC's tandems.[10]

VoiceStream also supports Sprint PCS's position that traffic sensitive elements of a PCS network, including, but not limited to, the MSC, spectrum cell sites, backhaul links, base station

---

[9] *See US West v. Minnesota Public Utilities Commission, and Aerial Communications, Inc.*, File No. Civ. 98-1295 ADM/AJB (D. Minn. filed March 31, 1999) at 17-18. A copy of this unpublished decision is attached hereto as Exhibit A.

[10] Under this analysis, the Michigan PSC held that AirTouch's network performs similar functions to Ameritech Michigan's tandem and end office switches and that each of AirTouch's MSCs serves a geographic area that is comparable to or greater than that served by one of Ameritech Michigan's tandem switches. It therefore concluded that AirTouch's proposed symmetrical reciprocal compensation plan should be incorporated into its interconnection agreement with Ameritech Michigan. *See In the Matter of the Application of AirTouch Cellular, Inc. for Arbitration of Interconnection Terms, Conditions, and Prices from Ameritech Michigan*, Opinion and Order of the Michigan Public Service Commission, Case No. U-11973 (Aug. 17, 1999).

controllers, and the intelligent network platform and signaling system should be considered as "additional costs" under the Commission's CMRS reciprocal compensation guidelines.[11]

B. While Asymmetrical Reciprocal Compensation Arrangements Must be Addressed, the Commission Must, as a Threshold Matter, Clarify Its Approach to Symmetric Reciprocal Compensation Arrangements

As observed by Sprint PCS, under symmetric reciprocal compensation arrangements, the rate that is charged by the non-incumbent is in part determined by the facility in the non-incumbent's network that is deemed to be the equivalent of an incumbent's end office switch. The problem with this approach is that CMRS providers may have entire categories of additional traffic-sensitive costs than ILECs and may need to recover these additional costs. The ILEC's cost generally cannot function as an adequate proxy for additional costs incurred by CMRS providers. The Commission has recognized this deficiency and attempted to provide a solution under its scheme for asymmetrical compensation. To justify asymmetrical rates, a competing carrier must perform a cost study using the forward-looking economic cost based pricing methodology.[12]

As a matter of first impression, VoiceStream agrees with Sprint PCS that a wireless cost model is required, and VoiceStream is delighted that Sprint PCS has raised this issue before the Commission. VoiceStream is in the process of examining this issue further since the Commission's May 11, 2000 Public Notice requesting comment. While clarification of

---

[11] VoiceStream notes that with respect to spectrum prices there may be some variation for PCS carriers, such as VoiceStream. As Sprint points out, "additional cost" spectrum prices would be based upon auction values, and could be an "additional cost."

[12] 47 C.F.R. §51.711(b).

asymmetrical compensation is a worthy topic, VoiceStream urges the Commission, as an initial matter, to address the need for a base of minimum, nationwide symmetrical reciprocal compensation rate structures between CMRS carriers and ILECs at the ILEC tandem rate.

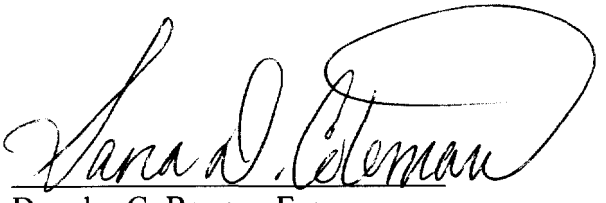
III. Conclusion.

For the foregoing reasons, VoiceStream Wireless Corporation encourages the Commission to establish national guidelines consistent with the above comments.

VoiceStream Wireless Corporation

Brian Thomas O'Connor
Vice President, Legislative & Regulatory Affairs
Robert Calaff
Corporate Counsel, Governmental & Regulatory Affairs
VoiceStream Wireless Corporation
1300 Pennsylvania Avenue, N.W.
Suite 700
Washington, D.C. 20004

(202) 204-3099



Douglas G. Bonner, Esq.
Sana D. Coleman, Esq.
Arent Fox Kintner Plotkin & Kahn PLLC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-6000

Its Attorneys

Dated: June 1, 2000

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

US West Communications, Inc.,

File No. Civ. 98-1295 ADM/AJB

Plaintiff,

vs.

Edward A. Garvey, Chairman,
Joel Jacobs, Commissioner,
Marshall Johnson, Commissioner,
Leroy Koppendrayer, Commissioner,
Gregory Scott, Commissioner (all in their official capacity as Commissioners of the Minnesota Public Utilities Commission);

Minnesota Public Utilities Commission,

and

Aerial Communications, Inc.,

Defendants.

MEMORANDUM OPINION AND ORDER

Geoffrey P. Jarpe and Martha J. Keon, Maun & Simon, PLC; Kevin J. Saville, US West Communications, Inc.; and Wendy M. Moser, Norton Cutler, and Blair A. Rosenthal, US West, Inc., for Plaintiff US West Communications, Inc.

Dennis D. Ahlers and Megan J. Hertzler, Assistant Attorneys General, for Defendants MPUC and the Commissioners.

Mark J. Ayotte and Darrin M. Rosha, Briggs and Morgan, P.A., for Defendant Aerial Communications, Inc.

Plaintiff US West Communications, Inc., ("US West") brought this action pursuant to the

FILED MAR 31 1999
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD
DEPUTY CLERK

Telecommunications Act of 1996 ("the Telecommunications Act" or "the Act"), specifically 47 U.S.C. § 252(e)(6), seeking judicial review of determinations made by the Minnesota Public Utilities Commission ("MPUC"). US West has named the individual commissioners of the MPUC as Defendants. For purposes of this order, the individual commissioners and the MPUC, itself, will be referred to collectively as the MPUC.

The above-captioned case is one of eight cases involving review of determinations made by the MPUC presently before this Court. On December 10, 1997, this Court issued an Order in US WEST Communications, Inc. v. Garvey, No. 97-913 ADM/AJB, slip op. at 3 (D.Minn. Dec. 10, 1997), determining the scope of review for cases brought pursuant to § 252(e)(6). The Court found the scope of review limited to an appellate review of the record established before the MPUC. Id. On May 1, 1998, the Court filed an Order addressing the standard of review in the eight Telecommunications Act cases. AT&T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998). Questions of law will be subject to *de novo* review while questions of fact and mixed questions of fact and law will be subject to the arbitrary and capricious standard. Id. at 11-13.

I. BACKGROUND

Before 1996, local telephone companies, such as US West, enjoyed a regulated monopoly in the provision of local telephone services to business and residential customers within their designated service areas. AT&T Communications of the Southern States v. BellSouth Telecommunications, Inc., 7 F.Supp.2d 661, 663 (E.D.N.C. 1998). In exchange for legislative approval of this scheme, the local monopolies ensured universal telephone service. Id. During this monopolistic period, the local telephone companies constructed extensive telephone

networks in their service areas. Id.

Congress passed the Telecommunications Act of 1996, in part, to end the monopoly of local telephone markets and to foster competition in those markets. Iowa Utils. Bd. v. FCC, 120 F.3d 753, 791 (1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S.Ct. 721 (1999) ; GTE North, Inc. v. McCarty, 978 F.Supp. 827, 831 (citing Joint Explanatory Statement of the Committee of Conference, H.R.Rep. No. 104-458, at 113 (1996)). Because the local monopolies, or incumbent local exchange carriers ("ILECs" or "incumbent LECs"), had become so entrenched over time through their construction of extensive facilities, Congress opted "not to simply issue a proclamation opening the markets," but rather constructed a detailed regulatory scheme to enable new competitors to enter the local telephone market on a more equal footing. AT&T Communications of the Southern States, 7 F.Supp.2d at 663. The Act obligates the incumbent LECs, like US West: (1) to permit a new entrant in the local market to interconnect with the incumbent LEC's existing local network and thereby use the LEC's own network to compete against it (interconnection); (2) to provide competing carriers with access to individual elements of the incumbent LEC's own network on an unbundled basis (unbundled access); and (3) to sell any telecommunication service to competing carriers at a wholesale rate so that the competing carriers can resell the service (resale). Iowa Utils. Bd., 120 F.3d at 791 (citing 47 U.S.C.A. § 251(c)(2)-(4)). In order to facilitate agreements between incumbent LECs and competing carriers, the Act creates a framework for both negotiation and arbitration. 47 U.S.C. § 252. Two sections of the Act, 47 U.S.C. §§ 251 and 252, explain the basic structure of the overall scheme for opening up the local markets.

Section 251

Section 251 describes the three relevant classes of participants effected by the Act: (1) telecommunications carriers, (2) local exchange carriers, and (3) incumbent local exchange carriers. 47 U.S.C. § 251(a), (b), and (c). A telecommunications carrier is a provider of telecommunications services, 47 U.S.C. § 153(44), telecommunication services being "the offering of telecommunications for a fee directly to the public . . . ," 47 U.S.C. § 153(46), and telecommunications being "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Both US West and Defendant Aerial Communications, Inc., ("Aerial") qualify as telecommunications carriers. A local exchange carrier ("LEC") is "any person that is engaged in the provision of telephone exchange service or exchange access," 47 U.S.C. § 153(26), within an exchange area. 47 U.S.C. § 153(47). An incumbent local exchange carrier is a company that was an existent local exchange carrier on February 8, 1996, and was deemed to be a member of the exchange carrier association. 47 U.S.C. § 252(h). In this action, only US West qualifies as an incumbent LEC.

Section 251 establishes the duties and obligations of these categories of participants. For example, all telecommunications carriers have a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers," 47 U.S.C. § 251(a); local exchange carriers have a duty "not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." 47 U.S.C. § 251(b); and incumbent LECs have a duty to negotiate in good faith with telecommunications carriers seeking to enter the local service market, as well as a duty to "offer for resale at wholesale prices any

telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c). Section 251 requires an incumbent LEC to provide interconnection that is at least equal in quality to that provided by the incumbent LEC to itself at any technically feasible point, 47 U.S.C. § 251(c)(2); to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, 47 U.S.C. § 251(c)(3); and to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. 47 U.S.C. § 251(c)(6).

Section 252

Section 252 delineates the procedures for the negotiation, arbitration, and approval of an interconnection agreement that permits a new carrier's entry into the local telephone market. 47 U.S.C. § 252. Once an incumbent LEC receives a request for an interconnection agreement from a new carrier, the parties can negotiate and enter into a voluntary binding agreement without regard to the majority of the standards set forth in § 251 of the Act. 47 U.S.C. § 252(a). If the parties cannot reach an agreement by means of negotiation, after a set number of days, a party can petition a State commission, here the MPUC, to arbitrate unresolved open issues. 47 U.S.C. § 252(b)(1).

An interconnection agreement adopted by either negotiation or arbitration must be submitted for approval to the State commission. 47 U.S.C. § 252(e)(1). The State commission must act within 90 days after the submission of an agreement reached by negotiation or after 30 days of an agreement reached by arbitration. 47 U.S.C. § 252(e)(4). The State commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. §

252(e)(1).

FCC Regulations

47 U.S.C. § 251(d)(1) directs the FCC to promulgate regulations implementing the Act's local competition provisions within six months of February 8, 1996. "Unless and until an FCC regulation is stayed or overturned by a court of competent jurisdiction, the FCC regulations have the force of law and are binding upon state PUCs [Public Utility Commissions] and federal district courts." AT&T Communications of California v. Pacific Bell, 1998 WL 246652, at *2 (N.D.Cal. May 11, 1998) (citing Anderson Bros. Ford. v. Valencia, 452 U.S. 205, 219-20 (1981)). Review of FCC rulings is committed solely to the jurisdiction of the United States Court of Appeals pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).

On August 8, 1996, the FCC issued its First Report and Order, which contains the Agency's findings and rules pertaining to the local competition provisions of the Act. Iowa Utils. Bd., 120 F.3d at 792 (citing First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499, CC Docket No. 96-98 (Aug. 8, 1996) ("First Report and Order")). Soon after the release of the First Report and Order, incumbent LECs and State Commissions across the country filed motions to stay the implementation of the Order, in whole or in part. The cases were consolidated in front of the Eighth Circuit. In Iowa Utilities Board, the Eighth Circuit decided that "the FCC exceeded its jurisdiction in promulgating the pricing rules regarding local telephone service." Id. The Eighth Circuit also vacated the FCC's "pick and choose" rule as being incompatible with the Act. Id. at 801. Other provisions of the First Report and Order were upheld by the Eighth Circuit.

On August 8, 1996, the FCC also promulgated the Second Report and Order, which

contains additional FCC comments and regulations concerning provisions of the Telecommunications Act of 1996 that were not addressed in the First Report and Order. The People of the State of California v. FCC, 124 F.3d 934, 939 (8th Cir. 1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S.Ct. 721 (1999). Again many local exchange carriers and state commissions filed suit challenging the order. Several cases were combined in front of the Eighth Circuit, which issued another order addressing the FCC's rules. Id.

On January 25, 1999, the Supreme Court reversed a significant portion of the Eighth Circuit's decisions. AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. at 721. The Supreme Court ruled that the FCC does have jurisdiction to implement local pricing rules and the FCC's rules governing unbundled access, with the exception of Rule 319, are consistent with the Act. Id. at 738. In addition, the Supreme Court upheld the FCC's "pick and choose" rule as a reasonable, and possibly the most reasonable, interpretation of § 252(i) of the Act. Id.

Procedural History

Aerial, a Commercial Mobile Radio Service ("CMRS"), sent a letter dated March 28, 1997, to US West requesting to negotiate an Interconnection Agreement pursuant to the Act. (A1, Ex. A). The parties failed to reach accord on all issues and Aerial petitioned the MPUC for arbitration on September 3, 1997. (A1; Petition of Aerial at 11). In its Petition for Arbitration, Aerial noted three open issues for arbitration:

(1) whether Aerial should "be compensated at the tandem interconnection rate for its termination of US West originated traffic;" (A1; Petition of Aerial at 6)

(2) whether after the MPUC approves an agreement between Aerial and US West, Aerial

will be permitted to use the most favored nations provision contained in § 252(i) of the Act; (A1; Petition of Aerial at 8)

(3) whether "reciprocal compensation and contract rates apply to all Aerial and US West originated traffic exchanged by those parties within the Minneapolis MTA [Major Trading Area],[1] even if such traffic crosses LATA [Local Access and Transport Area][2] or state boundaries." (A1; Petition of Aerial at 9) (footnotes added).

On September 19, 1997, the MPUC accepted Aerial's petition and established procedures for the arbitration. (A3; MPUC Order Granting Petition at 1-5). The MPUC referred the matter to the Office of Administrative Hearings[3] to designate an Administrative Law Judge (ALJ) to conduct arbitration proceedings and issue a recommendation. (A3; MPUC Order Granting Petition at 4). In its order, the MPUC noted that the Minnesota Department of Public Service ("DPS")[4] and the Residential Utilities Division of the Office of the Attorney General ("RUD-

---

[1]A Major Trading Area ("MTA") is a broadband PCS service area for CMRS providers established by FCC regulations. See 47 C.F.R. § 24.202. MTAs can cross state lines and can encompass more than one local access and transport area ("LATA"). See, infra, n.2. For example, the Minneapolis MTA includes the states of Minnesota and North Dakota, the eastern portion of South Dakota and the western portion of Wisconsin. (A11; Direct Testimony of Keith Sutton at 3).

[2]A Local Access and Transport Area ("LATA") is "a contiguous geographic area" established by a Bell operating company pursuant to a consent decree. 47 U.S.C. § 153(25). Generally a state will have more than one LATA. An InterLATA call is a call that crosses LATA boundaries, while an IntraLATA call remains within one LATA. See 47 U.S.C. § 153(21).

[3]The Office of Administrative Hearings is an independent state agency which employs administrative law judges to conduct impartial hearings on behalf of state agencies. See Minn. Stat. § 14.48 et seq.

[4]The Minnesota Department of Public Services is a state agency charged with the responsibility of investigating utilities and enforcing state law governing regulated utilities, as

OAG")[5] had a right under state law to intervene in all MPUC proceedings; both of the agencies opted to intervene as non-participants in the ALJ hearing. (A3; MPUC Order Granting Petition at 6); (A9). The MPUC also stated that: "The burden of production and persuasion with respect to all issues of material fact shall be on US WEST, pursuant to Minn. Rules 7812.1700, subp. 23. 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." (A3; MPUC Order Granting Petition at 10). The MPUC explained that the federal Act and the Minnesota Telecommunications Act of 1995 are designed to create competitive entry into the local telephone market and that placing the burden of proof on US West facilitates this purpose. (A3; MPUC Order Granting Petition at 10). In addition, the MPUC noted that US West controlled most of the key information relevant to the proceedings. (A3) (MPUC Order Granting Petition at 10).

ALJ Allen Giles presided over the arbitration hearing on October 21, 1997. (A10). Attorneys for US West, Aerial, and the DPS were present, as was a member of the MPUC staff. (A10; ALJ Hearing Transcript at 2-4). Three witnesses were called and various exhibits were entered. (A10; ALJ Hearing Transcript at 3). Aerial called Keith Sutton, Vice President of Mobile Switching for Nokia Telecommunications, as an expert witness. (A10; ALJ Hearing Transcript at 10-90); (A11); (A12). US West called Craig Wiseman, a member of US West's

---

well as enforcing the orders of the MPUC.

[5]The Attorney General of Minnesota is "responsible for representing and furthering the interests of residential and small business utility consumers through participation in matters before the Public Utilities Commission." Minn. Stat. § 8.33.

technical staff in the Interconnection Planning Group, and Gerald E. Coe, a member of US West's technical staff in the Technical Industry Issues Management Group. (A10; ALJ Hearing Transcript at 91-140); (A21-A23). Following the hearing, the parties, including the DPS, submitted briefs. (A24-A27).

On November 12, 1997, the ALJ issued a Report and Recommended Arbitration Decision. (A28). US West filed exceptions to the Recommended Arbitration Decision on November 24, 1997. (A30). The MPUC heard a staff briefing and oral arguments on December 2, 1997. (A32). The MPUC voted on two of the open issues but tabled its decision on the issue of reciprocal compensation for intra-MTA, inter-LATA calls until December 16, 1997. (A32; MPUC Hearing of 12/2/97 at 41-56). The MPUC directed the parties to submit additional filings on that issue. (A32; MPUC Hearing of 12/2/97 at 55). The MPUC met again on December 16, 1997 to resolve the remaining issue. (A42; Order Resolving Disputed Arbitration Issues at 1).

On December 31, 1997, the MPUC issued its Order Resolving Disputed Arbitration Issues and Ordering Submission of Final Contract. (A42). The MPUC reaffirmed that the burden of proof was properly placed on US West with respect to all issues of material fact and also resolved the open issues. (A42). The MPUC determined that Aerial should receive the full tandem and transportation switching rate for the operation of its Mobile Switching Center ("MSC"). (A42; Order Resolving Disputed Arbitration Issues at 5). The MPUC accepted US West's unopposed proposed language regarding the most favored-nation issue: "The Parties agree that the provisions of Section 252[i] of the Act shall apply, including state and federal interpretive regulations in effect from time to time." (A42; Order Resolving Disputed Arbitration Issues at 6). The MPUC also determined that US West has an obligation under § 251(b)(5) and

FCC regulations to reciprocally compensate Aerial for any transport and termination service Aerial provides for intraMTA, interLATA traffic originating in US West's exchanges. (A42; Order Resolving Disputed Arbitration Issues at 8). The MPUC directed the parties to submit a final contract, containing all of the arbitrated and negotiated terms, to it within 30 days of the date of the Order. (A42; Order Resolving Disputed Arbitration Issues at 9).

On February 2, 1998, the parties submitted an Agreement in accordance with the Order; the parties expressly reserved all rights in connection with any future challenges to the Order. (A48; Letter of William Batt at 1). In early January of 1998, both Aerial and US West filed Petitions for Reconsideration. (A43, A44). On February 27, 1998, the MPUC issued its Order Denying Reconsideration, Approving Contract as Modified, and Requiring Filing Such Modified Contract. (A56). In that Order, the MPUC denied the parties' Petitions for Reconsideration; the MPUC also rejected provisions in the Agreement that had not been addressed in the original Order and directed the parties to make further modifications. (A56). The additional modifications included:

(1) The parties agreeing to notify the MPUC of any proceeding involving the Agreement;

(2) A requirement that the MPUC approve any amendment to the Agreement;

(3) A requirement that if Aerial provides pager service, US West will compensate it for paging traffic originating from US West's subscribers;

(4) A requirement that the parties change the definition of "Local Calling Area" to the "geographic area defined by the MTA within which [Aerial] provides CMRS services where local interconnection rates apply as defined in FCC First Report and Order 96-325 47 CAR 51.701(b)(2)";

(5) A requirement that the parties adopt the language for "local telecommunication traffic" contained in the FCC regulations;

(6) A requirement that the parties add a provision concerning US West Dex's directory listing and yellow page advertising;

(7) A requirement that the parties submit a copy of any arbitration opinion concerning the Agreement to the MPUC for approval;

(8) A requirement that the parties notify the MPUC of any assignment of rights under the Agreement.

(A56; Order Denying Reconsideration at 7-13). The MPUC found the remainder of the submitted Agreement met the requirements of the Act, the FCC regulations, and the public interest. (A56) (Order Denying Reconsideration at 13). The parties were ordered to submit a complying Agreement within 30 days. (A56) (Order Denying Reconsideration at 14). On March 30, 1998, the parties submitted a US West-Aerial Agreement that complied with the Order Denying Reconsideration; they reserved their rights in connection with any future challenges. (A57; Type 2 Wireless Interconnection Agreement Between US West and Aerial at § 1.1). On April 6, 1998, the MPUC issued a Notice of Contract Approval. (A58).

On May 5, 1998, pursuant to 47 U.S.C. § 252(e)(6), US West filed a complaint in this Court seeking review of the MPUC's Orders. US West alleges five counts in its complaint: (1) Count I, the MPUC violated US West's due process rights and the dictates of the Act and Minnesota law by placing the burden of proof on US West; (2) Count II, the MPUC violated 47 U.S.C. § 252(d)(2) and (d)(A)(ii) by treating Aerial's Mobile Switching Center ("MSC") as a tandem switch for the purpose of compensation; (3) Count III, the MPUC violated 47 U.S.C. §

251(b)(5) when it directed that the parties provide reciprocal compensation for all intraMTA traffic, even when it crosses LATA boundaries; (4) Count IV, the MPUC violated 47 U.S.C. § 252(e)(2)(A) when it imposed additional provisions or modifications to negotiated provisions without a finding that the original provisions conflicted with the "public interest, convenience, and necessity"; and (5) Count V, the MPUC exceeded its authority when it imposed conditions on US West Dex.

II. TANDEM TRANSPORT AND TERMINATION

US West argues that a provision of the Agreement imposed by the MPUC unlawfully compensates calls terminated at Aerial's MSC at the tandem switching rate. US West alleges that the MPUC failed to consider actual function, that is that the MSC actually operates like an end-office switch rather than a tandem switch, in making its determination.

Section 251(b)(5) of the Act directs that all local exchange carriers are obligated to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). The terms and conditions for reciprocal compensation must be just and reasonable and, to meet this standard, they must allow for the recovery of a reasonable approximation of the "additional cost" of transporting and terminating a call begun on another carrier's network. 47 U.S.C. § 252(d)(2)(A). The FCC found that the "additional cost" will vary depending on whether or not a tandem switch is involved. First Report and Order, ¶1090. The FCC, therefore, determined that state commissions can establish transport and termination rates that vary depending on whether the traffic is routed through a tandem switch or directly to a carrier's end-office switch. Id. The FCC directed state commissions to "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." Id. The FCC further instructed that where the new carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the new carrier's costs is the LEC tandem interconnection rate. First Report and Order, ¶ 1090; 47 C.F.R. § 51.711(a)(3).[6] Therefore, in order to evaluate whether a switch performs as a tandem switch, it is appropriate to look at both the function and geographic scope of the switch at issue.

Whether a switch performs as a tandem or end-office switch is a factual determination that has been expressly delegated to state commissions by the FCC. Because this is a question of fact, the MPUC's determination is reviewed using the arbitrary and capricious standard of review. AT&T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998) (order denying motions to dismiss and determining standard of review); see TCG Milwaukee, Inc. v. Public Service Commission of Wisconsin, 980 F.Supp. 992, 1004 (W.D.Wisc. 1997).

The fundamental technical differences between wireless and landline telephone systems greatly complicate the comparison of the functions of their component elements. It is to some extent like comparing the proverbial apples and oranges.

---

[6]The Eighth Circuit vacated 47 C.F.R. § 51.711(a)(3) on the ground that the FCC lacked jurisdiction to issue the pricing rules. Iowa Utils. Bd., 120 F.3d at 800, 819 n.39. However, the Supreme Court overturned the Eighth Circuit and reinstated the FCC's pricing rules, including 47 C.F.R. § 51.711, finding that "the Commission has jurisdiction to design a pricing methodology." AT&T Corp., 119 S.Ct. at 733.

Keith Sutton, Vice President of Mobile Switching for Nokia Telecommunications, testified on behalf of Aerial that the functionalities and capabilities of the MSC far exceed those of an end-office switch. (A10; ALJ Hearing at 16); (A11; Direct Testimony of Keith Sutton at 7). Sutton explained that although the MSC performs a call completion function like an end-office switch, it does so over a much greater area, the entire MTA. (A11; Direct Testimony of Keith Sutton at 7). In fact, the MSC covers a geographic area far in excess of any tandem switch in Minnesota; the MSC covers Minnesota and North Dakota, as well as the eastern portion of South Dakota and the western portion of Wisconsin. (A11; Direct Testimony of Keith Sutton at 2, 3). Sutton opined that in Aerial's wireless system, it is the Base Controller Station ("BCS") that is most analogous to an end-office switch.

Sutton explained that a tandem switch performs "some or all of the following functions: 1) interconnect end office switches; 2) connect to other tandems; 3) serve as Centralized Automatic Message Accounting ("CAMA") points to end offices; 4) provide access to interexchange carriers; and 5) provide access to operator positions." (A11; Direct Testimony of Keith Sutton at 8 (citing Bellcore SR-TSV-00275)). He explained that tandem switches are essentially the second tier in a landline system, providing trunk-to-trunk switching as well as two basic network functions - traffic congestion and centralization of services. (A11; Direct Testimony Keith Sutton at 8, 10). Sutton stated that:

> [T]he MSC serves as the functional equivalent of a tandem switch. This is evidenced by:
>
> 1. The MSC is connected to multiple LEC tandems and ICs. End office switches do not have these connections.
>
> 2. The area served by the PCS-GSM [Personal Communication System - Global Systems for Mobile Communications] network under the MSC can cross LATA

boundaries, just as tandem switches have the technical ability to do.

3. The MSC has signaling transfer point ("STP") capability for carrying traffic between Access Tandems, with the MSC being one tandem switch leg.

4. The MSC serves as the gateway connection to the PCS-GSM network and other switches in the PCS-GSM network. For example, if a subscriber who resides in state A is roaming in state B, the gateway MSC will access the database locating the subscriber and route the call to the serving MSC in performing tandem switch routing of traffic.

5. The MSC serves as the traffic concentrator for all data and messaging services.

(A11; Direct Testimony of Keith Sutton at 12). Sutton continued by stating that the "MSC concentrates traffic from the served PCS-GSM network, from other MSCs in the PCS-GSM network, and from interfaces within the wireline network." (A11; Direct Testimony of Keith Sutton at 12). Sutton admitted that there is one tandem switch function that the MSC does not perform, CAMA, but countered that the MSC performs several functions that a tandem switch does not perform. (A11; Direct Testimony of Keith Sutton at 13-14).

US West, in turn, presented strong evidence that the MSC functions as an end-office switch rather than a tandem switch. (A21; Direct Testimony of Craig Wiseman at 11). US West's expert Craig Wiseman, a member of US West's technical staff in the Interconnection Planning Group, testified that the MSC only connected Aerial Communications subscribers to each other or to other local service provider networks in order to deliver calls to or receive calls from Aerial Communications subscribers. (A21; Direct Testimony of Craig Wiseman at 11). He then characterized these as purely end-office functions. (A21; Direct Testimony of Craig Wiseman at 11). Wiseman also testified that other wireless companies, such as GTE Mobilenet, SouthWestco, and Aliant, had recognized their switching offices as end offices in arbitrated agreements, and that other state arbitration panels had determined that wireless companies are

not entitled to tandem switching and transport compensation. (A21; Direct Testimony of Craig Wiseman at 13-14).[7]

Based on the evidence before the ALJ and the MPUC, it appears that the MSC performs functions comparable to both end-office and tandem switches. If faced with the MPUC's choice and if solely limited to the issue of function, the Court may well have determined that calls terminated at the MSC should not be compensated at the tandem switch rate. However, it is not the Court's role to make that decision and the MPUC's consideration is not limited to the MSC's function but also includes the MSC's geographic scope. Although there was conflicting evidence concerning the function of the MSC, the testimony of Sutton provided sufficient basis for the MPUC's finding that the MSC performs a tandem switch function.[8] This is particularly true in light of the FCC's admonition to consider the capabilities of new technology such as wireless networks. While there may be no exact corollaries between the wireless and landline systems, there is evidence to suggest that the MSC has capabilities and reach that are of a certain equivalence to a tandem switch.[9] The evidence also indicated that the MSC covers an area

---

[7]It is unclear as to whether the other wireless companies' systems exactly mirror Aerial's PCS-GSM system. Sutton testified that the PCS-GSM system differs from traditional cellular communications systems. (A11; Direct Testimony of Keith Sutton at 4). According to Sutton, the PCS-GSM system is fully digital and employs BSCs to perform certain switching functions. (A11; Direct Testimony of Keith Sutton at 4-5). Furthermore, Aerial uses just one MSC to serve the entire four state Minneapolis MTA. (A11; Direct Testimony of Keith Sutton at 5).

[8]US West argued that the MPUC should have been limited by the definition of tandem switch found in 47 C.F.R. § 51.319(c)(2). However, since the MPUC made its decision, 47 C.F.R. § 51.319 was vacated by the Supreme Court. AT&T Corp., 119 S.Ct. at 736. US West's argument is now moot in light of the Supreme Court's recent decision.

[9]It was permissible for the MPUC to take into consideration the fact that the MSC will be performing more tandem-like functions over time as Aerial becomes more established in

comparable to or larger than the tandem switch. Pursuant to the FCC rules, this alone provides sufficient grounds for finding that the appropriate rate for the MSC is the tandem switch rate.

The MPUC finding that calls terminated at Aerial's MSC should be compensated at the tandem switching rate is not arbitrary and capricious.

III. IntraMTA TRAFFIC THAT CROSSES LATA BOUNDARIES

US West argues that the MPUC erred when it determined that US West must compensate Aerial for the transport and termination of all traffic within its MTA, even if it crosses LATA boundaries and involves third-party interexchange carriers which ultimately hand off the traffic for termination on Aerial's network. US West relies upon the portion of the FCC Order stating that "the reciprocal compensation provision of section 251(b)(5) for transport and termination of traffic do not apply to the transport and termination of interstate or intrastate interexchange traffic." First Report and Order, ¶1034. Aerial argues that because the exchange could involve a third-party carrier the reciprocal compensation requirement of § 251(b)(5) does not apply.

Section 251(b)(5) of the Act states only that all local exchange carriers have an obligation to establish reciprocal compensation for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). Because the Act is silent as to whom the duty is owed, the FCC determined that under § 251(b)(5) the LECs' duty extends to any telecommunications carrier, including CMRS providers. First Report and Order, ¶1041.

The license areas for CMRS providers are federally determined and often are larger than

---

Minnesota. (A42; Order Resolving Disputed Arbitration Issues at 5). The purpose of the Act is to open up the local telephone market to competition; because competitors do not yet have a strong foothold in the market, they are not yet functioning at full capability.

the incumbent LECs' local service areas, which are determined by state commissions. Id. ¶1043. Therefore, in the case of CMRS' providers and § 251(b)(5)'s reciprocal compensation dictate, the FCC lacked a common ground between CMRS providers and incumbent LECs when selecting the geographic scope of the agreement. The FCC ultimately chose the MTA as the area to be covered by § 251(b)(5)'s reciprocal compensation dictate. Id. ¶1043. The FCC expressly stated that "traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA . . . is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges." Id. Acting pursuant to the FCC regulations, the MPUC correctly concluded that US West has an obligation under § 251(b)(5) to compensate Aerial, on a reciprocal basis, for any transport and termination service Aerial provides with regard to any intraMTA traffic, including that which crosses any LATA boundaries; it is the MTA that controls, not the LATA.

IV. US WEST DEX

US West claims the MPUC exceeded its authority when it rejected the parties' agreement to defer directory and yellow page issues to later negotiations and instead required the parties to adopt a provision that regulated US West Dex. US West argues that the MPUC does not have the authority, under either state law or the Act, to impose obligations on US West Dex.

In response, the MPUC and Aerial claim that the Commission did not directly regulate US West Dex. They argue that the MPUC did what it was required to do by the Act, ensure that Aerial had nondiscriminatory access to telephone numbers and listings, and that US West provide Aerial with services that are "at least equal in quality to that provided by the incumbent LEC to itself." First Report and Order, ¶ 970.

US West Communications, Inc., the party in this case, and US West Dex are wholly owned subsidiaries of US West, Inc. ("US West Parent"). MCI Telecomms. Corp. v. US West Communications, Inc., Case No. C97-1508R, at 23-24 (July 21, 1998 W.D.Wash.). US West Dex is the publishing branch of the parent company and publishes US West's white and yellow page directories. Id. at 24. US West Dex is not a named party to the underlying Agreements in this case.

Contrary to the MPUC's and Aerial's argument, the Commission did regulate US West Dex. The MPUC required the parties to include language in the Agreement that placed a direct obligation on US West Dex: "US WEST Dex will give the Carrier the same opportunity to provide directory listings as it provides to US WEST (for example, through some type of bidding process)." (A56; Order Denying Reconsideration at 11). While other portions of the MPUC's Order were explicitly directed only at US West, the MPUC did seek to control US West Dex's business and contract agreements, and therefore regulate US West Dex: "US WEST shall make its contracts with US WEST DEX available for review by the Carrier, as necessary, to ensure that the Carrier is receiving the same services at the same terms as US WEST." (A56; Order Denying Reconsideration at 11). The question becomes whether the MPUC had the authority to regulate US West Dex under either state law or the Act, or whether it assumed authority it never had as the Plaintiff claims.

Under state law, the MPUC has the "powers expressly delegated by the legislature and those fairly implied by and incident to those expressly delegated." In the Matter of Northwestern Bell Telephone Co., 371 N.W.2d 563, 565 (Minn.Ct.App. 1985) (citing Great Northern Railway Co. v. Public Service Comm'n, 169 N.W.2d 732, 735 (Minn. 1969)). Implied powers must be

fairly evident from the express powers. Id. (quoting Peoples Natural gas Co. v. Minnesota Public Utilities Comm'n, 369 N.W.2d 530 (Minn. 1985)). As the Minnesota Supreme Court held, Chapter 237 was created to resolve issues concerning public utility telephone companies; a business that publishes directories is not a telephone company and therefore does not fall under the regulatory powers of the MPUC. In the Matter of Northwestern Bell Telephone Co., 367 N.W.2d 655, 660 (Minn. 1985). US West, as a utility, is regulated by the MPUC, while US West Dex, which is in the business of publishing directories, is not. See id. The MPUC does not have the power under state law to regulate US West Dex. The Court must therefore analyze federal law as the possible source of the MPUC's authority to regulate US West Dex.

The Act states that local exchange carriers have the duty to provide competitors with nondiscriminatory access to telephone numbers, directory assistance, and directory listings. 47 U.S.C. § 251(b)(3). US West Dex is not a local exchange carrier because it does not engage in providing telephone exchange service or exchange access. See 47 U.S.C. § 153(26). As US West Dex is not a covered entity under the Act, the MPUC cannot use the statute to regulate US West Dex or impose an obligation on it. See MCI Telecommunications Corp. v. US West Communications, Inc., Case No. C97-1508R, at 25 (July 21, 1998 W.D.Wash.).[10]

Because it lacked the power under both state law and the Act to regulate US West Dex,

---

[10] The FCC concluded that the term "directory listings" encompasses directory listings published by a telecommunication carrier and its "affiliates," but then never defines the term "affiliate." 47 C.F.R. § 51.5. Given the Act's express limitation of covered entities to telecommunications carriers, a telecommunications carrier's control of an entity must be a prerequisite for finding that the entity is an affiliate within the meaning of the FCC's rules. Although US West and US West Dex share a parent company that does not equate to exerting control over one another. Without some evidence of US West's control of US West Dex, the Court cannot conclude that US West Dex is an affiliate of US West.

the MPUC exceeded its authority by ordering the addition of a provision to § 11 requiring US West Dex to treat US West and its competitors the same with respect to yellow page advertising and white page directory listings. These matters are remanded to the MPUC for further deliberations consistent with this Order.[11]

V. MPUC IMPOSED REQUIREMENTS

US West argues that the MPUC upheld an incorrect standard of review in evaluating negotiated §§ 4.9.1, 3.26, and 4.3.4 of the US West-Aerial Interconnection Agreement. The Act sets forth two separate standards of review for a state commission's evaluation of: (1) agreements adopted by arbitration and (2) agreements adopted by negotiation. For arbitrated agreements, a state commission can reject the agreement or any portion of the agreement, if it finds that "the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section." 47 U.S.C. § 252 (e)(2)(B). In the case of negotiated agreements, the Act creates a lower standard of review and directs that a state commission can only reject:

> an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that-
>
> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
>
> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity . . . .

47 U.S.C. § 252(e)(2)(A).

---

[11] As was noted by the Eastern District of North Carolina, the Act does not explain what should occur if a district court finds that an Interconnection Agreement violates the Act. AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., 7 F.Supp.2d 661, 668 (E.D.N.C. 1998). Given the appellate nature of the proceeding, a remand to the state commission appears is the most appropriate option. Id.

US West argues that the MPUC improperly rejected negotiated provisions of the Agreement because they did not meet all of the requirements of the Act or the FCC regulations, the standard of review which properly applies to arbitrated agreements. The MPUC responds that it acted within the authority granted to it by the Act and state law, because it rejected portions of the agreement that it found to be inconsistent with the public interest. Aerial argues that the MPUC acted in a manner consistent with § 252(e)(1) of the Act when it rejected the Agreement and that the modifications proposed by the MPUC were necessary to conform the Agreement to the requirements of federal law. Aerial also argues that neither parties' rights were violated because they voluntarily agreed to the modifications.

In the case of the three sections in dispute, the only express reason given by the MPUC for rejecting the sections was that the sections were inconsistent with the FCC's Interconnection Order: "[t]he Commission finds that the companies' proposed Section 4.9.1 is contrary to the FCC's Interconnection Order, ¶ 1008 and constitutes grounds to reject the contract" (A56; Order Denying Reconsideration at 9); "[t]he Commission agrees with the Department that the Companies' current definition of 'local calling area' is not consistent with the FCC's First Report and Order and, as such, constitutes grounds to reject the Companies' contract" (A56; Order Denying Reconsideration at 10 (rejecting § 3.26 of the Agreement)); and "[t]he Commission finds that Section 4.3.4, as proposed, is inconsistent with the FCC's Interconnection Order and the Act[,] and, hence, is grounds to reject the Companies' contract." (A56; Order Denying Reconsideration at 11). Rejecting a provision solely for inconsistency with an FCC regulation is the standard of review applicable to arbitrated agreements. Congress expressly created different standards to be applied by a state commission in analyzing arbitrated as opposed to negotiated

agreements. By creating a lower standard of review for negotiated agreements, Congress encouraged carriers to negotiate their agreements. See Iowa Utils. Bd., 120 F.3d at 801 ("The structure of the Act reveals the Congress's preference for voluntarily negotiated interconnection agreements between incumbent LECs and their competitors over arbitrated agreements."). It would undermine the design and effect of the Act if the two standards of review became indistinguishable. A state commission, acting pursuant to its power under § 252(e)(1) of the Act, cannot reject a negotiated provision solely because it does not conform to the Act or an FCC rule. Because the MPUC was reviewing negotiated portions of the Interconnection Agreement, it was improper for it to reject §§ 4.9.1, 3.26, and 4.3.4 based solely on an inconsistency with the FCC's Interconnection Order.

Whether US West may have agreed to the changes after the MPUC issued its Order, or even if US West might have failed to object to certain changes suggested by the DPS, is of no significance. Were it not for the impermissible action of the MPUC, the provisions at issue would have remained as originally submitted by the parties. Therefore, in relation to these provisions, the MPUC's actions had a clear impact on the final form of the Agreement and are properly reviewable under 47 U.S.C. § 252(e)(6). In addition, a party's altering provisions at the order of a state commission cannot reasonably be construed as a voluntary action incorporating the provisions.[12]

---

[12] The only indication that US West acted voluntarily came in relation to § 3.26, when the MPUC stated in its order that "[t]he Companies accepted the Department's recommendations" to modify the language concerning the definition of Local Calling Area. (A56; Order Denying Reconsideration at 10). However, that passage gives no indication as to the time when the parties accepted the recommendations. They may have accepted the recommendations at the hearing after the MPUC indicated that it would reject the provision as submitted, which would

As for the MPUC's argument that it acted pursuant to the dictates of 47 U.S.C. § 252(e)(3) ("nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement") and state law, there is nothing in the state law cited by the MPUC that establishes the MPUC's authority to impose its proposed changes. The MPUC first cites to various provisions of Minnesota statutory law, Minn. Stat. §§ 237.06, 237.11, 237.16, as providing it with the general duty to protect the public interest and then argues that it acted to protect the public interest when it rejected the provisions at issue.

Under state law, the MPUC has only the "powers expressly delegated by the legislature and those fairly implied by and incident to those expressly delegated." In the Matter of Northwestern Bell Telephone Co., 371 N.W.2d 563, 565 (Minn.Ct.App. 1985) (citing Great Northern Railway Co. v. Public Service Comm'n, 169 N.W.2d 732, 735 (Minn. 1969)). Implied powers must be fairly evident from the express powers. Id. (quoting Peoples Natural gas Co. v. Minnesota Public Utilities Comm'n, 369 N.W.2d 530 (Minn. 1985)). None of the sections cited by the MPUC, each of which deal with specific and well-defined powers, such as the powers to investigate inadequate services and ensure fair rates, nor any of the other Minnesota statutes delineating the powers and obligations of the MPUC, explicitly state that the MPUC has the

---

not alter the Court's analysis, or at some different point. Moreover, the modified Agreement submitted by the parties included a provision stating that the parties were entering into the Agreement without prejudice as to any position that they had earlier taken. This indicates that US West was reserving its right to object to any of the modifications imposed or suggested by the MPUC and the DPS, including the modifications to § 3.26. See (A57; Type 2 Wireless Interconnection Agreement Between US West and Aerial at § 1.1). Based on this evidence, the Court concludes that US West did not agree to the modification before the MPUC indicated its intent to reject § 3.26 as submitted.

general authority to protect the public interest. Because the MPUC is an agency of limited authority, it would be improper to infer from any specific statute or statutes a grant of general power to protect the public interest. To do so would give the agency unwarranted and unlimited power to act.

Because the MPUC lacked the authority to impose the requirements at issue under both § 252(e)(1) and state law, this matter is remanded to the MPUC for further deliberation.

VI. BURDEN OF PROOF

The MPUC, acting pursuant to Minn. Rules 7812.1700, subp. 23,[13] which was adopted to govern the arbitration of intercarrier negotiations, created the following burden of proof for the parties: "The burden of production and persuasion with respect to all issues of material fact shall be on US 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." (A3; MPUC Order Granting Petition at 10). US West challenges this allocation of the burden of production and persuasion in a conclusory fashion by stating that it conflicts with the Act and FCC rules.[14] US West provides

---

[13]Minn. Stat. § 237.16 authorized the MPUC to promulgate rules governing local competition and to define the procedures for competitive entry and exit. Minn. Stat. § 237.16, subd. 8.

[14]US West also alleges that the ALJ abused his discretion by failing to shift the burden to Aerial on any issue. The only example US West gives of this alleged abuse of discretion is in relation to the issue of "whether Aerial's MSC functions as a tandem." This issue concerned whether a tandem switch and an MSC were comparable for the purpose of the transport and termination of telecommunications. US West controlled the information about the function and cost of its tandem switch; Aerial controlled the information about the function and cost of the MSC. Assuming that the ALJ maintained the burden on US West, given the equal split as to the possession of information, it was reasonable for the ALJ not to switch the burden to Aerial. US

no specifics concerning this alleged conflict.

When Congress has spoken as to the burden of proof or production to be applied in an administrative proceedings, the courts must defer to Congress. Steadman v. S.E.C., 450 U.S. 91, 95-96, 101 S.Ct. 999, 1004-05 (1981). However, when Congress is silent as to this issue, it is left to the judiciary to resolve the question. 450 U.S. at 95, 101 S.Ct. at 1004.

The provisions of the Act and the FCC rules, which address the issue, place the burden of proof on the incumbent LEC. See 47 C.F.R. §§ 51.5 ("An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.") and 51.321(d) ("An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible."). There appears to be no section of the Act or FCC rules that places the burden of proof on the new entrant. Although the MPUC has admittedly placed a heavy burden of proof on the incumbent LEC, there is no evidence that such a standard conflicts with the Act or the FCC rules.[15] To the extent Congress and the FCC have

---

West failed to specify other instances when the ALJ improperly failed to switch the burden of proof.

[15]The one apparent exception involves the issue of technical feasibility of interconnection. The FCC rules create a clear and convincing standard in relation to this issue while the MPUC created a preponderance of the evidence standard. As this apparent conflict is not relevant to this case, it will not be addressed here.

spoken to the burden of proof, the MPUC's position does not conflict with their directives.

As for the burden of proof for the remainder of the statute, normally when a federal statute is silent as to the burden of proof in an administrative proceeding, a court would normally turn to the federal Administrative Procedure Act ("APA") to supply the missing standard. However the APA does not apply to these proceedings because the MPUC is not a federal agency. See Franklin v. Massachusetts, 505 U.S. 788, 800 (1992). To the extent the MPUC's standard reaches beyond the explicit dictates of the Act and the FCC's rules, the MPUC appropriately turned for guidance to the controlling state law - the rules it promulgated pursuant to the statutory directive of Minn. Stat. § 237.16.

Even if Minnesota Rule 7812.1700, subp. 23, did not control, the burden of proof the MPUC selected is in harmony with the procompetitive purposes of the Act and realistically reflects the parties access to and control of information. Generally, under federal and Minnesota common law, the proponent of an issue - that is the one who wants to prove the affirmative - has the burden of proof as to that issue. Newport News Shipbuilding and Dry Dock Co. v. Loxley, 934 F.2d 511, 516 (4th Cir. 1991) (citing Selma, Rome & C. Railroad v. United States, 139 U.S. 560, 567 (1891); Fleming v. Harrison, 162 F.2d 789, 792 (8th Cir.1947)); Holman v. All Nations Insurance Co., 288 N.W.2d 244, 248 (Minn. 1980). However, under both federal and Minnesota common law, genuine concerns of fairness, such as the control of information, can alter the allocation of the burden of proof. Fleming, 162 F.2d at 792; Holman, 288 N.W.2d at 248.

In this case, if the burden of proof were placed on the competitive local exchange carrier ("CLEC"), it might amount to an insurmountable barrier to entry into the local telephone market.

As the MPUC accurately noted, US West has held a monopoly in the local telephone market for an extended period of time and as a result largely controls the information about the market. It knows the operation and function of various component elements of its system as well as the costs involved. Thus, fairness supports requiring the burden of proof to be met by the incumbent LEC. In addition, the burden of proof established by the MPUC permits for the shifting of the burden in appropriate circumstances, e.g. when the CLEC controls the relevant information. There is adequate flexibility to accommodate situations where it would be unjust to maintain the burden of proof on the incumbent LEC.

Because it follows applicable state law and because it does not conflict with the dictates of the Act or the FCC rules, the burden of proof standard chosen by the MPUC was appropriate.

VII. TAKINGS CLAIM

US West makes a general claim that if the US West-Aerial Agreement is upheld, it will result in an unconstitutional taking of US West's property. US West makes the more specific claim that requiring it to make its physical network available for use by its competitors is a physical occupation of its property and therefore a "*per se* taking under the Fifth Amendment."

In relation to its takings claim, US West states that it is not seeking compensation for the alleged taking but rather that it wishes an injunction to prevent a taking without just compensation. US West appears to be alleging a violation of the jurisdictional grant of the Act. In making its argument, US West relies on Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (D.C.Cir. 1994). In Bell Atlantic, the D.C. Circuit determined that 47 U.S.C. § 201 did not vest the FCC with the necessary authority to order LECs to provide physical collocation of equipment upon demand. Id. at 1444-47. It found that because the particular statute did not expressly

authorize an order of physical collocation, the FCC could not impose it. Id. at 1447. Bell Atlantic is, however, inapposite to the present case, because, unlike the general Communications statute at issue in Bell Atlantic, 47 U.S.C. § 251(c)(6) expressly provides for limitations being placed on the LECs' property rights, including the requirement that incumbent LECs have a duty to provide for the physical collocation of equipment. See 47 U.S.C. § 251(c)(6). In fact, Congress was aware of the Bell Atlantic decision when it authorized the imposition of physical collocation:

> Paragraph 4(B) [of section 251] mandates actual collocation, or physical collocation, of equipment necessary for interconnection at the premises of a LEC, except that virtual collocation is permitted where the LEC demonstrates that actual collocation is not practical for technical reasons or because of space limitations. . . . Finally, this provision is necessary to promote local competition, because a recent Court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. (See Bell Atlantic Tel. Co. v. Federal Communications Commission, 24 F.3d 1441 (1994)).

House Rep. No. 104-204, at 73 (1995). Therefore, Congress clearly intended to vest the agencies with authority to place limitations on the LECs' property rights.

US West has not only challenged the MPUC's authority to impose these limitations on US West's property, but also claimed that the Agreement approved by the MPUC does not fully compensate US West for the taking of its property. This is a traditional takings claim allegation and the Court will therefore apply a traditional takings claim analysis.

The defendants argue that US West's taking claim must fail because: (1) it exceeds the scope of this Court's jurisdiction, which is limited by 47 U.S.C. § 252(e)(6); (2) the claim is not ripe for review; and (3) the agreement contains provisions which allow for full cost recovery by US West.

The Eighth Circuit explicitly noted that a takings claim can be presented to a federal district court under the review provisions of subsection 252(e)(6). Iowa Utils. Bd., 120 F.3d at 818. Therefore, this Court has jurisdiction to hear the takings claim.

In order for a takings claim to be ripe, two elements must be met: (1) the administrative agency has reached a final, definitive position as to how it will apply the regulation at issue, and (2) the plaintiff has attempted to obtain just compensation through the procedures provided by the State. Williamson Co. Regional Planning v. Hamilton Bank, 473 U.S. 172, 191, 194 (1985). Here, neither of these elements have been satisfied.

The Fifth Amendment states that, "private property [shall not] be taken for public use without just compensation." The Takings Clause is not meant to limit the government's ability to interfere with an individual's property rights, but rather to ensure compensation when a legitimate interference that amounts to a taking occurs. Glosemeyer v. Missouri-Kansas-Texas Railroad, 879 F.2d 316, 324 (8th Cir. 1989) (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987)). The compensation does not have to precede the taking; a process for obtaining compensation simply has to exist at the time of the taking. Id. (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984)). If US West ultimately receives just compensation then there has been no violation of the Takings Clause.

Public utilities, which have a hybrid public and private status, must be analyzed in a slightly different manner than other entities under the Takings Clause.[16] Duquesne Light Co. v.

---

[16] Although the traditional public utility rate model is not a perfect model for § 252(e)(6) cases, it is informative. See J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and Breach of the Regulatory Contract, 71 N.Y.U. Law Rev. 851, 954 (Oct. 1996).

Barasch, 488 U.S. 299, 307 (1989).

> The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597, 17 S.Ct. 198, 205-206, 41 L.Ed. 560 (1896) (A rate is too low if its is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); FPC v. Natural Gas Pipeline Co., 62 S.Ct. 736, 742, 86 L.Ed. 1037 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense"); FPC v. Texaco Inc., 417 U.S. 380, 391-392, 94 S.Ct. 2315, 2392, 41 L.Ed.2d 141 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level").

Id. at 308. If the state fails to provide sufficient compensation, then the state has taken the use of a utility without just compensation and thereby violated the Takings Clause. Id. The particular theory used to determine whether a rate is fair does not matter. Id. at 310 (citing FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944)). If the overall effect cannot be said to be unreasonable then judicial inquiry is at an end. Id. (citing FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944)). Whether a rate is unfair depends on what is a fair rate of return given "the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return." Id. "Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid . . . ." Hope Natural Gas, 320 U.S. at 605.

The purpose of the Telecommunications Act of 1996 is, in part, to foster competition in the local telephone market. GTE North, Inc. v. McCarty, 978 F.Supp 827, 831 (N.D.Ind. 1997) (citing Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, at

113 (1996)). Under the Act, US West provides services to its competitors rather than the public. 47 U.S.C. § 251(c). The end goal is not a fair rate of return as in the traditional rate-setting paradigm, but rather the equitable opening up of a market. Neither party to the Agreement is expected to profit in the interconnection or resale processes. See 47 U.S.C. § 251(c)(4)(A) ("to offer for resale at wholesale rates . . ."). Because these transactions are not designed to be profitable, the analysis cannot be fair rate of return as to any individual provision concerning the sale or access of services to the CLECs. Rather the query must be whether any provision or provisions of the Agreement negatively affect the *overall* operation of the incumbent LEC to such a degree that it can no longer receive a fair rate of return from its investment.

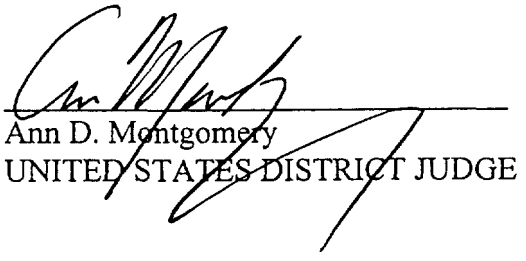
In this case, it is premature to ask this question for two reasons. First, the MPUC has not reached a final decision concerning the prices for unbundled elements; they are still subject to a true-up procedure at the end of the Generic Cost Investigation. Until the MPUC reaches a decision on that issue, the overall effect of the Agreement cannot be determined and the takings claim is not ripe for review. Second, the incumbent LEC still has an opportunity to have its public rates increased in light of the MPUC's Orders made pursuant to §§ 251 and 252. If US West is not earning a sufficient return on its investment in Minnesota, it can petition the MPUC for a rate change. See Minn. Stat. § 237.075. The MPUC is obligated to implement a rate base upon which a telephone company can earn a fair rate of return. See id., subd. 6. US West will not have exhausted its state remedies until it has taken this final step. It would only be after such a hearing that a court could determine whether the overall utility rates are "inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme." Duquesne Light Co. v. Barosch, 488 U.S. 299, 312 (1989). The

MPUC's actions under the Act establish LECs relationships with one another; the equation is not complete until the economic relationship with the public is determined in light of the intercarrier relationships. Because Minnesota offers an opportunity to US West to have its rates readjusted, US West has not yet exhausted its state remedies and its takings claim is ripe for review. US West's takings claim is therefore dismissed without prejudice.

CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. US West's request that this Court find that the MPUC's determinations concerning the US West-Aerial Agreement violates 47 U.S.C. §§ 251 and 252 is **GRANTED IN PART**, **DENIED IN PART**, and **DENIED WITHOUT PREJUDICE IN PART**. It is granted with respect to: (1) Count IV (MPUC imposed requirements) in so far as it involves the MPUC's determinations regarding §§ 4.9.1, 3.26, and 4.3.4 of the Agreement; and (2) Count V (regulation of US West Dex). It is denied without prejudice with respect to US West's takings claim. It is denied in all other respects. The matter is remanded to the MPUC for further determinations consistent with this decision.



Ann D. Montgomery
UNITED STATES DISTRICT JUDGE

Dated: March 30, 1999