

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF: OF TCG COLORADO)
)
PETITION FOR ARBITRATION PURSUANT)
TO 252(B) OF THE TELECOMMUNICA-) DOCKET NO. 96A-329T
TIONS ACT OF 1996 TO ESTABLISH AN)
INTERCONNECTION AGREEMENT WITH)
US WEST.)

DECISION REGARDING PETITION FOR ARBITRATION

- - - - -
Mailed Date: November 8, 1996
Adopted Date: November 5, 1996
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I. BY THE COMMISSION:

A. Statement

1. This matter comes before the Commission for consideration of the Petition for Arbitration filed by TCG Colorado ("TCG" or "Petitioner") on July 17, 1996. Pursuant to the provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 70, to be codified at 47 U.S.C., ("Act"), the petition requests that we arbitrate certain unresolved issues between TCG and U S WEST Communications, Inc. ("USWC" or "Company"), relating to the rates, terms, and

conditions for interconnection, unbundling of network elements, and resale of telecommunications services. USWC filed its response to the petition on August 12, 1996. We issued notice of the petition, and interested persons were allowed to intervene including Commission Staff ("Staff"), the Colorado Office of Consumer Counsel, American Communication Services of Colorado Springs, Inc., TCI Telephony Services, Inc., Sprint Communications Company L.P.; MCI Telecommunications Corporation; MCIMetro Access Transmission; and TCI Communications, Inc.

2. In addition to TCG's petition, a number of other tele-communications providers, pursuant to 252, have submitted similar Petitions for Arbitration involving USWC: MFS Communications Company, Inc. ("MFS"), on June 24, 1996; AT&T Communications of the Mountain States, Inc. ("AT&T"), on July 30, 1996; ICG Telecom Group, Inc. ("ICG"), on August 2, 1996; and MCIMetro Access Transmission Services, Inc. ("MCI"), on August 9, 1996. We consolidated all these petitions for consideration and hearing in Decision Nos. C96-835, C96-858, and C96-880. Our decision to consolidate was based upon substantial commonality of issues. Furthermore, we noted that 252(g) specifically permits a State commission to consolidate arbitration proceedings to reduce the administrative burden on the commission and the parties to the proceeding. See Decision No. C96-835.

3. In addition to permitting the parties to submit

pre-filed testimony, we conducted hearings in this and the other con-solidated requests for arbitration on September 24 through 27, and 30, 1996 and October 1 through 4, 1996. Closing Statements of Position were filed by the parties on October 10, 1996. In part, those statements specified the remaining unresolved issues between Petitioners and USWC. Now being duly advised in the premises, we issue our order regarding the TCG Petition for Arbitration.

4. As we anticipated in Decision No. C96-835, the consoli-dated hearings served the purpose of administrative economy and efficiency, inasmuch as the various petitions raised common issues. Nevertheless, we are issuing separate decisions on each petition. We do so as a matter of administrative convenience: The Act requires that we issue written decisions on the MFS and TCG peti-tions by November 8, 1996; written decisions are not due on the ICG petition until November 22, 1996; and the more extensive AT&T and MCIMetro petitions until December 1, 1996 and December 26, 1996 respectively. This process will not prejudice any party. In arriving at our determinations on the issues presented in each petition, we have considered the entirety of the consolidated record to the extent it is relevant to each issue.

B. Statutory Provisions Regarding Competition and Arbitration

1. Generally, the Act opens local exchange markets to com-petition. It does so, in part, by imposing certain duties upon incumbent local exchange providers ("ILECs") such as USWC. These include the duty to interconnect with the facilities and equipment of any requesting telecommunications provider; the duty to provide to any requesting provider nondiscriminatory access to network ele-ments on an unbundled basis on rates, terms, and conditions that are just and reasonable; and the duty to offer for resale, at wholesale

rates, any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. See 251(c). The Act contemplates that ILECs will provide for interconnection, unbundled network elements, and resale pursuant to binding agreements entered into with new entrants. Such agreements may be arrived at through voluntary negotiations or pursuant to binding arbitration by the State commission. See 252(a-b) and discussion *infra*.

2. To implement the provisions of the Act, the Federal Communications Commission ("FCC") adopted comprehensive rules relating to interconnection, the unbundling of network elements by ILECs, and resale of ILEC services. See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, First Report and Order (released August 8, 1996) ("First Report and Order"). In numerous instances, the parties have argued that the FCC's rules are dispositive of issues here.¹

3. AT&T filed its Motion to Narrow Issues on September 16, 1996. Essentially, that motion requested a declaration that the Commission is legally required to follow the FCC's rules with respect to matters at issue in the

¹ As discussed *infra* certain provisions of the FCC's rules were recently stayed by the 8th Circuit Court of Appeals. See *Iowa Utilities Board v. Federal Communications Commission et al.*, 1589204 (8th Cir. October 15, 1996).

consolidated proceedings. The motion was precipitated by USWC's positions in prefiled testimony which urged Commission consideration of certain issues independent of the FCC's rulings. At the September 20, 1996 prehearing conference, we ruled that our decisions would not reopen issues determined by effective FCC rules. We now memorialize that ruling.

4. The Act, 251(d), directs the FCC to promulgate implementing regulations. In addition, the Act also directs State commissions, during arbitration, to comply with the FCC's rules. See 252(c)(1). In our view, these provisions clearly express Congress' intent to preempt contrary State action on matters lawfully ruled upon by the FCC. To the extent USWC claims that the FCC exceeded its jurisdiction in its rulemaking, that is a judicial matter. For purposes of deciding the present case, we will not reopen matters determined by FCC rules.

5. We also note that prior to passage of the Act, the Colorado Legislature itself enacted House Bill ("HB") 1335, 40-15-501 *et seq.*, C.R.S., in the 1995 legislative session. In that statute, the Legislature determined that competition in the market for basic local exchange service is in the public interest. See 40-15-101, C.R.S. HB 1335, consistent with that determination, directed the Commission to encourage competition in the basic local exchange market by adoption and implementation of appropriate regulatory mechanisms. Specifically, HB 1335 mandated that the Commission adopt

rules establishing cost-based, non-discriminatory, and unbundled methods of pricing for carrier interconnection to essential facilities or functions, and rules relating to the terms and conditions for resale of services that enhance competition. See 40-15-503(2)(b)(I) and (IV), C.R.S. In fact, the Commission has adopted a number of rules to implement HB 1335's directives. See Rules on Interconnection and Unbundling, 4 Code of Colorado Regulations ("CCR") 723-39, and Rules for the Resale of Telecommunications Exchange Services, 4 CCR 723-40. During the 1996 legislative session, HB 1010 was enacted which mandated that the Commission adopt interim tariffs necessary to begin competition in the local exchange market by July 1, 1996. The interim tariffs of USWC were reviewed and adopted in Docket No. 96S-233T (See Decision No. C96-655), and the permanent tariff proceeding is ongoing in Docket No. 96S-331T.

6. As stated above, TCG's Petition for Arbitration was filed pursuant to the provisions of 252 of the Act. That section provides that telecommunications carriers (*i.e.*, an incumbent local exchange carrier and a new entrant into the local exchange market) may voluntarily negotiate the specific terms for the provision of interconnection services and unbundled network elements. In the event the negotiating

carriers are unable to reach an agreement with respect to such terms, 252(b) provides that, during the period from the 135th to the 160th day after the date on which an incumbent local exchange carrier receives a request for negotiation, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

7. Section 252(b)(4) of the Act provides that a State commission, in the course of arbitration proceedings, may require the petitioning and responding parties to provide such information as may be necessary for the commission to reach a decision on all unresolved issues. The issues in the arbitration proceeding are to be limited to those raised in the petition for arbitration and the response.² According to 252(b)(4)(C):

² Section 252(b)(4) of the Act.

The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions . . . upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.³

8. Notably, 252(c) directs that:

In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the (Federal Communications) Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

In accordance with the provisions of the Act, this decision sets forth our determinations regarding those issues upon which TCG and USWC have requested arbitration.⁴

³ TCG's petition states that its request for interconnection was served on USWC on February 6. Therefore, the Commission must decide all unresolved issues in the proceedings concerning USWC by November 8, 1996.

⁴ At hearing, USWC and TCG submitted their Joint Position Statement on Negotiated Terms to luded in an Arbitrated Interconnection Agreement (Exhibit 44). That statement reflects ties' agreement on a number of issues, and, in fact, sets forth proposed language to be included agreement between USWC and TCG.

C. Costing and Pricing Issues

The above discussion points out that, in arbitration proceedings, the Commission is required to establish "rates for inter-connection, services or network elements . . .". See 252(c). At the September 20, 1996 prehearing conference, in granting TCG's Motion to Sever Consideration of U S WEST TELRIC Cost Studies, we determined that the interim prices established by the Commission in Docket No. 96S-233T ("233T") would be incorporated as the applicable rates⁵ in the Agreements subject to pending Petitions for Arbitration.⁶

We now affirm our previous ruling. The prices established on an interim basis in 233T, as ultimately modified subject to true-up in Docket No. 96S-331T, shall be incorporated into the arbitrated Agreement in resolution of pricing issues.⁷

D. 96S-233T Tariffs

1. Docket Nos. 96S-233T and 96S-331T were the outcomes of HB 1010, enacted by the Colorado General Assembly in the 1996 legislative session. Those provisions are codified at 40-15-503(2)(g) and (h), C.R.S. HB 1010

⁵ The use of the term "rates" also includes the applicable terms and conditions for the service not superseded by contractual agreement or this arbitration order.

⁶ Various pleadings and testimony presented at the consolidated hearing pointed out that 233T establish rates for all services or elements at issue in the petitions. This decision and other arbitration orders relating to the consolidated petitions points out that, where 233T prices do not fit for a particular service or element, the specific interim rate will be subject to negotiation pursuant to a *bona fide* request process.

⁷ In 233T, pursuant to the requirements of HB 1010, we established interim rates for interconnection, unbundled elements, and resale. Docket No. 96S-331T is the proceeding intended to establish permanent rates. See discussion *infra*.

directed that the Commission require telecommunications service providers that would provide unbundled facilities or functions, interconnection, services for resale, or local number portability to file tariffs containing temporary interim rates, terms, and conditions for the sale of such products. See 40-15-503(2)(g)(I), C.R.S. The Commission was instructed to conduct expedited proceedings on proposed interim tariffs for unbundled facilities or functions, interconnection, services for resale, and local number portability. Based upon that expedited review, we were commanded to approve or modify the filed tariffs on an interim basis.

2. USWC, in accordance with HB 1010 and our implementing rules, submitted interim proposed tariffs along with supporting comment. Those proposals were investigated and considered in 233T. A number of parties, including some of the Petitioners here, filed responsive comments to the proposals by USWC. Based upon those submissions, we issued Decision No. C96-655 on June 25, 1996. That decision ordered USWC to file revised interim tariffs establishing rates for unbundled elements, interconnection, and services for resale.

The Company complied with that directive and interim interconnection, unbundling, and resale tariffs became effective on July 1, 1996.

3. HB 1010 and our implementing rules further mandated that USWC file proposed permanent tariffs to supersede the interim tariffs on or before July 1, 1996. In

fact, the Company complied with that requirement. Those proposed permanent rates are pre-sently under investigation in Docket No. 96S-331T. That docket is now set for hearing in March of 1997.

4. Finally, we point out that HB 1010 and our regulations provide that the interim rates (*i.e.*, 233T prices) are subject to "true-up" with interest. That is, USWC or competing local exchange carriers ("CLECs") who provided or purchased service under the interim tariffs, shall recover the difference between rates paid under the interim tariffs and rates that would have been paid had the permanent tariffs been in effect from inception.

E. FCC Pricing Provisions

1. In its rules implementing the Act, the FCC directed that State commissions utilize certain costing methodologies and principles in establishing rates for interconnection, unbundled elements, and resale. For example, Rules 51.503 and 51.505 require that rates for interconnection and unbundled elements must be based on the total element long-run incremental cost ("TELRIC") of the element, plus a reasonable allocation of forward-looking common costs. Rule 51.607 requires that rates for resale of services equal the ILEC's existing retail rate, less avoided retail costs; Rule 51.609 specifies Uniform System of Accounts accounts which shall be included in the calculation of avoided retail costs.

2. The FCC did recognize that, in particular arbitration proceedings, a State commission may not have available to it sufficient cost information to establish rates in compliance with the rules (*e.g.*, based upon TELRIC methodologies). See 767, First Report and Order (" . . . it

may not be possible for carriers to prepare, or the state commission to review, economic cost studies within the statutory time frame for arbitration"). In such circumstances, the FCC directed that State commissions use default proxy rates until such time as proper cost studies are reviewed and rates set in accordance with that review.

F. TCG Motion to Sever

1. In this consolidated proceeding, some of the parties, including USWC, AT&T, and MCI, presented cost studies and pricing recommendations for establishing prices in the arbitrated agreements. On September 6, 1996, TCG filed its Motion to Sever Consideration of U S WEST TELRIC Cost Studies. That motion requested that we *not* consider USWC's cost studies in the instant proceeding. TCG contended that the studies were only recently made available to the parties.

Since the studies were "extremely voluminous", TCG suggested, neither the parties nor the Commission could give adequate consideration to the costing issues (*e.g.*, to determine whether the studies, in fact, comply with the FCC's mandates) in the abbreviated schedule required in this case. TCG recommended, therefore, that the Company's cost studies be examined and considered in Docket No. 96S-331T. As all parties acknowledged, our ruling with respect to USWC studies would also apply to cost studies presented by other parties (*e.g.*, the Hatfield model presented by AT&T and MCI).

2. We allowed the parties to file a written response

to TCG's suggestions, and, in addition, heard oral argument on the motion at the September 20, 1996 prehearing conference. With the exception of USWC, no party objected to the request to defer con-sideration of costing and pricing issues. Most parties agreed that the accelerated schedule required for arbitration proceedings did not allow for adequate consideration of the cost studies offered in this case.

3. We note that, as in most ratemaking proceedings, the examination of cost studies is critical to price determinations. This is true regardless of what methodologies are used to set prices. Given the importance of cost to rate decisions, all par-ties and the Commission should be accorded sufficient opportunity to examine the studies and included cost models. The schedule required for resolution of the present petitions does not allow full and final consideration of these issues.

4. In light of our decision to sever final consideration of costing and pricing from the arbitration some, of the peti-tioners urged the use of the FCC proxies⁸ pending the resolution of 96S-331T. The FCC proxy rates, in general, are lower than the prices established in 233T.⁹ Staff and USWC recommended incorpora-tion of the interim rates established in 233T, to be replaced with permanent rates established in 96S-331T.

⁸ The FCC proxy rates are set forth in the First Report and Order, Appendix B - Final Rules, 513 (unbundled elements and interconnection), 51.611 (resale), and 51.707 (transport mination).

⁹ To illustrate, the FCC proxy ceiling rate for an unbundled loop in Colorado is \$14.97/month set this rate at \$18.

5. We conclude that the interim rates established in 233T should be incorporated by reference in the arbitration agreements subject to replacement with final rates to be established in 96S-331T. In the first place, we note that the FCC pricing rules, Rules 51-501 through 51.515, 51.601 through 51.611, and 51.701 through 517.17 were recently stayed pending appeal. *Iowa Utilities Board v. Federal Communications Commission et al.*, 1996 WL 589204 (8th Cir. October 15, 1996).

The primary argument in this case in opposition to use of the 233T rates was that the FCC, in its rules, prohibited the use of such rates in the interim (*i.e.*, before permanent rates are established). The court's stay of the First Report and Order's pricing provisions, including the provisions relating to proxy rates, disposes of this contention. In light of the stay, no FCC directive precludes us from using our own interim rates.

6. Moreover, at the prehearing conference, before entry of the stay order, we determined that the use of the 233T rates was most appropriate and not violative of the FCC's rules. The 233T rates, as explained above, are interim rates only, and are subject to true-up with interest. In the First Report and Order, it is unclear whether the FCC meant to preclude the use of interim rates which are subject to true-up, especially when proceedings are presently pending to establish permanent prices. We conclude that applying 233T rates is consistent with the intent of the First Report and Order (*e.g.*, to establish reasonable interim prices on an

expedited basis). Given the final adjustment of interim rates for CLECs in the near future (*i.e.*, after resolution of 96S-331T), we conclude that application of the 233T rates, instead of the FCC proxies, will not discourage competition in the interim.

7. Furthermore, we point out that the 233T rates were set by the Commission after consideration of voluminous written comments from a number of parties, including potential competing local exchange providers such as AT&T and MCI. That proceeding specifically determined appropriate rates in light of existing state and federal laws. These circumstances, along with the mechanisms for true-up in the near future, persuade us that incorporation of the 233T interim prices is most appropriate given the subsequent replacement with permanent rates. We also conclude that interim use of 233T rates, even in the absence of the stay, is consistent with the FCC's rules.¹⁰

8. Accordingly, reference to the Interconnection Tariff as a term in the Arbitrated Agreements shall mean incorporation by reference on an interim basis, the prices and terms established by tariff in 233T subject to subsequent replacement and true-up with permanent rates and terms as established in 96S-331T.

G. Most Favored Nation Provisions

¹⁰ At hearing, TCG requested that we resolve pricing issues relating to interim local number portability. Our decision to incorporate existing and pending costing and pricing matters applies to this matter for the reasons discussed above. We note that permanent rates for international number portability are presently under consideration in Docket No. 96S-250T.

1. Section 252(i) of the Act provides:
A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The First Report and Order (1314) interpreted this section to require that, ". . . incumbent LECs must permit third parties to obtain access under section 252(i) to any *individual* interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252" (emphasis added). Accordingly, the FCC (1316) directed that, ". . . any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same *individual* interconnection, service, or element once the *subsequent agreement* is filed with, and approved by, the state commission" (emphasis added).

The FCC, as did the parties to the consolidated proceeding here, referred to these provisions, which would allow a CLEC to select terms and conditions from other approved agreements regardless of the provisions of a pre-existing binding agreement between the CLEC and the ILEC, as a most favored nation ("MFN") provision.

2. The Petitioners contend that the interconnection agreements with USWC should include MFN conditions and, similarly, conditions which would permit a CLEC to purchase services out of any effective USWC tariff, regardless of

prices set forth in an existing agreement. Petitioners argue that the FCC correctly interpreted 252(i) to require that CLECs be permitted to select individual terms and conditions out of other approved interconnection agreements, notwithstanding the provisions of an existing, effective agreement with the incumbent carrier. Under this interpretation of the Act, a CLEC need not select the entirety of the subsequent or alternate interconnection agreement in order to avail itself of the more favorable terms or conditions contained in another agreement. Rather, Petitioners suggest, CLECs may select individual terms and conditions out of another agreement, regardless of the existence of a binding agreement with the incumbent.

3. Petitioners claim that a contrary interpretation of 252(i) (e.g., an interpretation which would preclude a CLEC from taking advantage of new and lower prices for the same service contained in a subsequent agreement) would be anti-competitive in contravention of the intent of the Act. For example, Petitioners contend, a CLEC purchasing service from an ILEC at a higher price than other CLECs could not fairly compete in the provision of service to end users. Similarly, Petitioners argue that making available new tariffed prices to CLECs, regardless of the terms of an

existing agreement, is consistent with USWC's role as a common carrier.

4. USWC fervently objects to inclusion of MFN conditions in its interconnection agreements, at least as requested by the Petitioners here. In the Company's view, 252(i) grants competing carriers the right to select provisions in a new interconnection agreement by selecting the new agreement **in its entirety only**; the Act does not suggest that CLECs may "pick and choose" individual terms and conditions from approved agreements. USWC contends that the MFN interpretation adopted by the FCC (and supported by Petitioners) is inconsistent with the Act's intent to implement competition, in part, through an individually negotiated interconnection agreement between ILECs and new entrants. This is so, inasmuch as the broad MFN requirements directed in the First Report and Order would frustrate carriers' ability to negotiate contracts reflecting the unique requirements of each CLEC: If discrete terms and conditions of any approved agreement are universally available to other interconnecting carriers, the ILEC will be motivated to negotiate standardized agreements.

5. Moreover, USWC suggests, the FCC's MFN requirement is inequitable since only one party, the ILEC, would be bound

to the economics of the interconnection agreement. Competing carriers would be able to unilaterally modify their contracts with ILEC in the event subsequent interconnection agreements were more favor-able.

6. In the event the Commission accepts the First Report and Order's MFN provisions, USWC suggests that we develop standard-ized, tariff-like offerings for interconnection agreements. Such standardized offerings would be applicable to all CLECs and would be modified by the Commission only. Staff agrees with the sugges-tion that the Company file tariffs reflecting generally available terms and conditions.

7. We understand the Company's concerns with overbroad MFN requirements. Inappropriate bifurcation of provisions or terms of a contract for adoption into another contract lead to unfair results. For example, a CLEC should not be permitted to select a lower nonrecurring charge from another interconnection agreement, but decline to accept a higher, directly related recurring charge. Nevertheless, we do not accept the Company's position that 252(i) contemplates carrier acceptance of interconnection agreements only in their entirety. While we acknowledge that the FCC's MFN holding was one of the mandates recently stayed by the Eighth Circuit Court (see footnote 1), our independent interpretation of the Act is inconsistent with USWC's contention. The language in 252(i) com-pels an ILEC to make available "any interconnection, service, or network element

(emphasis added)" provided in an approved agreement to other requesting carriers "upon the same terms and conditions as those provided in the agreement." The plain and clear provisions of the Act do not support USWC's argument on this issue.

8. Therefore, we direct that the interconnection agreements with USWC include MFN provisions incorporating the language of the Act. The provision should allow TCG to incorporate and use any interconnection, service, or network element from another agreement, upon acceptance of all of the terms and conditions in the agreement related to such interconnection service or element. In addition, while we cannot determine here all instances in which USWC may treat CLECs differently, we note that a carrier who causes the Company to incur greater costs in the provision of a service cannot reasonably demand the service at the original price.¹¹ The agreement shall also provide that USWC permit TCG to purchase services out of an effective tariff, regardless of prices set forth in an existing agreement.

9. As for the Company's recommendation that we develop standardized, tariff-like offerings, we point out that our Rules on Interconnection and Unbundling, 4 CCR 723-39, already accommodate this suggestion. See Rule 7 (incumbent providers required to file tariffs establishing rates, terms, and conditions for interconnection, termination of local

¹¹ The First Report and Order, 1317, pointed out that 252(i) permits different treatment Cs based upon differences in cost-of-service.

traffic, and unbundled elements). The Commission decision adopting the interconnection and unbundling rules held, consistent with USWC's suggestion here, that incumbent providers should be required to file tariffs even in light of the Act's provisions which permit carriers to negotiate interconnection agreements. See Decision No. C96-347, pages 26 through 30. Significantly, our decision to require tariffs was, in part, based upon our interpretation of 252(i) as requiring non-discriminatory treatment of interconnecting carriers. Decision No. C96-347, pages 28 through 29.

H. Resale

1. USWC intends to impose a Customer Transfer Charge that would apply to the transfer of a USWC customer account to a reseller, or to the transfer of an end user account from one reseller to another. According to the Company, the purpose of this charge is to cover the costs USWC would incur to initiate and complete the transfer (e.g., order costs). TCG objects to imposition of any such charge, claiming that it would impose a burden on resellers which the Company itself would not bear for providing this service to a customer.

2. We find that a Customer Transfer Charge is appropriate since USWC will incur costs in transferring accounts to resellers. The 233T rate for this activity was set at \$10. Consistent with our previous ruling we direct that the Agreement incorporate by reference, the Customer

Transfer Charge as established by the Interconnection Tariff.

I. Commission Authority to Impose Liquidated Damages Provisions

1. All Petitioners in the consolidated proceeding requested that we require liquidated damages provisions in the interconnection agreements with USWC.¹² Primarily, in conjunction with specific service quality standards, Petitioners request that USWC be compelled to pay specified liquidated damages whenever it failed to meet the approved standards.

2. USWC and Staff contend that the Commission lacks authority to **compel** liquidated damages as part of arbitration.¹³ In particular, both parties suggest that **under State law**, our jurisdiction to impose monetary penalties (or liquidated damages) upon regulated utilities such as the Company is limited to those instances specified by statute. *See Haney v. Public Utilities Commission*, 574 P.2d 863 (Colo. 1978) (levying of fines or financial penalties is a judicial function; Commission lacks jurisdiction to impose monetary fines absent specific statutory authorization). Since no State statute permits the Commission to impose liquidated

¹² The parties alternately referred to "liquidated damages" as "penalties." We disagree with this characterization. In our view, the remedies requested by the Petitioners for failure of USWC to meet certain standards are not the legal equivalent of penalties, such as those referenced in Article 40, Title 40. These monetary payments are not intended to penalize USWC. Rather, the remedies requested in the petitions are intended to compensate Petitioners for inadequate performance of contractual obligations on the part of the Company, as a substitute for actual damages.

¹³ USWC itself concedes that the Commission may approve a liquidated damages clause voluntarily agreed to by the parties. However, the Commission may not, according to the Company, impose such a provision in these proceedings.

damages upon USWC in the circumstances at issue here (*i.e.*, for failure to comply with performance standards set forth in interconnection agreements), these parties reason that we lack the authority to compel such provisions in the interconnection agreements.

3. The Company and Staff further contend that the Act does not confer authority upon State commissions to require liquidated damages provisions in interconnection agreements. Therefore, the Commission may not look to federal law for support of Petitioners' request here.

4. Finally, Staff appears to argue that, regardless of the Act's intent with respect to this issue, Congress could not empower the Commission to take action not specifically authorized under State law. Staff suggests that the principles enunciated by the Court in *Howlett v. Rose*, 110 S.Ct. 2430 (1990) (federal law cannot compel a State to create a court competent to hear a federal claim), preclude Congress from granting new authority to the Commission.

5. We hold that the Commission, as the state agency empowered to deal with utility regulation, is authorized to carry out the provisions of the Act as it relates to Colorado.

As the Petitioners point out, the Act forms the basis for our authority to arbitrate the instant petitions. Specifically, 252(b)(4)(C) directs that, "The State commission shall resolve each issue set forth in the petition and the response. . . . by imposing appropriate conditions. . . . upon the parties to the agreement. . . ." The Act does not limit State commission arbitration authority to specific regulatory provisions under State law.

6. More importantly, 252(c)(1) provides:
In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a *State commission shall ensure that such resolution and conditions meet the requirements of section 251*, including the regulations prescribed by the (Federal Communications) Commission. . . .

(emphasis added) Accordingly, the Commission in arbitration proceedings under the Act is, in good measure, enforcing federal rights. We further note that any appeal of our arbitration decision will involve the determination of whether our directives meet the requirements of federal law (*i.e.*, 251 of the Act). See 252(e)(6). These provisions clearly indicate that Congress intended to give State commissions the authority to enforce the Act and applicable

FCC rules.

7. As for the contention that the Act may not empower the Commission to take action which is not authorized under State law, we find that *Howlett* does not lead to the conclusion reached by Staff.¹⁴ Notably, the Court in *Howlett, supra*, at 2438, observed that federal law is enforceable in state courts because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the State Legislature. The Supremacy Clause makes those laws "the supreme Law of the Land", and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. Staff itself noted that in *Federal Energy Regulatory Commission v. Mississippi*, 102 S.Ct. 2126 (1982), the Court held that Congress could require a state utilities commission to hear and determine causes arising out of the federal Public Utilities Regulatory Policy Act, especially where the state agency had jurisdiction to entertain analogous claims.

8. We point out that in HB 1335, the State Legislature itself ordered that the local exchange market be opened to competition. That statute, independent of the provisions of the Act, directs the Commission to regulate the

¹⁴ Furthermore, whether Congress is empowered to expand or delegate Commission authority under the law (*i.e.*, whether these portions of the Act are constitutional) strikes as a matter of constitutional resolution by the courts, not an administrative agency. For purposes of the present proceedings, it is enough for us to conclude that the Act intended to grant us authority to carry out the federal A

interconnection of telecom-munications carriers' facilities, the provision of unbundled facilities and functions by providers, the terms and conditions for resale of services, etc. See 40-15-503(2), C.R.S. Hence, the Act does not impose significant new regulatory requirements upon the Commission. This is not an instance, as in *Howlett*, where Congress has ordered the State of Colorado to create a forum competent to hear cases arising under the Act. The Commission, pursuant to HB 1335 and other provisions of State law, possesses authority and responsibility to regulate utility matters in the state, and hence is properly empowered to accept the arbitration role created by the federal Act.

9. We conclude that the establishment of performance standards and associated liquidated damages provisions is reasonable and necessary to implement the provisions of the Act and HB 1335. Testimony by the Petitioners uniformly indicates that in order to bring competition to ILEC markets, performance standards for inter-connection agreements are essential. For example, the Act demands that an ILEC provide quality of service to CLECs which is equal to that provided to itself. See 251(c)(2) (ILEC required to provide interconnection at least equal in quality to that provided to itself); 251(c)(3) (ILEC required to provide unbundled elements on a "nondiscriminatory" basis).

10. Concomitantly, Petitioners point out that it is crucial that approved performance standards be enforceable through adequate remedies. With no specific economic

incentives to comply with performance standards, ILECs may discourage or inhibit competition by providing inferior services to new entrants. AT&T Witness Thayer, for example, stated that performance standards would be meaningless without adequate enforcement mechanisms. Petitioners further note that the option of forcing new entrants to undertake costly and time-consuming enforcement proceedings in court or before the Commission in each instance of non-compliance with performance standards, would be unduly burdensome and injurious to nascent competition. Finally, the Petitioners pointed out that liquidated damages provisions, similar to the credits proposed in various testimony, for nonperformance of contractual provisions, are commercially reasonable.

11. We find that the inclusion of performance standards and liquidated damages provisions in interconnection agreements with USWC is necessary to advance the goals stated in the Act and in HB 1335, and that to so rule is within the scope of our role as arbitrators under the Act.

J. Performance Standards and Liquidated Damages Provisions

1. In its petition, TCG requests that we impose specified performance standards and liquidated damages

provisions upon USWC.¹⁵ To illustrate, TCG's recommended standards for local interconnection trunks provide:

Order Confirmation--The parties would agree to an objective of 98% of orders confirmed by the end of the seventh business day following receipt of the order. Generally, USWC would pay liquidated damages of \$5,000, per measurement category based on a full month's reporting, for failure to confirm less than 95% of the average of all such orders.

Order Intervals--The parties would agree to an objective of 95% of orders confirmed with due dates meeting the standard intervals for USWC's switched access services. Generally, USWC would pay liquidated damages of \$10,000, per measurement category based on a full month's reporting, for failure to confirm at least 95% of the average of all such intervals.

Trunk Installations--The parties would agree to an objective of 95% of trunk orders completed on or before the agreed upon due date. Generally, USWC would pay liquidated damages of \$25,000, per measurement category based on a full month's reporting, for failure to complete 95% of the average of all such installations.

TCG proposes similar provisions for dedicated access and unbundled links.

¹⁵ The Petitioners advocated differing performance standards and liquidated damages provisions specific to their proposed agreements. For example, AT&T urged adoption of its Direct Measures Reliability standards which incorporate a more expansive range of measurements than proposed by TCG. Discuss these various proposals in the decisions relating to each petition.

2. The Company opposes TCG's recommendations. In part, USWC noted that, under the provisions of the Act and applicable State law, it is already obligated to provide non-discriminatory service to competitors. This means that the Company must provide service to CLECs of a quality that is at least equal to the service provided to itself. USWC suggests that the specific service standards urged by Petitioners, including TCG, are in excess of those standards used by the Company for provision of its own services and in excess of present Commission rules. In general, USWC suggests that we establish a baseline of service quality which would be available to all new entrants. A provider seeking premium service (*i.e.*, service quality in excess of the baseline standard) would request such service through the *bona fide* request process ("BFR"), and would be required to pay for that added quality.¹⁶

¹⁶ We note that the Company did agree to service standard conditions in its agreement with Exhibit 68, Part XXXII). Under those standards, USWC is required to perform specified activities (*e.*, installation of unbundled loops, interim number portability installation, out of service orders, and interconnection trunk installation) which meet or exceed the average performance by the Company for the total universe of specified activities. Notably, the MFS agreement does not provide for any liquidated damages.

3. Staff also addressed this issue. In Staff's view, service quality standards and liquidated damages provisions, if adopted,¹⁷ should be uniform and set forth in publicly available documents such as tariffs or rules. Hence, Staff agreed with the Company on this point. Similarly, Staff also agreed with USWC that superior (*i.e.*, in excess of the rules) service quality should be paid for by the requesting carrier.

Staff suggests that we order the Company to file each industry standard it presently relies on within 30 days. In particular, Staff urges, that USWC should submit to the Commission industry standards now relied upon for the provisioning of all services, including switched access, future interconnection services, unbundled network elements, and retail services that will be available for resale.¹⁸

4. For purposes of this arbitration proceeding, Staff recommends that we approve existing service standards: For resale, Staff points out that the Commission presently has rules in place for the provision of services to end users.¹⁹ For interconnection, Staff suggests that we approve those quality of service measurements presently utilized by the Company for interconnection with interexchange carriers. With

¹⁷ As discussed above, Staff questioned the Commission's authority to impose liquidated damages.

¹⁸ Staff witness Wendling also suggested that Petitioners submit proposed quality of service standards which could be used by the Commission in opening a rulemaking proceeding to establish service performance standards.

¹⁹ For example, the Rules Regulating Telecommunications Service Providers and Telecommunications Utilities, 4 CCR 723-2, set forth detailed requirements regarding the provision of local exchange service to end users.

respect to unbundled services, Staff generally recommends that the Company be ordered to provide a quality of service at least equal to that provided to itself and its own end use customers. Finally, Staff suggests that, in order to permit competing carriers to monitor the quality of service provided, USWC should be compelled to provide to competing providers, periodic reports (e.g., on a monthly or quarterly basis) containing service quality data.

5. In ruling upon this issue, we first note that Commission Rule 723-2-16.1.2 recognizes that a LEC is expected to meet generally accepted industry standards for an element of, or the total service when such standard is not specifically defined within the rules. With this in mind, we agree with Staff and USWC that the minimum baseline standards for service quality and related enforcement provisions should be uniform, so as to similarly affect the industry. As such, these standards should be set forth in the rule and all CLECs should be entitled to service under these criteria as part of any interconnection agreement. Establishing required minimum standards by rule will ensure an acceptable quality of service for all end users, including the customers of new entrants into the local exchange market. Therefore, we intend to initiate rulemaking proceedings in the near future to adopt any additional appropriate service quality standards that are necessary to reflect the interactions between the CLECs and ILECs.²⁰ To assist in this effort, and to guarantee that

²⁰ The agreements entered into by USWC pursuant to these consolidated proceedings should recognize that their provisions will be subject to modification to reflect new rules of the Commission

standards presently utilized by USWC in the provision of its own services are made public, those service standards²¹ and related enforcement provisions presently applicable to the Company or relied upon by the Company shall be filed with the Commission and served upon each Petitioner in this case within 30 days of the effective date of this order. For purposes of the present proceeding, we note that USWC must provide service to each Petitioner, including TCG, which is equal in quality to that provided by the Company to itself, which, at a minimum, requires meeting all applicable rules of the Commission.²²

arding performance standards and possible compensation related to performance under such standar

²¹ This would also include standards relied upon by the Company for evaluating its performance in such areas as billing and electronic data interface availability, besides the normal measurement of network performance as suggested in Appendix D of the USWC Closing Statement of Position.

²² See, for instance, Rules 723-39-3.6 and 3.7 under our Rules on Interconnection and Unbundling of Services, as well as Rules 723-40-3.3.1 and 4.1 under our Rules for the Resale of Telecommunications Exchange Services.

6. We also agree with Staff and the Company that CLECs desiring service quality in excess of the baseline standards should request such service through the BFR and will be required to pay for such service. Staff's suggested reporting requirements, as discussed above, are also approved. Appropriate language shall be incorporated into the interconnection agreement between USWC and TCG.²³

7. As for TCG's specific suggestions, we find them to be unsubstantiated. The specific proposals were submitted late in the arbitration process and were inadequately developed within the record.²⁴ For example, no justification for the particular monetary amount of recommended liquidated damages was offered to us. In addition, we cannot make a determination as to whether the means of measurement of the USWC performance requested by TCG constitutes a standard of service greater than that which USWC normally provides to itself.²⁵

K. Bona Fide Request Process

1. At the time of hearing, TCG and USWC still disputed the process to be utilized for requests for Company services not already available (*e.g.*, services not included in

²³ We note that USWC and MFS reached agreement on service quality reports to be provided by pany. See Exhibit 68, page 81. This particular arrangement appears to comply with this directi

²⁴ Tr. 9/30/96, pp. 43-44.

²⁵ We note that TCG proposed to measure the service it receives from USWC against that of largest comparable customers of USWC. It is not clear that TCG would also be within that sel up nor that it would normally operate in a manner similar to the individual customers of tl up.

the Interconnection Tariff). In their closing Statements of Position, TCG and the Company both informed us that they had reached an agreement regarding the provisions for a BFR. The parties have agreed to that process incorporated into the MFS/USWC agreement (Exhibit 68).²⁶

2. Since TCG and USWC no longer dispute this issue, we do not enter any directives regarding the process to be used when TCG requests services on an individual case basis. We simply observe here that under the agreed to by the Company and TCG, the parties will, in addition to other matters, negotiate the price to be charged for services subject to the process. As noted in the above discussion regarding Costing and Pricing Issues, 233T does not establish interim rates for all services. Consistent with the parties' agreement regarding the BFR, the Agreement shall provide that TCG and USWC will negotiate, pursuant to the BFR, the specific price to be charged for services for which no 233T rate now exists.

Such prices will be subject to modification by our decision in Docket No. 96S-331T. Since these negotiated prices will be subject to change and are not being finally approved here, we also direct that these rates will be subject to true-up under the same conditions as other 233T rates.

L. Indemnification

²⁶ Under the agreed upon process, USWC will address all requests for service on an individual basis within a maximum period of time of five months.

1. TCG and USWC propose different language relating to indemnification and assignment of obligations under the interconnection agreement.²⁷

2. We note that USWC has agreed to detailed contractual language to be included in its agreement with MFS. (See Exhibit 68.) In our view, the provisions in the MFS/USWC agreement relating to indemnification (page 88) and assignment (page 93) are more appropriate than those suggested by TCG. For example, the TCG proposal would allow either party to assign the agreement without the consent of the other. The MFS language, on the other hand, prohibits assignment without the prior written consent of the other party. We conclude that, inasmuch as interconnection agreements will involve the provision of regulated services, it is inappropriate to give a party the unilateral right to assign the agreement.²⁸ Accordingly, the agreement should include the indemnity and assignment provisions from the MFS agreement.

M. Punitive Damages

TCG specifically requests that we order the Company to agree to potential liability for punitive damages in its inter-connection agreement. Based upon the information

²⁷ Notably, the purpose of arbitration proceedings is for the State commission to resolve disputed issues. See 252(b)(4)(C). Since the Act (252(e)) apparently requires the parties to execute an agreement based upon the State commission's arbitration decision and to submit the agreement to the commission for approval, the Act does not require us, in this arbitration proceeding, to specify the precise contractual language of an interconnection agreement.

²⁸ Indeed, assignment of performance under an interconnection agreement may require approval of the Commission.

provided by TCG and other parties to the consolidated proceeding, we are unable to conclude that an express provision relating to liability for punitive damages is necessary. Therefore, we will not require that such a contractual provision be included in the Agreement.

N. Network Interconnection

1. Consistent with 251(a) of the Act, the Commission's Rules on Interconnection and Unbundling, 4 CCR 723-39-3.1, require that all telecommunications providers "shall interconnect directly or indirectly with the facilities and equipment of other telecommunications providers." Furthermore, USWC is required by 4 CCR 723-39-3.3.2, and the Act that interconnection shall be provided at "any technically feasible point within the [local exchange] provider's network."

2. The unresolved interconnection issues with TCG included: (1) the number of interconnection points; (2) interconnection at the local tandem switch or the access tandem switch; (3) sizing of the interconnection facilities; (4) directionality of the trunking facilities; (5) meet-point trunking arrangements; and (6) combination interconnection trunk groups.

3. Number of Interconnection Points:

a. USWC urges this Commission to require each CLEC to establish one point of interconnection ("POI") in each local calling area in which it offers facilities-based telecommunications service. USWC further requests that the Agreement provide for a construction charge if the CLEC meet point is greater than one mile from a USWC end office.²⁹

b. We will require TCG to establish a POI in each local calling area in which it is delivering and receiving

²⁹ USWC Closing Position Statement, page 7.

local traffic. TCG may establish the POI in a particular calling area through the use of its own facilities or through the lease of facilities from other providers. TCG may also offer service in a local calling area through the purchase of unbundled elements. USWC shall not require nor prevent TCG from establishing more than one POI in each local calling area served by TCG. We also decline to approve the USWC request for assessment of construction charges for interconnection meet-points over one mile from the USWC end-office and discuss this issue further *infra*.

c. For delivery of toll calls, TCG may choose to connect to the LATA access tandem switch of USWC or establish a toll POI in each local calling area that TCG desires to provide toll service. Recognizing that the LATA access tandem switches of USWC may have connections to each and every end office switch in a LATA, we find that a connection of a CLEC switch to the LATA access tandem switch does not constitute the establishment of a POI in each and every local calling area.

4. Interconnection at the Local Tandem Switch versus Access Tandem Switch:

a. TCG has requested that it be allowed to interconnect with the USWC access tandem switch. USWC presently employs access tandem switches in Colorado and has a local tandem switch serving the Denver Metropolitan Area. According to TCG, there are a number of problems that it will encounter if it must route its traffic to the local tandem switch of USWC. First, the Local Exchange Routing Guide

("LERG") does not contain routing information for associating end offices with the local tandem switch. Second, USWC testified that there remains only a few trunk ports on the local tandem switch. Without additional ports on the tandem switch, the additional trunking requirements of TCG cannot be met. Third, it appears that the USWC access tandem switch can provide Integrated Services Digital Network ("ISDN") capabilities, while the USWC local tandem switch cannot. USWC opposes termination of local traffic at the access tandem. Staff recommends that traffic be delivered separately to the local and the access tandem switch.³⁰

b. We note that Section 251(c)(2)(C) of the Act requires that USWC provide interconnection to its network that is at least equal in quality to that provided to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection. Because of the previously referenced disparities between the USWC local and access tandems, we believe that it is appropriate for TCG to be able to use the USWC LATA access tandem switch(es) for the delivery of local calls to USWC end offices.

c. For proper access billing and to avoid circumvention of the access tariff, the Agreement shall require that TCG utilize separate trunk groups for delivery of local and toll traffic to the USWC access tandem switch. We also note that TCG is responsible for providing appropriate data to USWC for identification of traffic transiting through

³⁰ Staff's Statement of Position, Attachment A, page 4.

the USWC network to other CLECs.

5. Sizing of Trunk Facilities:

USWC has recommended a traffic measurement standard of 512 Economic Centum Call Seconds ("ECCS") for the determination of when direct end-office trunking is appropriate. TCG states that it accepts this standard³¹ and it should be included in the Agreement, with provision for modification by mutual agreement on the basis of good engineering practice.

6. Combination Interconnection Trunk Groups:

a. TCG proposes contract language to use combination local and meet point trunk groups.³²

b. Consistent with previous discussions, we direct that local traffic is to be separated from toll traffic.

c. TCG would also incorporate the 512 ECCS standard to trigger separation of local traffic from its toll traffic under this proposal. However, we reject the use of the standard for this purpose and direct that toll traffic be separated from local traf-fic.

7. Trunking Directionality:

TCG has requested that it be allowed to deliver traffic as two-way trunk groups.³³ We direct that trunks be

³¹ TCG Brief, page 11.

³² TCG Brief, Tab C, page 15.

³³ TCG Brief, Tab C, Paragraph D, page 12.

established as one-way or two-way trunks in accordance with standard engineering practices at the option of TCG.

8. Meet Point Trunking Arrangements:

The Commission directs that the Agreement shall require each party to construct and maintain its own facilities to an equivalent meet-point, unless a different point is mutually agreed upon.³⁴

O. Sharing of Revenues for Jointly-Provided Switched Access

1. The Commission directs USWC and TCG to employ the pre-sent USWC/Independent Company Model for the joint provision of Switched Access. That is, in the joint provision of Switched Access, each company receives access charges according to its tariff for the elements it provides. For example, when an end-use customer of an Independent Telephone Company (*i.e.*, another ILEC) originates a toll call whereby USWC performs the transport function to the designated interexchange carrier ("IXC"), the Independent Telephone Company receives revenue from the application of its carrier common line charges, local switching charges, and local transport charges, to the USWC/Independent meet point. USWC receives revenue from the application of its local transport

³⁴ In determining the meet-point, it should be viewed as occurring at the half-way point between location of the two parties, unless mutually agreed upon to do otherwise. We find the language concerning the interactions of the parties contained on pages 44 through 46 under Section XI.F. Attachment A under Tab C of the TCG Post Arbitration Brief to be generally acceptable.

access charges for transporting calls from the meet point to the IXC. Further-more, it is our understanding that the Independent Telephone Com-pany "single-bills" the multiple-tariff provision of local trans-port. According to it's own Access Service Tariff, each company, USWC, and the Independent Telephone Company, receives the rates and charges for the portion of switched access that it provides. It is our intent that this same arrangement be maintained for the joint provision of switched access by TCG and USWC. That is, if the TCG end-use customer is connected to the TCG switch through loops pro-vided by TCG, TCG will bill the IXC for the use of its loops, local switch, and the TCG portion of the local transport to the meet point. USWC will be entitled to receive, according to its Access Tariffs, compensation for the local transport it provides from the meet point to the IXC.

2. Likewise, in the case of an end-use customer connected to the USWC local switch through local loops provided by USWC and is connected to an access tandem switch provided by TCG. USWC shall bill its tariff charges for the use of its loop, local switch, and local transport to the meet point. TCG shall bill the IXC for transporting calls from the meet point to the IXC location.

3. In the case where TCG directly connects to the USWC end office and performs 100 percent of the transport function of calls to the IXC, then TCG would be the single provider of transport and receive all transport charges. USWC shall not be entitled to any portion of local transport

charges given that it performs none of the transport function.

4. With regard to the issue of classification of TCG switches, we find that TCG may provide access tandem switching. For TCG to charge access tandem rates, it must clearly have local end offices subtending its access tandem switch. We also reject the USWC position that a TCG switch may be classified as a tandem switch only if it serves a geographic area comparable to that of the USWC access tandem switch. TCG may have a much smaller set of end offices than USWC in a LATA that subtends its access tandem switch. The requirement for a TCG switch to be classified as an access tandem switch is that the switch has end-office switches (either owned by the CLEC, other CLECs, or ILECs) subtending it and is performing trunk-to-trunk tandem switching functions.

5. Accordingly, the contract language proposed by TCG found in Tab C, Attachment A, pages 10 through 16, of its Post Arbitration Brief, shall be modified to allow interconnection at the USWC access tandem switch for the provision of services, size trunks according to 512 ECCS engineering practices for direct trunking, provide for two-way trunking, establish meet point arrangements for the delivery of toll traffic and for the delivery of local traffic, and separate local traffic from toll traffic in those cases where local traffic is routed to an access tandem switch.

6. TCG proposes a method for recovering that portion of the switched access charges when jointly providing switched

access service with USWC.³⁵ Based on our previous discussion of meet-point billing arrangements, under which each provider collects revenues under its tariff for the particular service provided, we decline to include the TCG Residual Interconnection Charge ("RIC") sharing proposal.

7. Specifically as to the RIC, if USWC provides all or part of the transport of an interstate call from the end-office to the IXC, then USWC is entitled to collect its interstate rates, including RIC. If, however, USWC is not providing the transport of a call from an end-office switch to an IXC, then USWC may not apply its switched access transport rates, including the RIC, to those calls. We reject arbitrary splits of revenues. In jointly provisioned switched access services, each company will develop and apply its tariffed rates to the portion of the service that it provides.

P. Collocation

³⁵ TCG Brief, page 14.

1. The necessity of physical collocation of CLEC equipment, where technically feasible, is recognized in 251(c)(6) of the Act and in this Commission's Rules found at 4 CCR 723-39-3.4. In 573 of the FCC's First Report and Order, the FCC broadly interprets the term "premises" to include ILEC central offices, service wire centers and tandem offices, as well as all buildings or similar structures owned or leased by the ILEC that houses ILEC network facilities. The FCC treats as an ILEC premise any structures that house ILEC network facilities on public rights-of-way, such as vaults containing loop concentrators or similar structures. USWC opposes a blanket determination that collocation at any USWC premises is technically feasible and urges that collocation in non-end office USWC structures will require a case-by-case determination and be handled through a BFR process.³⁶

2. Collocation on USWC premises shall be allowed whenever it is technically feasible in accordance with Commission Rules. These Rules, as well as the Act, require that USWC collocate equipment necessary for interconnection or access to unbundled elements at the premises of USWC. The FCC's Report and Order defines premises to include structures

³⁶ USWC Closing Position Statement, page 12.

other than USWC s end offices, such as cable vaults and we direct that collocation be allowed accordingly.

3. Collocation at any USWC premises shall be accomplished through the BFR process. Collocation provisions shall not con-strain the types of equipment that may be collocated. TCG shall be allowed to locate microwave equipment or other equipment, such as Digital Loop Carrier ("DLC") systems, at the premises of USWC sub-ject to availability of space.³⁷ TCG shall be permitted to share its collocated space with other providers³⁸ and to interconnect or cross-connect to other provider s equipment collocated at the premise. Where space is limited, such as in cable vaults or man-holes, TCG shall be permitted to collocate equipment of the type that USWC would normally locate in these facilities.

With regard to the terms of purchase or lease of equipment for virtual loca-tion, we adopt the terms within 9 on page 25 of the MFS/USWC Agreement (Exhibit 68).

4. With regard to access to collocation space, we find that TCG requires the ability to timely access its collocation equipment. However, we are also sensitive to the issue of preserv-ing the security and network reliability of USWC s equipment in USWC's portion of the premise. TCG stated that it would be willing to bear the cost of secured space

³⁷ TCG and other CLECs are also authorized to collocate Remote Switching Units at the USWC premises under the same terms and conditions included within the arbitration decision of the Commission for AT&T in Docket No. 96A-345T.

³⁸ While we condone the TCG concept of shared collocation space, we do not adopt the reservation or specific space requirement designations contained within the TCG language on this issue (see Section XI.B. of Attachment A of Tab C of the TCG brief)

provided for collocation to allow unescorted access. USWC stated that it does not have space available at all of its locations to construct secured collocation areas accessible 24 hours a day. Staff recommended that background checks, liability bonding, and other mechanisms should be in place before permitting unescorted 24-hour a day, 7-day a week access to unpartitioned collocated facilities.³⁹

5. We direct that where a provider has requested collocation through a BFR process and where space allows partition of USWC equipment, providers shall be allowed 24-hour a day, 7-day a week unescorted access. Where it is not possible to construct secured locations for unescorted access, USWC shall provide a 24-hour a day, 7-day a week manned telephone number through which TCG may request escorted entry to collocation space. Such escorted entry by USWC shall be made available within the approximate travel time required by the TCG technician to meet the USWC escort at the USWC premises. As an alternative to providing timely escorts, USWC may consider the mechanisms suggested by Staff, such as liability bonding and background checks, to allow unescorted access by TCG personnel to USWC premises not physically partitioned.

6. TCG's cost of its virtual collocation: TCG notes that it has expended resources in the past for virtual collocation in lieu of requested physical collocation. TCG requests reimbursement from USWC for these expenses. We do

³⁹ Staff's Position Statement, page 4.

not find sufficient information in the record in this docket to allow reimbursement. We decline to award reimbursement.

Q. Access to Unbundled Elements

1. TCG and USWC agree that USWC should provide non-discriminatory access to unbundled elements. The Act makes it clear that this type of unbundling must occur. Disputes as to prices for unbundled elements shall be resolved through incorporation by reference of the Interconnection Tariff as previously discussed.⁴⁰

2. TCG raised the issue of unbundled access to both "basic" and "assured" links (loops).⁴¹ TCG points out that USWC does not offer such a distinction for loops in its interim tariff for unbundled elements and recommends that USWC establish an interim rate for "basic" and "assured" links. USWC offers to provide its standard unbundled element two or four-wire loops capable of supporting services within the nominal voice-grade bandwidth of 300 to 3,000 Hertz (Hz). To the extent that TCG desires to provide services that require transmission capabilities beyond that of the nominal bandwidth available on its standard loop offering, USWC proposes to

⁴⁰ Within Section II of Attachment A under Tab C of its brief, TCG proposes language related to network elements. Except as otherwise noted in this decision, such as for the specific tariff recurring and nonrecurring rates, this language appears reasonable and the concepts or issues described therein are approved. We note that the descriptions of such functions as "servicing", "coordination", on pages 20 through 25, and the BFR (pages 25 through 29), which is also discussed, are similar to those found within the MFS/USWC Agreement (Exhibit 68).

⁴¹ As defined within Attachment A under Tab C of the TCG brief, a "basic" and "assured" link is described as loops with the capabilities of supporting services within the nominal voice-grade bandwidth of 300-3000 Hz. The primary distinction between the definitions of these loops lies in the guaranteed losses (5.5 dB) for the "assured" link relative to the "basic" link.

charge TCG for any necessary conditioning.⁴² USWC further testified that to the extent not already covered by the USWC tariff,⁴³ any work done to remove equipment, such as load coils used in provisioning voice grade service, would incur a non-recurring charge to be paid by the requesting party, commonly referred to as an "individual case basis" (ICB) charge.⁴⁴

3. Staff notes that the Commission's Rules (4 CCR 723-2-17) define basic service for which USWC is to provide on a ubiquitous basis over its existing loop plant. The definition does not include the capability for services such as ADSL (Asymmetric Digital Subscriber Line), HDSL (High-bit-rate Digital Subscriber Line), or ISDN. Staff further recommends that USWC file a tariff establishing a standard flat nonrecurring charge for qualifying conditioned unbundled loops (e.g., ADSL, HDSL, or ISDN).

4. We are persuaded by the recommendations of USWC and Staff on this issue. The Agreement shall provide for the standard unbundled loop, supporting services within the nominal voice-grade frequency bandwidth, available as either two or four-wire loop. Rates for this loop are established by the Interconnection Tariff. Loop conditioning for advanced services such as HDSL, ADSL, or the "assured" loops desired by TCG shall also be made available by USWC, subject to the

⁴² Exhibit 54, pp. 76-77.

⁴³ We note that under 5.4.5 of its Exchange and Network Services Tariff, USWC offers the Balance Enhancement feature which guarantees a specific loss level for a loop facility.

⁴⁴ Tr. 10/2/96, p. 194.

Interconnection Tariff. To the extent not covered by the Interconnection Tariff, USWC shall develop a standard nonrecurring rate for removal of existing conditioning, normally load coils used for voice-grade service. In Docket No. 96S-331T, USWC shall also develop its basic unbundled loop element recurring rate on the basis that no conditioning, load coils, or any other equipment investment, is included within that rate. If TCG requires "assured" loops or seeks to provide advanced digital services requiring conditioning features not provided in the current Interconnection Tariff, it shall utilize the BFR process to obtain such conditioned loops.

5. Use of meet points for access to unbundled network elements: The Commission also clarifies that when meet-points are to be used to access unbundled network elements, the CLEC, such as TCG, is responsible for the meet-point costs, normally collected through recurring rate elements for the type of service provided, associated with gaining access to these elements.⁴⁵

R. Nondiscriminatory Access to Poles, Ducts, Conduits, and Rights-of-Way

TCG recommends that we include a requirement in the arbitrated interconnection agreements for poles and conduits that include limitations on the termination of occupancy, preparation of the conduits by the owner, and specific terms

⁴⁵ See page 19, IV.B.2. of Exhibit 68.

for reasonable egress.⁴⁶ We have reviewed the suggested language proposed in Section III of TCG's Attachment A, Tab C, concerning the access to poles, ducts, conduits, and rights-of-way, and USWC's alternative in Section XVII of the MFS/USWC Agreement (Exhibit 68). Based on our review, we believe that the language on page 50 of Exhibit 68 is more reasonable and should be adopted for the TCG agreement. The title of Section XVII should be modified by including the word "Nondiscriminatory" before the word "Access" within the title block.

S. Customer Guide in White Pages

1. TCG requests that the Commission direct USWC to provide an equivalent number of customer guide pages to TCG as it uses for itself in its white pages directory. TCG argues that USWC has an obligation under 251(b)(3) of the Act not to discriminate in its provision of directory listings. USWC argues that directories are provided by U S WEST Direct, which is a separate company from USWC, and, therefore, any agreements between U S WEST Direct and TCG should be direct and not through USWC. Thus, USWC recommends that all negotiations for specific directory conditions should be between TCG and TCG's directory publisher or U S WEST Direct.

2. The Commission's rule (4 CCR 723-39-5.12.6) regarding the provision of directories in a competitive telecommunications market states that "each [incumbent] `White

⁴⁶ TCG Brief, page 27.

Pages' provider shall provide competing telecommunications providers space in the customer guide pages of the 'White Pages' telephone directory for the purpose of notifying customers how to reach competing providers to: (1) request service; (2) contact repair service; (3) dial directory assistance; (4) reach an account representative; (5) request buried cable local service; and, (6) contact the special needs center for customers with disabilities." We also agree that the Act requires an incumbent provider not to discriminate in its provision of directory listings.

3. We conclude that our rules require provision of specific information on the customer guide pages for CLECs within the directory published for USWC. In terms of the TCG request that the number of customer guide pages provided to TCG be equivalent to that provided to USWC in the directory, we shall not approve this request as proposed by TCG. However, TCG should have available to it the same terms and conditions available to USWC from the directory publisher for provision of customer guide pages and shall be entitled to at least the same number of customer guide pages within the directory as are provided to USWC with the USWC logo.

4. We also note that the issues of confidential customer information and commingling of NXX codes as proposed on pages 31 and 32 of Attachment A under Tab C of the TCG final brief are acceptable for incorporation into the Arbitration Agreement.

T. Billing for Advertising

TCG recommends that it be allowed to directly bill its own customers for directory advertising and remit such payments to USWC. TCG notes the importance of an exclusive relationship with its customer and the need to be a provider of full-range services. USWC, again on this issue, requests that the Company should not be responsible for providing this function. TCG's proposal is reasonable in establishing a nondiscriminatory arrangement under the same terms and conditions available to USWC for the provision of directory listings and should be incorporated into the Arbitration Agreement.

U. Other issues

Busy Line Verify/Busy Line Interrupt

a. As part of its proposed language under this heading, TCG proposes that each party should charge the other party for Busy Line Verify ("BLV") and Busy Line Interrupt ("BLI"), the rates contained in their respective tariff.⁴⁷ This issue, initially broached within the attachments to the arbitration petition of TCG (Exhibit A5),

⁴⁷ See IX.k. on page 38 of Attachment A under Tab C of the TCG Brief.

was included within the proposed interconnection agreement included as Attachment A to the testimony of TCG witness Washington (See Exhibit 42). In its formal initial response to the TCG petition, USWC specifically proposed that charges for BLV/BLI would be as set forth in USWC's FCC Tariff No. 5 or the applicable state tariffs.⁴⁸ Although USWC did not specifically comment on this issue within its brief, it did direct the Commission to use its agreement with MFS (Exhibit 68) as a guide to its position on issues left undiscussed within its brief.

⁴⁸ See IX.E3. on page 59 of Attachment B of Exhibit B5.

b. The MFS/USWC agreement includes agreed upon rates for BLV/BLI and is not subject to arbitration. In this instance, there is no apparent agreement between USWC and TCG for specific rates. TCG requests that each party bill the other using its tariffed rates. We note that under the current USWC Exchange and Network Services Tariff, that BLV/BLI is available to CLECs on a resale basis using a Commission approved discount from the tariffed retail rate for BLV/BLI. The TCG request on this issue to bill for this service using applicable tariff rates (*i.e.*, interstate or intrastate) appears reasonable and is similar to the original proposal of USWC within its initial response to the TCG arbitration petition. The TCG request on this issue is adopted.⁴⁹

V. Interim Number Portability

TCG and USWC both recognize that this issue is being resolved in Docket No. 96S-250T. Hearings were held on September 16, 1996 on the issues presented herein. The Company's argument disputes the FCC's decision in CC Docket No. 95-116⁵⁰ regarding cost recovery for interim number portability. We do not dispute the FCC's decision in this

⁴⁹ We also note that TCG makes a similar request regarding the appropriate charges for Direct instance. Review of the MFS/USWC Agreement finds that use of the tariffed rates is recognized a table alternative between those two parties (page 46 of Exhibit 68). Therefore, we adopt use iffed charges of the parties as the means of compensation for Directory Assistance charges.

⁵⁰ First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, day 2, 1996.

docket, and until such time as a decision is rendered by the Administrative Law Judge in our interim number portability docket, we have determined that the rates established in the Interconnection Tariff shall apply.

W. Definitions

In the proposed Interconnection Agreement, Attachment A under Tab C of its Post Arbitration Brief, TCG has listed numerous definitions on which it seeks a ruling. USWC proposed its set of definitions within the MFS/USWC Agreement.⁵¹ The Commission declines to undertake a sentence by sentence review of the proposed definitions. The definitions included within the Arbitration Agreement should be consistent with this order and applicable federal and state law.

⁵¹

See Exhibit 68.

X. Joint Provision of Wireless Service Provider Access

In its Post Arbitration Brief, TCG stated that the issue of joint provision of wireless service provider access may no longer be in dispute. USWC states that this issue is not appropriate within an arbitration agreement. Based on these representations, we decline to order that any terms relative to this issue be included within the TCG interconnection agreement.

Y. Pending Motion

On October 31, 1996, TCG filed its Motion Requesting Commission Acceptance of Late-Filed Post-Hearing Brief and Shortening of Response Time. Good grounds being stated within this request, the Commission will accept the late-filed brief of TCG.

II. ORDER

A. The Commission Orders That:

1. The issues presented in the Petition for Arbitration filed by TCG Colorado on July 17, 1996 are resolved as set forth in the above discussion.

2. Within 30 days of the effective date of this Order, TCG Colorado and U S WEST Communications, Inc., are directed to submit a complete proposed interconnection agreement for approval by the Commission, pursuant to the provisions of 252(e) of the Telecommunications Act of 1996.

The proposed agreement shall comply with this order.

3. TCG Colorado's late-filed brief is accepted for consideration in this proceeding.

4. The 20-day period provided for in 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

5. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING November 5, 1996.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____ Commissioners

BM: srs