ORDER NO. 04-600

ENTERED OCT 18 2004

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 537

In the Matter of	)	
	)	
WESTERN RADIO SERVICES CO.	)	
	)	ORDER
Petition for Arbitration of an Interconnection Agreement with QWEST CORPORATION, Pursuant to Section 252(b) of the Telecommunications Act of 1996.	)	

DISPOSITION: ARBITRATOR'S DECISION ADOPTED

On March 11, 2004, Western Radio Services Co. (Western) filed a Petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement with Qwest Corporation (Qwest), pursuant to the Telecommunications Act of 1996[1] (the Act). Western identified five issues for arbitration. Qwest responded to the Petition on April 6, 2004, identifying ten additional issues for arbitration.

The Commission assigned Administrative Law Judge Allan J. Arlow to act as arbitrator in this case. Telephone conferences were held on April 9, May l1 and June 11, 2004, for the purposes of establishing a procedural schedule, clarifying the issues and resolving factual disputes so that an evidentiary hearing could be avoided. The parties filed direct testimony on May 14, 2004, and rebuttal testimony on June 2, 2004. At the June 11, 2004, conference, the parties agreed that Issue Nos. 9, 13 and 14 had been resolved in their entirety and Issue No. 15 had been resolved in part.

The parties waived statutory deadlines in order to arrive at a revised briefing and decision schedule and, by Ruling of June 24, 2004, the Arbitrator granted the extension of time requested by the parties. On June 30, 2004, the parties submitted a Stipulation Regarding Facts on Issue Nos. 4 and 5 (Stipulation), and waived an evidentiary hearing and the right to cross-examine opposing witnesses on all of the

[1] Western and Qwest do not have any pre-existing interconnection agreement in Oregon.

outstanding issues. The parties filed their opening briefs on July 2, 2004, and reply briefs on July 23, 2004. Qwest filed a Request for the Commission to Consider Supplemental Filing (Supplement) on August 27, 2004. A Reply of Western Radio Services Co. to Qwest's Supplemental Filing (Reply to Supplement) was filed on September 1, 2004.

The Arbitrator issued his decision in this proceeding on September 20, 2004. Western timely filed exceptions to the decision in its Comments of Western Radio Services Co. on Arbitration Decision (Comments) on October 1, 2004.

Statutory Authority

The standards for arbitration are set forth in 47 USC §252(c):

> 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.

Section 252(e)(1) of the Act requires that any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. Section 252(e)(2)(B) provides that the State commission may reject an agreement (or any portion thereof) adopted by arbitration only "if it finds that the agreement does not meet the requirements of section 251, or the standards set forth in subsection (d) of this section." Section 252(e)(3) further provides:

> Notwithstanding paragraph (2), but subject to section 252, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Western takes exception to the Arbitrator's decisions with respect to each and every issue presented.

Issues 1 and 11.[2] Western first takes exception to the Arbitrator's decisions in Issues 1 (Is Qwest required to transport and terminate telephone exchange traffic and exchange access traffic delivered to a tandem by Western to another tandem?) and 11 (Single Point of Presence (SPOP) Option). The Arbitrator found that there was no federal or state requirement that an ILEC provide inter-tandem transport for the provision of local exchange services and that no carrier, including Qwest, utilized inter-tandem transport for that purpose. He further found that case law cited by Western related solely to the requirement to permit a CLEC to interconnect at a tandem switch if technically feasible and did not support the provision which Western sought to have included in its interconnection agreement with Qwest.[3] In Issue 11, the Arbitrator found that Qwest's offer of the SPOP option was reasonable and not mandatory.[4]

Western recites the same sections of federal statutes and rules as were cited in its brief—Section 251(c)(2) of the Act and 47 CFR 51.305(a)(2)(iii)—and reiterates its contention that it is therefore entitled to a single access tandem connection and inter-tandem transport for all local exchange traffic.[5] It offers no legal basis to find that the Arbitrator erred in his decisions. Western has merely reiterated earlier arguments and they are rejected. The decisions of the Arbitrator with respect to Issues 1 and 11 are adopted.

Issue 2. With respect to this issue, the definition of non-local calls, the Arbitrator cited several FCC orders and concluded that "[t]he FCC has made clear that the deciding factor in determining whether the call is local or non-local for purposes of compensation is whether or not an interexchange carrier has a role in handling the call and that such factor is applicable to LECs and CMRS providers."[6]

In its Comments, Western again offers no legal basis to find that the Arbitrator erred in his decision. Western has merely reiterated earlier arguments and rule citations.[7] The decision of the Arbitrator is adopted.

Issues 3 and 12. These issues—the availability of Multifrequency (MF) Signaling Options for Type 1 Interconnection (Issue 3) and the Special Request Process Language (Issue 12) are linked by Western because it wishes to order obsolete signaling methods without having to utilize the procedures Qwest wishes to put in place for dealing with non-standard facilities requests. In his Decision, the Arbitrator noted that there was scant case law and that the only precedent in law was a decision by the Utah Commission, which sided with Qwest against a Western affiliate which found the

[2] We have structured our Order to parallel that of Western's Comments.
[3] Arbitrator's Decision, p. 4.
[4] *Id.*, p. 9.
[5] Comments, p. 2.
[6] *Id*, pp. 4-5, and cases cited therein.
[7] Comments, p. 2.

special request process to be "a reasonable way…to make requests for DTMF or pulse signaling at specific locations." The Arbitrator found Qwest's approach to be the most reasonable under the circumstances.[8] In its Comments, Western makes no new arguments nor does it seek to distinguish the cited case's facts or undermine its logic. Rather, Western only reiterates earlier arguments and federal statute and rule citations.[9] The decision of the Arbitrator is adopted.

Issue 4. Western seeks to utilize unbundled loops as what is, in fact, "dedicated transport" to transport traffic between its switch and that of Qwest's. The Arbitrator noted that there was a large body of case law upholding Qwest's contention that an ILEC is not required to provide access to UNEs for the purposes Western proposes.[10] Here, too, Western makes no new arguments nor does it seek to distinguish the cited cases' facts or relevance or undermine their logic. Rather, Western only reiterates earlier arguments and federal statute and rule citations.[11] The decision of the Arbitrator is adopted.

Issue 5. Western contends that it is entitled to receive reciprocal compensation from the date that it made its first request for negotiation of an interconnection agreement. The Arbitrator reviewed the long history of the parties' negotiations and found that the stipulated facts and the records of the Commission pointed to the conclusion that an "unexplained four-year lapse [in Western's efforts to seek a negotiated agreement] is the dispositive event; it is conclusive evidence of the abandonment of any reasonable attempt to obtain an interconnection agreement. Western cannot benefit from its own inaction."[12] Western does not dispute either the findings of fact, nor the Arbitrator's conclusion as to the weight to be given to Western's actions. Instead, Western only reiterates earlier arguments and federal statute and rule citations.[13]

Issue 6. Western asserts that the Arbitrator erred because he recommended that the smaller CLEC-defined local calling area should be used for reciprocal compensation, rather than the larger Major Trading Area (MTA) established for CMRS providers.[14] However, the Arbitrator's Decision states:

> Qwest maintains that it has already acknowledged that traffic exchanged between the parties within the MTA is subject to reciprocal compensation under its proposed agreement; its only dispute with Western is that it finds Western's language to be incoherent…. Western is

[8] Arbitrator's Decision, p. 6, and case cited therein.
[9] Comments, p. 2.
[10] Arbitrator's Decision, pp. 6-7, citing Qwest Opening Brief, pp. 21-23, and cases cited therein.
[11] Comments, p. 2.
[12] Arbitrator's Decision, p. 8.
[13] Comments, p. 2.
[14] Comments, pp. 2-3.

> obtaining what it wants…. Utilization of new language upon which the parties do not agree as to its meaning, where existing language already in use with other, similarly situated CMRS carriers is also available, would only add uncertainty and the possibility of later disagreement.[15]

We affirm the Arbitrator's decision on this issue and reject Western's exception thereto.

Issue 7. Western asserts that the Arbitrator erred in limiting Qwest's obligation to provide dedicated transport to 50 miles. Western merely reiterates its earlier arguments and citations to Section 251(c)(2) of the Act and 47 CFR 51.305(a)(2)(vi). It neither responds to nor distinguishes the Arbitrator's discussion regarding his reliance upon the Commission's thorough exploration of this issue in Docket UM 823, which, in turn relied upon the FCC's Local Competition First Report and Order.[16] We affirm the Arbitrator's decision on this issue and reject Western's exception thereto.

Issue 8. Western contends that the Arbitrator's decision on this issue has caused the Commission to abdicate its responsibilities under Section 252(c)(2) of the act because it allows Qwest to set rates for reciprocal compensation. Western believes that Qwest is not entitled to assess all costs for analog loops, but that the costs should be reduced because it should receive reciprocal compensation for analog loop interconnection facilities.[17]

Under Issue 4, the Commission did not cede the right to set rates for dedicated transport to Qwest; rather, the Arbitrator concluded that Western is not entitled to use unbundled loops as a means for dedicated transport. The decision goes on to state:

> By adopting Qwest's language, it is assured that whatever two-way dedicated facilities are properly used to exchange traffic between parties will be subject to reciprocal compensation. Furthermore, the existence of similar language, utilized by numerous wireless carriers throughout Qwest's territory, will further help to guarantee fairness and uniformity in its application.[18]

[15] Arbitrator's Decision, p. 8.
[16] *Id.*, p. 9, text and Footnote 41.
[17] Comments, p. 3.
[18] Arbitrator's Decision, p. 10.

Here again, Western only reiterates earlier arguments and federal statute and rule citations.[19] We affirm the Arbitrator's decision on this issue and reject Western's exception thereto.

Issues 10 and 12. After noting that there was some misunderstanding of terms between the parties, the Arbitrator stated:

> [t]he substance of the dispute has largely been resolved by Qwest's assertion that it will consider Type 1 meet point interconnection. The 'Special Request Process' is a method for managing out-of-the-ordinary network configuration requests and does not impinge on the parties' rights to seek Commission assistance in the event that such requests are disputed. Western offers no rationale for treating CMRS requests differently from CLEC requests.[20]

Western asserts that "[t]he conditions recommended by the Arbitrator allow Qwest to determine the technical feasibility and the terms and conditions for meet point interconnection arrangements." Without responding to or demonstrating where the Arbitrator's decision on this issue was incorrect, Western reiterates earlier arguments and federal statute and rule citations, but otherwise offers no further explication of the Arbitrator's Decision's infirmities with respect to either meet point interconnection or the "Special Request Process."[21] We affirm the Arbitrator's decision on these issues and reject Western's exception thereto.

CONCLUSION

The Commission has reviewed the Arbitrator's Decision and the exceptions filed by Western. The Arbitrator's Decision complies with the requirements of the Act, applicable FCC regulations and relevant state law and regulations, and should be approved.

[19] Comments, p. 3.
[20] Arbitrator's Decision, p. 11.
[21] Comments, p. 3.

ORDER

IT IS ORDERED that the Arbitrator's decision in this case, attached to and made part of this order as Appendix A, is adopted.

Made, entered, and effective _____.

_____	_____
Lee Beyer Chairman	**Ray Baum** Commissioner
	_____
	John Savage Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

ARB 537 Order

ISSUED: September 20, 2004

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 537

In the Matter of	)	
	)	
WESTERN RADIO SERVICES CO.	)	
	)	ARBITRATOR'S DECISION
Petition for Arbitration of an Interconnection Agreement with QWEST CORPORATION, Pursuant to Section 252(b) of the Telecom-munications Act of 1996.	)	

On March 11, 2004, Western Radio Services Co. (Western) filed a Petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement with Qwest Corporation (Qwest), pursuant to the Telecommunications Act of 1996[1] (the Act). Western identified five issues for arbitration. Qwest responded to the Petition on April 6, 2004, identifying ten additional issues for arbitration.

Teleconferences were held on April 9, May l1 and June 11, 2004, for the purposes of establishing a procedural schedule, clarifying the issues and resolving factual disputes so that an evidentiary hearing could be avoided. The parties filed direct testimony on May 14, 2004, and rebuttal testimony on June 2, 2004. At the June 11, 2004, conference, the parties agreed that Issue Nos. 9, 13 and 14 had been resolved in their entirety, and that Issue No. 15 had been resolved in part.

The parties waived statutory deadlines in order to arrive at a revised briefing and decision schedule and, by Ruling of June 24, 2004, the Arbitrator granted the extension of time requested by the parties. On June 30, 2004, the parties submitted a Stipulation Regarding Facts on Issue Nos. 4 and 5 (Stipulation), and waived an evidentiary hearing and the right to cross-examine opposing witnesses on all of the outstanding issues. The parties filed their opening briefs on July 2, 2004, and reply briefs on July 23, 2004. Qwest filed a Request for the Commission to Consider Supplemental Filing (Supplement) on August 27, 2004. A Reply of Western Radio Services Co. to Qwest's Supplemental Filing (Reply to Supplement) was filed on September 1, 2004.

Background. The essential background facts are not in dispute. Western is licensed by the Federal Communications Commission (FCC) to provide Commercial Mobile

[1] Western and Qwest do not have any pre-existing interconnection agreement in Oregon.

Radio Service (CMRS) within the State of Oregon. Western does not have a certificate of authority under ORS 759.020 to provide wireline services in Oregon as a "competitive telecommunications service provider," commonly referred to as a "CLEC." Qwest has a certificate of authority pursuant to ORS 759.025, and provides wireline services in Oregon as a telecommunications utility.

Western and its predecessors and Qwest and its predecessors have been doing business with each other for over 20 years. Western interconnects with Qwest in Bend, using facilities and services purchased from Qwest's Oregon Radio Common Carrier Tariff (RCC Tariff). Qwest owns the switch serving Western's network and performs origination and termination of both incoming and outgoing calls.[2]

Some time subsequent to the February 8, 1996, effective date of the Telecommunications Act of 1996 (the Act), Western sent a letter[3] to Qwest requesting negotiation of a wireless interconnection agreement that would cover Oregon and other states. Attempts by the parties to reach an agreement were unsuccessful.[4] On June 24, 1999, Western requested Commission assistance for arbitration under Section 252(b) of the Act (Docket ARB 137), which ended in a dismissal, Order No. 99-466, entered August 6, 1999.[5] There were a number of additional negotiations between the parties, but none resulted in either a request for arbitration or a completed agreement. Throughout this time, Western continued to purchase Type 1 interconnection services and facilities from Qwest out of Qwest's RCC tariff and to exchange traffic through these services and facilities.[6]

According to Qwest, the instant Petition is part of a larger dispute between Qwest and Western's principal, Mr. Richard Oberdorfer, regarding Qwest's obligations under the Act. [7] Where decisions on similar matters to those in this proceeding have been issued, I will indicate where I have taken official notice of such decisions.

Statutory Authority

The standards for arbitration are set forth in 47 USC §252(c):

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[2] Qwest Opening Brief, p. 3.

[3] The parties do not agree on the exact date. Western cites a letter sent to Qwest dated August 12, 1996, which Qwest claims it has no record of. Qwest does acknowledge a March 5, 1997, letter. Stipulation ¶¶ II.3-4.

[4] *Id.*, ¶¶ II.5-6.

[5] "Western's filing on June 24 did not contain the required petition and information to initiate an arbitration proceeding. It is inadequate and defective as a petition for arbitration. Mr. Oberdorfer understands that and will now negotiate with USWC with the goal of signing an interconnection agreement. Commission personnel are available to assist in negotiations if the parties think Commission assistance will facilitate resolution of the disputed issues."

[6] Stipulation, ¶¶II.2, 5-7.

[7] "In December 2001, Mr. Oberdorfer, using the name 'Autotel,' requested negotiation with Qwest for a wireless interconnection agreement in Utah. Autotel Requested 'Type 1' and 'Type 2' wireless interconnection…. On or about September 22, 2003, Mr. Oberdorfer expanded his negotiations with Qwest to include Arizona…. With the exception of two issues, the issues are the same in Oregon and in Arizona. Mr. Oberdorfer is the principal of a Nevada corporation named Autotel. To the best of Qwest's knowledge, Autotel is not authorized to conduct business in Arizona, Oregon or Utah." Qwest Opening Brief, pp. 5-6, fn. 9.

> 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 above authority, there follows a discussion and decision on each of the issues still in dispute between the parties.

Issue 1: Is Qwest required to transport and terminate telephone exchange traffic and exchange access traffic delivered to a tandem by Western to another tandem?

Positions of the Parties. Western asserts that it should be able to connect at a single tandem because "there is no requirement for Western to interconnect at multiple tandems. Qwest's network is already configured to transport traffic between tandems." Western asserts that all CMRS traffic that originates and terminates in the same Major Trading Area (MTA) is local and that its local traffic would be delivered to a local switch and not a tandem and therefore Qwest's discussion of Type 1 and Type 2 interconnection is irrelevant. Western asserts that Qwest's position has been rejected by the Ninth Circuit on two previous occasions and provides the sections of the opinions it deems relevant.[8]

The issue, to Qwest, is not whether Western may interconnect at the access tandem, but whether it is required to reconfigure its network to transport local traffic between its access tandems.

> It is undisputed in the record that Qwest's network is not configured to provide this transport, that Qwest does not provide this transport to itself, that Qwest does not provide this transport to competitive local exchange carriers ("CLECS") or to other wireless carriers and that Qwest's Oregon SGAT does not contemplate such transport of local traffic.[9]

Qwest states that the only relevant case on the issue is the Utah Arbitration Order, which analyzed the same issue between Western's affiliate and Qwest, and found in Qwest's favor.[10]

[8] Western Reply Brief. Although not paginated, I refer to pages 2-3 thereof.
[9] Qwest Reply Brief, p. 2.
[10] *Id.*, fn. 5, citing *In the Matter of the Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the Telecommunications Act*, Docket No. 03-049-19 (Utah PSC, Feb. 18, 2004) ("Utah Arbitration Order"), p. 3.

Discussion. The parties had previously agreed to waive cross-examination of witnesses in this case. Therefore, assertions of fact in witnesses' testimony relied upon in the briefs are deemed to be uncontroverted by the opposing party.

The portions of *U S WEST v. MFS* and *U S WEST v. Jennings*[11] cited by Western relate solely to the requirement that the ILEC permit a CLEC to interconnect at a tandem switch if technically feasible.[12] Qwest does not dispute its obligation to do so. However, in the opinion and rules upon which Western relies, no mention is made of any obligation to provide inter-tandem transport for the provision of local exchange services.

The testimony of Qwest witnesses Rachel Torrence and Elmer Craig Morris described the configurations and uses of Qwest's inter-tandem trunking and, as Qwest notes, no exchange (local) traffic is carried on such inter-tandem transport for *any* carrier, *including Qwest*. Under the Qwest proposed language, Western's calls would be routed in a manner identical to Qwest's and would be interconnected with Qwest under the same terms and conditions as other WSPs. [13] Western has offered no substantial reason why it should be treated in a manner different from every other carrier. The language proposed by Qwest is adopted.

Issue 2: Definition of Non-Local Calls

Positions of the Parties. The parties disagree as to definition of "Non-Local Calls" in Sections III.GG, IV.C.4 and IV.H.1 for the purpose of determining whether the traffic is subject to reciprocal compensation or access charges. Western asserts that 47 CFR.51.701(b)(2) defines intraMTA calls as local traffic[14] and should therefore be subject to reciprocal compensation and that, if Qwest disagrees with the FCC's rulemaking processes, it is improper to challenge them in an arbitration proceeding. Furthermore, Western contends that access charges would make it impossible for Western to compete in the marketplace.[15]

Qwest does not dispute the 47 CFR 51.701(b)(2) definition but contends that a complete reading of the rule and relevant FCC orders make clear that calls that originate and terminate within the same MTA but involve more than two providers, i.e. not just the ILEC and the CMRS provider, are "non-local" for the purposes of intercarrier compensation and that the matter has been well-settled before the FCC.[16]

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[11] *U S WEST Communications, Inc. v. Jennings*, 204 F.3d 950, 961 (9th Cir. 2002).

[12] Qwest notes in its Supplement, p. 3, that Western raised this new argument in its Reply Brief, not responsive to Qwest's Opening Brief and should be disregarded as improper. Western again reargues Issue 1 in its Reply to Supplement. Although I disregard the submission of materials in the Reply Briefs and Supplement and Reply to Supplement that are beyond the scope of Opening Briefs (except for a change of position bringing the parties closer together), my decision would be no different than had the improperly submitted materials been considered.

[13] Qwest Opening Brief, citing Qwest/3, Torrence/5-8 and Qwest/1, Morris/13.

[14] "51.701(B)(2), a call, which at the beginning of the call, originates and terminates in the same MTA is local traffic."

[15] Western Reply Brief, pp. 3-4.

[16] Qwest Reply Brief, p. 3, Qwest Opening Brief, pp. 15-16, citing the First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rec. 8965(1996) ("*First Report and Order*"), ¶¶1034, 1043, and Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rec. 9151 (2001), ("*ISP Remand Order*"), ¶46, remanded *WorldCom, Inc. v. F.C.C.*, 288 F 3d 429 (C.C. Cir. 2002).

Discussion. The FCC has made clear that the deciding factor in determining whether the call is local or non-local for purposes of compensation is whether or not an interexchange carrier has a role in handling the call and that such factor is applicable to LECs and CMRS providers.

> Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC…. Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.[17]

The Qwest language is adopted.

Issue 3: Multifrequency (MF) Signaling Options for Type 1 Interconnection

Positions of the Parties. Western seeks to include a provision in the agreement that would require Qwest to provide "dial pulse" and "dual tone MF" (DTMF) signaling to Western. Qwest provides only "wink start MF" signaling to other carriers; the other forms of signaling are obsolete and provided to customers only on a grandfathered basis where available. However, Qwest is not offering pulse or DTMF to provide signaling to its own customers for use on switch-to-switch connections, and the few wholesale customers who do have DTMF signaling are grandfathered until such time as it can be phased out in favor of newer, more efficient technologies.[18] Western asserts that since Qwest offers dial pulse and DTMF signaling to its own end users and that Type 1 Interconnection using dial pulse and DTMF is technically feasible, Qwest is required to interconnect at the same level of quality it provides its own end users. By allowing Qwest to determine the conditions for Type 1 signaling, the Commission would shift its authority to Qwest.[19]

Qwest asserts that dial pulse and DTMF signaling are provided to customers only where two circumstances exist: first, the customers must already be utilizing dial pulse or DTMF (i.e., they are "grandfathered" into the service rather than new recipients of the service) and, second, the services must already be available through existing facilities.[20] Qwest is willing to provide dial pulse and DTMF signaling to Western in areas where it is currently available pursuant to the Special Request Process discussed *infra* as Issue 12. However, "Qwest should not be compelled to offer these obsolete types of signaling to Western in places where such signaling is not currently available simply because such types of signaling are technically feasible where they are in fact available."[21]

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[17] *First Report and Order*, ¶1043.
[18] Qwest Opening Brief, pp. 17-18.
[19] Western Opening Brief, p. 3.
[20] Qwest Opening Brief, p. 17.
[21] Qwest Reply Brief, p. 4.

Discussion. There is little precedent for a decision on this issue. The parties' only citation to prior cases addressing this issue is to the Utah Arbitration Order[22] between Qwest and Autotel, a Western affiliate. The Utah Commission concluded "Qwest's Special Request Process is a reasonable way for Autotel to make requests for DTMF or pulse signaling at specific locations."[23] Western's sole argument—that provision of DTMF is technically feasible—fails to address either Qwest's arguments or the Utah Arbitration Order's decision. I find Qwest's approach to be the most reasonable under the circumstances described above. The Qwest language is adopted.

Issue 4: Is Qwest required to provide the loop UNE so that Western may use it to provide a telecommunications service?

Positions of the Parties. Western seeks to purchase UNEs from Qwest, particularly, unbundled loops. Western says that it wishes to purchase loop UNEs from Qwest and is entitled to do so "as a telecommunications carrier requesting access to unbundled loops in order to provide a telecommunications service to its own end user customers.[24]

Qwest asserts that there are two sub-issue components to this issue. First, Qwest is not obligated to provide dedicated transport between a wireless carrier's switch and Qwest's switch or between portions of the wireless carrier's own network. Secondly, unbundled loops are to be used to serve end users, not to connect components of a carrier's network. Qwest notes that it will provide UNEs for appropriate purposes under the terms and conditions set forth in the Statement of Generally Available Terms (SGAT) developed in Docket UM 823 and amended in UM 973. [25]

Western acknowledges that it intends to replace the special access services it presently orders out of Qwest's Oregon Tariff with Qwest's unbundled loops and disagrees with Qwest's assertion that the FCC's intent was that unbundled loops were to only be used by CLECs to access an ILEC's own end-user customers.[26]

Qwest cites numerous FCC cases to support its assertion that well-established law confirms its view that Western may not use unbundled loops or subloops to connect portions of its own network, but must use those loops to access the ILEC's end-user customers.[27] Qwest also notes that the recent decision by the U.S. Court of Appeals for the District of Columbia Circuit[28] made clear that wireless carriers are not entitled to unfettered access to UNEs and further "raised serious questions whether it is necessary for ILECs to provide UNEs to CMRS providers at all."[29] Qwest then notes that both the Utah and Arizona Commissions have

[22] Report and Order *In the Matter of the Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the Telecommunications Act*, Docket No. 03-049-19, Utah PSC, February 18, 2004.
[23] *Id*., p. 9.
[24] Western Opening Brief, p. 3.
[25] Qwest Opening Brief, p. 19.
[26] Western Reply Brief, pp. 5-6.
[27] Qwest opening Brief, pp. 21-23, and cases cited therein.
[28] *United States Telecom Association v. FCC, 59 F.3d 554(D.C. Cir. 2004) (USTA II).*
[29] Qwest Opening Brief, p. 23.

supported Qwest's position in virtually identical disputes between Western's Autotel affiliate and Qwest,[30] and between Autotel and Citizens Communications Operating Companies.[31]

Discussion. I specifically adopt Qwest's language and reject Western's proposed language and Appendix D. The case law firmly upholds Qwest's contention that an ILEC is not required to provide access to UNEs for the purposes Western proposes. Qwest's offer to provide UNEs for appropriate purposes pursuant it its SGAT agreement is the most reasonable approach to making portions of its network available to Western on an unbundled basis.

Issue 5: Effective Date for Reciprocal Compensation

A stipulation of the facts (Stipulation) was submitted by the parties on June 30, 2004, and stated essentially the following:

1. The parties had no interconnection agreement governing compensation for exchange of telecommunications traffic prior to August 8, 1996.

2. Prior to August 8, 1996, Qwest's predecessor, U S WEST Communications, Inc., billed Western for transport and termination under Qwest's RCC Tariff which did not provide for reciprocal compensation. Qwest continues to bill Western under the terms of that tariff.

3. Western claims that it submitted a request for the negotiation of an interconnection agreement on August 12, 1996, and attached a copy of the letter to the Stipulation as Attachment 2. Qwest accepts that the letter was mailed.

4. The attorney to whom the letter was addressed worked solely in Qwest's Seattle, Washington, office, although the letter was addressed to a Qwest office in Portland, Oregon. Furthermore, the addressee had no authority or oversight over Oregon interconnection agreement negotiations and has no present recollection of Western, its attorneys or its principals.

5. Western requested negotiation of an interconnection agreement with Qwest several times, starting on March 7, 1997, through the current request which was received by Qwest on October 14, 2003.

Positions of the Parties. Western contends that it is entitled to reciprocal compensation from the date it made its request. Since it made its request under 51.717(b) ("Rule 717") on August 12, 1996, that should be the effective date. The rule does not specify: (1) how the request should be made, (2) that the requesting party has to prove that the ILEC received the request or (3) that the requesting party must adhere to any particular time schedule.[32]

[30] *Utah Arbitration Order*, p. 7.
[31] *In the Matter of the Petition of Auto Tel for Arbitration of an Interconnection Agreement with Citizens Communications Operating Companies of Arizona Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. T-03234A-03-0188 (Arizona Corporation Commission, October 24, 2003).
[32] Western Reply Brief, p. 8.

Qwest states that retroactive reciprocal compensation is not required by the FCC's Rule 717, given the facts and circumstances of the case. Qwest argues that, according to the address on the letter, it was misdirected and not effectively received by Qwest and that Western never followed up on it in a timely manner.[33] Qwest has no record of that request. Qwest asserts that its records indicate that on March 5, 1997, Western sent a letter to Qwest saying that it had requested negotiation of an interconnection agreement in August of 1996. Qwest claims that Rule 717 relates reciprocal compensation back to the request for renegotiation of an existing agreement or through the negotiation of a new agreement and that, because the sections are not self-executing, the procedures of 47 USC §252(a),(b) must be followed. Reciprocal compensation can only relate back when an agreement is reached via negotiations or through an arbitrated agreement as a result of a petition filed with a state commission.[34] Qwest asserts that "Western has never followed up with a request for negotiation with a timely and effective request for arbitration…. Therefore, each time that Western allowed a request for negotiation to lapse, the clock on the effective date for reciprocal compensation started over again…. Western cannot now be allowed to receive reciprocal compensation prior to October 14, 2003.[35]

Discussion. Western has pursued an interconnection agreement with Qwest with only sporadic effort. After the mailing and receipt of the March 5, 1997, letter, the parties were unable to agree on a starting place for negotiations and no substantive negotiations took place.[36] Another attempt begun in early 1999 met the same fate. On June 24, 1999, Western filed a request with the Commission seeking its assistance pursuant to Section 252(b). The request was dismissed on August 6, 1999, for failure to contain the required petition and information to initiate an arbitration proceeding.[37]

Western did not immediately amend and refile. Instead, Western's next request to negotiate was received by Qwest on October 14, 2003, over four years after the entry of Order No. 99-466. This unexplained four-year lapse is the dispositive event; it is conclusive evidence of the abandonment of any reasonable attempt to obtain an interconnection agreement. Western cannot benefit from its own inaction. The effective date for the purposes of Rule 717 is October 14, 2003.

Issue 6: What is the proper definition of Extended Area Service (EAS)/Local Traffic for the purposes of calculating Reciprocal Compensation?

Positions of the Parties. Western asserts that the local calling area for the purposes of reciprocal compensation should be the Metropolitan Trading Area (MTA) utilized by CMRS carriers pursuant to 47 USC 51.701(b)(2). Qwest maintains that it has already acknowledged that traffic exchanged between the parties within the MTA is subject to reciprocal compensation under its proposed agreement; its only dispute with Western giving rise to an issue is that it finds Western's language to be incoherent."[38]

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[33] Qwest Opening Brief, p. 31, and Qwest Reply Brief, p. 6.
[34] Qwest Opening Brief, p. 30.
[35] Qwest Reply Brief, p. 6.
[36] The record in the *Arizona* order highlights a similar problem. Qwest/18 at ¶1, cited in Qwest/15, Easton/10.
[37] *In the Matter of the Petition of Western Radio Services Co., Inc., for Arbitration of Rates, Terms and Conditions of Interconnection with U S WEST Communications, Inc., Pursuant to 47 USCA Sec. 252(b) of the Telecommunications Act of 1996,* ARB 137, Order No. 99-466, entered August 6, 1999.
[38] Qwest Reply Brief, p. 7.

Discussion. Western is obtaining what it wants with respect to the intent of the agreement. Utilization of new language upon which the parties do not agree as to its meaning, where existing language already in use with other, similarly situated CMRS carriers is also available, would only add uncertainty and the possibility of later disagreement. Qwest's language will be adopted.

Issue 7: Is Qwest's obligation to provide dedicated transport limited to 50 miles?

Positions of the Parties. Section 7.2.2.1.5 of Qwest's Oregon SGAT states that Qwest will provide dedicated trunked transport (DTT) LATA-wide where available; however, where DDT is greater than 50 miles and existing facilities are not available on either party's network and the parties cannot agree as to which party will provide the facility, the parties will each construct to the midpoint.

Western contends that there is no distance limit to Qwest's obligation to provide dedicated transport, unless Qwest can prove that it is not technically feasible.[39] Qwest acknowledges that it must provide dedicated transport when it currently exists between its wire centers, but cites previous Commission decisions recognizing limitations on distances for DDT construction.[40]

Discussion. Qwest's language is adopted. Qwest's obligation to construct DDT facilities is limited to 50 miles. The Commission fully explored this exact issue in Docket UM 823 and endorsed the 50-mile limit proposed by the ALJ who relied on guidance provided by the FCC's *Local Competition First Report and Order* in finding that Section 7.2.2.1.5 was reasonable.[41]

Issue 8: Reciprocal Compensation Credit

The parties do not dispute the fact that Western will be due reciprocal compensation as a result of Qwest's use of two-way interconnection trunks that it provides to Western.[42] The parties disagree as to whether language proposed by Qwest will fully compensate Western for the use of certain other facilities, specifically analog loops.[43]

Positions of the Parties. Western states that it is entitled to reciprocal compensation for all Qwest two-way facilities including analog loops, but that Qwest would not give credit for Qwest-provided analog loops and that the compensation is therefore not symmetrical, as required by 47 CFR 51.711(a).[44]

Qwest states that Western has simply misunderstood Qwest's proposed language and that the credit will be given on "two-way dedicated facilities." Qwest then notes that, as it discussed in its response to Issue 4, Western is not entitled to use analog loops or other UNEs

[39] Western Reply Brief, pp. 9-10.
[40] Qwest Reply Brief, pp. 7-8.
[41] Workshop 2 Findings and Recommendation Report of the Administrative Law Judge and Procedural Ruling, Docket UM 823, issued July 3, 2001, p. 10; Workshop 2 Findings and Recommendation Report of the Commission, Docket UM 823, entered October 22, 2001, p. 7.
[42] Qwest Opening Brief, p. 37.
[43] Western Opening Brief, pp. 5-6; Qwest Reply Brief, p. 8.
[44] Western Reply Brief, pp. 10-11.

to connect its network to Qwest's network and that those facilities will not be used to provide dedicated two-way facilities. Only properly used facilities will receive compensation. Furthermore, Qwest notes that its proposed language has been used by wireless carriers throughout its 14-state region without complaint or problem.[45]

Discussion. Western's interest in reciprocal compensation for analog loops is directly related to the resolution of Issue 4, in which Western sought to use the loop UNE to provide telecommunications services. Having resolved Issue 4 by adopting Qwest's proposed language, the *raison d'être* for specific language relating to loop facilities disappears.

I adopt Qwest's language on this issue. By adopting Qwest's language, it is assured that whatever two-way dedicated facilities are properly used to exchange traffic between the parties will be subject to reciprocal compensation. Furthermore, the existence of similar language, utilized by numerous wireless carriers throughout Qwest's territory, will further help to guarantee fairness and uniformity in its application.

Issue 9: Miscellaneous Charges and Testing

This issue has been resolved.[46] The language proposed by Qwest is adopted.

Issue 10: Negotiation of Mid-Span Meet Point of Interface (POI)

Qwest's proposed language is identical to that contained in Section 7.1.2.3 of the Oregon SGAT.[47] Except for one sentence and two words in another sentence, the language proposed by the parties of V.B.1 is identical. The language varies because the parties disagree on the requirement for the availability of mid-span meets in Type 1 interconnection.

Positions of the Parties. Western states that, under 47 CFR 51.321(b)(2), Qwest has an obligation to provide meet point interconnection for Type 1 interconnection and that Qwest is seeking to avoid that obligation altogether. In Western's view, Qwest should be required to negotiate with Western and consider all factors, including capacity, NEPA compliance, endangered species and weather. [48]

In its Reply Brief at page 10, Qwest indicated that it did not understand Western's argument and believed that Western's position is based on a misunderstanding of Qwest's proposed language. However, in its Supplement, Qwest states that it "has gained a better understanding of Western's position on the portion of this issue dealing with Type 1 interconnection…. Qwest is willing to consider such an arrangement if Western requests it. However, because this is non-standard network architecture, Western would still need to request it under the Special Request Process.…"[49]

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[45] Qwest Reply Brief, pp. 8-9.
[46] Western Reply Brief, p.11: "From reviewing Qwest's revised issues matrix, it appears Qwest has adopted Western's Position concerning miscellaneous services." Qwest Reply Brief, p. 9: "…Qwest believes the issue has been resolved in the manner provided in the Revised Issues Matrix, Attachment 1 to Qwest's Opening Brief."
[47] Qwest Reply Brief, p. 10.
[48] Western Opening Brief, pp. 6-7.
[49] Qwest Supplement, p. 2.

In its Reply to Supplement, Western faults Qwest for failing to explain why a Type 1 meet point is "non-standard architecture or the difference in the meet point interconnection facility if it terminated on one end at a Qwest local switch instead of a tandem switch…. Qwest fails to demonstrate why a 'Special Request Process' for CLECs to request non-standard UNEs is appropriate for CMRS interconnection requests that Qwest is already required to provide…"[50]

Discussion. The substance of the dispute has largely been resolved by Qwest's assertion that it will consider Type 1 meet point interconnection. The "Special Request Process" is a method for managing out-of-the-ordinary network configuration requests and does not impinge on the parties' rights to seek Commission assistance in the event that such requests are disputed. Western offers no rationale for treating CMRS requests differently from CLEC requests. As discussed below in Issue 12, the Special Request Process and the language utilized to engage it in the SGAT have been previously examined in the 271 process and have been found as an acceptable means to deal with such cases. Qwest has proposed to modify section V.B.1. I therefore decide that the following language shall be utilized in the agreement:

> A Mid-Span Meet POI is a negotiated Point of Interface requiring new construction by Qwest and is limited to the Interconnection of facilities between one Party's Switch and the other Party's Switch. The actual physical Point of Interface and facilities used will be subject to negotiations between the Parties. Each Party will be responsible for its portion of the build to the Mid-Span Meet POI. These Mid-Span Meet POIs will consist of facilities used for the Provisioning of one or two way Type 1 and Type 2 and Jointly Provided Switched Access Interconnection trunks, as well as Ancillary trunks such as, OS, DA, and 911 trunk groups. Requests for negotiation of a Mid-Span Meet POI for Type 1 interconnection will be made through the Special Request Process as defined by Section XVI.

Issue 11: Single Point of Presence (SPOP) Option

This issue concerns whether the standard SPOP option language should be included in the interconnection agreement. The SPOP option allows carriers to use a single point Type 2 interconnection at an access tandem to enable the carrier to reach all end offices behind the tandem for both local and toll traffic.[51]

Positions of the Parties. Western states that it has no intention of using the Qwest SPOP option and that the agreement should not contain any provisions that it has not requested. Western ties this issue to Issue 1, because, as noted above, it believes that Qwest must route its traffic to all tandems in the MTA no matter how connected. Western offers a draft agreement that allows for interconnection at a single access tandem, exchange of traffic for a CMRS carrier and no distance restrictions on dedicated transport. Western would exclude the SPOP language because it believes that Qwest wishes to insert the language to get a "second

[50] Western Reply to Supplement, p. 4.
[51] Qwest Opening Brief, p. 41.

chance to prevail" in the Issue 1 dispute.[52] Furthermore, if the Commission allows the "optional" language, it will become mandatory.[53]

Qwest states that inclusion of the clause will not harm Western, but rather, will offer it the opportunity to reduce its costs should it use Type 2 interconnection and the option. Qwest further commits to conform the SPOP option language to whatever requirements emerge from the Commission's decisions on the disputed issues.[54]

Discussion. Western did not obtain its requested language on disputed Issues 1, 6 and 7. The issue of the availability of SPOP for Type 2 interconnection is therefore still relevant. Western need not avail itself of the option, but Qwest's offering of such an option is appropriate and should be available should Western's views or circumstances change. Qwest's language is adopted.

Issue 12: Special Request Process Language

Positions of the Parties. Western states that it does not seek any non-standard UNEs and did not request the "Special Request Process" to be included in the interconnection agreement. Western believes that Section 251 imposes requirements on Qwest and that it cannot "delegate its responsibility" to Qwest via the Special Request Process.[55] Western contends that Qwest will abuse the Special Request Process to deny Western the same type of signaling Qwest provides itself.[56]

Qwest states that the Special Request Process is directly related to Issue 3, because of Western's desire for access to outmoded forms of signaling and that the availability of the Special Request Process will undermine Western's argument that technical feasibility is all that matters. This disagreement, in Qwest's view, highlights the very need for the Special Request Process, because its absence would limit Western's options.[57] Any dispute would still be subject to Commission review.[58]

Discussion. As noted above in the discussion and resolution of Issue 3, I concurred with the Utah Commission that the Special Request Process was the most reasonable approach to dealing with this issue. The Special Request Process will also be available when other out-of-the-ordinary requests arise and will allow the parties to seek accommodation with each other without having to resort to the Commission for dispute resolution as the first means of resolving the matter. Qwest's language is adopted.

Issue 13: Location for Arbitration of Disputes

This issue has been resolved by the parties and is no longer in dispute.

Issue 14: Rates-Exhibit A

[52] Western Opening Brief, p. 6.
[53] Western Reply Brief, p. 13.
[54] Qwest Reply Brief, pp. 10-11.
[55] Western Opening Brief, p. 9.
[56] Western Reply Brief, p. 13.
[57] Qwest Opening Brief, p. 43.
[58] Qwest Reply Brief, p. 11.

This issue has been resolved by the parties and is no longer in dispute.

Issue 15: Miscellaneous Clerical Issues

Positions of the Parties. Western notes that there were errors in the draft agreement it prepared, all of which have been corrected. Therefore, Western asserts that the issue is resolved.[59] Qwest states that there remain a variety of miscellaneous clerical differences between the interconnection agreements that the parties propose in this arbitration and that the real question is which party's proposed agreement should be used as a template, an observation which Qwest notes I made at the June 11, 2004, teleconference. Qwest further asserts that Western has disregarded other issues in its agreement, which is yet another reason to adopt Qwest's agreement as the template.[60] Western states that it had made all of the changes Qwest said were needed to correct clerical errors and that Qwest is just manufacturing more errors to maintain control of the document.[61]

Discussion. In general, there is no "right or wrong" with respect to which party's draft agreement should be used as the primary document. However, uniformity, ease of administration and comparability to other agreements when conflicts arise, can be both timesaving and an aid in reducing the possibility of committing omissions or errors where questions of interpretation and precedent are involved. The Qwest agreement is structured in a familiar and widely used format, mirroring agreements with other wireless carriers. It is therefore publicly beneficial to utilize the Qwest draft agreement as the template for the purposes of the parties. The Qwest proposed agreement shall be adopted for the purposes of this issue.

ARBITRATOR'S DECISION

1. The interconnection agreement between Western and Qwest shall adopt the Qwest-offered version of Section IV.A.3.a.ii (Issue 1).

2. The interconnection agreement between Western and Qwest shall adopt the Qwest-offered versions of Sections III.G.G, IV.C.4 and IV.H.1 (Issue 2).

3. The interconnection agreement between Western and Qwest shall adopt the Qwest-offered versions of Section V.E.4 (Issue 3).

4. The interconnection agreement between Western and Qwest shall adopt the Qwest-offered versions of Section VII and Exhibit A (Issue 4).

5. The interconnection agreement between Western and Qwest shall adopt the Qwest-offered versions of Sections IV.I.1, IV.I.2.b and XXII.D.2 (Issue 5).

6. The interconnection agreement between Western and Qwest shall adopt the Qwest-offered versions of Sections III.R, IV.B.1, IV.C.1, IV.D.1.a, IV.I.1, IV.K and V.F.4 (Issue 6).

[59] Western Opening Brief, p. 10.
[60] Qwest Opening Brief, p. 45, Qwest Reply Brief, p. 13.
[61] Western Reply Brief, p. 14.

7. The interconnection agreement between Western and Qwest shall adopt the Qwest-offered versions of Section IV.H.3 (Issue 7).

8. The interconnection agreement between Western and Qwest shall adopt the Qwest-offered versions of Section IV.I.2.a (Issue 8).

9. The interconnection agreement between Western and Qwest shall adopt the Qwest-offered versions of Sections IV.J, IV.M.2.b and IV.M.3 (Issue 9).

10. The interconnection agreement between Western and Qwest shall adopt the following language (Issue 10): "V.B.1. A Mid-Span Meet POI is a negotiated Point of Interface requiring new construction by Qwest and is limited to the Interconnection of facilities between one Party's Switch and the other Party's Switch. The actual physical Point of Interface and facilities used will be subject to negotiations between the Parties. Each Party will be responsible for its portion of the build to the Mid-Span Meet POI. These Mid-Span Meet POIs will consist of facilities used for the Provisioning of one or two way Type 1 and Type 2 and Jointly Provided Switched Access Interconnection trunks, as well as Ancillary trunks such as, OS, DA, and 911 trunk groups. Requests for negotiation of a Mid-Span Meet POI for Type 1 interconnection will be made through the Special Request Process as defined by Section XVI."

11. The interconnection agreement between Western and Qwest shall adopt the Qwest-offered versions of Sections V.F.9 and Exhibit D (Issue 11).

12. The interconnection agreement between Western and Qwest shall adopt the Qwest-offered versions of Sections XII and XVI (Issue 12).

13. The interconnection agreement between Western and Qwest shall adopt the following of the Qwest-offered versions of the agreement (Issue 15). Table of Contents, First Sentence, Sections III.K, IV.A.2, IV.A.3.a.i, IV.A.3.a.iii, IV.H, IV.I.2, IV.K, IV.L.2, IV.M.2.a, IV.O.9, IV.Q, V.E.1, V.G.2.a-b, X, XII, XIV, XX, XXII.I.4, XXII.I.5, XXII.I.6 and XXII.U.

14. Within 30 days of the date of the Commission's final order in this proceeding, Qwest and Western shall submit an interconnection agreement consistent with the terms of this decision.

15. As provided in OAR 860-016-0030(10), any person may file written comments within 10 days of the date this decision is served.

Dated at Salem, Oregon, this 20th day of September, 2004.

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Allan J. Arlow, Arbitrator