ORDER NO. 96-325

ENTERED DEC 09 1996

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 2

In the Matter of TCG Oregon's Petition for Arbitration Pursuant to Sec 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S WEST Communications, Inc.	)))))	COMMISSION DECISION

DISPOSITION: ARBITRATOR'S DECISION ADOPTED AS AMENDED

Procedural Background

On February 8, 1996, TCG Oregon (TCG) filed a request for negotiation of an interconnection agreement with U S WEST Communications, Inc. (U S WEST). On July 17, 1996, TCG filed a petition with the Public Utility Commission of Oregon (Commission) for arbitration of the agreement pursuant to §§ 251 and 252 of the Communications Act of 1934, 47 U.S.C. 151 *et seq*., as amended by the Telecommunications Act of 1996 (Act). U S WEST filed a response on August 12, 1996, and a supplemental response on September 11, 1996.

On October 3 and 4, 1996, Allen Scott, an Administrative Law Judge for the Commission, held an arbitration hearing in this matter in Portland, Oregon. The parties filed briefs thereafter. On November 8, 1996, the Arbitrator issued his order. On November 18, 1996, U S WEST, TCG, and Sprint Communications Company L.P. filed exceptions or comments in response to the Arbitrator's decision.

Standards for Arbitration

This arbitration was conducted under 47 U.S.C. Sec. 252(b) of the Act. Section 252(c) of the Act sets out a state Commission's task in arbitrating an interconnection agreement as follows:

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 Commission [Federal Communication 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.

Commission Approval

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, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section."

Section 252 (e)(3) provides as follows:

> 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.

On August 8, 1996, the Federal Communications Commission (FCC) issued rules on interconnection pursuant to §§ 251 and 252 of the Act. (47 C.F.R. § 51.100 *et seq.*

FCC Order 96-325).[1] On October 15, 1996, the U. S. Court of Appeals, Eighth Circuit, stayed the operation of the portions of those rules that relate to pricing and the "pick and choose" provisions.[2] *Iowa Utilities Board v. Federal Communications Commission et al., Case Nos. 96-3321 et seq. (8th Cir., October 15, 1996) (Order Granting Stay Pending Judicial Review).*

Commission Conclusion

The Commission has reviewed the Arbitrator's decision and the exceptions and comments under the standards set out above. Except with respect to Reciprocal Compensation, we conclude that the Arbitrator's decision comports with the requirements of the Act, FCC rules where applicable, and relevant state law and regulations and should be approved. We have explained below our reasons for changing the decision relating to Reciprocal Compensation. With respect to three other issues, we have provided clarification or additional explanation of the Arbitrator's decision while approving the decision.

Modifications of the Arbitrator's Decision

1. **Construction Costs** (Page 11). For clarification, the following material is added after the final paragraph of the "Arbitrator's Decision":

> Requiring the customer to pay for construction as an up front charge has two problems. First, it would require the competitor to pay for the service twice: once in the advance charge and again in the recurring charge. In addition, charging the first competitor for the construction imposes all the costs on that entity. Subsequent competitors would be able to request service using the facilities paid for by the first competitor. USWC has not proposed any mechanism that avoids these concerns.
>
> It is clear that USWC is entitled to recover its costs of construction. In situations where recovery through recurring charges is uncertain, USWC may take reasonable steps to insure cost recovery. For example, in situations involving temporary facilities or facilities to be constructed in advance of use, USWC may take reasonable steps to insure cost recovery. Those steps

[1] Section and Paragraph numbers cited herein refer to Order 96-325 unless otherwise indicated.
[2] The provisions of the rules subject to the stay are 47 C.F.R. §§ 51.501-515 (inclusive), 51.601-611 (inclusive), 51.701-717 (inclusive), the default proxy ranges set forth in the order, and 51.809. In an order on reconsideration, dated November 1, 1996, the court lifted the stay on §§ 51.701, 703, and 717.

> include, but are not limited to: term contracts, bonds or other security, or advance payment of construction charges.
>
> Our decision on this issue is consistent with the FCC Rules and Order relating to General Rate Structure, which set out principles for analyzing rate structure questions and developing methods of recovery of costs. (*See* § 51.507; ¶ ¶ 743-754).

2. **Nonrecurring Charges** (Page 12). For clarification, the following language is added to the decision section:

> The nonrecurring charge shall be the rate applicable to the use for the loop. Accordingly, TCG will pay a discounted residential nonrecurring charge for loops to be resold to residential customers and a discounted business nonrecurring charge for loops to be resold to business customers.

3. **Customer Guide in White Pages/Billing for Advertising** (Page 14). We agree with the Arbitrator's decision to reject TCG's proposal. However, we modify the language as follows to change the basis for the decision. The following language replaces the "Decision" portion of the Arbitrator's Decision:

> TCG's proposals are rejected. U S WEST Direct is not a party to this proceeding and has not had an opportunity to respond to these proposals. It would not be reasonable to impose these requirements on U S WEST Direct under these circumstances. If TCG concludes at some point that discrimination is occurring as it fears, it may seek redress under applicable provisions of law. The Arbitrator does, however, accept U S WEST's proposal that the contract contain a provision requiring U S WEST Communications to facilitate the discussions between TCG and U S WEST Direct.

4. **Reciprocal Compensation Arrangements** (Page 16). The "Decision" section set out below is substituted for the "Decision" section in the Arbitrator's decision. The Arbitrator rejected the positions of both parties and instead adopted rates set out in UM 351. He further concluded that TCG's switch qualifies for tandem rate treatment.

We change the Arbitrator's decision on this issue because it does not comport with § 252 (d)(2) of the Act. First, we conclude that the Arbitrator's conclusion that the TCG switch qualifies for tandem rate treatment is incorrect and would not provide for mutual and

reciprocal recovery of costs and would not lead to just and reasonable terms and conditions for reciprocal compensation. Notwithstanding Paragraph 1090 of FCC Order 96-325, we conclude that the Act requires that the classification of a switch be determined by functionality, not mere geographic scope of service.

The Arbitrator was correct in rejecting U S WEST's proposal, as its cost studies, which form the basis for its proposal, were properly excluded from consideration. However, we conclude that the Arbitrator's rejection of TCG's proposal for bill and keep was erroneous under the Act and our relevant decisions. We have concluded that bill and keep is an appropriate interim method of providing for compensation. Section 252 (d)(2)(B) expressly permits such arrangements. The record in this case supports the adoption of that arrangement. We therefore change the Arbitrator's decision by substituting this language for his decision:

> TCG's proposal to adopt "bill and keep" is accepted. The Commission has concluded in Order 96-021 that bill and keep arrangements are appropriate as an interim method of providing for compensation for the exchange of local traffic. The rationale expressed in that order applies here. Bill and keep is the simplest and least costly compensation arrangement. Adoption of it on an interim basis will allow time and opportunity for further review of the compensation issue with respect to these carriers and the industry in general. The evidence in this case that traffic is in balance is more persuasive than the evidence of imbalance. We do not find persuasive U S WEST's evidence relating to additional costs or perverse incentives arising from bill and keep. Moreover, U S WEST's proposed prices are based on the cost studies which the Arbitrator properly excluded from consideration for the reasons set out in the Arbitrator's order. We conclude that a bill and keep arrangement will be a reasonable compensation method in this case. Bill and keep is therefore adopted on the terms set out in Order No. 96-021.

5. **Resale Provisions** (Pages 17-19). The following additional explanation is added to the "Decision" section:

> The reasonableness of the 17 percent figure proposed by TCG is underscored by the fact that it is less than the 18.8 percent discount we have adopted in our decision in ARB 1, issued this date.

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 as modified in this order.

Made, entered, and effective ________________________.

____
Roger Hamilton
Chairman

____
Ron Eachus
Commissioner

____
Joan H. Smith
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 pursuant to applicable law.

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ISSUED November 8, 1996

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 2

In the Matter of TCG Oregon's Petition for Arbitration Pursuant to Sec 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S WEST Communications, Inc.	)))))	ARBITRATOR'S DECISION

PROCEDURAL BACKGROUND

On February 8, 1996, TCG Oregon (TCG) filed a request for negotiation of an interconnection agreement with U S WEST Communications, Inc. (U S WEST). On July 17, 1996, TCG filed a petition with the Public Utility Commission of Oregon for arbitration of the agreement pursuant to §§ 251 and 252 of the Communications Act of 1934, 47 U.S.C. 151 *et seq*., as amended by the Telecommunications Act of 1996 (Act). U S WEST filed a response on August 12, 1996, and a supplemental response on September 11, 1996.

On October 3 and 4, 1996, Arbitrator Allen Scott held an arbitration hearing in this matter in Portland, Oregon. The following appearances were entered:

For TCG:

Gregory J. Kopta, Seattle, WA,
and
Shelly Richardson, Portland, OR

For U S WEST:

Molly Hastings, Seattle, WA

Following prehearing conferences, the parties filed an initial joint position statement setting out the issues in dispute. On September 16, 1996, the parties jointly filed a base contract (Base Contract) entitled "Joint Submission of Documents." The Base Contract sets out agreed-upon language for several issues. It also designated those issues that were still in dispute between the parties. It contains the following language:

> Although both parties have submitted proposed agreements for use in the arbitration, they have reached agreement on a number of issues. Accordingly, in order to narrow the issues being arbitrated, TCG and U S WEST hereby stipulate to adoption of the language in the attached document by the arbitrator and the Commission.
>
> Those areas where the parties have not reached agreement are so marked in the attached document. They will be the subject of the arbitration hearing.

The Base Contract was signed by counsel for both parties: Larry Brotherson on behalf of U S WEST and Deborah S. Waldbaum on behalf of TCG.

At the hearing, the parties presented evidence and argument relating to those issues denominated as "not agreed" in the Base Contract. They did not present evidence or argument on the agreed-upon terms set out in the Base Contract.

In the final filing in this case, however, on October 15, 1996, U S WEST filed a "Last Best Offer" in which it stated that the Base Contract "cannot be a part of U S WEST's Last Best Offer." Instead, U S WEST offered an entirely different contract ("new contract") and asked that the Commission "implement the terms and conditions of that agreement in this arbitration."

U S WEST's filing of the new contract presents problems for this arbitration. It contains U S WEST's proposed language on the disputed issues, as is appropriate. That language is considered in this decision. It also, however, contains new language on issues agreed upon in the Base Contract. In some instances, the new wording is quite different from the agreed-upon provisions in the Base Contract. The new contract also contains provisions which do not correspond to any provision in the Base Contract and which do not appear to have been the subject of negotiations between the parties.

TCG did not, of course, address the wording of U S WEST's new contract at the hearing or in its brief and Last Best Offer because it was not aware that U S WEST would attempt to substitute the new contract for the Base Contract. Thus, U S WEST's new contract proposals on the already agreed-upon provisions and on matters not previously under negotiation have not been subject to scrutiny and challenge by the other party.

The Base Contract was an executed agreement between the parties on many issues and a stipulation that the Arbitrator and the Commission could adopt its language on those issues in this arbitration. Therefore, I will adopt and approve the Base Contract's wording on the agreed-upon issues and will not consider U S WEST's alternative wording set out in the new contract. Moreover, any provisions in

U S WEST's new contract that pertain to issues not set out in prior filings of the parties will not be considered. It would be unfair to TCG for the Arbitrator and the Commission to consider and adopt wording on issues upon which U S WEST has had the first, last, and only say. Additionally, the Act states that an arbitration must decide the issues set out in the petition to arbitrate and the response, if any. Any new issues posed by
U S WEST's new contract cannot be considered.

Arbitrator's Authority

This arbitration is being conducted under 47 U.S.C. Sec. 252(b) of the Act. Section 252(c) of the Act sets out a state Commission's task in arbitrating an interconnection agreement as follows:

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 Commission [Federal Communication 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.

On August 8, 1996, the Federal Communications Commission (FCC) issued rules on interconnection pursuant to §§ 251 and 252 of the Act. (47 C.F.R. § 51.100 *et seq.* FCC Order 96-325).[3] USWC asserted that the Arbitrator need not and should not follow the orders issued by the FCC where the orders are contrary to the Act or usurp the jurisdiction of this Commission.

On October 15, 1996, the U. S. Court of Appeals, Eighth Circuit, stayed the operation of the portions of those rules that relate to pricing and the "pick and choose" provisions.[4] *Iowa Utilities Board v. Federal Communications Commission et al., Case Nos. 96-3321 et seq. (8th Cir., October 15, 1996) (Order Granting Stay Pending Judicial Review).* As a result, I have considered the FCC pricing rules to be advisory and not binding on this arbitration.

[3] Section and Paragraph numbers cited herein refer to Order 96-325 unless otherwise indicated.
[4] The provisions of the rules subject to the stay are 47 C.F.R. §§ 51.501-515 (inclusive), 51.601-611 (inclusive), 51.701-717 (inclusive), the default proxy ranges set forth in the order, and 51.809. In an order on reconsideration, dated September 27, 1996, the court lifted the stay on §§ 51.701, 703, and 717.

On November 1, 1996, the Commission issued two orders that bear directly on this proceeding. In Order No. 96-283 (Reopened UM 351, Phase II), the Commission modified the prices for unbundled elements that it had adopted in Order No. 96-188 (July 19, 1996). Order No. 96-284 (UM 773), issued the same day, established the methodology that will be used to update the prices for unbundled network elements. The timing for pricing network elements based on the new methodology has not been established.

ISSUES IN DISPUTE

I. Definitions

The Telecommunications Act and FCC Rules. No provisions of the Act or Rules were cited by the parties as relevant to this issue.

TCG and U S WEST. Each party has submitted several pages of definitions, with TCG's list 66 items in length and U S WEST's 39 in length. The lists agree precisely on a few definitions, but often have different wording for the same item. Each contains many words or phrases not on the other party's list. The parties presented no evidence or argument on the definitions at the hearing. U S WEST presented no argument on brief regarding its proposed definitions. TCG stated in its brief that the parties did not have many substantive disagreements about definitions and that time constraints were the primary reason no agreement on this issue had been reached. TCG argued that as the parties had focused on the TCG proposed agreement, TCG's proposed definitions should be adopted.

Decision

The Arbitrator concludes that the only evidence in the record supports the adoption of TCG's provision on definitions. It is more comprehensive than that offered by U S WEST. Furthermore, as many of the sections in the final contract are derived from TCG's proposed contract, TCG's definitions are more pertinent. That list is adopted.

II. Network Interconnection

The Telecommunications Act. Every incumbent local exchange carrier (LEC) has "[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network (A) for the transmission and routing of telephone exchange service and exchange access; (B) at any technically feasible point within the carrier's network; (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. (§ 251(c)(2)).

FCC Rules. An incumbent shall provide for interconnection at any technically feasible point within the incumbent LEC's network including, at a minimum: (i) the line-side of a local switch; (ii) the trunk-side of a local switch; (iii) the trunk interconnection points for a tandem switch; (iv) central office cross-connect points; (v) out of band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and (vi) the points of access to unbundled network elements. (§ 51.305).

An incumbent LEC must accommodate two-way trunking requests where technically feasible (¶ 219). An incumbent LEC has the burden of demonstrating the technical infeasibility of a particular method of interconnection or access at any individual point (¶ 554).

A. Sizing and Structure of Interconnection Facilities.

TCG desires to be able to interconnect with U S WEST at U S WEST's access tandems, rather than at its local tandems, to terminate certain types of calls. TCG's request is based on routing problems, lack of capacity in U S WEST 's local tandem, and inability of U S WEST's local tandems to handle certain traffic (ISDN), which requires 64 kbps Clear Channel Capability (CCC). TCG argues that the Act requires interconnection at any feasible point of interconnection on U S WEST's network. It also claims that U S WEST uses the access tandems to route its own ISDN calls and that failure to provide comparable service to TCG would amount to "blatant discrimination" against TCG. TCG's contract proposal does not call for unlimited access by TCG to U S WEST's access tandem but permits access only when the local tandem does not have sufficient capacity or is not capable of carrying ISDN.

U S WEST insists that TCG deliver only local traffic to U S WEST's local tandems and only toll traffic to U S WEST's access tandems. U S WEST claims that its position conforms to industry standards. It asserts that TCG's proposal does not make engineering sense, will burden U S WEST's network, and will have an adverse impact on the availability of access tandem capacity to carry true access traffic. It does not have Clear Channel Capability at all local tandems and argues that there is no basis in the Act that would obligate U S WEST to have such capability at all tandems. It states that it is willing to work with TCG on a bona fide request basis to convert its tandems to that capability with costs shared by all companies desiring the capability.

Decision

U S WEST does not deny that the TCG's request to be allowed to interconnect at the access tandems is technically feasible nor that U S WEST provides service to itself that is equivalent to what TCG seeks. U S WEST's arguments regarding network capacity are not supported by persuasive evidence. TCG's request is for interconnections at the access tandems only when the local tandem lacks capacity or capability. TCG's position is reasonable, comports with the Act, and is adopted.

TCG's request for Clear Channel Capability is not adopted. There is no basis for requiring U S WEST to provide such capability at all tandems now. TCG's ability to interconnect at the access tandem when necessary, as described above, will allow it to carry the traffic it is concerned about. It can pursue specific requests for CCC as proposed by U S WEST.

B. Trunking Directionality. TCG proposes that it have the option to use either one-way or two-way trunks for the delivery of local exchange traffic to U S WEST. U S WEST provided no argument against this proposal.

Decision

TCG's proposal is adopted.

C. Busy Line Verification (BLV) and Busy Line Verification and Interrupt (BLVI). The Base Contract sets out a partial agreement between the parties on this issue. It merely states that each party shall establish procedures to coordinate with the operator bureau of the other to provide these services. It then sets out an agreement as to how TCG will interconnect. It indicates that the method of interconnection for U S WEST is not agreed between the parties. The price for the service is not indicated in the Base Contract.

TCG asks in its brief that its proposed language be adopted. However, I find no proposed language from TCG on the specific issue of how U S WEST will interconnect. **U S WEST** presented proposed language and prices. TCG argues that this language is incomprehensible but does not support that claim. U S WEST also indicated that the price it proposed for this service was agreed to by TCG.

Decision

U S WEST's proposal on the disputed portions of this matter is adopted.

C. Meet Point Trunking Arrangements. This issue involves the physical arrangements for the delivery of jointly-provided switched access. At the hearing, U S WEST's witness stated that the physical hookups can be done and are not a problem. U S WEST presented no argument on this issue in its brief.

Decision

TCG's proposal is adopted. U S WEST provided no evidence that TCG's proposal is not feasible and provided no comprehensive alternative proposal.

D. Combination Interconnection Trunk Groups. TCG proposes wording that requires the parties to work together on a technically feasible method of combining all functionalities of local interconnection trunk groups and meet point trunk groups on a single combination interconnection trunk group. It sets out a time frame for initial review of feasibility and for further review at the request of either party if the initial decision is that such arrangements are not now feasible. It also sets out the method of conversion if and when feasibility is established.

U S WEST argues that local and switched access traffic should be kept separate and that review of this issue should be undertaken in industry workshops or similar proceedings.

Decision

TCG's proposal merely requires cooperative review by the parties. U S WEST's suggestion regarding workshops or other procedures is too vague to be useful. TCG's position is adopted.

E. Performance Standards, Reporting Requirements, and Remedies.

The Telecommunications Act and FCC Rules. The parties cite no relevant provisions of the Act or Rules.

TCG proposes a detailed provision setting out objective measurements of performance, reporting and notice requirements, a remedy threshold, and liquidated damages for breaches. The damages range from $5,000 to $25,000 for various types of default based on a full month's reporting. The provision is designed to protect TCG against possible discrimination by U S WEST. The remedies are reciprocal but not exclusive.

U S WEST offers a less comprehensive provision. It provides that if U S WEST fails to meet stated criteria during a review period, U S WEST will use its "best efforts" to do so for the next period. If U S WEST fails to meet the criteria during the next period, the parties are to attempt to resolve the "issues" through mediation or non-binding arbitration. The parties retain their rights to seek other forms of relief, such as through intervention of legal or regulatory authorities. U S WEST objects to TCG's liquidated damages provision on the grounds that there is no legal basis for the Arbitrator or Commission to impose such a clause. U S WEST also notes that other companies with whom it is arbitrating interconnection agreements have proposed different provisions on this subject. U S WEST claims that TCG has remedies for discrimination or inadequate service under state and federal law.

Decision

TCG's position is adopted. TCG's proposal is detailed and specific. It requires performance reporting and establishes objective criteria for the determination of default. It also imposes liquidated damages for default. This provision is better designed to encourage appropriate performance and to quickly cure breaches than is U S WEST's, which is not calculated to expeditiously deal with default. U S WEST's argument that there is no legal basis for the Arbitrator or the Commission to impose liquidated damages is wrong. The Act requires that the arbitration resolve the open issues.

III. Nondiscriminatory Access to Network Elements

The Telecommunications Act. Section 251(c)(3) of the Telecommunications Act requires an incumbent LEC to unbundle its network into network elements at any technically feasible point. Section 252(d)(1) establishes pricing for unbundled network elements. Prices must be based on cost and may include a reasonable profit.

FCC Rules. The Rules require the unbundling of local loops, switching capability, interoffice transmission facilities, databases and signaling systems, and operator services and directory assistance. (¶ 367, 397, 428, 452, 504, 529). States may consider the unbundling of additional elements if it is technically feasible. (¶ 366). Prices for unbundled elements should be set at forward-looking long-run economic cost. In practice, this means prices will be based on Total Element Long Run Incremental Cost (TELRIC) and will include a reasonable allocation of forward-looking joint and common costs. (¶ 672). States may set prices at default proxy rates until the state commission can review economic cost studies. (¶ 767).

TCG and U S WEST. The parties are in apparent agreement about the general issue of the provision of unbundled elements as required by the Act. The remaining dispute is on the price for unbundled elements, particularly the Network Access Channel (NAC).

Decision

Both parties set out detailed contract provisions on the subject of network elements in their Last Best Offers. They did not present argument to support most of these offers, except as is discussed below. The contract provisions offered by TCG on this subject in its Last Best Offer are appropriate under the Act and are adopted except where otherwise indicated below.

A. Prices

TCG asks that either the proxy rates or the rates developed in UM 351 be applied. **U S WEST** asks that the Arbitrator apply the results of its TELRIC study submitted for this proceeding. In lieu of that, U S WEST asks that the NAC price be adjusted from the UM 351 price to bring it closer to the TELRIC price it has developed.

Decision

The interim price for an unbundled loop shall be $17.20 per month. This is the total price adopted by the Commission in Order No. 96-283 (reopened UM 351, Phase II) for the typical configuration of an unbundled loop including the NAC and the NAC connection. The final NAC price will be established when the Commission revises prices for unbundled elements in UT 125. (*See* Order No. 96-284 at 33.) The contract in this matter shall contain the following language:

> The prices and discounts in this contract are interim and will be replaced with final prices and discounts approved by order of the Public Utility Commission of Oregon.

The NAC prices adopted in Order 96-283 (Reopened UM 351(II)) are the most reliable prices for unbundled elements available to the Arbitrator and the Commission. Those prices were established through a formal, open investigation in which all facets of the telecommunications industry as well as consumers participated. The Commission sought and received comments, testimony, briefs, and expert advice from the participants. The Commission thoroughly examined the positions of the parties and came to a reasoned resolution of the contested issues. Furthermore, the Commission is continuing its efforts to update and improve the costing methodology for unbundled elements. In Order No. 96-284 (UM 773), the Commission adopted the cost methodology that U S WEST and the Commission-Staff agreed to by stipulation. Revised prices for unbundled elements will be determined in UT 125, U S WEST's rate case, based on the methodology adopted in UM 773.

U S WEST asks that its cost studies introduced into the record of this arbitration be used to determine the prices. It claims that it was denied due process because I indicated early in this arbitration that I intended to rely on the UM 351, Phase II, prices determined in the reopened proceeding (or, in the absence of such prices, on default or proxy prices in the FCC Order) rather than on these cost studies. This claim has no merit.

First, I am unable to conclude that that cost study would produce reasonable, cost based rates. U S WEST submitted its cost study into the record two weeks before the hearing. This study is over 2,000 pages long. Neither TCG nor the Arbitrator have had adequate time to review the study and make judgments as to the reliability or reasonableness of the underlying assumptions. U S WEST has presented no evidence demonstrating that its cost study has been audited, let alone approved, by any regulatory commission. U S WEST's suggestion that only the 100 page portion of the studies dealing with the loop cost and avoided

costs needs to be considered is not persuasive. The reality is that review and auditing are necessary before any portion of the study is used. Review and auditing have not occurred and cannot in the time available.

An initial review of the U S WEST study also raises some specific questions about the advisability of adopting the study in this proceeding. For example, the assumptions underlying U S WEST study do not comply with the terms of the stipulation that U S WEST reached with the Commission staff and which was adopted by the Commission in Order No. 96-284 (UM 773). One of the inputs that bears directly on unbundled loop costs is the estimated percentage of new investment in distribution plant in difficult versus easy circumstances. The U S WEST study assumes a ratio of 82 percent difficult to 18 percent easy. U S WEST stipulated to a 65 to 35 split in UM 773. The U S WEST cost study was introduced into the record of this proceeding after it had signed the stipulation with Staff. U S WEST's contradictory positions are unexplained in the record of this arbitration. Another cause for caution is U S WEST's proposed allocation of common costs to network elements to develop the proposed incremental cost of a loop. Order No. 96-283 (Reopened UM 351, Phase II) produced a loop price of $17.20. U S WEST's cost study produces a loop cost of $34.88. Adopting such an increase without the benefit of a careful review by the Commission Staff would be imprudent.

U S WEST has had, and will have, ample opportunity to present its evidence to the Commission on the proper methodology and assumptions to be used for pricing unbundled elements. U S WEST participated in UM 351, Phase II, UM 773, and is participating in its rate case, UT 125. In fact, the stipulation in UM 773, which U S WEST signed, provides that "all issues associated with pricing and implementation of … (the revised cost format) will be addressed in the rate design portion of docket UT 125." U S WEST is not denied due process because I have decided to adopt the results of proceedings that have explored the cost issues in detail.

U S WEST asks that the Arbitrator adjust UM 351 prices to produce pricing results which bring costs closer to the TELRIC. Because the Commission reevaluated the UM 351, Phase II, prices in the reopened proceeding, it is not necessary to consider the U S WEST alternatives.

B. Loop Deaveraging

The Telecommunications Act. The Act requires rates based on cost. (47 U.S.C. § 252(d)(1)(A))

FCC Order. State commissions shall establish different rates for elements in at least three defined geographic areas within the state to reflect geographic cost differences. (47 C.F.R. § 51.507(f)).

U S WEST asserts that the Commission should not geographically deaverage interconnection and unbundled network element wholesale prices until retail rates are deaveraged. It agrees that a competitive environment may require deaveraging of all prices. It asks, however, that the Commission address deaveraging within the context of U S WEST's entire rate structure so that wholesale rates and retail rates are deaveraged at the same time. It requests the Arbitrator to refrain from deaveraging U S WEST's interconnection and network element prices until the Commission has had an opportunity to deaverage U S WEST's retail prices. U S WEST provided loop costs on a deaveraged basis while maintaining its opposition to deaveraging at this time. The costs are based on its TELRIC cost studies which, for reasons described above, are not being considered in this arbitration.

Decision

Geographic deaveraging is an appropriate mechanism for matching the cost to provide unbundled elements with the price for those elements. However, U S WEST is correct in its assertion that deaveraging unbundled elements before deaveraging retail rates places it at a competitive disadvantage. Deaveraged prices are appropriate when all competitors can price retail services based on the underlying costs. Geographic deaveraging should not be implemented unless and until the Commission deaverages retail rates in UT 125.

C. Construction Costs

U S WEST proposes that TCG should be required to pay in advance for costs related to construction of new unbundled loops on behalf of TCG.[5] U S WEST requests that if TCG requires the construction of additional facilities for unbundling and provision of an element or for resale or collocation it should pay these costs in advance. It claims that otherwise it will not be able to recover its costs and could even be left "holding the bag" if TCG abandons a U S WEST facility after building its own. **TCG** opposes the charges.

Decision

U S WEST's argument relating to costs of construction is rejected. Construction costs are included in the TELRIC price for the particular service. Allowing U S WEST to recover construction costs in the rate and also to impose an additional construction charge would allow the company to recover the same costs twice. Furthermore, including these costs in the price will fairly allocate the cost of constructing new facilities to all the competitors.

U S WEST can address the abandonment problem by negotiating term contracts for the provision of certain services. When dealing with interconnectors that impose a

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[5]U S WEST makes the same argument regarding possible construction charges relating to construction of additional facilities for resale or special construction in connection or collocation or "otherwise." The decision set out in this section applies to all construction charges sought by U S WEST.

significant risk of nonpayment, U S WEST can require reasonable security that will assure recovery of costs. (*See* Order No. 96-128).

D. Conditioning Charges

U S WEST requests that it should receive an additional charge for providing conditioning on its lines to reduce decibel loss. **TCG** argues that although the FCC Order provides that the requesting carrier bear the cost of conditioning, U S WEST has failed to identify the cost. It asks that the NAC rate adopted in this order include conditioning "sufficient to render the U S WEST unbundled loop equivalent to the Pacific Bell 'assured' and 'ISDN' links, at least until U S WEST can demonstrate the existence and cost of conditioning as part of the Commission's examination and approval of proper TELRIC studies."

Decision

Conditioning charges are established in reopened UM 351 (II), Order No. 96-283. The prices set out in that Order are adopted for this arbitration.

E. Nonrecurring Charges for Providing an Unbundled Loop

TCG notes that UM 351 did not provide nonrecurring rates. TCG proposes that the nonrecurring charge be the retail nonrecurring charge that U S WEST charges to its retail customers, less the wholesale discount. **U S WEST** asks that the nonrecurring charge be based on its TELRIC studies.

Decision

TCG's proposal is reasonable and is adopted. As is noted elsewhere in this order, the Arbitrator and TCG have not had an adequate opportunity to review U S WEST's cost studies submitted in this docket and they will not be used to provide a basis for decisions.

F. Sham Unbundling

The Telecommunications Act. Incumbent local exchange carriers are required to provide unbundled network elements "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." (47 U.S.C. § 251 (c)(3)). In contrast to 47 U.S.C. § 251(c)(4), relating to resale, paragraph (3) contains no language authorizing any restriction on the sale of unbundled elements.

FCC Order. An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions, and capabilities, in a manner that allows the requesting

telecommunications carrier to provide any telecommunications service that can be offered by means of that network element. (47 C.F.R. § 51.307(c)).

An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends. (47 C.F.R. § 51.309(a)).

U S WEST is opposed to what it refers to as "sham unbundling." The FCC Rules appear to allow a carrier to purchase unbundled elements at unbundled element prices and have U S WEST bundle them back again to the finished service. The effect of the process is to allow a competitor to obtain a cheaper price than the Act's resale price (retail less cost avoided) for the same service. The competitor can thus completely circumvent the resale provisions of the Act by engaging in price arbitrage between resale prices and the prices of unbundled elements. U S WEST asks that the Arbitrator and Commission prohibit this "sham unbundling" by relying on "their jurisdiction to fulfill their state public interest obligation."

Decision

I do not adopt U S WEST's position. The Act requires U S WEST to both unbundle and sell at wholesale discounts. The Act contains no provisions allowing restrictions on the use of unbundled elements.

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

The Telecommunications Act. Section 251(b)(4) states that all telecommunications carriers have the duty to afford access to poles, ducts, conduits, and rights-of-way of such carriers to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

TCG offered a provision setting out detailed reciprocal requirements to fulfill the directives of the Act. Included is a requirement that the parties negotiate and execute a separate agreement on pole attachment and conduit usage within 30 days of the execution of the contract. The separate agreement is to conform with certain principles regarding termination of occupancy, compensation for innerduct costs, and egress. This provision is based upon TCG's belief, founded upon experience, that it needs guarantees against eviction from a pole or conduit without just cause (such as nonpayment) and protection for its need to egress from a conduit near to a customer premises. TCG asks that the Arbitrator not allow U S WEST to use what TCG describes as U S WEST's "standard contract of adhesion," which, TCG says, addresses none of TCG's legitimate concerns. TCG proposes a price ceiling of $0.60 per foot on an annual basis for conduit until U S WEST has provided appropriate cost studies for calculating the actual costs of TCG conduit usage.

U S WEST asserts that it will provide nondiscriminatory access to poles, conduits and rights of way. It asks that it not be required to accept contract terms differing with "each and every party with whom it's arbitrating an agreement for essentially the same services . . ." It proposes the following standard provision which it has used "for years to provide access to cable companies and, more recently since divestiture, to interexchange companies":

> Each party shall provide the other Party access to its poles, ducts, rights-of-way and conduits it controls on terms, conditions and prices comparable to those offered to any other entity pursuant to each party's applicable tariffs and/or standard agreements.

Decision

TCG's provision is adopted. It provides detailed reciprocal duties which are based on the requirements of the Act. The provision requiring negotiation of an agreement relating to pole attachment and conduit usage, including termination and egress, is reasonable. It is based upon a rational desire by TCG that it not be subject to potentially harmful eviction from facilities or denied egress from ducts to provide service to its customers. U S WEST's broadly worded provision is not based specifically on the Act and would provide less guidance to the parties.

V. Customer Guide in White Pages/Billing for Advertising

The Telecommunications Act and FCC Rules. The parties cite no relevant provisions of the Act or Rules.

TCG seeks a provision in the contract which would require that it be offered as many pages in the Customer Guide at the front of the white page Directory as U S WEST receives. It points to the general obligation of U S WEST not to discriminate against TCG and argues that such a provision would equalize the treatment of the two companies.

U S WEST argues that the Act sets out no requirement regarding Customer Guides. It notes, moreover, that the directory is published by U S WEST Direct, a separate entity from U S WEST Communications. It avers that the Commission has no authority over U S WEST Direct and should reject TCG's proposal.

The second issue relates to billing for directory advertising. **TCG** seeks a provision in the contract that allows it to bill TCG customers directly and remit the revenue to U S WEST. Such a provision would allow TCG to foster its business relationship with its customers.

U S WEST repeats its customer guide arguments here: that the Act does not require that this issue be dealt with in the interconnection agreements and that U S WEST Direct

is the entity controlling the billing. U S WEST asks that the arbitrator decline to rule on these issues, or, at most, simply include a provision in the contract that requires U S WEST Communications to facilitate discussions between TCG and U S WEST Direct.

Decision

TCG's proposals are rejected. It is not clear that the Arbitrator and Commission have any authority over U S WEST Direct, the party which would be the subject of the proposed provisions. The Arbitrator does, however, accept U S WEST's proposal that the contract contain a provision requiring U S WEST Communications to facilitate the discussions between TCG and U S WEST Direct.

VI. Interim Number Portability (INP)

The Telecommunications Act. Each telecommunications carrier has the duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the [FCC]. (251(b)(2)).

"The cost of establishing …number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC]." (251(e)(2)).

FCC Rules. The costs of currently available measures must be borne by all telecommunications carriers on a competitively neutral basis (such as gross telecommunications revenues, number of lines, or number of active telephone numbers). States may utilize various cost recovery mechanisms, so long as they are consistent with these statutory requirements. (FCC Order 96-268 at ¶ 6, 130, 136).

The FCC directs the forwarding and terminating companies to assess the IXCs charges for terminating access through meet-point billing arrangements, i.e. the terminating carrier would receive the common carrier line (CCL) and local switching charges. The transport charge would be shared. (FCC Order 96-268 at ¶ 140).

TCG and U S WEST agree in their Base Contract upon language pertaining to interim number portability. It is to be used in the contract if "the FCC Number Portability Order is followed in the arbitration . . ." As to costs, it calls upon the parties to recover costs "through a broad-based cost recovery mechanism, as descried in the FCC Number Portability Order." As to access revenues, it allows each party to "bill Switched Access charges for its portion of the call."

It is U S WEST's contention, however, that the Commission should assert jurisdiction and "should set a cost-based rate for the provision of INP."

Decision

The agreed-upon wording is designed to conform the parties' ultimate agreement with the FCC order. It is adopted.

VII. Reciprocal Compensation Arrangements

The Telecommunications Act. A state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless -- "(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." This paragraph does not preclude arrangements that waive mutual recovery (such as bill and keep arrangements). (47 U.S.C. § 252 (d)(2)(A) and (B)).

FCC Rules. An incumbent LEC's rates for transport and termination of local traffic shall be established, at the election of the state commission, on the basis of (1) the forward-looking economic costs of such offerings, using a cost study pursuant to 47 C.F.R. §§ 51.505 and 51.511, (2) default proxies, as provided in § 51.707, between $0.002 and $0.004 per minute to terminate local telecommunication traffic; or (3) a bill-and-keep arrangement, as provided in § 51.713. (§ 51.703).

Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate. (47 C.F.R. § 51.711 (a)(3)).

TCG asks that the Commission adopt a "bill and keep" form of compensation for this arbitration. It argues that U S WEST has not established that it will incur "additional cost" to terminate local traffic that would preclude a bill and keep arrangement. Moreover, it claims that U S WEST has presented no evidence that the traffic between the two companies will be out of balance. It notes that the Commission has adopted bill and keep as the appropriate form of compensation until an alternative form of mutual compensation has been established. (Order No. 96-021). TCG's proposal would keep bill and keep in effect until the Commission establishes an alternate form of compensation or until one year after permanent number portability is implemented throughout the LATAs in which the two companies both operate, whichever comes first.

If the Arbitrator and Commission decide against bill and keep, TCG requests that the compensation rate for terminating calls to U S WEST's end offices should be set at $.002 per minute, the lowest figure in the FCC default proxy range and at the tandem rate of $.0035 per minute for calls terminating at TCG's switch. TCG argues that its switch covers a

geographic area comparable to the area served by U S WEST's tandem switch and that U S WEST's arguments relating to density and functionality are misguided.

U S WEST opposes TCG's bill and keep proposal. It argues that such an arrangement would not allow U S WEST to recover its costs of terminating TCG's traffic. It avers, moreover, that the evidence does not support a finding or presumption that traffic between U S WEST and TCG is in balance. U S WEST offers, instead, a provision that would require measurement of call termination and payment of compensation only when the traffic is more than 5 percent out of balance. If it is within the five percent threshold, no compensation would be paid.

U S WEST urges the Arbitrator to reject proxy rates. U S WEST also argues that it should not be required to pay tandem rates for use of TCG's switch. It claims that the TCG switch will not perform functions similar to U S WEST's tandem switch nor serve a geographic area comparable to that served by the U S WEST tandem switch in that TCG's switch serves far fewer customers than does U S WEST's switch.

Decision

The positions of both parties are rejected. As is noted in my earlier ruling in this case, the rates set out in UM 351 will be used where applicable. TCG's switch qualifies for tandem rate treatment since it serves a geographic area at least as extensive as the U S WEST tandem switch. Density of coverage and functionality are not determinative on this issue. The tandem rate should be applied to transport and termination rates. The tandem rate adopted in Order No 96-283 (UM 351 (II)) is $0.003330. This rate is interim, pending Commission determination of the appropriate rates for unbundled services in UT 125.

VIII. Resale Provisions

Telecommunications Act. Under §251(c)(4)(A), U S WEST must offer for resale, "at wholesale rates" any telecommunications service that it offers at retail, and without any unreasonable or discriminatory limitations. A state Commission may impose a limitation that would prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers. (§251(c)(4)(B)). Section 252(d)(3) requires U S WEST to discount the rate by any costs "avoided" by U S WEST as a result of providing the service to a reseller rather than to an end-user customer.

FCC Rules. Two methods are provided for determining the appropriate avoided cost discount. The first, and preferred long term method, requires state commissions to identify and calculate avoided costs based on avoided cost studies. The second method allows states to select, on an interim basis, from a 17-25 percent default discount range. (¶ 908).

The FCC rules establish a presumption that promotional prices offered for a period of 90 days or less need not be offered for resale at wholesale rates. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates. (¶ 950).

In addition, retail services priced at a volume-based discount to end users must also be made available for resale at wholesale rates excluding avoidable costs. (¶ 951).

Resale restrictions are presumptively unreasonable and this presumption can be rebutted only if the restrictions are narrowly tailored. (¶ 939). However, restrictions prohibiting such cross-class reselling of residential services are reasonable. (¶ 962).

TCG asks that U S WEST be required to offer all of its retail services for resale at the lowest proxy discount rate set out by the FCC until the Commission has approved a cost study of U S WEST's avoided costs and established a different discount. TCG asks the Arbitrator to reject U S WEST's contention that there should be no discount on special access/private line services, on residential services, and on services offered at a volume discount. TCG notes that the FCC order exempts special access services from the discount requirement. It notes, however, that U S WEST has merged its special access tariffs and private line tariffs into a single tariff. It argues that this combining does not exempt private line services from the discount. TCG also argues that U S WEST's argument that residential services are priced below cost is of no avail under the FCC rules. TCG also points out that volume discounts, as opposed to promotional offers of less than 90 days, are not exempt.

U S WEST offers wholesale prices calculated through its cost study, which yields discounts of one to eight percent. It argues that the following services should not be discounted: private line transport, services subject to volume discounts, discontinued services, and residential services.

Decision

The Arbitrator concludes that TCG's position is reasonable. The discount rate for U S WEST's services shall be 17 percent until the Commission has approved a cost study of U S WEST's avoided costs and established a different discount.

Additional matters. The analysis regarding discontinued services in the FCC Order ¶ 968 is adopted. U S WEST must resell discontinued services at a discount only to the extent that U S WEST grandfathers its own customers of a withdrawn service. U S WEST indicates that Centrex is a withdrawn service. It is not and must be resold at a discount. (Order No. 96-067).

U S WEST claims that it need not make available for resale deregulated services. 47 U.S.C. § 251(c)(4) requires that U S WEST offer for sale at wholesale any

telecommunications service that the carrier provides at retail to non-telecommunications carriers. The Commission's authority to arbitrate wholesale prices is set forth in 47 U.S.C. § 252(d)(3). U S WEST has not cited any provision in the state or federal law that would prohibit the state arbitrator from setting prices in this proceeding pursuant to federal law.

IX. Collocation and Mid-Span Meets

The Telecommunications Act. Section 251(c)(6) requires incumbent LECs to provide physical collocation on rates, terms and conditions that are just, reasonable, and nondiscriminatory. A LEC may provide for virtual collocation if the LEC demonstrates to the State Commission that physical collocation is not practical for technical reasons or because of space limitations.

FCC Order. Section 51.323 spells out the detailed requirements for physical and virtual collocation. Section 51.323(c) states that nothing in this section requires an incumbent LEC to permit collocation of switching equipment or equipment used to provide enhanced services.

The FCC has defined "premises" broadly, to permit collocation at the following premises: "central offices, serving wire centers and tandem offices . . .all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities . . . [and] any structures that house LEC network facilities on public rights-of-way, such as vaults containing loop concentrators or similar structures."
(¶ 583).

PUC Order. In Order No. 96-079, the Commission required U S WEST to adopt a virtual collocation tariff establishing rates and terms.

TCG desires physical collocation and unescorted around-the-clock, seven-day-a-week access to its collocation facilities. It proposes to provide the wire for the cross-connects, which actually connect its equipment to U S WEST network elements, in exchange for which TCG would not be charged a recurring charge for the cross-connect. U S WEST would be entitled to a reasonable nonrecurring charge to establish the connection with its equipment. TCG also seeks the ability to interconnect with other collocated carriers at the same U S WEST premises. TCG also proposes language addressing specific types of collocation and interconnection arrangements, including microwave collocation, point of termination (POT) bay engineering and others.

TCG notes that the FCC Order creates a default proxy of the LEC's rates in its federal interconnection tariff for the equivalent services. TCG proposes a cost-sharing mechanism in which the first party pays the entire cost of the collocation arrangement but is reimbursed proportionately as additional carriers collocate at the same premises.

For floor space and infrastructure charges associated with building collocation space, TCG proposes specific rates: $3.00 per square foot per month for floor space, the maximum amount U S WEST proposed to TCG in Arizona; $40,000 per office for infrastructure expenditures.

U S WEST agrees to provide around-the-clock access where legally permissible, provided it can recover its costs. It asks that certain rates for physical and virtual collocation that it has developed in its TELRIC studies be adopted for rates not contained in its interstate tariff. It objects to TCG's proposal that specific rates be adopted for elements not contained in U S WEST's federal tariff. It asks that such rates be determined on an individual case basis (ICB). U S WEST objects to the expansive definition of "premises" in the FCC Rules and its proposed contract language is more restrictive on that issue than are the rules.

Decision

TCG's proposed contract language appears to conform to the Act and Rules and is adopted. U S WEST does not claim otherwise. TCG's proposals regarding cost sharing, cross-connects, and interconnection between collocated carriers are reasonable and are adopted.

U S WEST's interstate expanded interconnection tariff will be used to establish interim proxy rates for both physical and virtual collocation. When the unbundled rate elements adopted by the Commission in Order No. 96-283 are incorporated into tariff rates, TCG may purchase the necessary rate elements. For the reasons stated above, I do not adopt the prices based on the U S WEST cost study.

Where U S WEST does not have tariff rates in effect--that is, for floor space and infrastructure charges--TCG has made proposals for specific prices. The floor space figure of $3.00 per square foot per month is, according to TCG, at the high end of U S WEST's proposal to TCG in Arizona. The infrastructure figure of $40,000 per office is, according to TCG, a tariff rate referenced in an interconnection agreement between TCG and Pacific Bell. These figures are reasonable. U S WEST has provided no evidence otherwise. The adoption of specific figures will help prevent delay in the development of interconnection agreements. These figures are adopted.

X. Joint Provision of Wireless Service Provider Access

The Telecommunications Act and FCC Rules. The parties cite no applicable provisions of the Act or Rules.

TCG states that it no longer seeks revenue sharing for joint provision of wireless service provider access to landline networks. This change in position is based on TCG's understanding that U S WEST will treat wireless service provider traffic as transit traffic

pursuant to the arrangements for reciprocal compensation. It thus asks that the agreement identify wireless service provider traffic as one type of transiting traffic for purposes of reciprocal compensation.

U S WEST notes TCG's agreement but nevertheless "remains concerned that some misunderstanding exists between the parties on this issue." It asks that the Arbitrator's order state that TCG is "precluded under a (sic) such an arrangement from collecting up the wireless traffic of other providers (or interexchange traffic for that matter) and exchanging that traffic, on which U S WEST would normally receive terminating access charges, on a for free or bill and keep basis."

Decision

The parties' agreement that wireless service provider traffic will be treated as transit traffic requires no decision. U S WEST's request for additional wording is reasonable and is adopted. The transit provisions adopted in this order will govern.

XI. Meet Point Billing Arrangements

Telecommunications Act and FCC Rules. No specific provisions are cited by the parties.

TCG proposes that the Arbitrator adopt a revenue sharing provision governing situations in which TCG and U S WEST jointly provide switched access services. TCG's provision would require the company providing the tandem services (TCG or U S WEST) to bill the access customer for both the end-office and tandem charges, based on the carriers' respective rates in their tariff or price list. The tandem provider would then remit to the end-office provider 70 percent of the end-office charges, keeping 30 percent for itself.

This revenue sharing provision is necessary, according to TCG, to allow it to compete for provision of tandem services. Under the present tariff structure, U S WEST recovers the "Residual Interconnection Charge" (RIC) in its end-office charge for termination of switched access traffic. The RIC covers 80 percent of the costs of tandem switching and transport, with the remaining 20 percent of those costs recovered in the tandem switching charge. Thus, if TCG and U S WEST jointly provide switched access with TCG as the tandem party, TCG, having to charge a rate at or below U S WEST's subsidized rate, could not recover the cost of providing tandem service. TCG could not simply charge a higher tandem rate to recover its costs, as doing so would make it uncompetitive. U S WEST would be receiving amounts for which it did not provide any service and TCG would not be properly compensated for the services it was providing to the access customer.

TCG characterizes this proposal as a revenue-sharing device. It is not, according to TCG, a proposal to modify U S WEST's switched access rates nor U S WEST's

tariffs. TCG cites a decision by the United States Court of Appeals for the D.C. Circuit in *Comptel v. FCC* (No. 96-1168, D.C. Cir. July 5, 1996) as support for its position. The court there held that the RIC is not a proper end-office element because it is not cost-based. It ordered the FCC to "expeditiously" correct the problem through switched access reform. The FCC announced that it would deal with this issue in its forthcoming access reform proceeding.

U S WEST claims that TCG's proposal would violate Section 251(g) of the Act, which pertains to "Continued Enforcement of Exchange Access and Interconnection Requirements." It also claims that the proposal is contrary to the FCC Order's directive that reciprocal compensation does not apply to transport and termination of interstate or intrastate interexchange traffic. (¶ 034). U S WEST notes that the FCC will undertake access charge reform in the near future. Additionally, U S WEST argues that TCG's proposal would amount to an overruling of the interstate and intrastate tariffs relating to charges from provision of access service. U S WEST suggests that TCG should seek rate relief from the Commission and FCC in access restructuring dockets.

Decision

U S WEST's position is adopted. TCG has not provided persuasive evidence and argument that imposition of a revenue-sharing mechanism is appropriate at this time. The fate of the RIC (also called TIC) is to be considered by the FCC in its access charge reform proceeding. It is not clear that any need exists to require sharing of the revenues at this time or that it would be appropriate to do so.

XII. Most Favorable Terms and Treatment

Telecommunications Act. Section 252(i) provides that an incumbent LEC must make available to all carriers "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."

FCC Rules. The FCC interprets the above provision to mean that every carrier requesting interconnection is entitled to select, for its own agreement, particular items out of subsequently approved interconnection agreements. (¶1316).

TCG proposes wording designed to mirror the "most favored nation" interpretation in the FCC Order. It argues that inclusion of a provision in that form will prevent U S WEST from later attempting to deny to TCG more favorable terms given to another carrier in a later agreement.

U S WEST proposes wording which simply states that "The parties agree that the provisions of Section 252(i) of the Act shall apply, including state and federal interpretive regulations in effect from time to time." U S WEST believes the FCC interpretation is incorrect.

Decision

U S WEST's provision is adopted. The propriety of the FCC interpretation is under challenge. If the FCC interpretation is upheld, it will be applicable to the contract under either U S WEST's or TCG's proposed provision. If it is not upheld, there is no reason for the Arbitrator or Commission to impose a discredited FCC interpretation on the parties in this arbitration, as would be the case if TCG's provision were in the contract.

XIII. Dispute Resolution and Binding Arbitration

Telecommunications Act and FCC Rules. The parties cite no provisions of the Act or Rules relevant to this issue.

TCG states that the parties have agreed on most terms relevant to this issue. The basic agreement is that disputes that cannot be resolved through negotiation will be submitted for arbitration. The disagreement concerns costs: TCG's position is that the losing party should be required to pay the costs of the arbitration, including attorneys' fees, and, if a party refuses to arbitrate as required by the contract or delays the proceedings, that party should have to pay all costs even if it ultimately prevails. TCG asks that the provision make no mention of punitive damages.

U S WEST favors the so-called "American rule," whereby each party pays its own fees, including attorneys' fees. It cites the newness of the Act and resulting uncertainty as a basis for not requiring a losing party to pay all costs. It also asks that the contract specifically prohibit the award of punitive damages by the arbitrator.

Decision

I accept U S WEST's position as to costs. The interpretation of many portions of the Act and Rules is uncertain now and may remain subject to good faith dispute for some time. Imposition of TCG's "loser pays" provision would be unreasonable at this time.

On the issue of punitive damages, I accept TCG's position, which is to leave the provision silent on the arbitrator's authority to award punitive damages. U S WEST provided no argument on that matter with respect to this contract provision. Perhaps it meant to include here by reference its argument relating to punitive damages in the provision relating to limitation of liability. (*See* XV below). If so, that argument is rejected here, also.

XIV. Term of Agreement

Telecommunications Act and FCC Rules. The parties cite no relevant provisions in the Act or Rules.

TCG and U S WEST agree that the only issue in dispute is whether the term of the contract should be three years, as TCG proposes, or two years, as U S WEST asks. TCG asserts that a two year term would require the parties to begin renegotiation almost as soon as the contract is in effect. U S WEST notes that the Commission's decision on interim bill and keep will expire in less than two years and that the industry's rapid evolution should allow for an early opportunity for parties to adjust their agreements.

Decision

I adopt U S WEST's proposal. The changes in the industry and the uncertainty regarding the Act and Rules make a shorter period appropriate.

XV. Limitation of Liability

Telecommunications Act and FCC Rules. The parties cite no relevant portions of the Act or Rules.

TCG and U S WEST have agreed to a provision which bars recovery of "indirect, incidental, consequential, special damages, including (without limitation) damages for lost profits, regardless of the form of action, whether in contract, indemnity, warranty, strict liability, or tort." U S WEST asks that this provision also bar recovery of punitive damages. It asserts that it has been providing service for many years under agreements that do not provide for punitive damages and that the Commission should reject "TCG's presumption that U S WEST is predisposed to harm it or any other party." TCG asks that a bar on punitive damages not be included in this provision.

Decision

TCG's wording is accepted. U S WEST has provided no basis for specifically excluding punitive damages. Its claim that it should not be presumed to harm TCG is not really to the point. The provision is reciprocal and no presumption of any party's predisposition is implied in selecting TCG's version.

XVI. Indemnity

Telecommunications Act and FCC Rules. The parties cite no relevant portions of the Act or Rules.

TCG and U S WEST each offer provisions**.** U S WEST's provision is more comprehensive on this issue than is TCG's proposal. Neither party provides any substantive support for its provision.

Decision

I adopt the U S WEST provision. It has a more comprehensive scope and slightly more complete procedural directive.

XVII. Bilateral Agreements

It is not clear from the record whether the parties have an arbitrable dispute about this item. Testimony suggested that they anticipated additional discussion and probable agreement. There is no basis for a decision at this time.

IMPLEMENTATION SCHEDULE

The Act requires that the decision in an arbitration set out an implementation schedule. **TCG** states that no detailed schedule is necessary, as it needs the facilities and service now. It asks that the parties be required to perform the arbitrated agreement immediately. **U S WEST** offered no recommendation on implementation.

Decision

TCG has presented the only argument on this point. Its position is adopted.

ORDER

IT IS ORDERED THAT:

1. Following issuance the Commission's final order in this matter, TCG shall submit to U S WEST a contract incorporating terms that reflect the Commission's final decision. The contract shall bear the signature of a person authorized by TCG to sign the contract.

2. Within 5 days of receipt of the contract from TCG, U S WEST shall return the contract to TCG with the signature of a person authorized by U S WEST to sign the contract. U S WEST shall also file a copy of the contract with the Commission.

3. The contract is effective immediately upon delivery of the signed agreement to U S WEST.

Dated at Salem, Oregon, this 8th day of November, 1996.

____

Allen Scott
Arbitrator

kW/Arb2.fo