

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 100

In the Matter of the Petition of METRO ONE)
TELECOMMUNICATIONS, INC., for Arbitration of)
Interconnection Rates, Terms, and Conditions with U S) ARBITRATOR'S
WEST COMMUNICATIONS, INC., Pursuant to 47) DECISION
U.S.C. Sec. 252(b) of the Telecommunications Act of)
1996.)

I. Introduction

On November 13, 1998, Metro One Telecommunications, Inc. (Metro One), filed a petition with the Public Utility Commission of Oregon (Commission) to arbitrate a contract for network interconnection with U S WEST Communications, Inc. (U S WEST), pursuant to 47 U.S.C. §§ 251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. On December 31, 1998, U S WEST filed a response.

On February 8, 1999, Michael Grant, Arbitrator held an arbitration hearing on this matter in Salem, Oregon. Charles Best, Attorney, appeared on behalf of Metro One. Peter Butler, Attorney, appeared on behalf of U S WEST. On February 25, 1999, the parties filed post-hearing briefs.

II. Arbitrator's Authority

The federal Telecommunications Act of 1996 (Act) provides for the development of competitive markets in the telecommunications industry. Section 251 of the Act requires incumbent local exchange carriers to provide any requesting telecommunication carriers interconnection with the local network. Section 252 sets forth the procedures for the negotiation, arbitration, and approval of interconnection agreements.

When an incumbent provider and a requesting carrier are unable to negotiate the terms and conditions of an interconnection agreement, Section 252(b)(1) allows either party to petition a State commission to arbitrate any open issues. In resolving any open

issues by arbitration and imposing conditions on the parties, Section 252(c) requires a State commission to:

- (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the 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. *See* Section 252(c):

Pursuant to these federal requirements, the Commission has promulgated rules that establish procedures for conducting arbitration proceedings. *See* OAR 860-016-0030.

III. The Parties

Metro One provides operator-assisted telecommunications services in several states. It is certified to provide directory assistance and toll services in Oregon, has been assigned a Carrier Identification Code by Bellcore, and has obtained an Operating Company Number by the National Exchange Carrier Association.

Metro One primarily provides enhanced directory assistance service, with call completion, to end-users of local and interexchange telecommunications carriers. It also provides Short Messaging Service (SMS), which allows a caller to transmit a short digital message to another caller or telephone. It seeks an interconnection agreement with U S WEST for the transmission and routing of local exchange service and exchange access.

U S WEST is Oregon's largest incumbent local exchange carrier and a Bell Operating Company under the Act. U S WEST provides directory assistance service throughout its service territory, and competes with Metro One.

IV. Preliminary Issue

As part of its prefiled testimony in this matter, U S WEST submitted two cost studies to support its prices for directory assistance listings. U S WEST designated certain information in those costs studies, including specific cost factors, as confidential and subject to the protective order issued in this proceeding. *See* Order No. 99-050.

Metro One objects to U S WEST's designation and contends that the identified information does not qualify as a trade secret. Metro One contends that only U S WEST, as the incumbent local exchange provider, is able to create a database of subscriber listings. Therefore, Metro

One maintains that U S WEST's cost of creating and maintaining such a database is not competitive information. In support of its argument, Metro One notes that similar information has been made public in other jurisdictions.

A party seeking protection must demonstrate that the designated information is a trade secret or confidential information. The party must also establish that disclosure of the information would result in a clearly defined and serious injury. *See Citizen's Utility Board v. Public Utility Commission*, 128 Or App 650 (1994). While U S WEST carries these burdens, I do not believe that it has had the opportunity in this proceeding to fully address Metro One's challenge and establish that the designated information is confidential and that its release would cause a clearly defined and serious injury. I am reluctant to make a determination on this matter based solely on the parties' cursory arguments at the commencement of the hearing.

Because it is not necessary to disclose the designated cost information for purposes of the arbitration, I decline to resolve this dispute in this proceeding. The designated information will be treated as confidential pending a final determination as to whether the information should be kept from public disclosure. The parties may request the Commission to make a final determination on this issue following the arbitration award, or renew their arguments in related proceedings involving the designated information.

V. Issues Presented for Arbitration

In its petition for arbitration, Metro One identified two open issues for resolution. I address each separately.

A. Does the Act require Metro One to have a Certificate of Authority to provide local exchange service or to provide assurances to ILECs that it will "specifically and solely" use an interconnection agreement to provide local exchange service as conditions precedent to negotiating an interconnection agreement?

This issue arose shortly after Metro One filed a request with U S WEST to negotiate an interconnection agreement. While acknowledging that Metro One had been certified to provide directory assistance and toll services in Oregon, U S WEST asked the company whether it also intended to enter the market as a local exchange carrier. U S WEST believed such information was necessary to determine whether Metro One was properly seeking interconnection "for the transmission and routing of telephone exchange service and exchange access." *See* Section 251(c)(2)(A).

Metro One objected to U S WEST's request that it verify its intention to enter the local exchange market. Metro One argued that nothing in the Act requires a carrier to expressly declare that it is seeking an interconnection agreement for the "transmission and routing of telephone exchange service and exchange access." Metro One believed that, as a certified

provider of toll and operator services, it was a telecommunications carrier entitled to negotiate an interconnection agreement

This dispute continued up to and throughout most of the hearing. During cross-examination, however, Metro One witness Lonn Beedy testified that Metro One was seeking an interconnection agreement for the “transmission and routing of telephone exchange service and exchange access.” *See* Transcript at 56. Based on that representation, U S WEST withdrew its objection to negotiating an interconnection agreement with Metro One.

While acknowledging that this dispute had been resolved, both parties restated their earlier arguments in post-hearing briefs. It is obvious that a disagreement continues between the parties as to whether a requesting carrier must certify that it is a local exchange provider prior to entering negotiations for interconnection. That disagreement, however, is no longer relevant to or at issue in this arbitration. Regardless of whether the Act requires a requesting carrier to affirm that it seeks interconnection for the “transmission and routing of telephone exchange service and exchange access,” Metro One has provided such affirmation and U S WEST has withdrawn its objection. Because U S WEST is now willing to enter into an interconnection agreement with Metro One, this issue is no longer a disputed issue that the Commission must resolve in arbitration.

In its post-hearing brief, Metro One also argues that, by conditioning negotiations on proof that Metro One intended to provide local exchange service, U S WEST violated the duty to negotiate in good faith under Section 251(c)(1). As a penalty for this alleged violation, Metro One believes that U S WEST should refund a portion of the rates Metro One has paid U S WEST for directory assistance listings since the passage of the 1996 Act. Metro One, however, did not raise this issue in its request for arbitration. Nor did it present this issue or any supporting evidence at hearing. Consequently, this issue is not properly before this Commission, which must limit its consideration to issues identified by the parties in the petition for arbitration and response. *See* Section 252(b)(4)(A).

B. Are USWC’s directory assistance listings being offered to Metro One on a nondiscriminatory basis in compliance with the Act at cost based rates?

This issue relates to the appropriate costs for directory listings. Metro One seeks access to U S WEST’s directory listings to enable it to provide directory assistance to its customers. U S WEST is willing to provide Metro One access to its directory assistance database through its Directory Assistance List (DAL) product. U S WEST states that its DAL product is available for use by directory assistance providers who wish to maintain a directory assistance database that can be accessed to obtain listings for their users. U S WEST adds that the DAL product is the underlying database used by U S WEST operators in providing directory assistance.

1. U S WEST's Cost Studies

U S WEST has offered Metro One the DAL product at quoted prices per listing. To support those prices, U S WEST submitted Total Service Long Run Incremental Cost (TSLRIC) studies that identify costs for the three primary components of the DAL product: (1) initial load; (2) updates; and (3) record transmittal. U S WEST states that the cost studies utilize a methodology that incorporates the TSLRIC principles that were established by this Commission in docket UM 351.

To calculate the initial load and update costs per listing, U S WEST first estimated the direct expenses for each function the company must perform to provide listings. The per listing costs are then loaded with service-specific costs, such as product management, via the application of factors to the direct expense. The service specific costs are added to direct costs to provide the TSLRIC. An allocation of group related and common costs are also identified in U S WEST's cost studies.

To determine the costs for the transmittal of directory records, U S WEST used, as a surrogate, the cost per message of its CMDS system. U S WEST explains that the transfer of directory listings to a directory assistance provider is similar to the process used to transmit billing data using the CMDS system.

The results of the TSLRIC studies are used as a starting point to establish prices for the DAL product. Pursuant to the Commission standards adopted in docket UM 844, the identified costs for each element is subject to an approved mark-up to account for shared and common costs. Using these costs and multiplying them by the Commission approved mark-up,¹ the prices U S WEST proposes to charge Metro One for its DAL product, per listing, are as follows: initial load - \$0.0071; updates - \$0.0161; transmittal - \$0.00094.

2. Positions of the Parties

Metro One has been following regulatory proceedings in other states regarding the pricing of directory listings and does not believe that the rates quoted by U S WEST are cost-based. Metro One points out that a large disparity exists between the prices in these other dockets and U S WEST's purported costs. For example, the Texas Commission ordered Southwestern Bell to offer directory listings to competitive providers at a price of \$0.0011 for each initial load, and \$0.0014 or \$0.0019 for updates, depending upon format. Similarly, the Florida Commission set the price for BellSouth's directory assistance database at \$0.001 per

¹ Pursuant to the discussion above, the costs for each DAL product component are considered confidential. The Commission approved mark-up has been designated as confidential in other Commission proceedings. See Docket UM 844, Order No. 97-239.

listing plus a \$100.00 monthly fee. Metro One contends that these rates cast doubt on U S WEST's claims that its prices—which are several times higher—are cost based.

Metro One does not believe that the costs for providing directory listings should vary significantly from state to state. It contends that the Bell System provided directory listings to others for many years using similar, if not identical, procedures, processes, and systems. Metro One doubts that U S WEST's system for producing and maintaining directory listings is much different than that used by Southwestern Bell and BellSouth, let alone several times less efficient and costly.

Metro One suggests that some of the pricing discrepancies might be explained by U S WEST's costs studies. It questions whether the costs per message of the CMDS system is an appropriate surrogate for the costs associated with the transfer of directory listings. It also suspects that U S WEST included improper costs that were excluded by the other Regional Bell Operating Companies. It notes that more than half the cost for both the initial load of listings and updates is allocated to "White Page Production." Although U S WEST claims that this category had been mislabeled and had nothing to do with directory publishing, Metro One points out that the company admitted that a portion of those costs were attributable to "expanded use subscriber lists." According to Metro One, that product is designed for directory publishers and not directory assistance providers. Metro One also questions U S WEST's inclusion of expenses for auditing.

Due to these reasons, Metro One recommends that the Commission disregard U S WEST's cost studies and adopt as prices for directory listings those established in either Texas or Florida. It believes that the decisions of these other jurisdictions are more persuasive than the surrogate cost studies presented by U S WEST. As an alternative, Metro One recommends that the Commission adopt the Texas or Florida prices as interim and open a separate investigation to review U S WEST's cost studies. Whatever rates are ultimately adopted by the Commission, Metro One also argues that U S WEST should be ordered to refund the difference between the new rates and those paid by Metro One since the effective date of the 1996 Act.

U S WEST discredits the Texas and Florida directory listing prices relied upon by Metro One to claim that U S WEST's prices are too high. U S WEST notes that Metro One did not participate in any of the proceeding in which these other rates were established and could not vouch for the accuracy of the underlying studies used to determine those prices. It also questions whether any of the cost studies submitted in these other jurisdictions followed Oregon costing principles.

U S WEST also suggests that the cost study used in Florida was outdated. While the study is dated 1996, U S WEST points out that several items in the study are dated 1992, several years before the Oregon Commission established its TSLRIC costing principles. U S WEST also believes that, in rendering its decision, the Texas Commission may have confused

“volume sensitive” and “volume insensitive” costs. The order appears to simply treat all volume sensitive costs as recurring costs and all volume insensitive costs as nonrecurring costs. U S WEST contends that such treatment is inappropriate, especially in Oregon where recurring cost studies include both volume sensitive and volume insensitive costs that relate to the provision of the building block.

In addition, U S WEST dismisses Metro One’s claim that directory assistance listing costs should not vary state to state. U S WEST notes that each state holds its own cost and pricing dockets because costs vary state from state. It also contends that each state employs different cost and pricing designs. It points out that the rates established in Texas and Florida differ from those proposed by U S WEST in that they either contain a set-up charge or a flat-rate charge per central office.

U S WEST concludes that the Commission should require the parties to execute an interconnection agreement containing the prices established by U S WEST’s cost studies. U S WEST reemphasizes that its studies comply with Oregon’s TSLRIC costing principles, and that the costs identified are properly attributable to the directory assistance database to which Metro One seeks access.

3. Arbitrator Decision

Section 251(c)(2) of the Act imposes a duty on incumbent local exchange providers, like U S WEST, to provide access to network elements “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.” In providing such access, incumbent providers must also comply with the pricing standards of Section 252(d)(1)(A), which requires rates be based on the costs of providing the element, but may include a reasonable profit.

To support its proposed prices for access to its directory assistance database, U S WEST has submitted two cost studies in this arbitration. U S WEST contends that the studies are based on a TSLRIC methodology and accurately calculate the costs it incurs in providing access to its directory assistance listings. Metro One disputes the validity of U S WEST’s cost studies and questions if they produce reasonable, cost-based rates. It urges the Commission to adopt prices established by other jurisdictions for other regional Bell Operating Companies.

After my review, I agree with U S WEST that there is not enough information in this record to justify the adoption of directory listing prices established by the Texas and Florida Commissions. While it seems reasonable that the costs of producing and maintaining directory assistance listings should not vary considerably from state to state, there are too many outstanding questions about how those costs were developed to warrant the use of those prices in this interconnection agreement. It is unknown whether those costs were developed using Oregon TSLRIC principles, or whether they include all those reasonably incurred by U S WEST

in providing the listings. There also appears to be significant pricing design issues that may account for some of the discrepancy between prices.

For these reasons, I find that the prices based on U S WEST's costs studies should be adopted in this proceeding. I believe they provide a better reflection of the costs for initial loads, updates, and transmission of directory listings. The prices based on these costs, however, should be interim subject to refund. As Metro One notes in its brief, the cost studies submitted by U S WEST have not been reviewed or audited by the Commission or its Staff. Furthermore, given the limited time available in this arbitration, I have not had the opportunity to carefully review the studies myself and to make judgments as to the reliability or reasonableness of the underlying assumptions. Indeed, such review would no doubt require assistance from U S WEST personnel familiar with the preparation of both the cost studies and directory listings.

Accordingly, I conclude that, for purposes of the interconnection agreement between Metro One and U S WEST, the prices for access to directory listings should be based on the costs contained in U S WEST's cost studies. Those prices shall be interim, subject to refund. Metro One may petition the Commission to further evaluate these costs in a formal, open investigation, in which the Commission Staff and other interested parties will have the opportunity to assess the reasonableness of the models, assumptions, and cost data used in the studies by U S WEST.

I decline to address Metro One's argument that U S WEST should be ordered to refund the difference between any new rates and those paid by Metro One since the passage of the 1996 Act. Again, Metro One did not raise this issue in its request for arbitration, nor did it present this issue at hearing. Consequently, this issue is not properly before this Commission. *See* Section 252(b)(4)(A).

VI. Interconnection Agreement

Because U S WEST refused to enter into negotiations with Metro One prior to the hearing, Metro One was unable to submit a proposed interconnection agreement addressing all issues. In its brief, Metro One requests to select, as a proposed agreement addressing other issues, the interconnection agreement approved between U S WEST and MCI Metro Access Transmission Services, Inc. (MCI), with the exception of the section addressing the pricing of directory assistance listings. *See* ARB 6, Order Nos. 97-003 and 97-341. For the directory listings, Metro One requests to select the relevant sections of the interconnection agreement approved between U S WEST and GTE Northwest Incorporated (GTE). *See* ARB 26, Order Nos. 97-343 and 98-235. Metro One notes that these sections include a provisioning policy for providing directory assistance listings to other carriers.

Metro One's request is within its rights under the Act. Pursuant to 47 CFR Section 51.809, Metro One is entitled to incorporate into its contract any rate, term, or condition from any other interconnection agreement executed by U S WEST. Although this "pick and choose"

rule was originally struck down by the Eighth Circuit in *Iowa Utilities Board v. Federal Communications Commission et al*, Case Nos. 96-3321 et seq. (8th Cir, October 15, 1996), it was recently reinstated by the U.S. Supreme Court. *See AT&T Corp. vs. Iowa Utilities Board*, ___ U. S. ___ (1999). Accordingly, the interconnection agreement shall incorporate the provisions identified by Metro One above.

ARBITRATOR'S DECISION

1. The interconnection agreement between Metro One and U S WEST shall specify prices for access to directory assistance listings based on U S WEST cost studies. The prices shall be interim, subject to refund, pending a separate Commission investigation into the costs of U S WEST providing such access to carriers.
2. The interconnection agreement between Metro One and U S WEST shall include designated provisions contained in the approved interconnection agreements executed by U S WEST with MCI Metro and GTE.
3. Metro One and U S WEST shall prepare and submit to the Commission an interconnection agreement consistent with the terms of this decision pursuant to the procedures set forth in OAR 860-016-0030(12).
4. As provided in OAR 860-016-0030(10), any party may file written comments within 10 days of the date this decision is served.

Dated at Salem, Oregon, this 4th of March, 1999.

Michael Grant
Arbitrator