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In the Matter of the Petition of TCG UTAH )                    DOCKET NO. 96-2211-02  
for Arbitration Pursuant to §252(b) of the )  
Telecommunications Act of 1996 to Estab- )  
lish an Interconnection Agreement With )                    REPORT AND ORDER  
U S WEST COMMUNICATIONS, INC. )

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ISSUED: January 20, 1998

SYNOPSIS

The parties to the agreement which is the subject of this proceeding having submitted the same for Commission approval, with the exception of two provisions objected to by the Incumbent Local Exchange Carrier; and the Commission having rejected said objections; and the agreement appearing to conform to the requirements of § 252(e)(1) of the Federal Tele-communications Act of 1996 and applicable Federal Communications Commission regulations; and the agreement appearing to conform to applicable Utah law and Commission Regulations; and approval of the agreement appearing to be in the public interest, the Commission approved the agreement, subject to possible modification pending the outcomes in unrelated dockets involving the same subject matter.

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Appearances:

Deborah S. Waldbaum For TCG, Inc.

Brian W. Burnett

Douglas N. Owens " U S West Communications, Inc.

By the Commission:

PROCEDURAL HISTORY

U S WEST COMMUNICATIONS, INC. (hereafter "USWC"), and TCG UTAH, INC. (hereafter "TCG"), entered into an arbitrated interconnection agreement (hereafter "the Agreement") December 19, 1997. The Agreement is a modified version of the original award of the Commission sitting as arbitrator in this matter. We previously approved the arbitrated agreement, but suspended the approval pending the resolution of certain technical issues which the parties themselves resolved and presented to us in the form of the modified agreement. However, USWC, the Incumbent Local Exchange Carrier (ILEC) continues to object to two provisions of the arbitrated agreement. Subject to such objections, the parties filed the Agreement with the Commission December 24, 1997, for review and approval in accordance with 47 USC 229 § 252(e)(1), a part of the Federal Telecommunications Act of 1996 (hereafter "the Act"). The Commission, having reviewed said agreement and having been fully advised in the matter, now enters the following Report, containing Findings of Fact, Conclusions of Law, and the Order based thereon.

FINDINGS OF FACT

1. USWC objects to two provisions in the agreement, *viz*: Section I.L., relating to performance standards, measurement, and liquidated damage provisions; and Section XIX, relating to continuing Federal Communications Commission (FCC) oversight.
2. We find the Agreement does not discriminate against any telecommunication carrier not a party to it.
3. The United States Congress and the Utah Legislature having established the fostering of competition in the telecommunications industry as sound public policy, the Agreement is in the public interest, since it comports with such policy.
4. The Division of Public Utilities, Utah Department of Commerce, recommends approval of the Agreement, subject to possible later modification as set forth below.

### DISCUSSION

USWC argues, in support of its objection to Section I.L., that this Commission is without authority under applicable Federal or State law to require the performance standards, measurement, and liquidated damages provisions incorporated in the Agreement. We rejected this argument in our original award as arbitrator, and nothing that has transpired in the interim persuades us to alter our position.

We believe USWC's arguments are adequately answered in the arbitration decision of the Colorado Public Service Commission, between the same two parties.<sup>(1)</sup> The Colorado Commission concluded in regard to the liquidated damages issue:

We hold that the Commission, as the state agency empowered to deal with utility regulation, is authorized to carry out the provisions of the Act as it relates to Colorado. . . . [T]he Act does not limit State Commission arbitration authority to specific regulatory provisions under State law. . . . [T]he Commission in arbitration proceedings under the Act is, in good measure, enforcing federal rights.<sup>(2)</sup>

The Colorado Commission then concluded, as have we, that the inclusion of the performance standard, measurement, and liquidated damages provisions are necessary to carry out the intent of the Federal Act. We find especially unpersuasive USWC's analogy between hypothetical liquidated damages provisions in an automobile purchase contracts and the instant Agreement. We are here trying to establish a competitive telecommunications environment, and it is difficult to see how that can emerge if an ILEC can provide an entering Competing Local Exchange Carrier (CLEC) inferior service and force the CLEC to resort to protracted and expensive litigation as its only remedy.

Our conclusion is not altered by the recent Decision of the Federal Eighth Circuit Court of Appeals<sup>(3)</sup> interpreting, and in part invalidating FCC Rules, implementing the Act. As we read that opinion, the Court invalidated any requirement that an ILEC furnish service superior to that it furnishes itself, but left intact requirements that the ILEC furnish its CLEC resellers service at least equal to that it provides itself. Such is the intent of the provisions we mandated in our arbitration award, and we are not disposed to retreat therefrom.

In regard to USWC's objections to Section XIX, as we read the provision, it clearly provides for oversight only by the body enjoying jurisdiction under the Federal Act. Accordingly, we see no reason to amend the language.

### CONCLUSIONS OF LAW

USWC's objections to the Agreement are not well taken and should be rejected. The Agreement comports with the Federal Telecommunication Act's § 251, and with currently effective Federal Communications Commission (FCC) regulations. The Agreement comports with applicable Utah law and this Commission's rules. The Commission has pending before it a Petition for Reconsideration in Docket No. 94-999-01, a rulemaking proceeding which could impact the Agreement here at issue. Likewise, the Commission has pending Docket No. 96-049-15, a case involving Commission interpretation of 47 USC § 252(c)(1) and (2). The Commission deems resolution of those issues in the other dockets unnecessary for approval of the instant Agreement, subject to possible later modification based on such resolution. The Agreement should be approved now as meeting the requirements of 47 USC § 252(e)(1).

### ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

U S WEST COMMUNICATIONS, INC.'s objections to provisions in the arbitrated Resale/Interconnection Agreement between U S WEST COMMUNICATIONS, INC., and TCG UTAH, INC., dated December 19, 1997, be, and the same are, overruled.

The aforesaid Agreement be and it hereby is, approved in conformance with 47 USC § 252(e)(1), subject to possible subsequent Commission Order requiring modification.

Any person aggrieved by this Order may petition the Commission for review within 20 days of the date of this Order. Failure so to do will forfeit the right to appeal to the Utah Supreme Court.

DATED at Salt Lake City, Utah, this 20th day of January, 1998.

/s/ Stephen F. Mecham, Chairman

(SEAL) /s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard

Commission Secretary

1. *In the Matter of TCG Colorado Petition for Arbitration Pursuant to §252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with US West*, Docket No. 96A-329T (Colorado PSC, 1996).
2. *Id.* at 23.
3. *Iowa Utilities Board v. FCC*, 120 F.3d 753 (1997).

