

In the Matter of a Complaint Against US)
WEST COMMUNICATIONS, INC., by)
ELECTRIC LIGHTWAVE, INC., Requesting)
the Utah Public Service Commission Enforce)
an Interconnection Agreement Between)
Electric Lightwave, Inc., and US West)
Communications, Inc.)

DOCKET NO. 98-049-36

ORDER

ISSUED: January 22, 1999

BY THE COMMISSION:

Petitioner Electric Lightwave, Inc. ("ELI"), and US WEST Communications, Inc. ("US WEST"), entered into an agreement, dated November 10, 1997, that was entitled "Local Wireline Network Interconnection and Service Resale Agreement (the "Interconnection Agreement"). The Interconnection Agreement sets forth the terms, conditions, and rates for network interconnection; access to unbundled network elements; ancillary network services; and retail services available for resale within the State of Utah.

On November 20, 1997, ELI and US WEST submitted the Interconnection Agreement to the Utah Public Service Commission (the "Commission") for approval in accordance with Section 252(e)(2) of the Telecommunications Act of 1996, 47 U.S.C. § 252(e)(2). The Commission approved the Interconnection Agreement on January 13, 1998 by order in Docket No. 97-2202-02.

PROCEDURAL HISTORY

On November 23, 1998, ELI filed a Complaint pursuant to the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-3, and the Utah Public Telecommunications Law, Utah Code Ann. §§ 54-8b-2.2(1)(e), 54-8b-16 and -17, requesting an expedited proceeding and an Order from the Commission requiring US WEST to, among other things, comply with the terms of the Interconnection Agreement between ELI and US WEST.

ELI's Complaint contains two causes of action. The first cause of action alleges that under the terms of the Interconnection Agreement, traffic terminating to an Internet service provider ("ISP") is treated as local traffic for purposes of reciprocal compensation. ELI further alleges that US WEST has refused to treat ISP traffic as local traffic and, accordingly, has refused to pay ELI reciprocal compensation for such traffic. ELI further asserts that US WEST's refusal to compensate ELI for ISP traffic constitutes an intentional, wilful, and bad faith violation of the Interconnection Agreement.

The second cause of action alleges that under the terms of the Interconnection Agreement, the parties would use a bill and keep rate structure until such time as the parties had traffic measurements for a six-month period which demonstrated that traffic was out of balance by more than ten percent (10%), at which time the parties would commence reciprocal compensation for the remaining term of the Interconnection Agreement. ELI further alleges that on or about February 25, 1998, ELI provided US WEST with the required six-month history of local traffic for all originating and terminating usage on interconnection trucks between US WEST and ELI during the period from July, 1997 through December, 1997. ELI requested implementation of the reciprocal compensation schedule, effective January 1, 1998. ELI further asserts that despite the information set forth in ELI's traffic study showing that the local traffic exchange was out of balance and despite ongoing negotiations between US WEST and ELI over reciprocal compensation, US WEST

refuses to pay reciprocal compensation to ELI for the period from January 1, 1998 through the present.

In accordance with Utah Code Ann. § 54-8b-17(1)(c), which requires a prehearing conference not later than ten (10) days after a complaint is filed, a Prehearing Conference was held before the Commission on December 4, 1998 at 9:00 a.m. ELI was represented by Jerold G. Oldroyd, Esq. and Blake D. Miller, Esq., and US WEST was represented by Gregory B. Monson, Esq. and Jay T. Jorgensen, Esq. The Commission heard oral argument on ELI's Motion to Shorten Time in Which to Respond to Data Requests and US WEST's Motion to Dismiss Or, In the Alternative, For a Stay of the Proceedings. After hearing oral argument, the Commission granted ELI's Motion to Shorten Time in Which to Respond to Data Requests, denied US WEST's Motion to Dismiss Or, In the Alternative, For a Stay of the Proceedings, and established a briefing and hearing schedule.

The Commission set a Hearing on the Complaint, as required by Utah Code Ann. § 54-8b-17(1)(d), for December 18, 1998 at 9:00 a.m., at which time counsel for each party would present oral arguments on their respective legal positions as to interpretation of the Interconnection Agreement. The Commission further ordered that the Hearing would be continued until December 30, 1998 at 9:00 a.m. in order for the parties to present evidence, including testimony, on their respective positions, should the Commission decide that an evidentiary hearing was warranted. The December 30, 1998 date was later vacated and the Evidentiary Hearing was set for January 11, 1999.

Pursuant to the Scheduling Order, the matter came on for Hearing on the Complaint before the Commission pursuant to Utah Code Ann. § 54-8b-17(d)(I), which requires that a hearing commence on the complaint not later than twenty-five (25) days after the complaint is filed (unless the Commission finds that extraordinary conditions exist). ELI was represented by Blake D. Miller, Esq. and Claudia F. Berry, Esq., and US WEST was represented by David Jordan, Esq., Gregory B. Monson, Esq., Jay T. Jorgensen, Esq., and Michael C. Thompson, Esq. The Commission heard oral argument on the parties' respective legal positions as to interpretation of the Interconnection Agreement and took the matter under advisement.

On December 24, 1998, US WEST filed a Motion to Compel ELI to answer certain data requests.

The Motion to Compel came on for Hearing before the Commission on Monday, January 4, 1999. ELI was represented by Blake D. Miller, Esq. and Claudia F. Berry, Esq., US WEST was represented by Gregory B. Monson, Esq.

After hearing oral argument from the parties and being fully advised in the matter, the Commission enters the following conclusions of law and order on both the legal issues briefed and argued by the parties at the December 18, 1998 Hearing and US WEST's Motion to Compel argued at the January 4, 1999 Hearing.

The Commission finds it unnecessary to hold the Evidentiary Hearing currently scheduled for January 11, 1999 and, accordingly, the January 11, 1999 Hearing is vacated.

UNDISPUTED FACTS

1. In March, 1996, US WEST and ELI entered into a Stipulation and Agreement for Interim Interconnection until such time as a definitive agreement could be entered into by the parties.
2. US WEST and ELI commenced the exchange of traffic by the last quarter of 1996.
3. On November 10, 1997, US WEST and ELI executed the Interconnection Agreement. The Commission approved the Interconnection Agreement on January 13, 1998.
4. In February, 1998, ELI provided US WEST with a history of local traffic for the six-month period from July, 1997 through December, 1997. This history demonstrated that traffic terminated by ELI was out of balance by more than ten percent.

CONCLUSIONS OF LAW

The Commission concludes, as a matter of law, that:

1. Under the terms of the Interconnection Agreement between ELI and US WEST, traffic placed to an Internet service provider ("ISP") within a single local/EAS calling area is local traffic for purposes of

reciprocal compensation.

1. Under the terms of the Interconnection Agreement, (a) the six-month traffic measurement period (for purposes of determining whether traffic is out of balance) commenced six months after the date the parties first exchanged traffic; and (b) reciprocal compensation commenced when either party provided a six-month traffic measurement study demonstrating that traffic was out of balance by more than +/- ten percent (10%).
2. US WEST violated the terms of the Interconnection Agreement by refusing to include ISP traffic as local traffic for purposes of reciprocal compensation.
3. US WEST violated the terms of the Interconnection Agreement by refusing to use traffic measurement studies provided to it by ELI on February 25, 1998, for purposes of determining whether traffic was out of balance by more than ten percent (10%), and for failing to commence reciprocal compensation for the remaining term of the Interconnection Agreement.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. US WEST shall comply with the terms of the Interconnection Agreement and pay ELI reciprocal compensation for all local traffic (including ISP traffic) terminated by ELI pursuant to the terms of the Interconnection Agreement; and
2. The determination that traffic is out of balance by more than 10% may be based upon six-month traffic studies which consider or include time prior to the January 12, 1998 approval date, of the Interconnection Agreement.

DATED at Salt Lake City, Utah, this 22nd day of January, 1999.

/s/ Stephen F. Mecham, Chairman

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

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary