

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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IN THE MATTER OF PROPOSED RULES )  
REGARDING IMPLEMENTATION OF )  
40-15-101*ET SEQ.*--REQUIRE- ) DOCKET NO. 95R-556T  
MENTS RELATING TO INTERCONNEC- )  
TION AND UNBUNDLING. )

**COMMISSION DECISION GRANTING IN PART, AND DENYING IN PART,  
APPLICATIONS FOR REHEARING, REARGUMENT, OR RECONSIDERATION  
AND ADOPTING RULES**

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Mailed Date: April 25, 1996  
Adopted Date: April 25, 1996  
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**I. BY THE COMMISSION:**

**A. Statement**

1. This matter comes before the Commission for consideration of applications for rehearing, reargument, or reconsideration ("RRR") to Decision No. C96-347, issued on April 1, 1996. In that decision, we adopted, subject to applications for RRR, rules setting forth interconnection and unbundling requirements for telecommunications providers. Pursuant to the provisions of 40-6-114, C.R.S., a number of parties filed applications for RRR including: U S WEST Communications, Inc. ("USWC"); AT&T Communications of the Mountain States, Inc. ("AT&T"); TCI Communications, Inc., Teleport Communications Group Inc., and Sprint Communications Company L.P. ("TCI *et al.*"); MFS Intelenet of Colorado, Inc. ("MFS"); MCI Telecommunications Corporation ("MCI"); and the Colorado Independent Telephone Association ("CITA"). Now

being duly advised in the premises, we will grant the applications for RRR, in part, and deny them in part.

2. The applications, in large measure, reiterate arguments made in previous comments in this proceeding. We addressed many of these arguments in Decision No. C96-347. Since it is unnecessary to restate our previous rulings here, the present discussion, for the most part, specifically addresses those points on which we have modified the rules or on which we believe additional clarification is helpful.

#### **B. Rule 3.2--IntraLATA Dialing Parity**

1. USWC, in its request for reconsideration, suggests that we modify Rule 3.2<sup>1</sup> (telecommunications providers shall provide dialing parity to competing providers of telephone exchange service and telephone toll service) to reflect the provisions of 271(e)(2)(B), C.R.S., of the Telecommunications Act of 1996 ("Act").<sup>2</sup> That section generally provides that a state may not require a Bell Operating Company, such as USWC, to implement intraLATA toll dialing parity before that company has been granted authority to provide interLATA services originating in the state, or before three years after the date of enactment of the Act (*i.e.*, February 8, 1996). We agree with USWC's interpretation of 271(e)(2)(B), C.R.S.

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<sup>1</sup> Attachment A to Decision No. C96-347.

<sup>2</sup> Public Law No. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. 151, *et seq.*).

2. However, we will not modify the rule as suggested. We note that Rule 3.2 is virtually identical to 251(b)(3), C.R.S., of the Act. As such, the rule imposes the same duties with respect to dialing parity as imposed in the Act. We acknowledge the limitations upon state authority stated in 271(e)(2)(B), C.R.S., and note that it is not the intent of Rule 3.2 to require USWC to implement intraLATA toll dialing parity in contravention of those provisions. However, the federal dialing parity requirement is not limited to intraLATA toll dialing parity as described by USWC. With this clarification, we find that it is unnecessary to amend Rule 3.2 as suggested by USWC.

**C. Rules 8.1 and 8.2--Negotiation, Mediation, and Arbitration**

1. Rules 8.1 and 8.2 state that even though providers are required to file interconnection and unbundling tariffs, such providers are still permitted to reach interconnection agreements pursuant to negotiation, mediation, or arbitration.<sup>3</sup> The rules further provide that such agreements may not be inconsistent with the rates, terms, or conditions contained in a provider's currently effective tariff. Finally, the rules state that interconnection agreements shall be submitted for approval by the Commission, and that the Commission shall review submitted agreements in accordance

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<sup>3</sup> Section 252 of the Act specifies procedures by which providers may enter into bind erconnection agreements through negotiation, mediation, or arbitration.

with the Rules of Practice and Procedure, 4 Code of Colorado Regulations 723-1. USWC and AT&T object to these provisions.

2. First, these parties suggest that the requirement that privately negotiated agreements may not be inconsistent with filed tariffs subverts the ability of providers to enter into such agreements. USWC argues that this requirement is inconsistent with the statement in Rule 8.1 that providers are permitted to reach negotiated, mediated, or arbitrated agreements. We disagree with these suggestions.

3. As explained in Decision No. C96-347, pages 26 through 30, a tariff process and the negotiation procedures defined in 252 of the Act may coexist.<sup>4</sup> In our contemplation, a provider's tariff will set forth the rates and charges for interconnection and unbundled network elements, and standard terms and conditions for such services.<sup>5</sup> There are other matters, however, relating to

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<sup>4</sup> Decision No. C96-347, page 28 and 29, observed that any interconnection agreement adopted by negotiation or arbitration under 252 must be made public. Additionally, 252(i) compels a long distance carrier to make available any interconnection service or network element provided under a negotiated (by the Commission) agreement to any other requesting provider upon the same terms and conditions as those provided in the agreement. The arguments by USWC and AT&T imply that 252(d) and 252(e) constrain agreements which may be negotiated by providers. In fact, the provisions of the Act (i.e., agreements must be made public and approved by State commissions, and a provider must offer the same negotiated terms and conditions to any other requesting provider) substantially confine the negotiation process. The provisions of Rule 8.1 (i.e., interconnection agreements may not contravene the provisions of a provider's currently effective tariff) do not circumscribe interconnection negotiations significantly more than the provisions of 252(i).

<sup>5</sup> This requirement is similar to the requirements of 252(i). We also note that, pursuant to 252(f), USWC may file with the Commission a statement of the terms and conditions generally offered by providers in compliance with the requirements of 251.

interconnection and unbundling which may not be contained in a tariff, and which are appropriate for negotiation or arbitration. See Decision No. C96-347, page 27, paragraph 3.

In short, the provisions of Rule 8.1 do not undermine the negotiation/arbitration process provided for in 252, nor is the rule internally inconsistent. The language to which USWC and AT&T object simply provides that a privately negotiated agreement may not contravene the provisions of a currently effective tariff. The rule still allows for negotiation and arbitration on matters not addressed by tariff.

4. Next, AT&T objects to the language in Rules 8.1 and 8.2 which states that interconnection agreements shall be reviewed by the Commission pursuant to the Rules of Practice and Procedure. We agree that these provisions should be deleted from the rules, and grant the request for RRR to the extent it suggests modification of these rules. Notably, after Decision No. C96-347 was issued we adopted emergency rules establishing specific procedures for the review and approval of interconnection agreements. See Decision No. C96-413. We have also initiated proceedings to adopt permanent rules for the review of such agreements. See Decision No. C96-440. In light of these subsequent events, Rules 8.1 and 8.2 will be modified. Rule 8.1 will be amended to provide:

Nothing in Rule 7 shall be construed to limit a telecommunications provider's ability to reach a negotiated, mediated, or arbitrated agreement with respect to the rates, terms, and conditions associated with interconnection, the termination of local traffic, the purchase of an unbundled network element, or publication of a 'White Pages' directory. Such agreements shall not be

inconsistent with the rates, terms, or conditions contained in a telecommunications provider's currently effective tariff, ~~and will be processed according to the applicable Commission Rules of Practice and Procedure.~~

Rule 8.2 will be amended to provide:

All agreements for interconnection, the termination of local traffic, the purchase of an unbundled network element, or publication of a 'White Pages' directory shall be submitted to the Commission for approval ~~and will be processed according to the applicable Rules of Practice and Procedure.~~

**D. Rule 2.10--Definition of "Incumbent Telecommunications Provider"**

1. MCI<sup>6</sup> and TCI *et al.* objected to the definition of "incumbent telecommunications provider" set forth in Rule 2.10 to the extent the factors from 251(h)(2) are stated in the disjunctive. In part, the definition of "incumbent telecommunications provider" was based upon 251(h)(2). That statute provides that the Federal Communications Commission ("FCC") may, by rule, provide for the treatment of a local exchange carrier ("LEC") as an incumbent LEC if:

- (1) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by an incumbent LEC (as defined in 251(h)(1));
- (2) such carrier has substantially replaced an incumbent LEC; *and*
- (3) such treatment is consistent with the public interest, convenience, and necessity.

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<sup>6</sup> MCI argued that the Commission should conform the definition of "incumbent telecommunications provider" to 251(h)(2). We interpret this argument as, not only an objection to the three-year term specified in the rule, but also as an objection to changing language of 251(h)(2) to the disjunctive.

Rule 2.10 incorporates these provisions with one exception: the three factors are stated in the disjunctive "or" (i.e., any one of the findings stated above would result in treatment of a new entrant as an incumbent LEC). MCI and TCI *et al.* contend that the rule should conform to the Act by using the conjunctive "and."

2. We accept this suggestion, and modify the rule accordingly. As noted above, this portion of Rule 2.10 was, in fact, based upon 251(h)(2). Since the rule was modelled upon the Act, upon reconsideration we agree that it should be consistent with its provisions. Rule 2.10 will, therefore, be amended:

A telecommunications provider that on February 8, 1996, provided telephone exchange service in Colorado and either (a) on such date was a member of the exchange carrier association or (b) is a person or entity that became a successor or assign of a member described in clause (a). If a provider has held a Certificate of Public Convenience and Necessity to offer local exchange service in Colorado for three years, such provider shall be considered an incumbent unless the Commission determines that such designation is not in the public interest. A telecommunications provider may also be considered an incumbent telecommunication provider if: (a) such provider occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a provider described above; (b) such provider has substantially replaced an incumbent telecommunication provider described above; ~~or~~ and, (c) the Commission determines that such designation is in the public interest.

3. A number of parties also object to Rule 2.10 to the extent it provides that a new entrant shall be considered

an incumbent three years after certification, absent a Commission determination that such designation is not in the public interest. These parties argue that this provision is unlawful inasmuch as it contravenes the Act. In addition, these parties contend that the choice of three years, after which new entrants will be treated as incumbents, is arbitrary and unsupported in the record. We reject these arguments.

4. First, we conclude that the Act does not preempt the proposed rule. The significance of this issue (*i.e.*, when a new entrant shall be considered to be an incumbent) relates to the question of whether new entrants will be subject to interconnection and unbundling requirements set forth in the rules. Decision No. C96-347, pages 8 and 9, points out that the Act preserved substantial State prerogative with respect to establishing interconnection and unbundling rules. See 251(d)(3) (in prescribing and enforcing rules, the FCC shall not preclude the enforcement of State access and interconnection regulations which are consistent with 251 and which do not substantially prevent implementation of the purposes of the Act); 253(b) (nothing in 253 shall affect the ability of a state to impose, on a competitively neutral basis, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers); 261(b) (nothing in the Act shall be construed to prohibit any state commission from enforcing regulations prescribed prior to the Act, or

from prescribing regulations after the date of enactment, if such regulations are not inconsistent with the Act); 261(c) (the Act does not preclude a state from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the state's requirements are not inconsistent with the Act or the FCC's regulations).<sup>7</sup>

5. These provisions indicate that Congress intended to permit the states to take a significant, independent role in establishing interconnection and unbundling requirements. The new entrants' argument that Rule 2.10 is preempted implies that the Act **compels** the States (as opposed to the FCC) to treat incumbents and new entrants differently. We find no such indication in the Act.

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<sup>7</sup> The FCC is presently conducting rulemaking to implement the Act. As such, no federal regulations yet exist which might arguably preempt our rules.

6. Furthermore, we find that Rule 2.10 is not inconsistent with the provisions of the Act. Notably, the rule does not automatically treat a new entrant as an incumbent three years after certification. The rule, in effect, creates a presumption that this should occur. However, a new entrant will be permitted to demonstrate to the Commission that designation as an incumbent is not in the public interest. This provision is not inconsistent with specific requirements of the Act.<sup>8</sup>

7. Moreover, the new entrants' position that we are precluded from adopting such a rule is itself inconsistent with the intent of the statute. Specifically, that argument, in effect, holds that only the FCC may decide to treat a new entrant as an incumbent.<sup>9</sup> A state would be unable to adopt this policy even if it were in the public interest for the citizens of that state. This position would substantially interfere with state authority to establish and enforce interconnection and unbundling requirements, **including for new entrants**, in contravention of the clear intent of the Act. Assuming (as we do) that states retain the prerogative to establish interconnection and unbundling rules **which apply to new entrants**, Rule 2.10 is a permissible exercise of our authority.

8. As for the alleged arbitrariness of the three-year

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<sup>8</sup> We note that 251(h)(2) permits the FCC, by rule, to provide for the future treatment of entrants as incumbents.

<sup>9</sup> Indeed, in its February 28, 1996 comments, MFS made this exact argument.

time period, this provision was specifically suggested by Commission Staff and the Colorado Office of Consumer Counsel ("OCC"). See Staff/OCC February 20, 1996 comments, page 6. Staff and the OCC stated that three years should give new entrants ample time to establish themselves in the market, while the eventual unbundling of new providers' networks would serve to enhance competition. For purposes of adopting these rules, we accept that rationale. 9. Finally, we again note that the rule will permit new entrants, in the future, to demonstrate to the Commission that the public interest requires that they not be treated as incumbents even after three years. The parties who oppose the rule essentially object to being compelled to prove, in future proceedings, that there is good reason to continue to accord them extraordinary treatment (*i.e.*, the rules exempt new entrants from the unbundling requirements imposed upon incumbents). These objections are not well-taken.

**E. Rule 9.1--Exemption For Rural Telecommunications Providers**

In its application for RRR, CITA requests that we modify the criteria in Rule 9.1 relating to *bona fide* requests for service from a rural telecommunications provider. We will grant this request, in part only. Rule 9.1 states that rural telecommunications providers are exempted from a number of the rules until they receive a *bona fide* request for interconnection, the termination of local traffic, the

purchase of an unbundled network element, or publication of a White Pages directory, and such request is approved by the Commission. CITA argues that a request for publication of a White Pages directory should not constitute a *bona fide* request for service as would precipitate proceedings under Rule 9.2. Since we accept this contention, Rule 9.1 will be amended to provide:

Rules 3, 4, 5.4 through 5.10, 5.12, 6, 7, and 8 shall not apply to rural telecommunications providers until: (1) such company has received a *bona fide* request for interconnection, the termination of local traffic, or the purchase of an unbundled network element, ~~or publication of a "White Pages" directory~~; and, (2) such request is deemed by the Commission to be technically feasible and not unduly economically burdensome.

**F. Rule 3--Imposition Of Interconnection Mandates Upon New Entrants**

1. A number of the parties object to the provisions in Rule 3 which impose identical interconnection requirements upon new entrants as are imposed upon incumbents. The rule mandates that new entrants, like incumbents, interconnect with the facilities and equipment of any requesting provider at any technically feasible point. While we reject the requests to modify the rule, we comment upon some of the arguments made in the applications for RRR.

2. The objecting parties first contend that the Act precludes the Commission from requiring new entrants to interconnect with other providers at any technically feasible point. The above discussion sets forth our views regarding

the authority of State commissions to adopt interconnection and unbundling requirements in light of the provisions of the Act. That discussion applies here as well.

3. We point out that under the Act, 251(a)(1), all providers, including new entrants, have the duty to interconnect directly or indirectly with the facilities and equipment of other providers. In choosing to treat all providers equally (*i.e.*, requiring even new entrants to interconnect at any technically feasible point), we have concluded that such a rule will promote competition in the local exchange market and will benefit end-users. For example, this rule will give all providers equivalent access to the networks of new entrants for purposes of terminating calls on those networks. Notably, comment in this docket (*e.g.*, by USWC) indicated that, with competition in the local exchange market, even the incumbent will need to interconnect with the networks of new entrants when terminating calls on those networks. USWC further noted that some of the potential new entrants in the Colorado market already have substantial facilities in place.

4. In their opposition to Rule 3.3, the new entrants have made conclusory statements such as: the rule creates a substantial burden for new entrants and constitutes a barrier to entry; the rule will deter competition generally; rule will deter facilities-based competition specifically; etc. Little explanation was offered in support of such allegations. As we understand the arguments, the new entrants essentially suggest

that imposition of identical interconnection mandates on new entrants and incumbents will discourage investment in new facilities on the part of new entrants. If a new entrant must provide access to its new facilities at any technically feasible point, the argument goes, that provider may not undertake construction of such facilities.

5. We are not persuaded by this argument. Decision No. C96-347 pointed out that the willingness of new entrants to construct facilities will likely be influenced by other factors. Some of these include the price of access to other carriers' networks, the cost of new facilities, the present availability of satisfactory facilities, etc.<sup>10</sup> We are not convinced that mandating equivalent interconnection standards for both new entrants and incumbents will cause new entrants to forsake otherwise prudent investment in new facilities.

6. Given the necessity of interconnection for all providers, good reason should exist to treat carriers disparately with respect to interconnection mandates. No persuasive reason was offered in this case.

7. We finally comment upon the AT&T contention that

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<sup>10</sup> We emphasize that the rules compel only incumbents to unbundle their network. To the extent that unbundling of network elements will affect competition, the rules accord new entrants an advantage over incumbents by requiring only incumbents to unbundle.

imposition of identical interconnection requirements constitutes *de facto* repeal of the unbundling exemption for new entrants. We disagree. Rule 6 exempts new entrants from the unbundling mandate. As such, only incumbents will be required to price network elements on an unbundled basis. This exemption for new entrants is unaffected by the interconnection requirements in Rule 3.

#### **G. Loop Unbundling**

AT&T reiterates its request that Rule 8 should require incumbents to unbundle the loop into three separate components: loop distribution, loop concentrator/multiplexer, and loop feeder. We again reject this suggestion for the reasons discussed in Decision No. C96-347, page 46. We simply note here that our rejection of AT&T's proposal does not preclude it from requesting unbundled loop elements when negotiating interconnection agreements.

#### **H. Conclusion**

The applications for RRR raise a number of other issues not specifically discussed above. We find that those issues were adequately addressed in Decision No. C96-347. Except as specifically stated in the above discussion, the applications for RRR will be denied.

## **II. ORDER**

### **A. The Commission Orders That:**

1. The application for rehearing, reargument, or reconsideration filed by U S WEST Communications, Inc., is denied.

2. The application for rehearing, reargument, or reconsideration filed by AT&T Communications of the Mountain States, Inc., is granted consistent with the above discussion, and is otherwise denied.

3. The application for rehearing, reargument, or reconsideration filed by TCI Communications, Inc., Teleport Communications Group Inc., and Sprint Communications Company L.P. is granted consistent with the above discussion, and is otherwise denied.

4. The application for rehearing, reargument, or reconsideration filed by MCI Telecommunications Corporation is granted consistent with the above discussion, and is otherwise denied.

5. The application for rehearing, reargument, or reconsideration filed by MFS Intelenet of Colorado, Inc., is denied.

6. The application for rehearing, reargument, or reconsideration filed by the Colorado Independent Telephone Association is granted consistent with the above discussion, and is otherwise denied.

7. The rules attached to Decision No. C96-347 are revised consistent with the above discussion and are hereby adopted. This order adopting rules shall become final 20 days following the Mailed Date of this Decision in the absence of

the filing of any applications for rehearing, reargument, or reconsideration. In the event any application for rehearing, reargument, or reconsideration to this Decision is timely filed, this order of adoption shall become final upon a Commission ruling on any such application, in the absence of further order of the Commission.

8. Within 20 days of final Commission action on the attached rules, the adopted rules shall be filed with the Secretary of State for publication in the next issue of the *Colorado Register* along with the opinion of the Attorney General regarding the legality of the rules.

9. The finally adopted rules shall also be filed with the Office of Legislative Legal Services within 20 days following the above-referenced opinion by the Attorney General.

10. The 20-day period provided for in 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration to this Decision begins on the first day following the Mailed Date of this Decision. This order is effective immediately upon its mailed date.

B. ADOPTED IN SPECIAL OPEN MEETING April 25, 1996.

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

\_\_\_\_ Commissioners

COMMISSIONER CHRISTINE E. M. ALVAREZ  
RESIGNED EFFECTIVE APRIL 5, 1996.