

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE PETITION OF)
MFS COMMUNICATIONS COMPANY,)
INC., FOR ARBITRATION PURSUANT)
TO 47 U.S.C. 252(b) OF INTER-) DOCKET NO. 96A-287T
CONNECTION RATES, TERMS, AND)
CONDITIONS WITH U S WEST COMMU-)
NICATIONS, INC.)

DECISION REGARDING PETITION FOR ARBITRATION

- - - - -
Mailed Date: November 8, 1996
Adopted Date: November 5, 1996
- - - - -

T A B L E O F C O N T E N T S

I. BY THE COMMISSION 2

 A..... Statement .

 B. Statutory Provisions Regarding Competition
 anc

 C..... Costing and Pricing Issues

 D Docket No. 96S-233T Tariffs

10

 E..... FCC Pricing Provisions

 F..... TCG Motion to Sever

 G..... Geographically Deaveraged Loop Rates

 H..... Loop Rates .

 I..... Routing Points/Rate Center Points

 J. Symmetrical Compensation and the Definition
 of

 K. Construction Charges.

L..... Trunk Groups for Non-USWC Local and Toll Traffic

M..... Resale Requirements

N..... Sham Unbundling

O. Application of Compensation Charges for
Enhanced Services Traffic

30

P..... Billing Cycle for Resold Services

Q..... Late Payment Charges

II. ORDER..... 33

A..... The Commission Orders That:

B..... ADOPTED IN OPEN MEETING

I. BY THE COMMISSION:

A. Statement

1. This matter comes before the Commission for consideration of the Petition for Arbitration filed by MFS Communications Company, Inc. ("MFS" or "Petitioner"), on June 24, 1996. Pursuant to the provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 70, to be codified at 47 U.S.C. ("Act"), the petition requests that we arbitrate certain unresolved issues between MFS and U S WEST Communications, Inc. ("USWC" or "Company"), relating to the rates, terms, and conditions for interconnection, unbundling of network elements, and resale of telecommunications services. USWC filed its response to the petition on July 28, 1996. We issued notice of the petition, and interested persons were allowed to intervene, including Commission Staff ("Staff"), the Colorado Office of Consumer

Counsel; American Communication Services of Colorado Springs, Inc.; TCI Telephony Services, Inc.; Sprint Communications Company L.P.; MCI Telecommunications Corporation; MCIMetro Access Transmission; and TCI Communications, Inc.

2. After MFS filed its petition, a number of other telecommunications providers, pursuant to 252, submitted similar Petitions for Arbitration involving USWC: TCG Colorado ("TCG") on July 17, 1996; AT&T Communications of the Mountain States, Inc. ("AT&T") on July 30, 1996; ICG Telecom Group, Inc. ("ICG") on August 2, 1996; and MCIMetro Access Transmission Services, Inc. ("MCI") on August 9, 1996. We consolidated all these petitions for consideration and hearing in Decision Nos. C96-835, C96-858, and C96-880. Our decision to consolidate was based upon substantial commonality of issues. Furthermore, we noted that 252(g) specifically permits a state commission to consolidate arbitration proceedings to reduce the administrative burden on the commission and the parties to the proceeding. See Decision No. C96-835.

3. In addition to permitting the parties to submit prefiled testimony, we conducted hearings in this and the other consolidated requests for arbitration on September 24 through 27, and 30, 1996 and October 1 through 4, 1996. Closing Statements of Position were filed by the parties on October 10, 1996. In part, those statements specified the remaining unresolved issues between Petitioners and USWC. Now being duly advised in the premises, we issue our order

regarding the MFS Petition for Arbitration.

4. As we anticipated in Decision No. C96-835, the consolidated hearings served the purpose of administrative economy and efficiency, inasmuch as the various petitions raised common issues. Nevertheless, we are issuing separate decisions on each petition. We do so as a matter of administrative convenience: The Act requires that we issue written decisions on the MFS and TCG petitions by November 8, 1996; written decisions are not due on the ICG petition until November 22, 1996, and on the more extensive AT&T and MCI petitions until December 1, 1996 and December 26, 1996, respectively. This process will not prejudice any party. In arriving at our determinations on the issues presented in each petition, we have considered the entirety of the consolidated record to the extent it is relevant to each issue.

B. Statutory Provisions Regarding Competition and Arbitration

1. Generally, the Act opens local exchange markets to competition. It does so, in part, by imposing certain duties upon incumbent local exchange providers ("ILEC") such as USWC.

These include the duty to interconnect with the facilities and equipment of any requesting telecommunications provider; the duty to provide to any requesting provider nondiscriminatory access to network elements on an unbundled basis on rates, terms, and conditions that are just and reasonable; and the duty to offer for resale, at wholesale

rates, any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. See 251(c). The Act contemplates that ILECs will provide for interconnection, unbundled network elements, and resale pursuant to binding agreements entered into with new entrants. Such agreements may be arrived at through voluntary negotiations or pursuant to binding arbitration by the state commission. See 252(a-b) and discussion, *infra*.

2. To implement the provisions of the Act, the Federal Communications Commission ("FCC") adopted comprehensive rules relating to interconnection, the unbundling of network elements by ILECs, and resale of ILEC services. See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order (released August 8, 1996) ("First Report and Order"). In numerous instances, the parties have argued that the FCC's rules are dispositive of issues here.¹

3. AT&T filed its Motion to Narrow Issues on September 16, 1996. Essentially, that motion requested a declaration that the Commission is legally required to follow the FCC's rules with respect to matters at issue in the

¹ As discussed *infra*, certain provisions of the FCC's rules were recently stayed by the Circuit Court of Appeals. See *Iowa Utilities Board v. Federal Communications Commission, et al.*, 1589204 (8th Cir. October 15, 1996).

consolidated proceedings. The motion was precipitated by USWC's positions in prefiled testimony which urged Commission consideration of certain issues independent of the FCC's rulings. At the September 20, 1996 prehearing conference, we ruled that our decisions would not reopen issues determined by effective FCC rules. We now memorialize that ruling.

4. The Act, 251(d), directs the FCC to promulgate implementing regulations. In addition, the Act directs state commissions, during arbitration, to comply with the FCC's rules. See 252(c)(1). In our view, these provisions clearly express Congress' intent to preempt contrary State action on matters lawfully ruled upon by the FCC. To the extent USWC claims that the FCC exceeded its jurisdiction in its rulemaking, that is a judicial matter. For purposes of deciding the present case, we will not reopen matters determined by FCC rules.

5. We also note that prior to passage of the Act, the Colorado Legislature itself enacted House Bill 1335 ("HB 1335"), 40-15-501, *et seq.*, C.R.S., in the 1995 legislative session. In that statute, the Legislature determined that competition in the market for basic local exchange service is in the public interest. See 40-15-101, C.R.S. HB 1335, consistent with that determination, directed the Commission to encourage competition in the basic local exchange market by adoption and implementation of appropriate regulatory mechanisms. Specifically, HB 1335 mandated that the Commission adopt rules establishing cost-based, non-

discriminatory, and unbundled methods of pricing for carrier interconnection to essential facilities or functions, and rules relating to the terms and conditions for resale of services that enhance competition. See 40-15-503(2)(b)(I) and (IV), C.R.S. In fact, the Commission has adopted a number of rules to implement HB 1335's directives. See Rules on Interconnection and Unbundling, 4 *Code of Colorado Regulations* ("CCR") 723-39, and Rules for the Resale of Telecommunications Exchange Services, 4 CCR 723-40. During the 1996 legislative session, HB 1010 was enacted which mandated that the Commission adopt interim tariffs necessary to begin competition in the local exchange market by July 1, 1996. The interim tariffs of USWC were reviewed and adopted in Docket 96-233T, See Decision C96-655, and the permanent tariff proceeding is ongoing in Docket 96S-331T.

6. As stated above, MFS' Petition for Arbitration was filed pursuant to the provisions of 252 of the Act. That section provides that telecommunications carriers (*i.e.*, an incumbent local exchange carrier and a new entrant into the local exchange market) may voluntarily negotiate the specific terms for the provision of interconnection services and unbundled network elements. In the event the negotiating carriers are unable to reach agreement with respect to such terms, 252(b) provides that, during the period from the 135th to the 160th day after the date on which an incumbent local exchange carrier receives a request for negotiation, the carrier or any other party to the negotiation may petition a

state commission to arbitrate any open issues.

7. Section 252(b)(4) of the Act provides that a state commission, in the course of arbitration proceedings, may require the petitioning and responding parties to provide such information as may be necessary for the commission to reach a decision on all unresolved issues. The issues in the arbitration proceeding are to be limited to those raised in the petition for arbitration and the response.² According to

252(b)(4)(C):

The state commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions.....upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.³

² 252(b)(4) of the Act.

³ MFS's petition states that its request for interconnection was served on USWC on February 6. Therefore, the Commission must decide all unresolved issues in the proceedings concerning USWC by November 8, 1996.

8. Notably, 252(c) directs that:
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 (Federal Communications) 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.

In accordance with the provisions of the Act, this decision sets forth our determinations regarding those issues upon which MFS and USWC have requested arbitration.⁴

C. Costing and Pricing Issues

The above discussion points out that, in arbitration proceedings, the Commission is required to establish "rates for interconnection, services or network elements . . ." See 252(c). At the September 20, 1996 prehearing conference, in granting TCG's Motion to Sever Consideration of U S WEST TELRIC Cost Studies, we determined that the interim prices established by the Commission in Docket No. 96S-233T ("233T") would be incorporated as the applicable rates⁵ in the

⁴ At hearing, USWC and MFS submitted their Joint Position Statement on Negotiated Terms to be included in an Arbitrated Interconnection Agreement (Exhibit 68). That statement reflects the parties' agreement on a number of issues, and, in fact, sets forth proposed language to be included in the agreement between USWC and MFS.

⁵ The use of the term "rates" also includes the applicable terms and conditions for the service not superseded by contractual agreement or this arbitration order.

Agreements subject to pending Petitions for Arbitration.⁶ We now affirm our previous ruling. The prices established on an interim basis in 233T as ultimately modified subject to true-up in Docket No. 96S-331T shall be incorporated into the Arbitrated Agreement in resolution of pricing issues.⁷

D. Docket No. 96S-233T Tariffs

1. Docket Nos. 96S-233T and 96S-331T were the outcomes of House Bill 1010 ("HB 1010"), enacted by the Colorado General Assembly in the 1996 legislative session. Those provisions are codified at 40-15-503(2)(g) and (h), C.R.S. HB 1010 directed that the Commission require telecommunications service providers that would provide unbundled facilities or functions, interconnection, services for resale, or local number portability to file tariffs containing temporary interim rates, terms, and conditions for the sale of such products.⁸ The Commission was instructed to conduct expedited proceedings on proposed interim tariffs for unbundled facilities or functions, interconnection, services for resale, and local number portability. Based upon that

⁶ Various pleadings and testimony presented at the consolidated hearing pointed out that Docket No. 96S-233T did not establish rates for all services or elements at issue in the petitions. The Commission and other arbitration orders relating to the consolidated petitions points out that, when interim rates do not exist for a particular service or element, the specific interim rate will be subject to negotiation pursuant to a *bona fide* request process. (See Section XXIII of Exhibit 68 for a description of the request process.)

⁷ In 96S-233T, pursuant to the requirements of HB 1010, we established interim rates for interconnection, unbundled elements, and resale. Docket No. 96S-331T is the proceeding intended to establish permanent rates. See discussion, *infra*.

⁸ Section 40-15-503(2)(g)(I), C.R.S.

expedited review, we were commanded to approve or modify the filed tariffs on an interim basis.

2. USWC, in accordance with HB 1010 and our implementing rules, submitted interim proposed tariffs, along with supporting comment. Those proposals were investigated and considered in 233T. A number of parties, including some of the petitioners here, filed responsive comments to the proposals by USWC. Based upon those submissions, we issued Decision No. C96-655 on June 25, 1996. That decision ordered USWC to file revised interim tariffs establishing rates for unbundled elements, interconnection, and services for resale.

The Company complied with that directive, and interconnection, unbundling, and resale tariffs became effective on July 1, 1996.

3. HB 1010 and our implementing rules further mandated that USWC file proposed permanent tariffs to supersede the interim tariffs on or before July 1, 1996. In fact, the Company complied with that requirement. Those proposed permanent rates are presently under investigation in Docket No. 96S-331T. That docket is now set for hearing in March of 1997.

4. Finally, we point out that HB 1010 and our regulations provide that the interim rates (*i.e.*, 233T prices) are subject to "true-up" with interest. That is, USWC or competing local exchange carriers ("CLECs") who provided or purchased service under the interim tariffs shall recover the difference between rates paid under the interim tariffs and

rates that would have been paid had the permanent tariffs been in effect from inception.

E. FCC Pricing Provisions

1. In its rules implementing the Act, the FCC directed that state commissions utilize certain costing methodologies and principles in establishing rates for interconnection, unbundled elements, and resale. For example, Rules 51.503 and 51.505 require that rates for interconnection and unbundled elements must be based on the total element long-run incremental cost ("TELRIC") of the element, plus a reasonable allocation of forward-looking common costs. Rule 51.607 requires that rates for resale of services equal the ILEC's existing retail rate, less avoided retail costs; Rule 51.609 specifies Uniform System of Accounts, accounts which shall be included in the calculation of avoided retail costs.

2. The FCC did recognize that, in particular arbitration proceedings, a state commission may not have available to it sufficient cost information to establish rates in compliance with the rules (e.g., based upon TELRIC methodologies). See 767, First Report and Order ("... it may not be possible for carriers to prepare, or the state commission to review, economic cost studies within the statutory time frame for arbitration"). In such circumstances, the FCC directed that state commissions use default proxy rates until such time as proper cost studies are reviewed and rates set in accordance with that review.

F. TCG Motion to Sever

1. In this consolidated proceeding, some of the

parties, including USWC, AT&T, and MCI, presented cost studies and pricing recommendations for establishing prices in the arbitrated agreements. On September 6, 1996, TCG filed its Motion to Sever Consideration of U S WEST TELRIC Cost Studies.

That motion requested that we **not** consider USWC's cost studies in the instant proceeding. TCG contended that the studies were only recently made available to the parties. Since the studies were "extremely voluminous," TCG suggested, neither the parties nor the Commission could give adequate consideration to the costing issues (e.g., to determine whether the studies, in fact, comply with the FCC's mandates) in the abbreviated schedule required in this case. TCG recommended, therefore, that the Company's cost studies be examined and considered in Docket No. 96S-331T. As all parties acknowledged, our ruling with respect to USWC studies would also apply to cost studies presented by other parties (e.g., the Hatfield model presented by AT&T and MCI).

2. We allowed the parties to file written response to TCG's suggestions, and, in addition, heard oral argument on the motion at the September 20, 1996 prehearing conference. With the exception of USWC, no party objected to the request to defer consideration of costing and pricing issues. Most parties agreed that the accelerated schedule required for arbitration proceedings did not allow for adequate consideration of the cost studies offered in this case.

3. We note that, as in most ratemaking proceedings, the examination of cost studies is critical to price

determinations. This is true regardless of what methodologies are used to set prices. Given the importance of cost to rate decisions, all parties and the Commission should be accorded sufficient opportunity to examine the studies and included cost models. The schedule required for resolution of the present petitions does not allow full and final consideration of these issues.

4. In light of our decision to sever final consideration of costing and pricing from the arbitration, some petitioners urged the use of the FCC proxies⁹ pending the resolution of Docket No. 96S-331T. The FCC proxy rates, in general, are lower than the prices established in Docket No. 96S-233T.¹⁰ Staff and USWC recommended incorporation of the interim rates established in 233T, to be replaced with permanent rates established in Docket No. 96S-331T.

5. We conclude that the interim rates established in 233T should be incorporated by reference in the arbitration agreements subject to replacement with final rates to be established in Docket No. 96S-331T. In the first place, we note that the FCC pricing rules, Rules 51-501 - 51.515, 51.601 - 51.611, and 51.701 - 51.717 were recently stayed pending appeal. *Iowa Utilities Board v. Federal Communications Commission, et al.*, 1996 WL 589204 (8th Cir. October 15,

⁹ The FCC proxy rates are set forth in the First Report and Order, Appendix B - Final Rules, 513 (unbundled elements and interconnection), 51.611 (resale), and 51.707 (transport mination).

¹⁰ To illustrate, the FCC proxy ceiling rate for an unbundled loop in Colorado is \$14.97 ; th; Docket No. 96S-233T set this rate at \$18.

1996). The primary argument in this case in opposition to use of the 233T rates was that the FCC, in its rules, prohibited use of such rates in the interim (*i.e.*, before permanent rates are established). The court's stay of the First Report and Order's pricing provisions, including the provisions relating to proxy rates, disposes of this contention. In light of the stay, no FCC directive precludes us from using our own interim rates.

6. Moreover, at the prehearing conference, before entry of the stay order, we determined that use of the 233T rates was most appropriate and not violative of the FCC's rules. The 233T rates, as explained above, are interim rates only, and are subject to true-up with interest. In the First Report and Order, it is unclear whether the FCC meant to preclude the use of interim rates which are subject to true-up, especially when proceedings are presently pending to establish permanent prices. We conclude that applying 233T rates is consistent with the intent of the First Report and Order (*e.g.*, to establish reasonable prices on an expedited basis). Given the final adjustment of interim rates for CLECs in the near future (*i.e.*, after resolution of Docket No. 96S-331T), we conclude that application of the 233T rates, instead of the FCC proxies, will not discourage competition in the interim.

7. Furthermore, the 233T rates were set by the Commission after consideration of voluminous written comments from a number of parties, including potential competing local

exchange providers such as AT&T and MCI. That proceeding specifically determined appropriate rates for USWC in light of existing state and federal laws. These circumstances, along with the mechanisms for true-up in the near future, persuade us that incorporation of the 233T interim prices is most appropriate given the subsequent replacement with permanent rates. We also conclude that interim use of the 233T rates, even in the absence of the stay, is consistent with the FCC's rules.

8. Accordingly, reference to the Interconnection Tariff as a term in the Arbitrated Agreements shall mean incorporation by reference on an interim basis the prices and terms established by tariff in 233T subject to subsequent replacement and true-up with permanent rates and terms as established by tariff in Docket No. 96S-331T.

G. Geographically Deaveraged Loop Rates

1. MFS notes that the existing 233T loop rates are not geographically deaveraged. Specifically, the same \$18 price under the interim rates applies to all unbundled loops.

MFS points out that the FCC's rules require that loop rates be geographically deaveraged, both on a permanent and on a proxy basis. For example, Rule 51.507(f) provides that "state commissions shall establish different rates for elements in at least three defined geographic areas within the state to reflect geographic cost differences." Relying upon these directives, MFS, in the instant Petition for Arbitration,

requests that USWC's unbundled loops be geographically deaveraged by wire center by average loop length. Under the specific methodology suggested by MFS, USWC's loops would be priced according to three zones (depending upon average loop length by wire center), with prices ranging from \$11.38 per loop to \$32.87 per loop.¹¹ The statewide average price would remain at \$18 per loop.

2. The Company opposes MFS's suggestions. Generally, USWC contended that we should not deaverage prices for unbundled elements until we deaverage the Company's retail prices. Otherwise, USWC argues, such pricing structures will create unwarranted arbitrage opportunities (*e.g.*, CLECs alternately selecting unbundled loops or reselling USWC's local exchange service depending upon location and the geographic deaveraged wholesale rates). USWC contends that such actions would result in the loss of support from low-cost geographic areas to high-cost geographic areas.

¹¹ MFS acknowledges that these rates would be interim only, and subject to change in Docket 1 -331T.

3. We decline to grant geographic deaveraging of loop prices in this Docket. As noted by Staff, the existing local exchange service tariffs of USWC are deaveraged.¹² Currently, there exists three zones beyond the existing Base Rate Area for each local exchange. In such zones, USWC assesses exchange zone increment charges in addition to the standard rate for local exchange service.¹³ Such tariffs are traditionally reviewed and adjusted during rate proceedings before this Commission, when cost studies and other information are available. We note that during the interim tariff proceeding, Docket No. 96S-233T, no party requested that the rate for the unbundled loop element be geographically deaveraged.¹⁴ Notably, MFS's request for deaveraged rates relies exclusively upon the FCC's pricing directives--directives which are now stayed. In reliance upon the FCC's pricing provisions, MFS essentially contends that we should modify 233T prices on an interim basis for purposes of the arbitrated agreement. That is, even though the average loop price would remain at \$18 under the MFS methodology, actual unbundled loop prices charged by USWC would not be \$18. We conclude that the actual rates for unbundled loops--indeed

¹² Tr. 10/4/96, pp 39-44.

¹³ See pages 31 and 32, section 5.1.6, of the USWC Local Exchange and Network Services Tariff. Currently, these additional zone charges range from \$5 to \$25 per month depending on the zone in which customer is located.

¹⁴ See footnote 47, page 66 of Decision C96-655.

whether prices should be deaveraged¹⁵--should be determined only after full consideration of cost studies and other evidence regarding just and reasonable rates in Docket No. 96S-331T. The same reasons which support our decision to defer costing and pricing matters generally, as discussed above, compel us to deny MFS's request for deaveraged loop rates here.

H. Loop Conditioning

1. MFS has recommended that no conditioning charges should apply to unbundled loops until and unless USWC demonstrates that such charges would be incurred by an efficient provider using forward-looking costs.¹⁶ MFS argues that if the price of an unbundled loop properly reflects forward-looking costs and technologies of an efficient provider, then there should be no difference between loops conditioned for high-capacity traffic and loops conditioned for ordinary voice traffic. Specifically, an MFS witness testified that loops conditioned for ADSL (Asymmetric Digital Subscriber Line), HDSL (High-bit-rate Digital Subscriber Line), or ISDN (Integrated Services Digital Network) should be priced the same as voice-grade loops. MFS specifically pointed out that some USWC loops have inductors (load coils)

¹⁵ The recent stay of the FCC's rules apparently permits state commissions to reject veraging concept imposed in the First Report and Order.

¹⁶ MFS Post Arbitration Brief, October 10, 1996, p. 12.

placed on them for the purpose of signal transmission for long loops. MFS would require USWC to remove such coils at no cost to MFS to allow for high-capacity traffic.

2. The Company testified that the Commission has already determined the interim price for an unbundled loop in 233T. This loop price, according to USWC, is based upon costs for a standard 2- or 4-wire loop capable of supporting services within the nominal bandwidth voice-grade bandwidth of 300 to 3,000 Hertz (Hz). To the extent that a CLEC desires to provide services that require transmission capabilities beyond that of the nominal bandwidth available on its standard loop offering, USWC believes that the CLEC should be separately charged for any conditioning necessary to provide that capability.¹⁷ USWC further testified that to the extent there is not already a charge in the USWC tariff for such activity,¹⁸ it believed that any work done to remove any equipment, such as load coils used in provisioning voice grade service, would require a nonrecurring charge to be paid by the requesting party, commonly referred to as an "individual case basis" (ICB) charge.¹⁹

3. Staff notes that the Commission's Rules (4 CCR 723-2-17) contain a definition of basic service for which USWC

¹⁷ Exhibit 54, pp. 76-77.

¹⁸ We note that under section 5.4.5 of its Exchange and Network Services Tariff, USWC offers a Exchange Enhancement feature which guarantees a specific loss level for a loop facility.

¹⁹ Tr. 10/2/96, p. 194.

is to provide on a ubiquitous basis over its existing loop plant. The definition does not include the capability for services such as ADSL, HDSL or ISDN. Staff further recommends that USWC file a tariff establishing a standard flat nonrecurring charge for qualifying conditioned unbundled loops (e.g., ADSL, HDSL, or ISDN).²⁰

4. We are persuaded by the recommendations of USWC and Staff on this issue. The Agreement shall provide for the standard unbundled loop, supporting services within the nominal voice-grade frequency bandwidth, available as either 2- or 4-wire loop. Rates for this loop shall be as determined in the Interconnection Tariff.

5. Loop conditioning for advanced services such as ADSL shall also be made available by USWC, either as it is currently offered in the USWC tariff or otherwise to improve and guarantee the loss and bandwidth performance of USWC's standard unbundled loop element. In addition, USWC shall develop a standard nonrecurring rate for removal of existing conditioning, normally load coils used for voice-grade service. In Docket No. 96S-331T, USWC shall also develop its basic unbundled loop element recurring rate on the basis that no conditioning, load coils or any other equipment investment, is included within that rate. If MFS requires loops or seeks to provide advanced digital services using USWC's unbundled

²⁰ Staff Statement of Position, October 11, 1996, Attachment A, p.1.

loop element and the required conditioning feature is not provided in the Interconnection Tariff. MFS shall utilize the *bona fide* request process to obtain such conditioned loops. This process would include negotiating interim prices for such conditioning.

I. Routing Points/Rate Center Points

1. MFS recommends that routing points need not be the same as rate center points, but must be in the same LATA as the rate center's NPA-NXX. MFS argues that new entrants should not be required to establish more than one point of interconnection in the markets where they do operate and should not have to establish a point of interconnection for each USWC rate center. MFS defines a **routing point** (also known as a rating point) generally as the geographic location of a wire center or end office that is used to measure distance for the purpose of applying distance sensitive transport access charges. A **rate center point** is the geographic location associated with a particular telephone number (*i.e.*, each NPA-NXX combination).

2. USWC urges that MFS be required to establish a single point of interconnection in each local calling area within which it operates. Staff recommends that MFS should be required to establish a point of interface in every USWC-defined local calling area served by MFS thereby reducing the need of USWC to backhaul traffic.

3. We agree with the overall recommendation of Staff. The Agreement shall require that MFS establish a point of interface in each USWC-defined local calling area where it does business. We note that this finding only affects a facilities-based provider and is not an issue with resale.

J. Symmetrical Compensation and the Definition of New Entrants' Switches

1. MFS recommends that symmetrical compensation should apply to traffic terminated on USWC's and new entrants' facilities irrespective of whether new entrants' switches are considered tandems. USWC objects to the classification of an MFS switch as a tandem. An MFS witness testified that it believes USWC disagrees because of an interpretation of the FCC Interconnection Order regarding the application of symmetrical compensation for instances where a new entrant's switch is classified as a tandem switch. The Staff SOP objects to MFS switches being classified as tandem switches. Staff believes that initially CLEC switches will serve end-user customers on the line side and will not serve end office switches on the trunk side; therefore, in Staff's opinion, the CLEC switches cannot be considered as tandems for the purpose of compensation.

2. As we understand the question, a tandem switch can be classified either as a local tandem or an access tandem. A local tandem switch is a switch that provides trunk-to-trunk

switching between at least two Class 5 (local switch) end offices for local traffic. An access tandem switch provides trunk-to-trunk switching between an interexchange carrier switch(es) and a local end office(s) for the origination and termination of toll traffic. In most circumstances, an end office that terminates customer loops does not also function as either a local tandem or an access tandem. We are aware of specific situations where a switch can be partitioned to perform both the end office and the tandem functions. However, this is not usually the case. We are also aware of the operating situation that currently exists between USWC and the Independent Telephone Companies (*i.e.*, other ILECs) in Colorado wherein the ILECs exchange traffic between their end offices and the USWC tandems.

3. The Agreement shall provide that MFS may designate a switch as a tandem switch if it performs either of the tandem functions described above. If the MFS switch performs tandem functions, it may be considered a tandem switch. Likewise, if the switch does not perform a tandem function, it cannot be designated as a tandem for compensation purposes.

K. Construction Charges

1. MFS recommends that construction charges be included in a proper estimate of TELRIC and, thus, it is inappropriate to specify separate construction charges. USWC contends that when a CLEC requests additional unbundled

elements, requires the construction of additional facilities for resale, or desires other special construction in connection with collocation or otherwise, it should pay the full costs that USWC incurs to provide those facilities. USWC requests, at a minimum, that the Commission require a long-term commitment that insures cost recovery by USWC over time.

Staff believes that a construction charge provision to cover unusual or custom construction should be included in the contracts. MFS witness Porter testified that properly performed TELRIC would include construction charges for a particular element.

2. The current interim rates in the resale portion of USWC's Exchange and Network Services Tariff provide for the application of the USWC construction charge tariff in cases where USWC is required to extend a line for a customer. Also, a construction charge is set forth in the USWC Access Tariff which applies to facilities constructed for a purchaser of unbundled network elements from the access tariff.

3. We find that the current tariff provisions for construction charges contained in the USWC Exchange and Network Services Tariff shall be incorporated by reference into the agreement as it applies to construction requested by a new entrant for the purpose of providing resold local services. We also incorporate the tariff provisions in the USWC Access Service Tariff for construction related to unbundled network elements and collocation for instances in

which the facilities are only for the purposes of the CLEC. We clarify that such charges do not apply to interconnection between USWC and a CLEC.²¹

L. Trunk Groups for Non-USWC Local and Toll Traffic

1. MFS recommends that new entrants should not be required to establish separate trunk groups for non-USWC toll and local traffic in addition to trunk groups already required for toll and local traffic. MFS objects to being required to provide separate trunk groups for toll and local traffic from non-USWC carriers. An example of this would be traffic from a customer of another CLEC that traverses a USWC switch and terminates to an MFS customer. MFS therefore requests that the Commission reject USWC's proposal that MFS (and the other CLEC in the above example) establish separate trunk groups for this traffic to differentiate it from normal traffic between MFS and USWC customers.

2. USWC also proposes that the Commission should require separate trunk groups for different types of traffic (*i.e.*, local and toll). The Staff agrees with this proposal.

3. We conclude that separate trunk groups for different types of traffic (*e.g.*, local and toll) are appropriate. However, the Agreements should not require that

²¹ We also believe that this clarification is consistent with the intent of the conditions : n special construction charges apply as listed on pages 4-5 of Section 5.1.3 of the Access Serv iff of USWC.

separate trunk groups be established for traffic from different CLECs traversing the USWC switch. Carriers shall not be required to provide carrier-specific trunk groups.

4. MFS shall not be authorized to circumvent access billing by delivering toll calls over local trunks connected to the access tandem switch of USWC. Furthermore, MFS shall be responsible for providing appropriate billing data to USWC for identification of traffic transiting through the USWC network.

M. Resale Requirements

1. USWC and MFS were unable to resolve two issues regarding the resale of the Company's telecommunications services: (1) whether MFS would be permitted to resell USWC services which are deregulated under state law; and (2) whether resale of USWC's services would be restricted to its intended or disclosed use. We agree with MFS on both issues.

2. Resale of Deregulated Services

a. USWC claims that the Commission has no authority to order the resale of telecommunications services which are deregulated. We assume that the Company contemplates services such as those listed in 40-15-401, C.R.S. (*e.g.*, new products and services centron and centron-like services, special arrangements and assemblies, etc.). USWC reasons that, inasmuch as the Commission lacks authority under State law to regulate these offerings, we also lack the authority to

require the resale of such services.

b. In opposition to the Company's position, MFS contends that we possess the authority to incorporate the resale of any telecommunications service pursuant to the Act and the FCC rules. According to this contention, the Act represents an independent grant of authority to the Commission as Arbitrator to incorporate the resale of telecommunications services, regardless of the provisions of State law. We agree.

d. Section 251(c)(4) imposes certain duties upon ILECs, including the duty:

(A) to offer for resale at wholesale rates any telecom-munications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service . . .

The Act does not limit the resale of the ILEC's telecommunications services to those offerings regulated under State law only. To the contrary, the Act's resale mandate appears to be broad and inclusive.

e. As discussed above, the Act also imposes on state commissions certain responsibility for implementation of its provisions. This includes the obligation and authority to arbitrate disputes under 252(b) and (c). Under 252(c), the Commission, in arbitrating the disputes between MFS and USWC, must ensure that the requirements of 251 (e.g., the

provisions regarding resale) are met. Given the critical role of state commissions in implementation of the Act, a contrary interpretation would likely leave new entrants with no recourse to enforce rights accorded under the statute.

f. Therefore, we agree with MFS that we possess the authority to incorporate the resale of deregulated telecommunications services in this arbitration proceeding. Since the Act and the FCC's rules appear to require the resale of telecommunications services deregulated under State law, USWC will be ordered to permit such resale in its interconnection agreement with MFS.

3. Restrictions on Resale

a. USWC requests that we restrict the resale of services to their intended or disclosed use, under the same terms and conditions applicable to the Company's end users, and only to the same class of customers which are eligible to purchase the service from the Company. MFS objects to these proposed restrictions.

b. Section 251(c)(4)(B), USWC points out, provides:

[A] state commission may, consistent with regulations prescribed by the (Federal Communications) Commission under this section, 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.

The First Report and Order contains extensive discussion

relating to the types of restrictions which may be placed upon resale of services. In general, the FCC rules expressly recognize restrictions on the resale of residential services,²² access services,²³ and the resale discount for promotional offerings of less than 90 days²⁴ only. The First Report and Order holds that other restrictions on resale are presumptively unreasonable; ILECs may rebut presumption, but only if the restrictions are narrowly tailored. See First Report and Order, 939. Furthermore, the FCC held that restrictions on the resale of flat-rated offerings to multiple users (e.g., shared tenant service) and other cross-class selling restrictions should be presumed unreasonable. ILECs may rebut this presumption by proving to the state commission that the class restriction is reasonable and nondiscriminatory. See, First Report and Order, 963-64. Accordingly, the interconnection agreement with MFS shall not restrict resale of service except in the case of residential access services and discounted promotions of offerings of less than 90 days in duration.

N. Sham Unbundling

²² The First Report and Order, 962, explains that residential services may not be resold -residential end users. Additionally, means-tested offerings such as Lifeline shall not ilable for resale.

²³ First Report and Order, 873.

²⁴ First Report and Order, 948-953.

1. USWC recommends that the Commission restrict MFS's ability to buy unbundled elements such that reassembly of those unbundled elements to create a complete telecommunications service is not possible. USWC witnesses testified that they disagree with the FCC Interconnection Order and are of the opinion that the purchase of all of the necessary unbundled elements to form a complete service is not within the intent of the 1996 Telecommunications Act. Specifically, Dr. Harris, a USWC witness, testified that the potential for price arbitrage created by this situation would harm USWC.

2. MFS disagrees with the USWC position and recommends that there should be no restriction on the combinations of unbundled elements that interconnectors may purchase. MFS also maintains that such a restriction is contrary to the FCC Interconnection Order. MFS argues that the Act requires that USWC provide access to unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.²⁵ MFS also argues that the FCC Interconnection Order expressly held that incumbents must provide unbundled elements in a way that *enables* requesting carriers to combine them to provide a service.²⁶

3. The Staff provided two options based on whether

²⁵ See 47 U.S.C. 251(c)(3).

²⁶ FCC Interconnection Order at 294.

the Commission is preempted by the FCC on this issue. If the Commission is not preempted, Staff recommends the implementation of a Residual Unbundling Charge ("RUC") to account for the disparity in prices between current retail finished business services and the sum of the unbundled elements, including unbundled loop charges. USWC agrees with the institution of such an additional charge to CLECs. However, if the Commission determines that the FCC preempts the State on this issue, then Staff recommends that the Commission follow the FCC rules.

4. We agree with MFS, especially since the issue will be readdressed in the Interconnection Tariff (Docket No. 96S-331T) to be incorporated by reference in the Agreement. Any losses incurred by USWC in the interim will be trued-up in the permanent rates. The Agreement shall not include any restrictions on the bundling of network elements to offer services, apart from any incorporated through the Interconnection Tariff, nor will we implement any residual charge as proposed by Staff and USWC at this time.

O. Application of Compensation Charges to Enhanced Services Traffic

1. MFS recommends that compensation charges should apply to all types of traffic. It argues that exceptions should not be created for enhanced services traffic. In its Joint Position Statement with MFS (Exhibit 68), USWC proposes

that it is appropriate to exempt traffic originated and terminated by enhanced service providers from the reciprocal compensation arrangements of the interconnection agreement. However, as noted by MFS, USWC witnesses Wiseman and Johnson testified that USWC is not proposing differential treatment of traffic from enhanced service providers, such as Internet traffic. Staff recommends that compensation charges not be based on the content of traffic but on the applicable tariff for transport of such traffic. MFS notes that such a differentiation of traffic would be technically unworkable.

2. We have searched the Act and the FCC Interconnection Order and find no reference to this issue. We agree with the MFS and Staff position, that the Agreement should apply compensation charges to all types of traffic and exceptions shall not be created for enhanced services traffic.

P. Billing Cycle for Resold Services

1. MFS recommends that payments for resold services be due from MFS 90 days after the close of the billing period.

USWC proposes that the billing cycle for resellers be dependent on the terms of its tariff, *i.e.*, 30 days. MFS believes that its 90-day proposal is commercially reasonable since it fixes a date certain for billing within the arbitrated agreement rather than relying on an external source that may change over the life of the agreement.

2. Staff agrees with USWC in its recommendation that

the billing cycle for resold services be the same as for retail services. It believes that should a CLEC desire a longer billing cycle, the CLEC should be required to pay a higher rate to cover the additional cost. Staff believes that the wholesale rate used by the reseller is a discounted retail rate and that billing cycles are based upon the Company's need for cash working capital. Therefore, the 30-day period for retail rates should also apply to the wholesale rates.

3. We agree with USWC and Staff that the current USWC tariff contains the appropriate billing cycle for wholesale service purchased by resellers and shall be incorporated into this Agreement.

Q. Late Payment Charges

1. MFS requests that we approve proposed language for its agreement with USWC which would provide for late payment charges in the event switched access usage data is not submitted in a timely manner. We incorporate this suggestion only partially.

2. The specific language proposed by MFS (Exhibit 68, page 17) would impose a late payment charge on USWC at an annual rate of 18 percent for the Company's failure to "timely" submit switched access detail usage data or switched access summary usage data. A late payment charge would also be imposed if the data is not submitted in a "proper format."

Finally, in the event the recording party has not submitted such data within 90 days of the original due date, billings

for the associated traffic would be deemed lost and the recording party would be liable for the amount of the lost billings.

3. We find that provision for late charges is commercially reasonable and should be included in an interconnection agreement.²⁷ We conclude that the 18 percent annual rate is reasonable. We note that the requirement for "timely" submission of the switched access usage is undefined in MFS's proposal. USWC and MFS are directed to include for clarity the due date or term. We do not incorporate the suggestion that traffic will be deemed "lost" for failure to submit usage data within 90 days, since the present record does not support this recommendation.

²⁷ The Commission's authority to impose such provisions as part of arbitration is more fully discussed in the decision relating to TCG's Petition for Arbitration (Docket No. 96A-329). Generally, we hold that we possess the authority to order reasonable and necessary liquidated-damages provisions as part of our obligation to arbitrate pursuant to the Act. Therefore, this power derives from federal, not state, law.

III. ORDER

A. The Commission Orders That:

1. The issues presented in the Petition for Arbitration filed by MFS Communications Company, Inc., on June 24, 1996 are resolved as set forth above.

2. Within 30 days of the effective date of this Order, MFS Communications Company, Inc., and U S WEST Communications, Inc., are directed to submit a complete proposed interconnection agreement for approval by the Commission, pursuant to the provisions of 252(e) of the Telecommunications Act of 1996. The proposed agreement shall comply with this Order.

3. The 20-day period provided for in 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

4. This Order is effective on its Mailed Date.

B. ADOPTED IN OPEN MEETING November 5, 1996.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners