

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF ICG TELECOM GROUP)
INC. PETITION FOR ARBITRATION PUR-)
SUANT TO SECTION 252(b) OF THE)
TELECOMMUNICATIONS ACT OF 1996 TO) DOCKET NO. 96A-356T
ESTABLISH AN INTERCONNECTION AGREE-)
MENT WITH U S WEST COMMUNICATIONS,)
INC.)

DECISION REGARDING PETITION FOR ARBITRATION

Mailed Date: November 15, 1996
Adopted Date: November 13, 1996

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I. BY THE COMMISSION:

A. Statement

1. This matter comes before the Commission for consideration of the Petition for Arbitration filed by ICG TELECOM Group, Inc. ("ICG"), on August 2, 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 ICG and U S WEST Commu-nications, 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 August 27, 1996. We issued notice of the petition, and interested persons were allowed to intervene including Commission Staff ("Staff"), the Colorado Office of Con-sumer Counsel, American Communication Services of Colorado Springs, Inc., TCI Telephony Services, Inc., Sprint Communications Company L.P.; MCI Telecommunications Corporation; MCImetro Access Transmis-sion

("MCImetro"); and TCI Communications, Inc.

2. In addition to ICG's petition, a number of other tele-communications providers, pursuant to 252, have submitted similar Petitions for Arbitration involving USWC: MFS Communications Com-pany, Inc. ("MFS"), on June 24, 1996; AT&T Communications of the Mountain States, Inc. ("AT&T"), on July 30, 1996; TCG Colorado ("TCG"), on July 17, 1996; and MCImetro, on August 9, 1996 (collec-tively the "Petitioners").

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) specif-ically permits a State commission to consolidate arbitration pro-ceedings 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 pre-filed testimony, we conducted hearings in this and the other con-solidated 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 ICG Petition for Arbitration.

4. As we anticipated in Decision No. C96-835, the consoli-dated 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 the more extensive AT&T and MCI metro 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 ("ILECs") 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 & 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 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

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

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 also 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 law-fully 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 ("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 No. 96S-233T (See Decision No. C96-655), and the permanent tariff proceeding is ongoing in Docket No. 96S-331T.

6. As stated above, ICG's 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 an 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 Section 252(b)(4) of the Act.

³ ICG'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 23, 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 ICG and USWC have requested arbitration.

C. Costing and Pricing Issues

The above discussion points out that, in arbitration proceedings, the Commission is required to establish "rates for inter-connection, 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 rates⁴ in the Agreements subject to pending Petitions for Arbitration.⁵

⁴ The use of the term "rates" also includes the applicable terms and conditions for the services not superseded by contractual agreement or this arbitration order.

⁵ Various pleadings and testimony presented at the consolidated hearing pointed out that 233T establish rates for all services or elements at issue in the petitions. Our other arbitral decisions relating to the consolidated petitions (e.g., Decision No. C96-1186) point out that, where rates do not exist for a particular service or element, the specific interim rate will be subject

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.⁶

D. Docket No. 96S-233T Tariffs

1. Docket Nos. 96S-233T and 96S-331T were the outcomes of 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. See 40-15-503(2)(g)(I), C.R.S. 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 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

otiation pursuant to a *bona fide* request process.

⁶ In 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*.

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 interim 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 MCImetro, 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 man-dates) 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 MCImetro).

2. We allowed the parties to file a 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 issues from this arbitration, some of the Petitioners urged the use of the FCC proxies⁷ pending the resolution of 96S-331T. The FCC proxy rates, in general, are lower than the prices established in 233T.⁸ Staff and USWC recommended incorporation of the interim rates established in 233T, to be replaced with permanent rates established in 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 96S-331T. In the first place, we note that the FCC pricing rules, Rules 51.501 through 51.515, 51.601 through 51.611, and 51.701 through 51.717 were recently stayed pending appeal. *Iowa Utilities Board v. Federal Communications Commission et al.*, 1996 WL 589204 (8th Cir. October 15, 1996).

The primary argument in this case in opposition to use of the

⁷ 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 (transportation).

⁸ To illustrate, the FCC proxy ceiling rate for an unbundled loop in Colorado is \$14.97/month set this rate at \$18.

233T rates was that the FCC, in its rules, prohibited the 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 the 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 interim prices on an expedited basis). Given the final adjustment of interim rates for CLECs in the near future (*i.e.*, after resolution of 96S-331T), we conclude that application of the 233T rates, instead of the FCC proxies, will not discourage competition in the interim.

7. Furthermore, we point out that 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

MCImetro. That proceeding specifically determined appropriate rates 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 233T rates, even in the absence of the stay, is consistent with the FCC's rules.⁹

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 in 96S-331T.

⁹ At hearing, ICG requested that we resolve pricing issues relating to interim local number portability. Our decision to incorporate existing and pending costing and pricing matters applies to this matter for the reasons discussed above. We note that permanent rates for international number portability are presently under consideration in Docket No. 96S-250T.

G. Most Favored Nation Provisions

1. Section 252(i) of the Act provides:
A local exchange carrier shall make available any inter-connection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The First Report and Order (1314) interpreted this section to require that, ". . . incumbent LECs must permit third parties to obtain access under section 252(i) to any *individual* interconnec-tion, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under sec-tion 252" (emphasis added). Accordingly, the FCC (1316) directed that, ". . . any requesting carrier may avail itself of more advan-tageous terms and conditions subsequently negotiated by any other carrier for the same *individual* interconnection, service, or ele-ment once the *subsequent agreement* is filed with, and approved by, the state commission" (emphasis added).

The FCC, as did the par-ties to the consolidated proceeding here, referred to these provi-sions, which would allow a CLEC to select terms and conditions from other approved agreements regardless of the provisions of a pre-existing binding agreement between the CLEC and the ILEC, as a most favored nation ("MFN") provision. We also use this term (*i.e.*, an MFN provision) to refer to Petitioners' request that they be per-mitted to purchase services from USWC out of tariffs, regardless of the provisions of an existing interconnection

agreement.

2. The Petitioners contend that the interconnection agreements with USWC should include MFN conditions and, similarly, conditions which would permit a CLEC to purchase services out of any effective USWC tariff, regardless of prices set forth in an existing agreement. Petitioners argue that the FCC correctly interpreted 252(i) to require that CLECs be permitted to select individual terms and conditions out of other approved interconnection agreements, notwithstanding the provisions of an existing, effective agreement with the incumbent carrier. Under this interpretation of the Act, a CLEC need not select the entirety of the subsequent or alternate interconnection agreement in order to avail itself of the more favorable terms or conditions contained in another agreement. Rather, Petitioners suggest, CLECs may select individual terms and conditions out of another agreement, regardless of the existence of a binding agreement with the incumbent.

3. Petitioners claim that a contrary interpretation of 252(i) (e.g., an interpretation which would preclude a CLEC from taking advantage of new and lower prices for the same service contained in a subsequent agreement) would be anti-competitive in contravention of the intent of the Act. For example, Petitioners contend, a CLEC purchasing service from an ILEC at a higher price than other CLECs could not fairly compete in the provision of service to end users. Similarly, Petitioners argue that making available new

tariffed prices to CLECs, regardless of the terms of an existing agreement, is consistent with USWC's role as a common carrier and its obligation to provide services on a non-discriminatory basis.

4. USWC fervently objects to inclusion of MFN conditions in its interconnection agreements, at least as requested by the Petitioners here. In the Company's view, 252(i) grants competing carriers the right to select provisions in a new interconnection agreement by selecting the new agreement **in its entirety only**; the Act does not suggest that CLECs may "pick and choose" individual terms and conditions from approved agreements. USWC contends that the MFN interpretation adopted by the FCC (and supported by Petitioners) is inconsistent with the Act's intent to implement competition, in part, through an individually negotiated interconnection agreement between ILECs and new entrants. This is so, inasmuch as the broad MFN requirements directed in the First Report and Order would frustrate carriers' ability to negotiate contracts reflecting the unique requirements of each CLEC: If discrete terms and conditions of any approved agreement are universally available to other interconnecting carriers, the ILEC will be motivated to negotiate standardized agreements.

5. Moreover, USWC suggests, an MFN requirement is inequitable since only one party, the ILEC, would be bound to the economics of the interconnection agreement. Competing carriers would be able to unilaterally modify their contracts with the ILEC in the event subsequent interconnection agreements or new tariffs were more favorable.

6. In the event the Commission accepts the First Report and Order's MFN provisions, USWC suggests that we develop standardized, tariff-like offerings for interconnection agreements. Such standardized offerings would be applicable to all CLECs and would be modified by the Commission only. Staff agrees with the suggestion that the Company file tariffs reflecting generally available terms and conditions.

7. We understand the Company's concerns with overboard MFN requirements. Inappropriate bifurcation of provisions or terms of a contract or a tariff for incorporation into another contract lead to unfair results. For example, a CLEC should not be permitted to select a lower nonrecurring charge from another interconnection agreement, but decline to accept a higher, directly related recurring charge. Nevertheless, we do not accept the Company's position that 252(i) contemplates carrier acceptance of interconnection agreements only in their entirety. While we acknowledge that the FCC's MFN holding was one of the mandates recently stayed by the Eighth Circuit Court (see footnote 1), our independent interpretation of the Act is inconsistent with USWC's contention. The language in 252(i) compels an ILEC to make available "any interconnection, service, or network element (emphasis added)" provided in an approved agreement to other requesting carriers "upon the same terms and conditions as those provided in the agreement." The plain and clear provisions of the Act do not support USWC's argument on

this issue.

8. Therefore, we direct that the interconnection agreements with USWC include MFN provisions incorporating the language of the Act. The provision should allow ICG to incorporate and use any interconnection, service, or network element from another agreement, upon acceptance of all of the terms and conditions in the agreement related to such interconnection service or element. In addition, while we cannot determine here all instances in which USWC may treat CLECs differently, we note that a carrier who causes the Company to incur greater costs in the provision of a service cannot reasonably demand the service at the original price.¹⁰ The agreement shall also provide that USWC will permit ICG to purchase services out of an effective tariff, regardless of prices set forth in an existing agreement. We agree that this provision is consistent with the Act and USWC's common carrier obligations. Specifically, we agree with Petitioners that a CLEC would be unable to fairly compete in serving end users if it is required to purchase services from USWC at unfavorable rates or on less favorable terms and conditions as compared to other providers.

9. We reject ICG's suggestion that USWC shall be required to provide new interconnection agreements or tariffs to ICG within five days of the date new agreements are signed or new tariffs are submitted to the Commission. All approved agreements will be available for public inspection at the

¹⁰ The First Report and Order, 1317, pointed out that 252(i) permits different treatment Cs based upon differences in cost-of-service.

Commission within ten days of approval. See 252(h). Similarly, USWC is required to give public notice of new tariff filings under Colorado law. See 40-3-104, C.R.S. These provisions are adequate to provide notice of new agreements or new tariffs to ICG. We also direct that, in the event ICG decides to modify its existing agreement with USWC by selecting provisions from new agreements or tariffs, it shall give 30 days' notice to USWC and the Commission prior to effectuating this decision.

10. As for the Company's recommendation that we develop standardized, tariff-like offerings, we point out that our Rules on Interconnection and Unbundling, 4 CCR 723-39, already accommodate this suggestion. See Rule 7 (incumbent providers required to file tariffs establishing rates, terms, and conditions for interconnection, termination of local traffic, and unbundled elements). The Commission decision adopting the interconnection and unbundling rules held, consistent with USWC's suggestion here, that incumbent providers should be required to file tariffs even in light of the Act's provisions which permit carriers to negotiate interconnection agreements. See Decision No. C96-347, pages 26 through 30. Significantly, our decision to require tariffs was, in part, based upon our interpretation of 252(i) as requiring non-discriminatory treatment of interconnecting carriers. Decision No. C96-347, pages 28 and 29.

H. Commission Authority to Impose Liquidated Damages Provisions

1. All Petitioners in the consolidated proceeding requested that we require liquidated damages provisions in the interconnection agreements with USWC.¹¹ Primarily, in conjunction with specific service quality standards, Petitioners request that USWC be compelled to pay specified liquidated damages whenever it failed to meet the approved standards.

¹¹ The parties alternately referred to "liquidated damages" as "penalties." We disagree with this characterization. In our view, the remedies requested by the Petitioners for failure of USWC to meet certain standards are not the legal equivalent of penalties, such as those referenced in Article 40 of the Commission's Title 40. These monetary payments are not intended to penalize USWC. Rather, the remedies requested in the petitions are intended to compensate Petitioners for inadequate performance of contractual obligations on the part of the Company, as a substitute for actual damages.

2. USWC and Staff contend that the Commission lacks authority to **compel** liquidated damages as part of arbitration.¹² In particular, both parties suggest that **under State law**, our jurisdiction to impose monetary penalties (or liquidated damages) upon regulated utilities such as the Company is limited to those instances specified by statute. *See Haney v. Public Utilities Commission*, 574 P.2d 863 (Colo. 1978) (levying of fines or financial penalties is a judicial function; Commission lacks jurisdiction to impose monetary fines absent specific statutory authorization). Since no State statute permits the Commission to impose liquidated damages upon USWC in the circumstances at issue here (*i.e.*, for failure to comply with performance standards set forth in interconnection agreements), these parties reason that we lack the authority to compel such provisions in the interconnection agreements.

3. The Company and Staff further contend that the Act does not confer authority upon State commissions to require liquidated damages provisions in interconnection agreements. Therefore, the Commission may not look to federal law for support of Petitioners' request here.

4. Finally, Staff appears to argue that, regardless of the Act's intent with respect to this issue, Congress could not empower the Commission to take action not specifically

¹² USWC itself concedes that the Commission may approve a liquidated damages clause volunteered to by the parties. However, the Commission may not, according to the Company, impose such a provision in these proceedings.

authorized under State law. Staff suggests that the principles enunciated by the Court in *Howlett v. Rose*, 110 S.Ct. 2430 (1990) (federal law cannot compel a state to create a court competent to hear a federal claim), preclude Congress from granting new authority to the Commission.

5. 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.

As the Petitioners point out, the Act forms the basis for our authority to arbitrate the instant petitions. Specifically, 252(b)(4)(C) directs that, "The State commission shall resolve each issue set forth in the petition and the response. . . . by imposing appropriate conditions. . . . upon the parties to the agreement. . . ." The Act does not limit State commission arbitration authority to specific regulatory provisions under State law.

6. More importantly, 252(c)(1) provides:
In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a *State commission shall ensure that such resolution and conditions meet the requirements of section 251*, including the regulations prescribed by the (Federal Communications) Commission. . . .

(emphasis added)

Accordingly, the Commission in arbitration proceedings under the Act is, in good measure, enforcing federal rights. We further note that any appeal of our arbitration decision will involve the determination of whether our directives meet the

requirements of federal law (*i.e.*, 251 of the Act). See 252(e)(6). These provisions clearly indicate that Congress intended to give State commissions the authority to enforce the Act and applicable FCC rules.

7. As for the contention that the Act may not empower the Commission to take action which is not authorized under State law, we find that *Howlett* does not lead to the conclusion reached by Staff.¹³ Notably, the Court in *Howlett, supra*, at 2438, observed that federal law is enforceable in state courts because the Constitution and laws passed pursuant to it are as much laws in the states as laws passed by the State Legislature. The Supremacy Clause makes those laws "the supreme Law of the Land", and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. Staff itself noted that in *Federal Energy Regulatory Commission v. Mississippi*, 102 S.Ct. 2126 (1982), the Court held that Congress could require a state utilities commission to hear and determine causes arising out of the federal Public Utilities Regulatory Policy Act, especially where the state agency had jurisdiction to entertain analogous claims.

8. We point out that in HB 1335, the State Legislature itself ordered that the local exchange market be opened to competition. That statute, independent of the provisions of the Act, directs the Commission to regulate the

¹³ Furthermore, whether Congress is empowered to expand or delegate Commission authority under the law (*i.e.*, whether these portions of the Act are constitutional) strikes us as a matter for resolution by the courts, not an administrative agency. For purposes of the present proceedings, enough for us to conclude that the Act intended to grant us authority to carry out the federal A

interconnection of telecom-munications carriers' facilities, the provision of unbundled facilities and functions by providers, and the terms and conditions for resale of services, etc. See 40-15-503(2), C.R.S. Hence, the Act does not impose significant new regulatory requirements upon the Commission. This is not an instance, as in *Howlett*, where Congress has ordered the State of Colorado to create a forum competent to hear cases arising under the Act. The Commission, pursuant to HB 1335 and other provisions of State law, possesses authority and responsibility to regulate utility matters in the state, and hence is properly empowered to accept the arbitration role created by the federal Act.

9. We conclude that the establishment of performance standards and associated liquidated damages provisions is reasonable and necessary to implement the provisions of the Act and HB 1335. Testimony by the Petitioners uniformly indicates that in order to bring competition to ILEC markets, performance standards for interconnection agreements are essential. For example, the Act demands that an ILEC provide quality of service to CLECs which is equal to that provided to itself. See 251(c)(2) (ILEC required to provide interconnection at least equal in quality to that provided to itself); 251(c)(3) (ILEC required to provide unbundled elements on a "nondiscriminatory" basis).

10. Concomitantly, Petitioners point out that it is crucial that approved performance standards be enforceable through adequate remedies. With no specific economic incentives to comply with performance standards, ILECs may discourage or inhibit competition by providing inferior services to new entrants. AT&T Witness Thayer, for example, stated that performance standards would be meaningless without adequate enforcement mechanisms. Petitioners further note that the option of forcing new entrants to undertake costly and time-consuming enforcement proceedings in court or before the Commission in each instance of non-compliance with performance standards, would be unduly burdensome and injurious to nascent competition. Finally, the Petitioners pointed out that liquidated damages provisions, similar to the credits proposed in various testimony, for nonperformance of contractual provisions, are commercially reasonable.

11. We find that the inclusion of performance standards and liquidated damages provisions in interconnection agreements with USWC is necessary to advance the goals stated in the Act and in HB 1335, and that to so rule is within the scope of our role as arbitrators under the Act.

I. Performance Standards and Liquidated Damages Provisions

1. In its petition, ICG requests that we impose specified performance standards and liquidated damages provisions

upon USWC.¹⁴ Specifically, ICG would require USWC to meet certain standards relating to unbundled loop installation, interim number provisioning, and out-of-service repairs. For example, ICG's recommended performance standards would compel USWC to install 80 percent of orders for 1-10 loops, on a monthly basis, within five days of receipt of the service order. Failure to comply with this requirement would result in liquidated damages payments of \$75,000.

¹⁴ The Petitioners advocated differing performance standards and liquidated damages provisions specific to their proposed agreements. For example, AT&T urged adoption of its Direct Measures of Quality standards which incorporate a more expansive range of measurements than proposed by ICG. Discuss these various proposals in the decisions relating to each petition.

2. The Company opposes ICG's recommendations. In part, USWC noted that, under the provisions of the Act and applicable State law, it is already obligated to provide non-discriminatory service to competitors. This means that the Company must provide service to CLECs of a quality that is at least equal to the service provided to itself. USWC suggests that the specific service standards urged by Petitioners are in excess of those standards used by the Company for provision of its own services and in excess of present Commission rules.

In general, USWC suggests that we establish a baseline of service quality which would be available to all new entrants.

A provider seeking premium service (*i.e.*, service quality in excess of the baseline standard) would request such service through the *bona fide* request process ("BFR"), and would be required to pay for that added quality.¹⁵

¹⁵ We note that the Company did agree to service standard conditions in its agreement with Exhibit 68, Part XXXII). Under those standards, USWC is required to perform specified activities (*e.g.*, installation of unbundled loops, interim number portability installation, out of service orders, and interconnection trunk installation) which meet or exceed the average performance by the Company for the total universe of specified activities. Notably, the MFS agreement does not provide for any liquidated damages.

3. Staff also addressed this issue. In Staff's view, service quality standards and liquidated damages provisions, if adopted,¹⁶ should be uniform and set forth in publicly available documents such as tariffs or rules. Hence, Staff agreed with the Company on this point. Similarly, Staff also agreed with USWC that superior (*i.e.*, in excess of the rules) service quality should be paid for by the requesting carrier. Staff suggests that we order the Company to file each industry standard it presently relies on within 30 days. In particular, Staff urges, USWC should submit to the Commission, industry standards now relied upon for the provisioning of all services, including switched access, future inter-connection services, unbundled network elements, and retail services that will be available for resale.¹⁷

4. For purposes of this arbitration proceeding, Staff recommends that we approve existing service standards: For resale, Staff points out that the Commission presently has rules in place for the provision of services to end users.¹⁸ For interconnection, Staff suggests that we approve those quality of service measurements presently utilized by the Company for interconnection with interexchange carriers. With

¹⁶ As discussed above, Staff questioned the Commission's authority to impose liquidated damages.

¹⁷ Staff witness Wendling also suggested that Petitioners submit proposed quality of service standards which could be used by the Commission in opening a rulemaking proceeding to establish service performance standards.

¹⁸ For example, the Rules Regulating Telecommunications Service Providers and Telephonic Services, 4 CCR 723-2, set forth detailed requirements regarding the provision of local exchange service to end users.

respect to unbundled services, Staff generally recommends that the Company be ordered to provide a quality of service at least equal to that provided to itself and its own end use customers. Finally, Staff suggests that, in order to permit competing carriers to monitor the quality of service provided, USWC should be compelled to provide to competing providers, periodic reports (e.g., on a monthly or quarterly basis) containing service quality data.

5. In ruling upon this issue, we first note that Commission Rule 723-2-16.1.2 recognizes that a LEC is expected to meet generally accepted industry standards for an element of, or the total service when such standard is not specifically defined within the rules. With this in mind, we agree with Staff and USWC that the minimum baseline standards for service quality and related enforcement provisions should be uniform, so as to similarly affect the industry. As such, these standards should be set forth in the rule and all CLECs should be entitled to service under these criteria as part of any interconnection agreement. Establishing required minimum standards by rule will ensure an acceptable quality of service for all end users, including the customers of new entrants into the local exchange market. Therefore, we intend to initiate rulemaking proceedings in the near future to adopt any additional appropriate service quality standards that are necessary to reflect the interactions between the CLECs and ILECs.¹⁹ To assist in this effort, and to guarantee that

¹⁹ The agreements entered into by USWC pursuant to these consolidated proceedings sho

standards presently utilized by USWC in the provision of its own services are made public, those service standards²⁰ and related enforcement provisions presently applicable to the Company or relied upon by the Company shall be filed with the Commission and served upon each Petitioner in this case within 30 days of the effective date of this order. For purposes of the present proceeding, we note that USWC must provide service to each Petitioner, including ICG, which is equal in quality to that provided by the Company to itself, which, at a minimum, requires meeting all applicable rules of the Commission.²¹

recognize that their provisions will be subject to modification to reflect new rules of the Commission regarding performance standards and possible compensation related to performance under such standards.

²⁰ This would also include standards relied upon by the Company for evaluating its performance in such areas as billing and electronic data interface availability, besides the normal measurement of network performance as suggested in Appendix D of the USWC Closing Statement of Position.

²¹ See, for instance, Rules 723-39-3.6 and 3.7 under our Rules on Interconnection and Unbundling, as well as Rules 723-40-3.3.1 and 4.1 under our Rules for the Resale of Telecommunications Exchange Services.

6. We also agree with Staff and the Company that CLECs desiring service quality in excess of the baseline standards should request such service through a BFR process and will be required to pay for such service. Staff's suggested reporting requirements, as discussed above, are also approved. Appropriate language shall be incorporated into the interconnection agreement between USWC and ICG.²²

7. As for ICG's specific suggestions, we find the pro-posed damages to be unsubstantiated. Outside of referencing acceptance within a negotiated agreement with Ameritech Communications International, Inc., no justification for the particular monetary amount of recommended liquidated damages was offered to us in this arbitration proceeding.

8. We also note that ICG has proposed standards which are different from other Petitioners, such as AT&T, for the same service. While this may be acceptable to the Petitioners, such differences could create problems for USWC in managing its business to meet different standards for basic service elements which it must provide under the Act. Therefore, as discussed, *infra*, we decline to incorporate the proposed standards at this time.²³

J. Interim Number Portability

²² We note that USWC and MFS reached an agreement on service quality reports to be provided Company. See Exhibit 68, page 81. This particular arrangement appears to comply with the Act.

²³ See the expected installation intervals for unbundled loops in Section 9 of Attachment 3 Exhibit 15.

ICG and USWC both recognize that the issue regarding cost recovery for interim local number portability is being considered in Docket No. 96S-250T. Hearings were held on September 16, 1996 on the issues presented herein. The Company's argument disputes the FCC's decision in CC Docket No. 95-116²⁴ regarding cost recovery for interim number portability. We do not dispute the FCC's decision in this docket, and until such time as a decision is rendered by the Administrative Law Judge in our interim number portability docket, we have determined that the rates established in the Interconnection Tariff shall apply.

²⁴ First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, day 2, 1996.

K. Approval of Contract Language

ICG also requests that we now impose the entirety of its proposed contract upon USWC. We decline to do so at this time.²⁵ In the first place, ICG did not present sufficient information in this proceeding to justify adoption of the entirety of its proposed contract. Moreover, we believe that the purpose of this arbitration proceeding is for the Commission to resolve disputed issues. See 252(b)(4)(C). The Act apparently requires the parties to submit an agreement based upon the arbitration decision and to submit that agreement to the Commission for subsequent approval; the Act does not require us, in this arbitration proceeding, to specify the precise language of an interconnection agreement in its entirety. See 252(e).²⁶

II. ORDER

A. The Commission Orders That:

1. The issues presented in the Petition for Arbitration filed by ICG TELECOM Group, Inc., on August 2, 1996 are resolved as set forth in the above discussion.

2. Within 30 days of the effective date of this Order, ICG TELECOM Group, Inc., and U S WEST Communications, Inc., are directed to submit a complete proposed

²⁵ We may impose actual contractual language upon the parties in the future, in the event U. ICG are unable to timely submit a final contract based upon the directives in this decision.

²⁶ To the extent ICG finds it helpful, we note that USWC and MFS have reached substantial agreement on the contractual language of an interconnection agreement. See Exhibit 68.

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, reargu-ment, 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 COMMISSIONERS' WEEKLY MEETING November 13, 1996.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

BM:srs