

The Commission's October 23 order also noted an October 15, 1996 decision of the Eight Circuit Court of Appeals that stayed rules of the FCC relating to pricing and implementation of the Act's provisions allowing interconnecting companies to choose from the terms of any prior contract (the most favored nation or pick and choose provision).

The result of the Commission and Eighth Circuit decisions is that we are not bound to either the USWC TELRIC-based proposals or the TCG proxy proposals. We will consider both companies' pricing proposals in this docket with a view to which is the more correct.

INTRODUCTION

Final Offer Arbitration. In this decision, we¹ follow the agreed "modified best offer" arbitration model.²

TCG/Pacific Bell Agreement. Both parties acknowledged that TCG has been negotiating with other regional Bell operating companies or RBOCs and that TCG reached agreement with Pacific Bell. The parties used that agreement as the model for organization of their negotiations and in some instances for terms. TCG advocates its agreement with Pacific Bell as the basis for the document that the Commission should adopt, and states in its favor that its acceptance by another RBOC demonstrates its commercial acceptability -- that the terms are commercially reasonable and therefore appropriate for adoption here.

The Pacific Bell agreement is evidence regarding the TCG proposal, and will be considered as such. It is viewed, however, with the awareness that Pacific Bell is a different company. *Inter alia*, it has different territory, has different customers; has different commercial and competitive realities, and has different resources. Independent judgment must be exercised. Neither the fact of the agreement nor the acceptance therein of any of its terms is persuasive for the adoption of any of its terms in the USWC/TCG agreement.

Agreed Matters; Commendation. The parties are to be commended in two respects. First, the extent of their good faith negotiations are demonstrated by the progress they made and the number of matters on which they have reached agreement.³ Early on, the parties submitted a joint position statement that forms the basis for the agreed contract elements. Second, both parties counsel operated at the highest professional level.

Use of the first person plural in this document is an editorial convention adopted to support the tone of the document. The decision is the rator's alone.

In preparing the arbitration report in this matter, the arbitrator has selected between the parties' final proposals as to each unresolved issue, selected proposal which appears to be the most consistent with the requirements of state and federal law and Commission policy as reflected in its rules, decisions, and policy statements. The arbitrator has chosen between parties' proposals on an issue-by-issue basis. When neither proposal proved to be acceptable, the arbitrator has directed a modification that renders a proposal acceptable.

By terms of 47 U.S.C. Sec. 252(b)(4)(A) and (c), we are limited to addressing matters on which the parties disagree.

Organization of this Decision. At the outset of its brief, USWC makes general comments and lists seven "key issues" on which it perceives the arbitration to turn.⁴ TCG begins its brief by setting out several principles that it believes to govern the proceeding, identifies areas on which it and USWC agree and those on which they disagree, and then addresses disputed items in the order addressed in the draft contract. We will begin by treating the "key issues" and other matters that appear to transcend individual contract provisions. Then we will follow the outline of the proposed contract. The order of the Pacific Bell contract, the agreed model for negotiations, is used as a framework for discussions.

GENERAL MATTERS

TCG Motives. USWC contends that TCG may have an undisclosed motive in seeking some of the provisions it proposes. This decision is based upon the relevant evidence and argument as to the real issues in question. We do not believe it appropriate to either accept or reject a proposal because it might have an undisclosed effect that is not relevant to this decision.

Power to Ignore FCC Actions. USWC contends that the arbitrator and the Commission have the power to ignore controlling federal agency rules and orders when we disagree with them. As an administrative agency, the Commission is limited in power both by the federal and state Constitution, and also by the limitations imposed by state statute. We decline USWC's invitation to reject apparently lawful federal agency rules or actions.

Sham Unbundling. USWC argues strenuously that in the Act, Congress did not contemplate what USWC calls "sham unbundling." USWC urges the Commission to prohibit it. Sham unbundling is a situation in which a reseller secures all of the unbundled elements needed to provide service, then combines them into products that compete head to head with USWC products -- flat rate business or residential service, for example. In those situations, USWC contends, the reseller must buy the bundled product at retail less the avoided cost. TCG opposes the proposal, contending that resellers must be free to choose how they purchase and provision services for resale.

We reject USWC's proposal. We can't conceive that a provision so basic and so important as the one USWC proposes would be intended by Congress and yet omitted from the Act. Irrespective of our personal sentiment, looking at the Act and its overall effect we are convinced that it contemplates exactly the process that USWC urges constitutes "sham unbundling." Once a reseller purchases an unbundled element, it is free to combine the element for resale with other elements, whether it secures those elements from that or another provider or whether it provides them via its own facilities.⁵

⁴ These are the rates for unbundled loops; geographic deaveraging; "sham unbundling"; the level of reciprocal compensation; division of the common line charge; and performance standards.

⁵ Resale of finished products may be limited in some ways, but that is not at issue here.

Performance Standards, Reporting Requirements and Remedies. TCG proposes that the agreement include performance standards, with remedies in the event of failure to comply. USWC strongly opposes these measures, contending that they constitute penalties which the Commission is only entitled to impose after a hearing, pursuant to law, and with the penalty being paid to the state treasury rather than a private party.

This is a private contract between two commercial parties, in which differences are resolved by arbitration conducted under the auspices of the state regulatory body. Remedy provisions such as TCG's proposal are not specifically precluded by any provision of law that USWC cites.

One substantial problem with TCG's proposal from a public policy standpoint is that it would tend to elevate TCG and its needs to a status superior to other USWC customers. With insufficient means to accomplish immediately all capital and expense projects, it would be tempted to defer needs of other ratepayers and to meet those of TCG, to avoid payments in the event of missed schedules. All customers, including TCG and other resellers, have the benefit of Commission rules and standards and the right to complain formally or informally in the event of service failure. TCG's proposal is therefore rejected.

Issues Not Addressed. USWC did not address every item that is shown as unresolved, while TCG did. As to the items that USWC did not address, we consider failure to address the item as relevant to this decision, but not controlling. We have also reviewed and consider the evidence the parties presented and the text of the related proposals.

Organization of this decision. Following is a table of contents of the TCG version of the agreed contract organization. To the extent possible, we will follow that organization. Areas of dispute are shown in bold face in the following table of

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⁶The boldface elements remain in dispute between the parties. For our convenience and that of the parties, as far as possible we use the paragraphs and numbering of the model agreement referenced in TCG's brief.

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DEFINITIONS

TCG represents that the differences between the parties as to definitions are small and that they result not from major philosophical differences but from the lack of time to address them. It suggests accepting the TCG proposal as reasonable. USWC does not address definitions in its brief, lending credence to TCG's observation that the differences between companies are not substantial. TCG's definitions are adopted, *provided*, that if any specific operative provision adopted in this decision is inconsistent with any definition adopted here, the operative provision adopted herein shall control for the purposes of that provision.

I. NETWORK INTERCONNECTION

Points at issue here include Sizing and Structure of Interconnection Facilities, Trunking Directionality, Meet Point Trunking Arrangements, and Bilateral Agreements.

C. Sizing and Structure of Interconnection Facilities. TCG wants to interconnect with USWC both at access tandem switches and at local or end office switches.⁷ USWC argues that connecting at the access tandems for local traffic will require it to transport the calls longer distances, using more of its facilities, than connections at the local switches. It urges that the access tandem connections may be sought more for TCG's competitive access provider activities than for its local activities. TCG points out that the Act requires interconnection at any technically feasible point of interconnection, and insists that USWC's refusal to allow interconnection at the access tandems impose significant and discriminatory operating constraints on it. It argues that routing difficulties, capacity constraints, and inability to handle high speed data prevent the utility of local switches for TCG's traffic, and insists that USWC under the Act must treat it as well as it treats itself.

TCG's position is the better and is adopted. TCG represents, and this decision is based upon the representation, that its position requires access at tandem switches only when local switches will not handle the traffic to be transported, and that once standard traffic flow thresholds are reached, TCG will break out separate trunk groups for more economical USWC handling. USWC will treat facilities requiring construction activity as any other facilities that it is required to provide, with the reseller-required facilities entitled to no preference over other USWC activities but entitled to equal treatment with other USWC projects. This decision addresses construction costs and performance standards, below.

⁷ Access tandems, which USWC refers to as tandem switches, connect trunks to trunks. Local tandems, which USWC calls local switches, connect to local lines.

D. Trunking Directionality. TCG wants the option of using two-way trunks on interconnection when its traffic volume does not justify the use of higher-volume one-way trunks. USWC contends that this request is a part of switched access interconnection and is thus not part of this arbitration.

TCG argues persuasively that the interconnection relates to local as well as to switched access, and that its position is preferable. Switched access traffic will continue to be subject to pertinent charges.

I. Combination Interconnection Trunk Groups. TCG proposes that the parties work cooperatively on trunking arrangements that permit combining local and meet point trunk functions in one trunk when doing so becomes technically feasible. The position is reasonable and will be adopted.

II. NONDISCRIMINATORY ACCESS TO NETWORK ELEMENTS

TCG states that it and USWC are agreed that USWC must provide nondiscriminatory access to unbundled elements. It states that the parties' differences relate to price, specifically the price of unbundled loops.

Pricing Unbundled Loops. USWC contends that its TELRIC study supports a loop price of \$36.20. The rate that TCG proposes is \$13.37, based on an FCC proxy. We discuss above the status of both the TELRIC study and the FCC proxies and need not repeat that discussion here.

The Commission did review extensive evidence relating to both methodology and inputs in USWC's recent general rate case, Docket No. UT-950200. The Fifteenth Supplemental Order in that proceeding found that credible evidence regarding cost, including USWC's own TSLRIC study, placed the cost of the local loop at a much lower level than the price USWC is proposing, near the level of the FCC proxy.⁸ The Company has used inputs to its TELRIC study that the Commission specifically rejected in Docket No. UT-950200. Use of the Commission-approved inputs would reduce the results substantially. In the absence of a thorough review of the TELRIC study, this renders the Company study unacceptable.

Use of the TCG-proposed price is not required by law inasmuch as the Eighth Circuit has stayed the federal action⁹. Therefore, we look to the underpinnings of the pricing. We find that the

⁸The order is now undergoing judicial review at the Company's request.

⁹Iowa Utilities Board v. Federal Communications Commission, No. 96-3321, Order Granting Stay Pending Judicial Review (Eighth Cir., October 15, 1996).

Benchmark Cost Model and the Hatfield cost model used to derive the FCC's underlying costs represent credible cost study approaches that are consistent with the Commission's approach.

Here, given a choice only between the company proposal and the TCG proposal, we find that the USWC proposal is seriously flawed, while the TCG proposal is based on credible studies with inputs in a reasonable range. The TCG proposal is much more realistic, therefore, and it is accepted.

Basic and Assured Loops; Conditioning. The model Pacific Bell interconnection agreement offers basic and assured links, based on services that the incumbent offers. USWC does not classify or tariff comparable service. TCG argues that the basic loop rate thus should include conditioning until USWC proves that an additional cost is involved in that conditioning. USWC proposes to charge for conditioning, but does not state in its proposal what is involved in that conditioning, why a charge is needed, nor how much the charge should be. USWC's proposal is not sufficiently supported for adoption and does not offer the commercial certainty required in an agreement of this sort -- it provides neither a specific amount nor a means to derive the appropriate charge. TCG's proposal is accepted.

Nonrecurring Charge for Unbundled Loop. The parties disagree regarding a proper nonrecurring charge for providing unbundled loops. TCG proposes to use the tariffed nonrecurring charge that is assessed to retail customers, less the wholesale discount; USWC proposes a nonrecurring charge that it says is based on its TELRIC cost study. Again, the cost study is not ripe for use. The retail rate, less the 17% avoided cost discount,¹⁰ is appropriate for the service and is accepted.

Implementation and Special Construction Charges. USWC proposes to impose implementation charges to compensate it for the effort required to unbundle elements and special construction charges to recover costs of constructing facilities to serve interconnecting carriers. TCG opposes these charges, contending that the TELRIC costing methodology will enable pricing in a manner to recover these costs over the life of the equipment.

We believe it clear that USWC can impose any tariffed charge upon resellers or interconnectors, less the avoided cost discount, in general, if the services requiring the tariffed charge are for resale.

There is nothing inherently unreasonable with a proposal to recover costs of investment in unbundled network elements in advance rather than in recurring charges over the life of the elements. Such a price structure might well lead competitors to more economically efficient decisions as to whether to build or to buy elements, and might also lead to more efficient sharing of risks among competitors.

This proposal, however, fails in its specific provisions. Charges are not sufficiently specific to provide TCG with reasonable certainty of its outlay or to eliminate the possibility of opportunistic behavior by the incumbent. Neither does USWC propose to reflect the advance payment in rates, although USWC's witness testified that doing so would be appropriate. For the reasons stated, the USWC proposal for additional, nontariffed implementation or special construction charges should

⁰Application of the avoided cost discount is not specifically contested.

be rejected.

III. NONDISCRIMINATORY ACCESS TO POLES, DUCTS, CONDUITS, AND RIGHTS OF WAY

Future Agreement. TCG has proposed language from its Pacific Bell agreement that requires the parties to negotiate a future agreement based on stated principles. It argues that USWC's standard contract meets none of the criteria in this contract to enter a later agreement that includes principles stated in TCG's brief.¹¹ The requirement is appropriate, it is reasonable, and it is adopted.

Conduit Pricing. The parties failed to agree on pricing for sharing space in conduit. TCG has proposed 60¢ per foot per year; USWC does not dispute this position in its brief or offer evidence that the amount is unreasonable or noncompensatory. The rate will be adopted.

V. WHITE PAGE DIRECTORY LISTINGS

The parties have resolved most directory issues; two linger on. First is the number of customer guide pages available to TCG in the US WEST Direct directory; second is billing for directory and other services.

Customer Guide Pages. TCG states correctly that USWC has the duty to provide nondiscriminatory access to directory listings; that interconnection between USWC and TCG must be equal in quality to USWC's interconnection with itself; and the Commission requires that USWC provide directory listings to new entrants on the same terms and conditions by which they are available to USWC. None of this appears to be in dispute.

USWC, however, has referred TCG to its affiliate, US WEST Direct, to negotiate inclusion in the directory of customer service pages for TCG. TCG contends that this is unreasonable, and it insists that the Commission equalize treatment between the two companies by requiring USWC to require US WEST Direct to provide to it as many customer guide pages as it provides for USWC.

Here, we think that TCG's proposal is flawed. There is no sufficient showing of need for the same number of pages and no sufficient explanation why the lack of access is harmful. TCG has basic access for listing purposes. USWC need not order its affiliate to provide the requested service, although we expect it to cooperate with TCG in securing the requested service. TCG may negotiate with the affiliate for the access that it desires.

Customer Billing. TCG proposes to be the exclusive billing agent for its customers' yellow page advertisements, responsible to USWC for the required payments. USWC wants the authority to bill TCG's customers directly.

¹¹These include a ban on termination without cause; a provision for innerducting; and provision for egress from the conduit.

There may be no reason, as TCG argues, why USWC cannot bill TCG rather than the customers; in fact, doing so could reduce USWC's billing costs and its uncollectibles. That does not, however, translate into a reason why an obligation should be imposed on USWC to do it. TCG does not argue that the method of sales or the identity of the agents who arrange the advertising or who secure contracts for the advertising render it particularly appropriate that USWC have no contact at all with the customer. There is no demonstrated reason why USWC or its affiliates should in a competitive world be ordered to deal only with TCG on matters regarding billing for the US WEST Direct directory, divorced from related elements of customer service. TCG's proposal is rejected.

VII. INTERIM NUMBER PORTABILITY

TCG states that the parties reached a joint position statement that TCG now proposes be adopted. USWC states that the parties agree on the service, which involves remote call forwarding, but disagree on the question of who should pay for it.

USWC raises concerns regarding the FCC's Number Portability order.¹² It charges that TCG would have USWC's ratepayers cover the cost of remote call forwarding, while it contends that TCG, the cost causer, should bear the cost. USWC argues here, also, that we should reject the unreasonable provisions of an FCC order. It urges adoption of TELRIC-based proposed charges for number portability that are stated in Mr. Moran's testimony.

The Act requires at Sec. 251(e)(2) a sharing of costs in a competitively neutral way. The Number Portability order addressing that requirement (see, paragraphs 130 and following) is not stayed. It identifies several approaches for cost recovery, and we will not act in violation of the order whether or not we agree with it. The parties shall select an appropriate mechanism for sharing costs. In the absence of their selection, costs shall be apportioned on the basis of active local numbers.

IX. RECIPROCAL COMPENSATION AGREEMENTS

Local Traffic. The parties have a fundamental disagreement regarding the compensation for transport and termination of local traffic. TCG proposes bill and keep, by which each party bills its own customers and keeps that revenue in lieu of exchanging revenues with other the other carrier. USWC proposes a metered compensation plan, arguing that TCG is free to pick and choose its customers and may develop traffic that is not balanced with USWC. It does not demonstrate that the traffic is not roughly balanced at present.

The proposals should be compared with the Commission's decision in the Interconnection case. The Commission held that per-minute compensation did not reflect cost and should not be imposed on carriers. The Commission did not rule out such a proposal if parties agreed to it, but that does not occur here. The Commission found bill and keep to be appropriate as an interim mechanism, but that it should be replaced with specific rates reflecting the fixed-cost nature of call

²In re Telephone Number Portability, First Report and Order, CC Docket NO. 95-116, FCC 96-286 (July 2, 1996), citing paragraph 140.

termination. Only TCG's proposal meets the Commission's concerns, and it is accepted.

As TCG points out, however, under paragraph 1113 of the FCC order, a party may prove that the traffic is unbalanced. If USWC later shows an imbalance exceeding 10%, an alternative compensation plan may be required.

Toll and Transit Traffic. Both parties agree that toll traffic will be carried at switched access rates. TCG proposes a reciprocal transit rate of \$.006 per minute. USWC proposes several elements at rates shown on its Appendix A.

TCG's proposal is accepted. First, the local, toll, and transit rate elements are interspersed in the proposals and it will be better to choose one comprehensive package than to choose item by item. Second, the TCG proposal is simpler and easier to understand. Third, the rate is clearer and more understandable. Fourth, the USWC rates are subject to the reservations about USWC's cost study. On balance, the TCG proposal is better.

X. TELECOMMUNICATIONS SERVICES AVAILABLE FOR RESALE.

TCG states that it is a facilities-based provider and not primarily interested in buying services for resale, but that it needs the option of reselling services while expanding its own network. Therefore, it proposes holding USWC to its obligation under the Act (47 U.S.C. 251(c)(4)) to offer every telecommunications service to resellers, at a wholesale rate, that it offers to retail customers.

Avoided Cost Discount Calculation. USWC suggests wholesale avoided cost discounts pursuant to its own cost study, ranging between zero and eight per cent. TCG suggests that the appropriate wholesale discount is 17% on all eligible services, the lowest of the proxy rates suggested by the FCC. USWC contends that the proxy for avoided retail sales costs is too high. The USWC avoided cost study has not been reviewed by the Commission. It appears to be a bottom up study rather than a top down study of the sort prescribed in Sec. 252(d)(3) of the Act. Its use is therefore inappropriate for those reasons.

The TCG figure is within a range of avoided cost discount numbers developed in other jurisdictions through credible analyses and studies and adopted as appropriate by other state commissions. It is supported by a credible study at the FCC. We accept the TCG proposal as appropriate for interim use only, with the modification and reservations stated below.

Exclusion of Services from Resale. USWC urges that the Commission exclude certain services from resale or from the wholesale avoided cost discount. It asks exclusion from the discount for special services; private line services; and services offered at a volume discount. It cites the FCC order in support of its view that state commissions have the power to determine whether retail discounts will be afforded to resellers.¹³ We feel obligated by federal law to reject USWC's proposal to exclude services from the avoided cost discount; the Act appears to require that all tariffed services be offered for resale.

³FCC Order at paragraphs 951 and 952 (USWC Brief, page 10).

Volume Discounts. USWC contends that volume discounts in its tariffs are avoided cost discounts, and it urges that no other discounts be made available on volume-discounted services. TCG urges that the avoided cost discount be applied universally to every tariffed service, whether or not it is offered at a volume discount.

We reject USWC's contention that discounted services be excluded from the avoided cost discount. We agree with USWC, however, that the volume discount is a form of avoided cost discount. We believe that TCG's full proposal would make services available at inappropriately low prices.

We modify TCG's proposal. The agreement must provide that a reseller may take at the lower rate, after application of either the tariffed volume discount or the proxy avoided cost discount, but that both discounts cannot be applied.

Private Line/Special Access Services. The FCC Order provides¹⁴ that special access services are not subject to resale even though they are taken by end users as well as resellers. USWC's Washington tariff provides alike for private line and special access services; they are one in the same under different names.

TCG argues that because they are called private line services as well as special access services, they are thereby subject to resale. We disagree. To the extent that USWC is correct and the services actually are identical, and the FCC order excludes special access services from the resale discount, it does not matter what they are called -- they are still exempt from resale. To hold otherwise would require the elevation of form over substance and reverse the federal action.

Grandfathered Services. USWC is offering services to some customers that have been grandfathered; i.e., that are not open or available to new customers. TCG may resell grandfathered services to customers already purchasing the same service from USWC. It may not resell grandfathered services to new customers.

Customer Transfer Charge. A customer transfer charge appears to be an appropriate way to recognize the actual, legitimate, otherwise unrecoverable costs of effecting a transfer. TCG argues that USWC's charge is impermissible because it imposes a burden on resellers that USWC does not have to bear for itself. That argument is incorrect, because USWC does bear those costs itself on internal transfers. The Act does not mandate that LECs must absorb costs imposed on them by resellers. The FCC has apparently recognized such costs in the area of interstate toll, and has authorized a fee for transferring customers' message toll accounts. There is no reason why such a charge should be seen as improper.

Here, however, USWC's proposal is a substantial fee,¹⁵ many times larger than the fee

⁴Sections 873-874

⁵It is shown in the price list as ranging from \$54.13 to \$57.15 per line, depending on whether it relates to a business, residential, or ISDN line.

authorized for the transfer of toll accounts, and is imposed on a per-line basis. The USWC proposal is not shown to be reasonable. We have stated our reservations regarding USWC's cost study. A charge that is substantially higher than costs would operate as a barrier to competition. We are reluctant to impose a charge even on an interim basis that could constitute a substantial barrier to competition. For these reasons, we accept TCG's proposal.

XI. COLLOCATION AND MID-SPAN MEETS.

Physical Collocation; Escorted Access. The Act requires USWC to provide entrants with facilities and equipment needed to access USWC's network at any technically feasible point¹⁶ and in a manner that is at least equal in quality to the interconnection it provides itself or any other carrier, either physical collocation of equipment needed for interconnection or access; or virtual collocation if physical collocation is not practical for technical reasons or lack of space.

TCG asks for physical collocation as a necessity in its proposed business development plan; USWC does not disagree, as far as space is available at its facilities. The remaining issue relates to access to the facilities. Both acknowledge that each party needs access to its own facilities at any time of the night or day to deal with emergencies, as well as access to install, maintain, test, modify, etc., its own equipment. TCG asks unlimited, unescorted access to its collocated facilities. USWC would charge for providing escorts under some circumstances.

The underlying issue is a serious one. USWC facilities are valuable technical properties that are susceptible to sabotage or unintentional maladjustment that could adversely affect service to millions of persons. Neither TCG nor USWC would countenance improper action by its employees against the other's property, but accidents might happen and personnel could conceivably commit unauthorized actions. Each party has the right to reasonable assurances that this will not happen.

In situations where the building layout does permit independently secure facilities --i.e., independent entrances, secure hallways, etc. -- there should not be any need for security or escorts. In other settings, USWC's proposal does acknowledge the potential for danger, but it does impose a financial barrier to the free access that is required. A limited number of personnel will require this access. We propose a modification by which TCG provides bonding in reasonable amounts for the personnel having unescorted access privileges and provides USWC the opportunity to review pertinent records (equivalent to that which it requires of its own staff) and approves persons for unescorted access using the same standards it uses for its own personnel. If TCG agrees to this modification, the USWC proposal will be rejected and the modified proposal may be used. If TCG does not agree, USWC's proposal is accepted.

Cross-Connects. TCG urges that it be allowed to provide the wire and any regeneration equipment needed for physical connection; in exchange, it asks that no recurring charge be imposed. It also asks that a reasonable nonrecurring charge be established, and that it be allowed to contract for the service with an approved contractor as a check upon the reasonableness of the nonrecurring charge.

⁶The required points of interconnection are limited to the six points identified in paragraph 212 of the FCC order.

TCG does not demonstrate that providing wire and regeneration equipment eliminates all recurring costs of interconnection. We are not convinced that it is the case. If the parties agree, it should be permitted to provide portions of the equipment, and that provisioning should be considered in calculating rates. But it should not achieve freedom from recurring rates unless it does demonstrate freedom from costs, in order to avoid imposing costs on USWC's ratepayers or stockholders. The TCG proposal is rejected.

Interconnection between Collocated Carriers. TCG proposes language to support its right under the Act to interconnect with other collocated carriers at the same USWC premises; USWC does not argue in opposition and the TCG proposal should be included in the agreement.

Other Collocation. TCG proposes provisions addressing shared space collocation; microwave collocation; POT bay engineering; virtual collocation; and mid-span meet arrangements. Again, USWC does not argue in opposition, the TCG proposals appear reasonable, and the TCG proposals are accepted.

Collocation Rates. TCG proposes to use the rates in USWC's federal interexchange tariff for equivalent services -- to be shared by all collocating carriers on a proportional basis. USWC proposes its own TELRIC-based rates. We have described above our reluctance to use the TELRIC-based rates. The existing, approved rates for interstate elements are more reasonable and the TCG-proposed provision is accepted.

Physical Collocation Charges. USWC does not have a tariff for floor space or infrastructure requirements, and it urges setting those rates on a case-by-case basis. It offers to prepare quotes, for a fee, but provides no time deadlines for preparing the quotes and no way to verify their reasonableness. TCG views the proposal as unacceptable and counters with a flat rated \$3 per square foot per month based on USWC's offer to TCG in Arizona. TCG offers a flat rate of \$40,000 per location for infrastructure expenditures, based on its agreement with Pacific Bell in California.

We acknowledge that TCG's proposal does not consider any potential differences between local costs and those in California, or differences between Pacific and USWC. Even so, the TCG proposal appears to be much more practical in operation, less subject to delay or confusion, and based on rates that seem on their face to be fair. Certainty and the avoidance of delay are appropriate goals and the TCG proposal will reduce the costs of problems that appear to be likely under USWC's proposal. TCG's proposal is accepted.

XII. JOINT PROVISION OF WIRELESS SERVICE PROVIDER ACCESS.

TCG identifies this as an area of apparent agreement and proposes that this matter be identified as one type of transiting traffic for purposes of reciprocal compensation. USWC does not speak in opposition, and the proposal is accepted.

XIII. MEET POINT BILLING ARRANGEMENTS.

This issue involves the rates for switched access services and how those are apportioned between TCG and USWC.

TCG notes that USWC enjoys the benefit of the RIC, or residual interconnection charge, paid by interexchange carriers to the LEC to contribute toward its costs of providing tandem service. TCG represents that the end-office RIC generates 80% of the cost of switching and transport. TCG complains that it cannot afford to provide that service unless it shares in the revenues from the RIC. It proposes that the tandem switch provider bill for minutes of use on both the tandem and the end switch service, no matter which carrier provided it, and that the tandem carrier keep 30% of the end office charge and remit the remaining 70% to the end office provider.

USWC's proposal would have each party continue to bill the interexchange carrier separately for the traffic each carries. TCG candidly cites *Comptel v. FCC*, No. 96-1168 (D.C. Circuit, 1996) and the FCC's Order at paragraph 727. The court recognized the problem of the RIC, and directed the FCC to correct it -- which the FCC has not done.

We accept USWC's proposal and reject TCG's. The latter is certainly a creative approach. TCG does not provide cost support for its proposal -- nor does it state why we should correct a problem that the courts and the FCC both acknowledge is the FCC's to fix.

XVII. MOST FAVORABLE TERMS AND TREATMENT.

TCG proposes that the agreement recite the FCC's most favored nation language, interpreting the Act, as a reminder of USWC's obligations under the law. USWC opposes the provision, contending that the FCC rule errs in its interpretation of the Act. Application of this rule has been stayed by the Eighth Circuit court.

The TCG proposal should be rejected. If we impose the meaning set out in the stayed federal rule, we are in a sense usurping the authority of the federal court and imposing on the parties a federal rule that is not effective. Even without this provision, the federal Act will apply and both parties are entitled to an interpretation of the statutory provision from an appropriate federal decision-maker.

XVIII. DISPUTE RESOLUTION AND BINDING ARBITRATION.

The parties agree upon the process for settling disputes under the agreement. They do not agree upon how to assign the costs of dispute resolution. TCG proposes that the party losing an arbitration pay all of the costs, including the other's attorneys' fees. TCG proposes that a party refusing to arbitrate who is later required to do so must bear all costs of arbitration. USWC proposes the American Rule in which each party bears its own costs and attorneys' fees.

TCG acknowledges that USWC's proposal applies in court, but urges that it can properly be the element of a contract on which parties agree. While we agree that this is true, we also

note that the parties have not agreed to that provision in this contract and believe that in the absence of agreement, the provision should not be forced on an unwilling participant. We also observe that many decisions are not win/lose black and white, but include shades of gray. Reinforcing the win-lose nature of an agreement may in fact impede parties from seeing or accepting win-win solutions that can be more workable and more mutually satisfying, especially in a long-term relationship, than imposing upon both parties the will of one party or the other.

We accept the TCG provision that a party refusing to arbitrate that is later required to do so be responsible for the entire cost of arbitration. Adding this provision should avoid temptations to stonewall and should make parties more receptive to resolving matters.

XXII. TERM OF AGREEMENT.

The parties have apparently agreed that the appropriate term for the agreement is 30 months. If that information is incorrect, and a dispute remains, we accept USWC's proposal for a two-year agreement because we believe that the state of flux of the industry may well require parties to accommodate unexpected contingencies, and that three years is too long to bind parties in this changing environment. We do not believe that negotiations must begin immediately to renew a two-year document.

XXV. LIMITATION OF LIABILITY.

The parties are in basic agreement as to limitation of liability, except that USWC contends that the agreement should exclude liability for punitive damages. TCG calls this position outrageous, and urges that conduct so egregious that it would otherwise be liable for punitive damages should not be excluded. USWC did not oppose TCG's proposal on brief.

Here we apply the same standard that we applied above as to costs and attorneys fees. While parties can agree to exclude liability for punitive damages, that exclusion is not of itself, on its face, reasonable. It should not be forced upon parties to an arbitration without substantial support that we do not find in the facts or arguments in this proceeding. TCG's proposal is adopted.

XXV. INDEMNITY.

Each party has proposed an indemnification clause. TCG urges that its proposal, adopted in its agreement with Pacific Bell, be accepted because it is simpler, easier to understand, and more commercially acceptable. USWC does not argue against TCG. While the proposals are similar, TCG's has the qualities that it describes and it is the preferable proposal.

IMPLEMENTATION SCHEDULE

The Act requires the arbitrator to provide a schedule for implementation of the agreement by the parties. 47 U.S.C. Sec. 252(c)(3).

TCG urges that no implementation schedule is needed, because TCG has proposed only those terms and conditions that it needs immediately. It therefore proposes that both parties be required to perform immediately under the arbitrated Agreement. USWC does not argue against TCG. We agree with TCG, to the extent that by immediately, TCG means the agreement shall take effect immediately after it is approved by the Commission .

The implementation schedule is Immediately upon state commission approval.

CONCLUSION

The foregoing provisions of this decision resolve the disputed elements presented by the parties, pursuant to the requirements of 47 U.S.C. Sec. 252(c). The parties shall enter into an agreement consistent with the terms of this report and decision. Pursuant to the Commission's interpretive and policy statement,¹⁷ the agreement must be submitted to the Commission no later than 30 days after the date of this decision. Parties are referred to that document for the appropriate procedure.

DATED at Olympia, Washington and effective this 8th day of
November 1996.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

C. ROBERT WALLIS
Arbitrator

⁷In Re Implementation of Certain Provisions of the Telecommunications Act of 1996, Docket No. UT-960269 (June 28, 1996).