

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF) CASE NO. GNR-T-94-5
AT&T COMMUNICATIONS OF THE)
MOUNTAIN STATES, INC. FOR INTRALATA)
EQUAL ACCESS AND CARRIER PRESUB-)
SCRIPTION IN THE SERVING TERRITORY) ORDER NO. 27837
OF U S WEST COMMUNICATIONS, INC.)
)

By a Motion filed October 1, 1998, MCI Telecommunications Corp. (MCI) revived this case first opened by the Commission in December 1994 to consider whether intraLATA toll dialing parity should be implemented in U S WEST Communications' service territory in Idaho. Toll dialing parity, also referred to as one-plus equal access or carrier presubscription, allows a customer to preselect a carrier for in-state, intraLATA toll calls and then access its chosen carrier simply by dialing 1 plus the telephone number. Without dialing parity, a customer wishing to use a toll carrier other than U S WEST for such calls must dial a series of numbers before dialing the telephone number. By this Order the Commission grants MCI's Motion in part, although on different grounds than stated by MCI, and directs U S WEST to provide a schedule for implementing toll dialing parity.

BACKGROUND

This case was initiated in late 1994 by AT&T Communications of the Mountain States, Inc. (AT&T) by a petition requesting an order to require U S WEST to implement intraLATA toll dialing parity in its Idaho service area. LATA stands for Local Access Transport Area and is a geographic area in which U S WEST provides long distance, or toll services within the state. During its next session following AT&T's petition, the Idaho Legislature enacted *Idaho Code* § 62-608A, effective March 9, 1995, which essentially rendered AT&T's Petition moot. Section 62-608A states that a telephone company that provides basic local exchange service and that is

subject to interLATA telecommunication service restrictions, shall not be required to provide dialing parity to other telephone corporations for the provision of intraLATA message telecommunication services until such telephone corporation is also permitted to provide interstate and intrastate interLATA and intraLATA message telecommunication services on an integrated basis, and is not subject to interLATA telecommunication service restrictions.

The section defines “interLATA telecommunication service restrictions” as “the restrictions upon interexchange telecommunication services contained in Section II(D)(1) of the Modification of Final Judgment entered in the case of the *United States v. Western Electric Company*, 552 F.Sup. 131(D. D.C. 1992), and Section V(C)(1) of the Final Judgment entered in the case of the *United States v. GTE Corporation*, 1985-1 Trade CS. (CCH) P. 66, 355 (D. D.C. Dec. 21, 1984).” The Consent Decrees entered in those cases prevented certain telephone companies, including U S WEST, from providing interLATA telecommunications toll service. Because U S WEST was subject to the service restrictions in the Consent Decrees, *Idaho Code* § 62-608A meant that U S WEST could not be required to provide intraLATA dialing parity until such time as it is permitted to provide interstate, interLATA service. Other than procedural moves to vacate the hearing set to commence in June 1996, this case has been inactive since the enactment of Section 62-608A.

The telecommunications landscape significantly changed in early 1996 with passage of the federal Telecommunications Act of 1996 (Telecom Act), which became effective February 8, 1996. The Telecom Act amends the Telecommunications Act of 1934 and is codified throughout Title 47, United States Code. The Telecom Act was enacted by Congress to foster competition in telecommunications markets, and to replace many of the structures in place under historical regulatory procedures. One of the structures specifically superseded by the Telecom Act is the Consent Decrees in the *Western Electric* and *GTE* cases. Section 601 of the Telecom Act expressly provides that restrictions and obligations imposed by those cases are now controlled by the Telecom Act. 47 U.S.C. § 601. In response to enactment of the Act, the U.S. District Court entered an order dismissing the *Western Electric* and *GTE* cases. See *United States v. Western Electric, et al.*, 84 F.3d 1452 (D.C. Cir 1996).

Two other sections of the Telecom Act have particular relevance to MCI’s Motion in this case. Section 251 describes the duties of telecommunications carriers in regard to interconnection with other carriers, and Paragraph 251(b)(3) states a duty to provide dialing parity to a competing provider. Section 271 addresses entry into interLATA services by Bell Operating Companies (BOCs), including U S WEST. Subsection 271(e)(2) prescribes limitations regarding dialing parity requirements for such companies. These provisions will be discussed in greater detail in regard to MCI’s Motion.

On October 9, 1998, the Commission issued an Order Establishing Briefing Schedule and Oral Argument to hear MCI’s Motion, Order No. 27759. The Order invited briefs from the parties

on the legal issue of any dialing parity requirement for U S WEST, and established a hearing date of November 18, 1998, for oral argument. In response to MCI's Motion, legal briefs were filed by U S WEST, AT&T, and Sprint Communications Company. AT&T and Sprint supported MCI's Motion, while U S WEST filed its Brief in Opposition.

MCI'S MOTION

MCI's Motion makes three specific requests of the Commission: MCI asks the Commission to

(1) determine and declare that U S WEST must make toll dialing parity commercially available on February 8, 1999, or at such time as it receives interLATA authority under Section 271 of the Telecommunications Act of 1996, whichever first occurs; (2) require U S WEST to file with the Commission and the parties a toll dialing parity implementation plan and schedule; (3) convene a prehearing conference to determine if any issues regarding the plan and schedule must be resolved by hearing.

MCI Motion, p. 1-2.

MCI, Sprint and AT&T contend that the Telecom Act requires U S WEST to implement dialing parity on February 8, 1999. MCI quotes Sections 271(e)(2) and 251(b)(3) and concludes therefrom that "the legal requirement [of U S WEST] to offer toll dialing parity is clear." Motion p. 5. Section 251(b)(3) provides as follows:

SEC. 251. INTERCONNECTION

(b) **OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.**—Each local exchange carrier has the following duties:

* * * *

(3) **DIALING PARITY.**—The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

47 U.S.C. 251(b)(3).

Section 271(e)(2) specifically addresses toll dialing parity for BOCs, as follows:

SEC. 271. BELL OPERATING COMPANY ENTRY INTO INTERLATA SERVICES

(2) INTRALATA TOLL DIALING PARITY.—

(A) PROVISION REQUIRED.—A Bell operating company granted authority to provide interLATA services under subsection (d) shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) LIMITATION.—Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require dialing parity in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after the date of enactment of the Telecommunications Act of 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

47 U.S.C. 271(e)(2).

MCI concludes from these sections that “all local exchange carriers have the duty to offer toll dialing parity, but that duty is suspended for Bell Operating Companies until the earlier of two events—receipt of interLATA authority or the passage of three years.” MCI Motion p. 4.

Regarding *Idaho Code* § 62-608A, MCI makes two arguments: first, that Section 62-608A’s prohibition of dialing parity for U S WEST is preempted by the dialing parity provisions of the Telecom Act, and second, that Section 62-608A by its own terms no longer is applicable. Because that section applies to telephone providers that are subject to the terms and restrictions of the Consent Decrees, and those restrictions no longer apply to U S WEST by virtue of Section 601 of the Telecom Act, MCI argues that Section 62-608A has no force and effect for U S WEST.

AT&T and Sprint also argue that Sections 251 and 271 of the Telecom Act require U S WEST to implement dialing parity by February 8, 1999. Sprint contends that state law requires the same result. Also arguing that Section 62-608A is preempted by provisions of the Telecom Act, Sprint further states that recent enactments by the Idaho Legislature support MCI’s position. Sprint points to *Idaho Code* § 62-602(4), stating a legislative desire to “encourage the development of open competition in accordance with provisions of Idaho law and consistent with the federal Telecommunications Act of 1996.” Sprint’s Brief in Support of Motion, p. 3.

In response to MCI’s Motion, U S WEST points to the clear language of *Idaho Code* § 62-608A, and argues that the statute is not preempted by any provision of the Telecom Act.

Regarding Section 271(e)(2)(B), U S WEST notes that the section merely prohibits a state from requiring a BOC without interLATA authority to implement dialing parity prior to February 8, 1999. It does not state that dialing parity must be implemented on that date. According to U S WEST, “instead of requiring that BOCs without interLATA authority implement intraLATA toll dialing parity on February 8th, the statute simply allows the state the option of ordering dialing parity from February 8, 1999, forward.” U S WEST Brief in Opposition, p. 4. U S WEST also quotes from the decision in *People of the State of California v. Federal Communications Commission*, 124 F.3d 934 (8th Cir. 1997) to support its position that the “specifics of implementation of intraLATA toll dialing parity remain for Idaho policy makers.” *Id.*

DISCUSSION

The Telecom Act Does Not Require Toll Dialing Parity By U S WEST

MCI identifies the first issue for the Commission’s determination as “whether federal law requires implementation of dialing parity by February 8, 1999.” MCI’s Reply Brief p. 1. MCI regards Section 251(b)(3) as providing a blanket, “absolute duty on local exchange companies to offer dialing parity,” and the limitation in Section 271(e)(2)(B) as a narrow exception to the general duty of Section 251(b)(3). In other words, by MCI’s reading of the Telecom Act, Section 251(b)(3) requires immediate implementation of dialing parity on the effective date of the Telecom Act (February 8, 1996), except that Section 271(e)(2)(B) allowed a maximum exemption period of three years for U S WEST and other BOCs. This conclusion ignores the language and context of the two relevant sections.

First, as apparently even MCI, Sprint and AT&T would concede, Section 271(e)(2)(B) does not itself contain a mandate that dialing parity be implemented by February 8, 1999. Instead, Paragraph A of Section 271(e)(2) states that a BOC *must provide* dialing parity “throughout that state” when it begins to provide interLATA services in the state. Paragraph B of Section 271(e)(2) then allows a state to require a BOC to implement toll dialing parity throughout the state even if the BOC has not been granted interLATA authority, but not before three years from the effective date of the Telecom Act. That is the clear meaning of the operative language from Paragraph B: “a state may not require a Bell Operating Company to implement intraLATA toll dialing parity in that state before a Bell Operating Company has been granted authority under this section to provide interLATA

services originating in that state or before three years after the date of enactment of the Telecommunications Act of 1996, whichever is earlier.”

The duty of Paragraph A is mandatory—a BOC must provide dialing parity throughout a state coincident with its authority to provide interLATA services. Paragraph B creates a permissive authority for a state following a period of limitation—a state may but is not obligated to require a BOC to implement dialing parity in the state after three years, even in the absence of interLATA authority for the BOC. Nothing in Section 271(e)(2) *requires* dialing parity in a state by a date certain. Only by gleaning a universal dialing parity duty from Section 251(b)(3) are MCI, AT&T and Sprint able to argue that U S WEST must implement dialing parity within its Idaho service area. But that interpretation of this section creates difficulty in reconciling it with Section 271(e)(2), and also ignores the terms and context of Section 251(b)(3).

Section 251 is entitled “Interconnection” and prescribes specific duties of telephone companies in regard to interconnecting with other, competing carriers. The Telecom Act establishes interconnection as a means to allow competitive companies to enter a local telecommunications market previously served by a single company. The interconnection requirements make it possible for a competitor to purchase and resell the services of the incumbent company, and to make the necessary facilities connections. Interconnection does not happen automatically or magically, however; it requires a complex agreement to provide the necessary terms and details. Accordingly, Section 252 of the Telecom Act provides a means for the parties to reach an interconnection agreement by voluntary negotiations or, if necessary, by mandatory arbitration by a state commission. Any interconnection agreement, whether negotiated or arbitrated, must be submitted to a state commission for approval.

While Section 252 provides the process for two companies to reach an interconnection agreement, Section 251 provides certain minimum terms, at least for an arbitrated agreement. So, for example, Paragraph 3 requires a local exchange carrier to provide dialing parity to “competing providers of telephone exchange service and telephone toll service” when the companies are interconnecting. When a state Commission arbitrates an interconnection agreement between a local exchange carrier and a competitive provider, Section 252(c) requires that the agreement contain the terms described in Section 251.¹ A state Commission can reject an arbitrated agreement, but not a

¹The arbitrated interconnection agreement between U S WEST and AT&T approved by the Commission in Order No. 27738 requires U S WEST to provide dialing parity to AT&T.

negotiated agreement, if it does not contain terms for dialing parity and the other requirements of Section 251. 47 U.S.C. 252(e)(2)(B).

Requiring dialing parity terms for interconnection between two companies is different than mandating statewide dialing parity. By its terms, Section 251 applies to interconnection; by contrast, Section 271 addresses general, statewide dialing parity issues. Paragraph A of Section 271 describes a dialing parity duty “throughout that state” when a BOC is given interLATA authority. Paragraph B, each time it references implementing dialing parity, describes the implementation as being “in that state.” In short, neither the language nor context of Section 251 and 271 suggest that they were intended by Congress to be read in conjunction with each other. Additionally, if Congress had intended that BOCs implement dialing parity no later than February 8, 1999, such language easily could have been included in Section 271(e)(2), thus obviating the awkward interpretation advocated by MCI.

The language of Sections 251 and 271 does not mandate the implementation of dialing parity within a state by February 8, 1999, or any other date. Accordingly, the Commission cannot declare an intraLATA toll dialing parity duty for U S WEST pursuant to federal law.

***Idaho Code § 62-608A No Longer
Bars the Implementation of Toll Dialing Parity
by U S WEST.***

MCI, AT&T and Sprint contend that *Idaho Code § 62-608A* no longer operates as a bar to a requirement that U S WEST implement toll dialing parity. By its terms, Section 62-608A applies only to a telephone corporation “subject to interLATA telecommunications service restrictions,” which are defined in the statute. “InterLATA telecommunication service restrictions” are those restrictions contained in specific sections of final judgments (Consent Decrees) in two different federal District Court antitrust cases. Because Section 601 of the Telecom Act expressly removes and replaces the Consent Decree restrictions, MCI, AT&T and Sprint contend that Section 62-608A no longer is applicable by its own terms.

In response to MCI’s position, U S WEST points out that “the interLATA restrictions of the federal Telecom Act are identical to the restrictions contained in the consent decree and referenced by the Legislature [in Section 62-608A].” Tr. p. 35. U S WEST argues that a determination invalidating Section 62-608A by its terms “is tantamount to asking this Commission to blatantly frustrate the policy of the Legislature based upon the flimsiest of technicalities.” *Id.*

We believe U S WEST's argument misses the point. The issue raised by MCI, Sprint and AT&T is not in regard to a statement of policy on dialing parity, but rather whether the Legislature intended Section 62-608A to have a specific application. Clearly by the terms of the statute, it does have a specific application; it applies only to those telephone corporations that are subject to various specifically identified restrictions. Conversely, the statute does not apply to telephone corporations that are not subject to those specific restrictions, regardless of whether the restrictions applied at some previous time.

We believe the Legislature knew what it was doing when it specifically referenced the consent decree restrictions to trigger the application of Section 62-608A. See, *State, Dept. of Law v. One 1955 Willys*, 100 Idaho 150, 153, 595 P.2d 299 (1979) (Where a statute is clear and unambiguous the expressed intent of the legislature must be given effect; the courts must assume that the legislature meant what it said). Because of the consent decree, U S WEST was barred from providing interLATA service operations. The Telecom Act now provides the means for U S WEST to begin interLATA services, and the protection afforded U S WEST by Section 62-608A has lost its urgency. Additionally, the Legislature has had at least two opportunities to amend Section 62-608A since the Telecom Act was enacted to remove references to the Consent Decrees, and has not done so. We conclude that Section 62-608A implemented a specific, narrow application that no longer exists. Section 62-608A by its own terms no longer applies to U S WEST.

**Dialing Parity Should
Be Implemented as a Matter of Public Policy.**

The federal Telecom Act does not mandate in-state, intraLATA dialing parity, but *Idaho Code* § 62-608A no longer prevents the implementation of dialing parity by U S WEST. The question remaining for the Commission is whether dialing parity should be required as a matter of public policy. As U S WEST stated, "intraLATA dialing parity issues remain the province of the state policy makers." U S WEST Brief in Opposition, p. 4. We believe the interest of consumers overwhelmingly weighs in favor of requiring U S WEST to expeditiously implement in-state, intraLATA toll dialing parity in its service territory.

U S WEST argued that the policy reflected in *Idaho Code* § 62-608A should control the Commission's consideration of public policy and intraLATA dialing parity. Although Section 62-608A became effective less than four years ago, the rules and restrictions in place in 1995 have been dramatically altered or removed. Public policy considerations have also changed in significant ways.

For one, as already mentioned, U S WEST now has the means, some of it primarily within its control, to enter the interLATA telecommunications market. IntraLATA dialing parity is already in place for many Idaho customers who receive local exchange service from GTE Northwest and Citizens. Even U S WEST is in the process of implementing dialing parity in most of the other states it serves. Finally, more intraLATA service providers are available for customers, thereby significantly increasing the number of options available to consumers. We believe that dialing parity enhances customer choices and is the preferred public policy to reflect and promote the interests of customers.

The Commission concludes that U S WEST should implement intraLATA toll dialing parity in its Idaho service area. In its Motion, MCI asked the Commission to require U S WEST to file a toll dialing implementation plan and schedule, after which a prehearing conference can be scheduled “to determine if any issues regarding the plan and schedule must be resolved by hearing.” We find this recommendation to be the best method for reactivating and proceeding with this case. Accordingly, we direct U S WEST to file on or before June 1, 1999, a plan to implement dialing parity in its Idaho service area. The Commission will schedule a prehearing conference if necessary after the implementation plan has been filed.

ORDER

IT IS HEREBY ORDERED that MCI’s Motion is granted in part. U S WEST must implement intraLATA toll dialing parity within Idaho as expeditiously as possible. U S WEST shall file on or before June 1, 1999, a plan to implement intraLATA dialing parity in its Idaho service area.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this
day of December 1998.

DENNIS S. HANSEN, PRESIDENT

RALPH NELSON, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Myrna J. Walters
Commission Secretary

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