

Service Date: December 1, 1997

**DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA**

IN THE MATTER OF the Application of	)	UTILITY DIVISION
U S WEST Communications, Inc. and	)	
Montana Wireless, Inc. Pursuant to	)	DOCKET NO. D97.9.168
Section 252(e) of the Telecommunications	)	
Act of 1996 for Approval of their Interconnection	)	ORDER NO. 6031
Agreements.	)	

**FINAL ORDER**

**I. Introduction and Procedural Background**

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (1996), sets out methods by which local competition may be encouraged in local exchange markets which historically have been monopolistic. One of the paths to a competitive local exchange market set forth in the 1996 Act is the resale of services. Another such path is the access to the incumbent local exchange company's unbundled network elements. *See* 47 U.S.C. §§ 251(c)(3) and 251(c)(4). Parties can voluntarily negotiate agreements for interconnection, including resale and access to unbundled network elements, or they may request state commissions to mediate or arbitrate unresolved issues. *See* 47 U.S.C. § 252. Once agreement is reached voluntarily or by arbitration, the parties to the agreement must submit the agreement to the appropriate state commission for approval. *See* 47 U.S.C. § 252(e).

U S WEST Communications, Inc. (U S WEST) and Montana Wireless, Inc. (MWI) began interconnection negotiations on February 26, 1997. Although the parties essentially had reached fully negotiated agreements for interconnection and related services, the agreements could not be

formally executed prior to the expiration of the arbitration window provided for by the 1996 Act. *See* 47 U.S.C. § 252(b)(1). Therefore, on August 5, 1997, MWI petitioned the Commission for arbitration of all unresolved issues in the interconnection negotiation between MWI and U S WEST. Shortly thereafter, the parties executed the agreements. On September 3, 1997, the Commission granted MWI's August 28, 1997 motion to withdraw its petition for arbitration and dismissed the proceeding.

MWI and U S WEST entered into two separate interconnection agreements, one being a combined agreement for resale and access to unbundled network elements entitled "Interconnection Agreement Between U S WEST Communications, Inc. and Montana Wireless, Inc. for Montana" (Wireline Agreement), and the second agreement for the interconnection of wireless services entitled "Wireless Interconnection Agreement Between U S WEST Communications, Inc. and Montana Wireless, Inc." (Wireless Agreement). The parties filed the Agreements with the Commission on September 11, 1997.

The Commission issued a "Notice of Application For Approval of Interconnection Agreements and Opportunity To Intervene and Comment" on September 16, 1997, giving public notice of the requirements that Commission approval of the filings be nondiscriminatory toward other telecommunication carriers not parties to the agreement and be consistent with the public interest, convenience and necessity. This notice provided a deadline for intervention of September 26, 1997, and a separate deadline for comments of October 7, 1997. The notice further contemplated that no public hearing would be held unless requested by an interested party by September 26, 1997.

## **II. Findings of Fact and Commission Decision**

1. MWI is a telecommunications provider organized and incorporated under the laws of the State of Montana. MWI is registered with the Commission as a telecommunications carrier in Montana. MWI is the owner of a Federal Communications Commission (FCC) license to provide personal communications service (PCS) in the Kalispell and Missoula Basic Trading Areas, as well as Powell County from the Butte Basic Trading Area. MWI intends to provide both wireless and wireline service on a facilities basis, as well as toll services on a combined facilities and resale basis.

2. U S WEST Communications, Inc. is a Colorado corporation authorized to operate as a telecommunications carrier providing local exchange and other services in the State of Montana. U S WEST is registered with the Commission as a telecommunications carrier in Montana.

3. Both the wireline and wireless agreements were reached through negotiations between the parties. Section 252(e)(4) of the Telecommunications Act of 1996 (1996 Act) provides that a negotiated agreement submitted for Commission approval must be approved or rejected within 90 days or it will be deemed approved. Thus, Commission approval or rejection according to the substantive standards set forth in the 1996 Act must issue by December 10, 1997, or the Agreement will be deemed approved. The Commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1).

4. Section 252(e)(2)(A) prescribes the grounds for rejection of an agreement reached by negotiation:

(2) GROUNDS FOR REJECTION.--The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. § 252(a)] if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

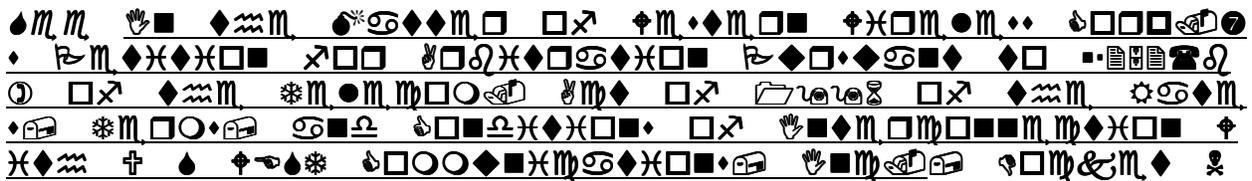
(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

The standard for approving an agreement reached by negotiation under § 252 (e)(2)(A) as set forth above is different from the standard for approving an arbitrated agreement in § 252(e)(2)(B) of the Act.

a. The Wireless Agreement

4. The parties executed a wireless interconnection agreement on August 22, 1997. On that same date, the parties also executed an adoption agreement in which they agreed, *inter alia*, to adopt the entire interconnection agreement which U S WEST had entered into with Western Wireless Corporation.<sup>1</sup> The adoption agreement requires no Commission approval.

<sup>1</sup>





5. The Western Wireless/U S WEST Agreement was reached in part through negotiation and in part through arbitration. The MWI/U S WEST interconnection Agreement, although identical to the Western Wireless/U S WEST Agreement, must be approved by the Commission prior to implementation.<sup>2</sup>

6. The Commission reviewed the Western Wireless Agreement according to the standards set forth in § 252(e)(2)(B) of the Act, which permits rejection of an arbitrated agreement only when the agreement does not meet the requirements of § 251, the FCC regulations adopted pursuant to § 251, or the pricing standards in § 252(d).

7. U S WEST, pursuant to § 251 of the 1996 Act, has a duty to provide interconnection on rates, terms and conditions that are just, reasonable, and nondiscriminatory. U S WEST has complied with this duty by offering MWI the same rates, terms and conditions that it offers to Western Wireless as a result of both negotiation and arbitration. Therefore, the nondiscrimination requirement of Section 252(e)(2)(A)(i) has been met.

8. Our review of the Wireless Agreement is thus narrowed to making the determination as to whether the agreement is consistent with the public interest, convenience and necessity, according to § 252(e)(2)(A)(ii) of the Act. In a sense, the standard for approval of an arbitrated

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<sup>2</sup> Comment Cellular, Inc. also adopted the Western Wireless/U S WEST wireless interconnection agreement. The Commission approved that agreement in In the Matter of the Application of U S WEST and Comment Cellular, Inc., Docket No. D97.4.64, Order No. 5996 (August 14, 1997).

agreement is more restrictive than for a negotiated agreement. For example, parties can negotiate an agreement without regard to the standards in Section 251(b) and Section 251(c), which include obligations for all local exchange carriers and additional obligations of incumbent local exchange carriers, respectively. However, these duties that are required in connection with approval of an arbitrated agreement contain elements which directly affect the public interest. As an example, the requirement to provide number portability according to the FCC's rules not only affects the new competitor by removing a possible barrier to competition, but also the end user customer who may switch providers without having to change his or her telephone number. *See* 47 U.S.C. § 251(b)(2).

9. Consistency with the public interest, convenience and necessity is supported by our prior findings in Western Wireless and in Comment Cellular that the identical agreement has met the requirements of § 251, the FCC regulations adopted pursuant to § 251, and the pricing standards in § 252(d). Another indicator of this consistency is the fact that the Commission received no comments in response to the notice issued in this proceeding and no requests for intervention or a hearing. These two factors, combined with our independent review of the agreement with the public interest, convenience and necessity in mind, support a conclusion that the Wireless Agreement should be approved.<sup>3</sup>

#### b. The Wireline Agreement

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<sup>3</sup> The corrections required by the Commission in the Western Wireless approval order, Order No. 5949c, Docket No. D96.9.150, do not affect this interconnection agreement.

10. The parties executed an interconnection agreement for wireline services on August 19, 1997. The terms and conditions agreed to by the parties in the Wireline Agreement are based, in large part, on this Commission's determinations in the AT&T arbitration proceeding, Docket No. D96.11.200.<sup>4</sup> Specifically, the resale discount and wholesale pricing for unbundled network elements adopted by the Commission in that docket have been incorporated by the parties in their interconnection agreement. These terms and conditions will be available to other telecommunication providers in Montana.

11. Notwithstanding the limited grounds for rejection in 47 U.S.C. § 252(e)(2)(A), the state commission's authority is preserved in § 252 (e)(3) to establish or enforce requirements of state law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Although state law requirements apply to interconnection agreements, § 253 of the 1996 Act does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

12. As we have stated, a voluntarily negotiated agreement--unlike an agreement reached through arbitration--need not comply with standards set forth in § 251(b) and (c). 47 U.S.C. §§ 251(b), 252(c) and 252(a)(1) permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in § 252(c) of the Act, as would

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<sup>4</sup>See In the Matter of The Petition of AT&T Communications of the Mountain States, Inc. Pursuant to 47 U.S.C. Section 252(b) for Arbitration of Rates, Terms, and Conditions of Interconnection With U S WEST Communications, Inc., Docket No. D96.11.200, Order No. 5961b (March 20, 1997) and Order No. 5961c (July 9, 1997).

be required in the case of an agreement that includes arbitrated terms determined by the Commission. By approving the Wireline Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of most of the terms and conditions. Our interpretation of the 1996 Act is that §§ 252(a) and (e) prevent the Commission from addressing such issues in this proceeding.

13. MWI's entry into competitive wireline service is consistent with the public interest, convenience and necessity in furtherance of the goals of the 1996 Act to promote full, fair and open competition. An indicator of the Wireline Agreement's consistency with the public interest, convenience, and consistency is the fact that the Commission received no comments in response to the notice issued in this proceeding and no request for intervention or a hearing. The Montana Consumer Counsel, who represents the consumers of the State of Montana, has not intervened or filed comments to indicate that he believes that the Agreement is not consistent with the public interest, convenience and necessity. No other telecommunications carrier has filed comments to indicate that the Agreement is discriminatory toward a carrier not a party to the Agreement.

14. With the exception of particular sections of the Agreement as specifically discussed below, the Commission finds that the parties' Wireline Agreement appears to conform to the standards required by the Act. In approving the Agreement, the Commission is guided by provisions in federal and state law which have been enacted to encourage the development of competitive telecommunications markets. Section 69-3-802, MCA, for example, states that it is

the policy of the State of Montana to encourage competition in the telecommunications industry and to provide for an orderly transition to a competitive market environment.

The Commission rejects the following terms:

15. Dispute Resolution - Section 26.18.2 sets forth the parties' agreement pertaining to resolution of claims, controversies or other disputes which cannot be settled through negotiation. It provides that such disputes be resolved by arbitration conducted by a single arbitrator, who is an attorney, under the rules of the American Arbitration Association, and that the arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. While the parties are free to provide for dispute resolution in this manner according to the 1996 Act, the resolution arrived at by the arbitrator may not be consistent with the public interest, convenience and necessity. The Commission concludes that this contract provision should be rejected because it does not provide for notification to the Commission of issues to be arbitrated or of the subsequent decision reached by the arbitrator. The public interest and the facilitation of market entry is better served by such notification. The parties may amend this section of the Wireline Agreement to include this language.

16. Payment - Section 11.10 sets forth in detail the provisions for payment to U S WEST by MWI. It provides for suspension of the provision during the initial three months of the Agreement and for three billing cycles. According to § 11.10.5, MWI's payment to U S WEST, if not made pursuant to the terms of this section, could place the MWI's end user customers' services in jeopardy of being disconnected through no fault on their part.

17. This section contains no provision for notification to the Commission of a pending disconnection of service to an indeterminable number of end users. U S WEST must

follow certain Commission rules prior to terminating service to its own end users--as must MWI.

If notified of a pending termination of service to MWI's customers, the Commission can act appropriately. It is not consistent with the public interest to permit U S WEST to terminate service to MWI's end users with no notification to the Commission. The Commission rejects § 11.10.5 of the parties' Wireline Agreement. The parties may amend this section of the Wireline Agreement to include a notification provision that allows for a reasonable notification to the Commission that will afford the Commission time in which to take any appropriate action to protect end users.

18. Construction - Section 11.5.7 of the Wireline Agreement (p. 62) states:

Resold services are available only where facilities currently exist and are capable of providing such services without construction of additional facilities or enhancement of existing facilities. However, if MWI requests that facilities be constructed or enhanced to provide resold services, USWC will review such requests on a case-by-case basis and determine, in its sole discretion, if it is economically feasible for USWC to build or enhance facilities. If USWC decides to build or enhance the requested facilities, USWC will develop and provide to MWI a price quote for the construction. If the quote is accepted, MWI will be billed the quoted price and construction will commence after receipt of payment."

The Commission finds that this provision could conflict with the public interest and should be rejected. There may be circumstances which arise where U S WEST is required by law to construct facilities. The parties may agree to the terms in Section 11.5.7 for instances where U S WEST is required to construct facilities, but the Commission rejects this section as presently written because it does not consider such instances. The parties may amend this section of the Wireline Agreement to so provide.

19. Regulatory Approval -- The first sentence in § 26.31 (p. 89) states: "The Parties understand and agree that this Agreement will be filed with the Commission and may thereafter

be filed with the FCC and shall, at all times, be subject to review by the Commission or the FCC." (Emphasis added.) The 1996 Act provides for review by state commissions only. *See* 47 U.S.C. § 252. Although the FCC concocted an interpretation of the Act by which it intended to establish a federal review process under its § 208 complaint process, this interpretation was invalidated by the Court in Iowa Utils. Bd. v. FCC, 120 F.3d 753, 803-04 (8th Cir. 1997). These are intrastate telecommunications matters under the exclusive review of state commissions. Id., at 804. As such, the inclusion of the FCC is not appropriate and, therefore, the Commission rejects this provision.

### **III. Conclusions of Law**

1. The Commission has authority to supervise, regulate, and control public utilities. *See* § 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunication services in the State of Montana and MWI will be regulated when it provides the same. *See* § 69-3-101, MCA.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. *See* § 69-3-103, MCA.

3. The Commission has jurisdiction to approve or reject the interconnection agreements (or portions thereof) negotiated between MWI and U S WEST and submitted to the Commission according to the standards set forth in 47 U.S. § 252(e)(2)(A). Section 69-3-103, MCA.

4. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the State, to be handled by the State agency with regulatory control over telecommunication carriers. *See, generally*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending scattered sections of the Communications Act of 1934, 47 U.S.C. §§ 151, et seq.). The Montana Public Service Commission is the State agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this docket pursuant to Title 69, Chapter 3, MCA.

5. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

6. Section 252(e)(4) of the 1996 Act provides that negotiated agreements submitted for a state commission's approval must be approved or rejected within ninety (90) days or they will be deemed approved. Thus, Commission approval or rejection according to the standards set forth in the 1996 Act must issue by December 10, 1997, 90 days following submission of the MWI/U S WEST Agreements for Commission approval.

7. The Commission must approve these interconnection Agreements pursuant to the requirements of federal law set forth in 47 U.S.C. § 252. Section 252(e) limits the Commission's review of negotiated agreements to the standards set forth therein for rejection of such agreements.

#### **IV. Order**

THEREFORE, based upon the foregoing, it is ORDERED that both the Wireless Interconnection Agreement and the Wireline Interconnection Agreement between U S WEST Communications, Inc. and Montana Wireless, Inc. are approved as discussed herein, subject to the following conditions:

1. Within 14 days of service of this order the parties may file an amendment to the Wireline Agreement consistent with the Commission's decision in this proceeding.
2. The parties shall file subsequent amendments to their Agreement with the Commission for approval pursuant to the 1996 Act.

DONE AND DATED this 24th day of November, 1997, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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DAVE FISHER, Chairman

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NANCY MCCAFFREE, Vice Chair

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BOB ANDERSON, Commissioner

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DANNY OBERG, Commissioner

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BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.