

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

IN THE MATTER OF the Application of)
U S WEST Communications, Inc. and) DOCKET NO. D99.2.37
CCCMT, Inc. d/b/a Connect! for Montana)
Pursuant to Section 252(e) of the) ORDER NO. 6163
Telecommunications Act of 1996 for Approval)
of their Interconnection Agreement)

FINAL ORDER APPROVING INTERCONNECTION AGREEMENT

I. Introduction and Procedural Background

1. On February 8, 1996, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act") was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to the local exchange telecommunications markets. The 1996 Act requires companies like U S WEST Communications, Inc. (U S WEST) to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. § §251(c) and 252(a).

2. U S WEST and CCCMT, Inc. d/b/a Connect! for Montana (Connect) negotiated an interconnection contract after Connect requested contract negotiations. The agreement is entitled □Interconnection Agreement Between U S West Communications, Inc. and CCCMT, Inc. dba CONNECT "for Montana" (Agreement).

3. Connect submitted the interconnection agreement to the Montana Public Service Commission (Commission) for approval on February 17, 1999, along with Amendment No. 1 to the Agreement. The Agreement was reached through voluntary negotiations and requires Commission approval prior to implementation pursuant to 47 U.S.C. § 252(e). The Commission

must approve or reject the Agreement no later than May 18, 1999, 90 days following the request for approval, or it will be deemed approved. 47 U.S.C. § 252(e)(4).

4. On February 22, 1999, the Commission issued a Notice of Application for Approval of Interconnection Agreement and Opportunity to Intervene and Comment. The Notice established March 7, 1999 as the deadline for intervention and limited intervenors to addressing the grounds for Commission action identified in Section 252(e)(2)(A) of the Act. The Notice stated that no public hearing was contemplated by the Commission unless requested by an interested party by March 7, 1999. The Notice further stated that comments were required to be filed no later than March 18, 1999. The Commission's public notice also advised interested parties in the geographic areas affected by the Agreement that intervention in the proceeding was limited and that the Montana Consumer Counsel (MCC) could be contacted to represent consumer interests.

5. Rather than negotiate a separate interconnection agreement with U S WEST, Connect elected to opt into the wireline Interconnection Agreement between Montana Wireless, Inc. (Montana Wireless) and U S WEST that was approved by the Commission on December 1, 1997. *See* Order No. 6031, Docket No. D97.9.168. Under the Agreement, Connect will resell U S West's services. In their application Connect and U S West assert that approval of the Agreement will "foster competition and consumer choice in Montana." Additionally, they state that the Agreement is in conformance with past decisions of the Commission, is in the public interest, and does not discriminate against other telecommunications carriers. Upon review of the Agreement, the Commission makes the following findings, conclusions and order.

II. Applicable Law and Commission Decision

6. The Interconnection Agreement between U S WEST and Connect provides for, *inter alia*, interconnection by means of collocation, entrance facilities or meet point arrangements; the exchange of traffic between U S WEST and Connect; compensation for transportation and termination of such traffic; the purchase of U S WEST's retail services for resale; the acquisition of unbundled network elements from U S WEST; Connect customer access to operator assistance, directory assistance and E911 service; access to operational support systems and myriad other arrangements necessary for Connect's provision of competitive local exchange services in Montana.

7. Connect has elected to opt into the Montana Wireless/U S WEST wireline Interconnection Agreement, which the Commission approved on December 1, 1997, and amended on January 13, 1998. In Order No. 6031, Docket No. D97.9.168, the Commission approved, subject to conditions, the Wireline Agreement between Montana Wireless and U S WEST. The conditions were that the parties could file an amendment to the Agreement correcting certain deficiencies identified by the Commission in the Order, and that subsequent amendments would be submitted to the Commission for approval. In Order No. 6031a, Docket No. D97.9.168, the Commission approved in part Amendment No. 1 to the U S WEST/Montana Wireless Agreement, which corrected in part the deficiencies identified in Order No. 6031.

8. The Commission must approve or reject the parties' Agreement, with written findings as to any deficiencies, no later than May 18, 1999. 47 U.S.C. . 252(e)(1) and (4). Section 252(e)(2)(A) limits the grounds for rejection of an agreement reached by voluntary 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.

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

10. Unlike an agreement reached by arbitration, a voluntarily negotiated agreement need not comply with standards set forth in Section 251(b) and (c). Significantly, standards set forth in § 251(c) and which this Agreement may have been negotiated "without regard to" include the following:

(c) **ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS.** --In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(2) **INTERCONNECTION.**--The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carriers' network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or any other party to which the carrier provides interconnection; and

(D) on rates, terms and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

47 U.S.C. § 251(c). This section and § 252(a)(1) of the Act 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 be required in the case of arbitrated rates set by the Commission. By approving the 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 many of the terms and conditions. Our interpretation of the 1996 Act is that . . . 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

11. When parties execute an interconnection agreement and one or both parties submit it to the Commission for approval, the Commission must approve or reject it (in whole or in part) according to the standards in . . . 252 of the 1996 Act--to determine if it discriminates against a carrier not a party to the agreement or is inconsistent with the public interest, convenience and necessity. The Commission can reject portions of the agreement, but it cannot require additional provisions. If the Commission does not act within 90 days of submission to approve or reject the Agreement, the Agreement will go into effect as is on May 18, 1999, and be deemed approved.

12. The Commission finds that the terms in the parties' Agreement, as amended in Amendment No. 1, appear to conform to the standards required by the 1996 Act, with the

exception of the contract provisions described, discussed and rejected below. The terms are the same as those terms in the Montana Wireless/U S WEST Agreement, which the Commission approved on December 1, 1997.

13. Section 11.5.7 (Construction), in the Agreement and as amended, is not approved and is not a part of the Agreement. The Commission discussed this section in Order No. 6031, paragraph 18, Docket No. D97.9.168 (U S WEST/Montana Wireless).¹ In response to that discussion the parties submitted an "Amendment" that in fact did not amend § 11.5.7. The Commission addressed this in Order No. 6031a, paragraph 3.² The parties to this Docket have done exactly the same thing, they have submitted an amendment that does not amend, and for that reason § 11.5.7 is rejected.

¹ 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 [Montana Wireless, Inc.] 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.

² 3. Construction – Amendment No. 1 does not contain an amended § 11.5.7. It simply states that the Commission did not approve § 11.5.7 and that the Commission opined that, "There may be circumstances which arise where U S WEST is required by law to construct facilities." Section 11.5.7 remains stricken from the Wireline Agreement.

14. The amendment to § 11.10.5 (Payment) is approved with the same comments and qualifications contained at Order No. 6031a, paragraph 4.³ U S WEST must notify the Commission immediately if it initiates action pursuant to this section.

15. Section 26.18.2 (Dispute Resolution) was addressed in Order No. 6031, Docket No. D97.9.168, paragraph 15.⁴ The parties to that Docket amended the section and the amendment was addressed in Order No. 6031a, paragraph 5.⁵ Section 26.18.2 of the Agreement, as amended, is approved consistent with Order Nos. 6031 and 6031a.

16. Regarding § 26.31 (Regulatory Approval), the subject of Agreement amendment 4, the Commission wrote the following:

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.

³ 4. Payment – Amendment No. 1, as proposed by the parties, adds the following sentence at the end of § 11.10.5: "It is understood that U S WEST will provide the Commission with a duplicate copy of any notice of disconnection of all or substantially all of MWI's services provided under this Section 11." This is a somewhat anemic revision to the Wireline Agreement. It is not what the Commission contemplated when it rejected the provision and it does not fully address the concerns that the Commission identified in Order No. 6031. The Commission approves § 11.10.5 with this revision, but will independently require U S WEST to notify the Commission immediately if it initiates action pursuant to this section.

⁴ 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 [in]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.

⁵ 5. Dispute Resolution – The parties have amended § 26.18.2 to add the following to the end of the clause: "The Parties agree to promptly notify the Commission at the commencement of any arbitration regarding the issues to be arbitrated, and to promptly notify the Commission of any decision issued by an arbitrator pursuant to the terms of the Agreement." The Commission concludes that this amendment adequately addresses the concerns voiced in Order No. 6031 and should be approved.

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.

Order No. 6031, Docket No. D97.9.168, paragraph 19.

The Commission notes that the decision of the Court of Appeals in Iowa Utilities Board v. FCC, referred to in Order No. 6031, paragraph 19, was reversed as not ripe in AT&T v. Iowa Utilities Board, ___ U.S. ___ (1999). The Commission reasserts its interpretation of the 1996 Act, expressed at Order No. 6031, paragraph 19. The amendment to § 26.31 is not inconsistent with that interpretation, and is approved.

17. The Commission notes that it would be far easier if in the future U S WEST could file agreements that contain, in the body of the agreements, the changes that have been required previously. It is awkward to be presented with an agreement and an amendment, before the agreement has been approved. Once a contract provision is rejected, and the reasons for the rejection are explained, the provision should not be included in future agreements. This will lessen the need for further amendments to the agreements and will expedite resellers market entry.

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 Connect 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 Connect 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 states, to be handled by the state agencies 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 May 18, 1999, 90 days following submission of the Connect/U S WEST Agreements for Commission approval.

7. The Commission must approve this interconnection Agreement 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 the Interconnection Agreement between U S WEST and Connect, and Amendment No. 1 to that Agreement, are approved and rejected 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 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.
3. The Commission approves Amendment No. 1 to the Agreement by incorporating and adopting by reference its Order No. 6031a, Docket No. D97.9.168, where the Commission approved, with qualifications, Amendment No. 1 to the Agreement between U S WEST and Montana Wireless.

DONE AND DATED this 4th day of May, 1999, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

GARY FELAND, Commissioner

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.