Minnesota Public Utilities Commission

Staff Briefing Paper

Meeting Date: November 24, 2014..... ** Agenda Item # 4

Companies: CenturyLink Communications, CenturyTel of Minnesota, Embarq Minnesota & Integra Telecom of Minnesota

Docket Nos. Docket No. P5643, 551/IC-14-778
In the Matter of the Joint Application for Approval of an Interim Interconnection Agreement for the State of Minnesota by and between CenturyTel of Minnesota, Inc. d/b/a CenturyLink and Integra Telecom of Minnesota, Inc.

Docket No. P5643, 430/IC-14-779
In the Matter of the Joint Application for Approval of an Interim Interconnection Agreement for the State of Minnesota by and between Embarq Minnesota, Inc. d/b/a CenturyLink and Integra Telecom of Minnesota, Inc.

Docket No. P5096, 551/IC-14-794
In the Matter of the Joint Application for Approval of an Interconnection Agreement for the State of Minnesota by and between CenturyTel of Minnesota, Inc. d/b/a CenturyLink and CenturyLink Communications, LLC

Issue: **Should the Commission approve or reject the proposed Interconnection Agreements (ICAs)?**

Staff: Kevin O'Grady.....651-201-2218

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Main Issue

Should the Commission approve or reject the proposed Interconnection Agreements (ICAs)? Note that the same issue regarding jurisdiction over disputes arises in all three ICAs.

Relevant Documents

CenturyTel/Integra Proposed ICA (14-778) ..... September 12, 2014
DOC Comments (14-778) ..... September 22, 2014
DOC Supplemental Comments (14-778) ..... October 24, 2014
OAG Reply Comments (14-778) ..... October 28, 2014

Embarq/Integra Proposed ICA (14-779) ..... September 12, 2014
DOC Comments (14-779) ..... September 22, 2014
DOC Supplemental Comments (14-779) ..... October 24, 2014
OAG Reply Comments (14-779) ..... October 28, 2014

CenturyTel/CenturyLink Proposed ICA (14-794) ..... September 24, 2014
DOC Comments (14-794) ..... September 26, 2014
DOC Supplemental Comments (14-794) ..... October 24, 2014
OAG Reply Comments (14-794) ..... October 28, 2014

US WEST v. MN PUC (see Attachment A) ..... March 30, 1999

Background

On September 12, 2014, petitions for approval of two interconnection agreements (ICAs) were filed in Dockets 14-778 and 14-779.

On September 22, 2015, the Minnesota Department of Commerce (DOC) filed comments recommending approval of the petitions in Dockets 14-778 and 14-779.

On September 24, 2014, a third petition for approval of an ICA was filed in Docket 14-794.

On September 26, 2014, DOC filed comments recommending approval in Docket 14-794.

On October 24, 2014, DOC filed supplemental comments modifying its position to recommend rejection of all three proposed ICAs. That recommendation was based on objection to language common to all three agreements.

On October 28, 2014, the Minnesota Office of the Attorney General – Antitrust and Utilities Division (OAG) filed comments recommending rejection of all three agreements.

Decision Criteria

The Telecommunications Act of 1996, § 252(e)(1), states that:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

And § 252(e)(4) states, in part:

> If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation … the agreement shall be deemed approved.

The 90-day deadline for Dockets 14-778 and 14-779 is December 11, 2014. The 90-day deadline for Docket 14-794 is December 23, 2014.

With respect to the Commission's decision criteria § 252(e)(2) states, in part:

> The State commission may only reject … an agreement (or any portion thereof) adopted by negotiation … 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 …

Objections to the ICAs

DOC Objection

DOC's recommendation of rejection focuses on two clauses in the ICAs. They are:

9.3 Choice of Law and Venue. This Agreement shall be governed by and construed in accordance with the Act, applicable federal and (to the extent not inconsistent therewith) domestic laws of the State where the services are being provided, and **shall be subject to the exclusive jurisdiction of the State or of the federal courts of Monroe, Louisiana**.[1] In all cases, choice of law shall be determined without regard to a local State's conflicts of law provisions. [emphasis added]

And,

16.2.4 If the Parties are unable to resolve the dispute within sixty (60) Days after delivery of the initial notice of the dispute, then either Party may file a petition or complaint **with any court, commission or agency of competent jurisdiction** seeking resolution of the dispute. The petition or complaint shall include a statement that both Parties have agreed (by virtue of this stipulation) to request an expedited resolution within sixty (60) Days from the date on which the petition or complaint was filed, or within such shorter time as may be appropriate for any Service Affecting dispute. [emphasis added]

DOC believes the provision in Section 9.3, which purports to remove the Commission's jurisdiction over the agreements, and afford "exclusive jurisdiction" instead to courts of Louisiana, is not likely to encourage competition in Minnesota or to be in the public interest. At best, the agreements are ambiguous because the "exclusive jurisdiction" of the "courts of Louisiana" provision of Section 9.3 is inconsistent with Section 16.2.4, which affords jurisdiction of disputes to courts, agencies and commissions with "competent jurisdiction."

[1] Section 9.3 in dockets 14-778 and 14-779 refers to Monroe, Louisiana. Section 9.3 in docket 14-794 refers to Monroe, Texas. DOC notes that CenturyLink has confirmed that the 14-794 language should refer to Louisiana, not to Texas. [p.3, footnote 4, DOC Comments, October 24, 2014]

DOC argues the ICAs are contrary to the public interest:

> By selecting a venue in Louisiana, CenturyLink may achieve selection of law, rendering dispute resolution lengthy, cumbersome, duplicative and unduly complicated.
>
> If Louisiana courts are given "exclusive" jurisdiction it is highly unlikely that the Minnesota public agencies or other Minnesota carriers or consumers would seek to intervene or participate in matters affecting the public interest in Minnesota.
>
> The surrender of primary jurisdiction by the Commission could have far-reaching and unintended consequences. The Dispute Resolution section of the agreements is unacceptable because it purports to share Commission jurisdiction over disputes arising under Commission-approved agreements to agencies other than the Commission. Normally, the FCC, not foreign courts, acquire this authority if the State fails to exercise it.
>
> DOC does not believe that the negotiation of an ICA is always a negotiation between equals. In certain cases it has been very difficult and costly for a Competitive Local Exchange Carrier (CLEC) to make any changes to an agreement. A Minnesota CLEC may be forced to accept dispute resolution language that puts the CLEC at a disadvantage if CenturyLink selects Louisiana as the venue.

DOC argues that there is precedent for addressing these issues. In Docket 06-1452 the Commission agreed with DOC's analysis that similar provisions in which venue and jurisdiction were established outside Minnesota were contrary to the public interest.

DOC recommends that the following provisions replace and supplement the existing provisions of the three agreements:

> 9.3 Choice of Law and Venue. This Agreement shall be governed by and construed in accordance with the Act, applicable federal and (to the extent not inconsistent therewith) domestic laws of the State where the services are being provided, and shall be subject to the exclusive jurisdiction of the State or of the federal courts of Minnesota.
>
> 16.2.4 If the Parties are unable to resolve the dispute within sixty (60) Days after delivery of the initial notice of the dispute, then either Party may file a petition or complaint with the Federal Communications Commission or the state Public Utilities Commission where the action falls within those jurisdictions.

16.2.4.1 Any action not within the jurisdiction of the Federal Communications Commission or the state Public Utilities Commission will be brought in either a federal or state court in the State in which this Agreement has been filed with a public utility commission, or in a forum to which both parties have agreed. The Parties agree that such courts have personal jurisdiction over them. The agreement shall not prohibit either party from litigating, including appealing, any dispute before the Minnesota Commission or before a state or federal court located in Minnesota.

16.2.4.2 The petition or complaint shall include a statement that both Parties have agreed (by virtue of this stipulation) to request an expedited resolution within sixty (60) Days from the date on which the petition or complaint was filed, or within such shorter time as may be appropriate for any Service Affecting dispute.

16.2.8 The Parties agree to give notice to the Commission of any law suits, or other proceeding that involve or arise under the Agreement to ensure that the Commission has the opportunity to seek to intervene in the proceeding on behalf of the public interest. Any final or binding order resulting from a dispute resolved under the procedures of section 16.2.4.1 may be entered in any court having jurisdiction thereof. The Parties shall submit a copy of each such order to the Commission, the Department Commerce, and the Office of Attorney General, Residential and Small Business Utilities Division for the purpose of determining any filing and or review obligation under federal or state law.

DOC further recommends that the Commission expedite the process of approving revised agreements that conforms to the Commission's decision. This may include delegating authority to the Executive Secretary to examine any revisions filed by the Parties, confirming that the deficiencies have been corrected as recommended, and issuing a letter to the Parties approving the revised agreements as of the date of filing.

OAG Objection

OAG generally agrees with the DOC analysis on these matters and joins in the DOC recommendation that the agreements in each docket, as currently written, be rejected.

Signatories to the ICAs

The signatories to the ICAs did not file comments.

Staff Analysis

The Act dictates that a state commission "shall approve or reject the agreement, with written findings as to any deficiencies." [§ 252(e)(1)] And the Commission " may only reject … an agreement (or any portion thereof) adopted by negotiation … 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 …[§ 252(e)(2)]

If the Commission determines that it is not in the public interest of Minnesota's consumers to cede jurisdiction over ICA disputes to the courts of Louisiana it must reject the agreements. The parties to the agreements may then choose to (or choose not to) approach the Commission with another contract. The Commission's "written findings as to any deficiencies" can provide guidance to the negotiating parties.

Jurisdiction

Staff is in agreement with DOC and OAG that it is not in the public interest of Minnesota's consumers to cede jurisdiction over ICA disputes to the courts of Louisiana. Although there are myriad ways of crafting contract language to retain Minnesota authority, the language offered by DOC is not unreasonable. Staff, however, suggests that the language proposed by DOC in Section 16.2.8 be modified to refer to the "Antitrust and Utilities Division" as opposed to the "Residential and Small Business Utilities Division."

Previous ICAs

It is important to note that the Commission has approved at least one ICA in the past that includes language granting jurisdiction over disputes to the courts of Louisiana (specifically, in Docket 14-194, approved June 13, 2014). And it is of at least equal importance to note that Commission approval of contract terms at one point in time does not prevent the Commission from rejecting identical terms at another point in time.

On March 17, 1997, the Commission approved an ICA between MFS and US WEST (Docket 96-729). On April 4, 1997, US WEST and OCI sought approval to adopt, in entirety, (opt into) the MFS/US WEST agreement pursuant to § 252(i) of the Act (Docket 97-522). On May 21, 1997, US WEST and KMC also sought approval to opt into the MFS/US WEST agreement (Docket 97-850). The Commission rejected the two requests to adopt terms identical to those of the MFS/US WEST contract and recommended modifications that could cure deficiencies in the contracts. In both cases the parties submitted modifications to the contract terms, and the modified agreements were subsequently approved.

On August 21, 1997, US WEST filed a complaint with the US District Court, Minnesota District, arguing that the Commission exceeded its authority by rejecting contract terms of the two opt-in agreements the Commission had previously approved in the form of the MFS/US WEST agreement.[2] The Court's decision may be instructive (see Attachment A). It rejected US WEST's arguments stating:

> In evaluating negotiated agreements, state commissions are permitted by the Act to reject a negotiated agreement if it discriminates against a third-party telecommunication carrier or if it is not consistent with the public interest, convenience, and necessity. These are the only directives given by the Act concerning a state commission's evaluation of negotiated agreements. If Congress had wanted to further limit a state commission's ability to approve adopted agreements, it could have said so in clear language. It chose not to do so. There is no requirement in the Act, either explicit or implicit, that a state commission must approve an agreement or portion of an agreement that is identical to one previously approved. [p. 13]

And,

> A state commission has the statutory latitude to determine, upon reflection and perhaps more evidence, that a previously approved provision of an agreement is actually contrary to the public interest. [p. 13]

And,

> Therefore, it is not inherently arbitrary and capricious for the MPUC, whose membership changes over time, to decide that a provision protects the public interest at one point and then later determine that it does not. A commission

[2] *US WEST Communications v. MN PUC*. Memorandum Opinion and Order; File No. 97-CV-1921; US District Court, District of Minnesota, March 30, 1999.

> should weigh the previous approval in its contemplations, and the evidence here does suggest that the MPUC was aware that identical provisions had already been approved. However, the fact of prior approval alone does not bind a state commission to its previous decision. If a certain latitude were not allowed, the MPUC would be forever precluded from correcting past omissions or errors even though it now believes them to be contrary to the public interest. [p. 14]

Expedited Approval Process

If the Commission rejects the agreements the parties may choose to approach the Commission with modified contracts incorporating the modified language suggested by the Commission. DOC recommends that the Commission expedite the process of approving a revised agreement that conforms to the Commission's decision. This may include delegating authority to the Executive Secretary to examine any revisions filed by the Parties, to confirm that the deficiencies have been corrected as recommended, and to issue a letter to the Parties approving the revised agreement as of the date of filing.

Staff does not have a strong objection to this DOC recommendation. However, Staff believes that the filing of modified agreements may better be processed like any other filing. The parties may choose to file language identical to that which the Commission recommends. In this case the task of the Executive Secretary would be relatively simple. However, the parties may choose to craft different language that could also, potentially, meet the Commission's approval. In this case the task of the Executive Secretary could become more difficult. Here, it may be appropriate to refer the matter back to the Commission. Currently, the Commission relies on its "consent calendar" as a way of expeditiously handling the vast majority of ICAs. This process requires relatively few resources and can be accomplished in a relatively short time.

Commission Options re: Contract Terms

Note: The Commission should recognize that its decision will affect three different contracts. If there is any reason to distinguish one contract from the others the Commission should address three separate motions. At the time of the writing of this Briefing Paper Staff is unaware of any difference between the contracts in terms of the issues or the arguments of the parties.

A.1 Approve the ICAs as filed.

A.2 Reject the ICAs as not in the public interest. Find that the deficiencies can be remedied by (i) deleting the provisions in Section 9.3, 16.2.4, and 16.28 and (ii) by replacing the deleted language with the following provisions:

9.3 Choice of Law and Venue. This Agreement shall be governed by and construed in accordance with the Act, applicable federal and (to the extent not inconsistent therewith) domestic laws of the State where the services are being provided, and shall be subject to the exclusive jurisdiction of the State or of the federal courts of Minnesota.

16.2.4 If the Parties are unable to resolve the dispute within sixty (60) Days after delivery of the initial notice of the dispute, then either Party may file a petition or complaint with the Federal Communications Commission or the state Public Utilities Commission where the action falls within those jurisdictions.

16.2.4.1 Any action not within the jurisdiction of the Federal Communications Commission or the state Public Utilities Commission will be brought in either a federal or state court in the State in which this Agreement has been filed with a public utility commission, or in a forum to which both parties have agreed. The Parties agree that such courts have personal jurisdiction over them. The agreement shall not prohibit either party from litigating, including appealing, any dispute before the Minnesota Commission or before a state or federal court located in Minnesota.

16.2.4.2 The petition or complaint shall include a statement that both Parties have agreed (by virtue of this stipulation) to request an expedited resolution within sixty (60) Days from the date on which the petition or complaint was filed, or within such shorter time as may be appropriate for any Service Affecting dispute.

16.2.8 The Parties agree to give notice to the Commission of any law suits, or other proceeding that involve or arise under the Agreement to ensure that the Commission has the opportunity to seek to intervene in the proceeding on behalf of the public interest. Any final or binding order resulting from a dispute resolved under the procedures of section 16.2.4.1 may be entered in any court having jurisdiction thereof. The Parties shall submit a copy of each such order to the Commission, the Department <u>of</u> Commerce, and the Office of <u>the</u> Attorney General, ~~Residential and Small Business~~ <u>Antitrust and</u> Utilities Division for the

purpose of determining any filing and or review obligation under federal or state law.

A.3 Take other action.

Staff recommends option A.2.

Commission Options re: Expedited Approval

Note: To the extent the Commission rejects one or more of the contracts it should make a decision as to the proposed expedited approval process – for each of the rejected contracts. If the Commission approves the contracts as filed it need not address the options below.

B.1 Take no action to modify the review process.

B.2 In the event the parties file revised contract language within two weeks of the order rejecting the contracts, grant the Executive Secretary authority to review the modified agreements, to approve the modified agreements should the Executive Secretary determine that the modified contract language remedies the deficiencies identified by the Commission, and to issue a letter indicating approval of the terms as of the date of the filing of the modified terms.

Staff recommends option B.1.

ATTACHMENT A

U S WEST v. MN PUC
Memorandum Opinion and Order
U.S. District Court, District of Minnesota
File No. 97-CV-1921 ADM/AJB
March 30, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

US West Communications, Inc.,
a Colorado Corporation,

Plaintiff,

vs.

Edward A. Garvey, Chairman;
Joel Jacobs, Commissioner;
Marshall Johnson, Commissioner, and
Don Storm, Commissioner (all in their
Official Capacity as Commissioners of
the Minnesota Public Utilities Commission);

Minnesota Public Utilities Commission;

OCI Communications of Minnesota, Inc.; and

KMC Telecom, Inc.,

Defendants.

File No. 97-CV-1921 ADM/AJB

MEMORANDUM OPINION AND ORDER

Geoffrey P. Jarpe and Martha J. Keon, Maun & Simon, PLC; Kevin J. Saville, US West Communications, Inc.; and Wendy M. Moser, Norton C. Cutler, and Blair A. Rosenthal, US West, Inc., for Plaintiff US West Communications, Inc.

Dennis D. Ahlers and Megan J. Hertzler, Assistant Attorneys General, for Defendants MPUC and the Commissioners.

Mark A. Jacobson, Lindquist & Vennum; and Ky E. Kirby and Morton J. Posner, Swidler, Berlin, Shereff, Friedman, LLP, for Defendant KMC Telecom, Inc.

Plaintiff US West Communications, Inc., ("US West"), brought this action pursuant to the Telecommunications Act of 1996 ("the Telecommunications Act" or "the Act"), 47 U.S.C.

§ 252(e)(6), seeking judicial review of determinations made by the Minnesota Public Utilities Commission ("MPUC"). US West has named the individual commissioners of the MPUC as Defendants. For purposes of this order, the individual commissioners and the MPUC, itself, will be referred to collectively as the MPUC.

The above-captioned case is one of eight cases involving review of determinations made by the MPUC presently before this Court. On December 10, 1997, this Court issued an Order in US WEST Communications, Inc. v. Garvey, No. 97-913 ADM/AJB, slip op. at 3 (D.Minn. Dec. 10, 1997), determining the scope of review for cases brought pursuant to § 252(e)(6). The Court found the scope of review limited to an appellate review of the record established before the MPUC. Id. On May 1, 1998, the Court filed an Order addressing the standard of review in the eight Telecommunications Act cases. AT&T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998). Questions of law will be subject to *de novo* review while questions of fact and mixed questions of fact and law will be subject to the arbitrary and capricious standard. Id. at 11-13.

I. BACKGROUND

Before 1996, local telephone companies, such as US West, enjoyed a regulated monopoly in the provision of local telephone services to business and residential customers within their designated service areas. AT&T Communications of the Southern States v. BellSouth Telecomms., Inc., 7 F.Supp.2d 661, 663 (E.D.N.C. 1998). In exchange for legislative approval of this scheme, the local monopolies ensured universal telephone service. Id. During this monopolistic period, the local telephone companies constructed extensive telephone networks in their service areas. Id.

Congress passed the Telecommunications Act of 1996, in part, to end the monopoly of local telephone markets and to foster competition in those markets. Iowa Utils. Bd. v. FCC, 120 F.3d 753, 791 (1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S.Ct. 721 (1999) ; GTE North, Inc. v. McCarty, 978 F.Supp. 827, 831 (citing Joint Explanatory Statement of the Committee of Conference, H.R.Rep. No. 104-458, at 113 (1996)). Because the local monopolies, or incumbent local exchange carriers ("ILECs" or "incumbent LECs"), had become so entrenched over time through their construction of extensive facilities, Congress opted "not to simply issue a proclamation opening the markets," but rather constructed a detailed regulatory scheme to enable new competitors to enter the local telephone market on a more equal footing. AT&T Communications of the Southern States, 7 F.Supp.2d at 663. The Act obligates the incumbent LECs, like US West: (1) to permit a new entrant in the local market to interconnect with the incumbent LEC's existing local network and thereby use the LEC's own network to compete against it (interconnection); (2) to provide competing carriers with access to individual elements of the incumbent LEC's own network on an unbundled basis (unbundled access); and (3) to sell any telecommunication service to competing carriers at a wholesale rate so that the competing carriers can resell the service (resale). Iowa Utils. Bd., 120 F.3d at 791 (citing 47 U.S.C.A. § 251(c)(2)-(4)). In order to facilitate agreements between incumbent LECs and competing carriers, the Act creates a framework for both negotiation and arbitration. 47 U.S.C. § 252. Two sections of the Act, 47 U.S.C. §§ 251 and 252, explain the basic structure of the overall scheme for opening up the local markets.

Section 251

Section 251 describes the three relevant classes of participants effected by the Act: (1)

telecommunications carriers, (2) local exchange carriers, and (3) incumbent local exchange carriers. 47 U.S.C. § 251(a), (b), and (c). A telecommunications carrier is a provider of telecommunications services, 47 U.S.C. § 153(44), telecommunication services being "the offering of telecommunications for a fee directly to the public . . . ," 47 U.S.C. § 153(46), and telecommunications being "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). A local exchange carrier ("LEC") is "any person that is engaged in the provision of telephone exchange service or exchange access," 47 U.S.C. § 153(26), within an exchange area. 47 U.S.C. § 153(47). An incumbent local exchange carrier is a company that was an existent local exchange carrier on February 8, 1996, and was deemed to be a member of the exchange carrier association. 47 U.S.C. § 252(h).

Section 251 establishes the duties and obligations of these categories of participants. For example, all telecommunications carriers have a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers," 47 U.S.C. § 251(a); local exchange carriers have a duty "not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." 47 U.S.C. § 251(b); and incumbent LECs have a duty to negotiate in good faith with telecommunications carriers seeking to enter the local service market, as well as a duty to "offer for resale at wholesale prices any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c). Section 251 requires an incumbent LEC to provide interconnection that is at least equal in quality to that provided by the incumbent LEC to itself at any technically feasible point, 47 U.S.C. § 251(c)(2); to provide nondiscriminatory

access to network elements on an unbundled basis at any technically feasible point, 47 U.S.C. § 251(c)(3); and to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. 47 U.S.C. § 251(c)(6).

Section 252

Section 252 delineates the procedures for the negotiation, arbitration, and approval of an interconnection agreement that permits a new carrier's entry into the local telephone market. 47 U.S.C. § 252. Once an incumbent LEC receives a request for an interconnection agreement from a new carrier, the parties can negotiate and enter into a voluntary binding agreement without regard to the majority of the standards set forth in § 251 of the Act. 47 U.S.C. § 252(a). If the parties cannot reach an agreement by means of negotiation, after a set number of days, a party can petition a State commission, here the MPUC, to arbitrate unresolved open issues. 47 U.S.C. § 252(b)(1).

An interconnection agreement adopted by either negotiation or arbitration must be submitted for approval to the State commission. 47 U.S.C. § 252(e)(1). The State commission must act within 90 days after the submission of an agreement reached by negotiation or after 30 days of an agreement reached by arbitration. 47 U.S.C. § 252(e)(4). The State commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1).

FCC Regulations

47 U.S.C. § 251(d)(1) directs the FCC to promulgate regulations implementing the Act's local competition provisions within six months of February 8, 1996. "Unless and until an FCC

regulation is stayed or overturned by a court of competent jurisdiction, the FCC regulations have the force of law and are binding upon state PUCs [Public Utility Commissions] and federal district courts." AT&T Communications of California v. Pacific Bell, 1998 WL 246652, at *2 (N.D.Cal. May 11, 1998) (citing Anderson Bros. Ford. v. Valencia, 452 U.S. 205, 219-20 (1981)). Review of FCC rulings is committed solely to the jurisdiction of the United States Court of Appeals pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).

On August 8, 1996, the FCC issued its First Report and Order, which contains the Agency's findings and rules pertaining to the local competition provisions of the Act. Iowa Utils. Bd., 120 F.3d at 792 (citing First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499, CC Docket No. 96-98 (Aug. 8, 1996) ("First Report and Order")). Soon after the release of the First Report and Order, incumbent LECs and State Commissions across the country filed motions to stay the implementation of the Order, in whole or in part. The cases were consolidated in front of the Eighth Circuit. In Iowa Utilities Board, the Eighth Circuit decided that "the FCC exceeded its jurisdiction in promulgating the pricing rules regarding local telephone service." Id. The Eighth Circuit also vacated the FCC's "pick and choose" rule as being incompatible with the Act. Id. at 801. Other provisions of the First Report and Order were upheld by the Eighth Circuit.

On August 8, 1996, the FCC also promulgated the Second Report and Order, which contains additional FCC comments and regulations concerning provisions of the Telecommunications Act of 1996 that were not addressed in the First Report and Order. The People of the State of California v. FCC, 124 F.3d 934, 939 (8th Cir. 1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___ ,119 S.Ct. 721 (1999). Again many local

exchange carriers and state commissions filed suit challenging the order. Several cases were combined in front of the Eighth Circuit, which issued another order addressing the FCC's rules. Id.

On January 25, 1999, the Supreme Court reversed a significant portion of the Eighth Circuit's decisions. AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. at 721. The Supreme Court ruled that the FCC does have jurisdiction to implement local pricing rules and the FCC's rules governing unbundled access, with the exception of Rule 319, are consistent with the Act. Id. at 738. In addition, the Supreme Court upheld the FCC's "pick and choose" rule as a reasonable, and possibly the most reasonable, interpretation of § 252(i) of the Act. Id.

Procedural History

On April 3, 1997, US West and OCI submitted a joint application for approval of their Interconnection Agreement, which was identical to the previously approved Interconnection Agreement between US West and MFS Communication Company, Inc. (A1; Application at 1-2).[1] Via a Notice of Comment Period and Notice of Revised Comment Period, the MPUC invited comments on the US West-OCI joint application for approval. (A2, A3). The MPUC received comments from the Minnesota Department of Public Service ("DPS")[2] and the

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[1]The US West-MFS Agreement was filed with the MPUC on March 25, 1997, following the MPUC's final order in US West's consolidated arbitration proceedings with AT&T, MCI, and MFS. (A1; Application at 2). It was a primarily negotiated agreement with some provisions imposed by the MPUC. (A1; Application at 2). US West subsequently brought a court action challenging some of the provisions of the Agreement. That action is a companion case to this action. US West Communications, Inc. v. Garvey, No. 97-CV-913 ADM/AJB.

[2]The Minnesota Department of Public Services is a state agency charged with the responsibility of investigating utilities and enforcing state law governing regulated utilities, as well as enforcing the orders of the MPUC. The DPS is authorized to intervene as a party in all

Residential Utilities Division of the Office of the Attorney General ("RUD-OAG").[3] The DPS recommended adoption of the US West-OCI Agreement subject to two modifications: (1) adding the MPUC as a party to whom notice must be given, and (2) changing the effective date of the Interconnection Agreement. (A4). US West does not oppose these modifications as they are consistent with the US West-MFS Agreement. (A12). The RUD-OAG also recommended two changes to the US West-OCI Agreement: (1) eliminating the provision prohibiting either company from providing interim number portability to any customer in arrears, and (2) requiring US West to secure MPUC permission prior to terminating service to OCI and requiring OCI to notify its customers ten days prior to such termination. (A5).

On June 5, 1997, the DPS filed reply comments recommending that the MPUC adopt the changes advocated by the RUD-OAG, as well as its own. (A7). The DPS noted that changes recommended by the RUD-OAG would be consistent with the "policies established by the [MPUC] in its April 14, 1997 ORDER APPROVING CONTRACT in the matter of the application by Info-Tel Communications Inc.," but inconsistent with the previously approved US West-MFS Agreement. (A7). The MPUC Staff Briefing Papers recommended that the MPUC should adopt the RUD-OAG's proposed changes. (A9). The MPUC conducted a hearing on June 25, 1997, and voted to reject the US West-OCI Agreement as submitted, subject to change if the parties adopted the recommendations of the RUD-OAG. (A10; Tape of MPUC meeting of

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proceedings before the MPUC. Minn. Stat. § 216A.07.

[3]The Attorney General of Minnesota is "responsible for representing and furthering the interests of residential and small business utility consumers through participation in matters before the Public Utilities Commission." Minn. Stat. § 8.33.

6/25/97). On July 22, 1997, the MPUC issued an Order Rejecting Interconnection Agreement, referring to the Agreement as originally filed by US West and OCI. (A13).

On July 18, 1997, US West submitted an amendment to the Agreement that complied with the MPUC's directives from the June 25, 1998 hearing, but reserved its rights to challenge any MPUC action. (A12). In the same correspondence, US West informed the MPUC that the proposed US West-OCI Agreement filed on April 3, 1997 was deemed approved as filed by operation of the Act, specifically 47 U.S.C. § 252(e)(4), because the MPUC had failed to issue an order within 90 days. (A12). After reviewing the revisions and amendments filed by the parties, the MPUC approved the Agreement on August 1, 1997. (A14).

On May 20, 1997, US West and KMC submitted a joint application for the MPUC to approve an adopted Interconnection Agreement. (A15). The adopted Agreement was the same as the one used by US West and OCI. (A1, A15). Again, the MPUC invited comments on the joint application via a Notice of Comment Period. (A17). DPS' position was that the US West-KMC Agreement be modified in a manner consistent with the US West-OCI Agreement. (A18). The MPUC staff concurred. (A21). On August 5, 1997, the MPUC met to consider the Agreement and voted to reject the Agreement, subject to change if the parties adopted the DPS suggested modifications. (A22; Tape of MPUC meeting of 8/5/97). On August 13, 1997, the MPUC issued an Order Rejecting Interconnection Agreement. (A23). The parties submitted a revised Agreement incorporating the DPS' suggestions on September 11, 1997. (A24). The MPUC approved the revised Agreement on October 21, 1997. (A25).

On August 21, 1997, pursuant to 47 U.S.C. § 252(e)(6), US West filed the complaint in this Court seeking review of the MPUC's actions. US West alleged two counts in its complaint:

(1) Count I, the MPUC violated 47 U.S.C. § 252(i) by ordering revisions to the US West-OCI Agreement although it was identical to the previously adopted US West-MFS Agreement, and (2) Count II, the MPUC issued its Order Rejecting Interconnection Agreement more than 90 days after US West and OCI submitted the Agreement for approval, and therefore the MPUC's rejection was untimely and without effect. On November 20, 1997, US West filed an amended complaint alleging the same counts with reference to the US West-KMC Agreement.

II. ACTION WITHIN 90 DAYS

The Act requires an interconnection agreement adopted by negotiation to be submitted to a state commission for approval and if the state commission "does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation . . . , the agreement shall be deemed approved." 47 U.S.C. § 252(e)(1) and (4). US West argues that the MPUC failed to act within the requisite 90 days and that therefore the proposed US West-OCI and US West-KMC Agreements took effect as a matter of law. To advance this argument, US West claims that public voting at the hearing does not qualify as an "act to approve or reject the agreement" within the meaning of § 252, because the Act requires that the MPUC's decision either be in writing or accompanied by a writing. US West cites § 252(e)(1) of the Act, which states that: "A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies."47 U.S.C. § 252(e)(1).

The MPUC responds that its vote at the two open meetings rejecting the Agreements qualified as the requisite "acts" for the purpose of § 252's 90-day time limit. The MPUC argues that both common usage and the Telecommunications Act, itself, make a distinction between an

agency's "act" and its "order," and that this Court should follow the plain meaning of the Act.[4]

A court can determine the meaning of a statutory provision by referring to the language itself, the context of the language in the statute, and the broader context of the statute as a whole. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (citations omitted). The beginning point for a court is the language of the statute; if the language is clear, the judicial inquiry is generally at an end. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992). Words in a statute should be given their ordinary meaning. Perrin v. United States, 444 U.S. 37, 42 (1979).

The verb "act" is defined by Webster's Third New International Dictionary as "to carry into effect a determination of the will," "to take action," or, even more aptly, "to give a decision." 20 Webster's Third New International Dictionary (Merriam-Webster, Inc. 1993). A public vote at an open meeting in the presence of the parties qualifies as making and communicating a decision. Therefore, the MPUC acted.

Furthermore, in the context of the statute both of the terms, "to act" and "to issue an order," are used in close proximity: "If a State commission fails *to act* to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall *issue an order* preempting the State commission's jurisdiction of that proceeding or matter . . . and shall assume the responsibility of the State commission . . . and *act* for the State commission." 47 U.S.C. § 252(e)(5) (emphasis added). Congress did not use the word synonymously, but rather to create a distinction. In this passage, "act" is a general term, while "issue an order" has greater specificity. Issuing an order might be one way to act, but is

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[4]KMC Telecom, Inc., submitted a brief in which it stated that it takes no position on the claims asserted by US West. OCI Communications of Minnesota, Inc., did not submit a brief.

not the only possible action.

As for the Act's requirement that a "State commission must reject an agreement, with written findings as to any deficiencies," 47 U.S.C. § 252(e)(1), the Act does not definitively state that the written findings must issue contemporaneously with the action indicating approval or rejection of the agreement. The statute does not prohibit a state commission from making a decision about whether to approve an agreement and then issuing a written order at a later date. This is the eventuality that transpired in this case.[5]

Based on the plain meaning of the Act, the MPUC "acted" within the requisite 90 days by voting at the open meetings.

III. REJECTION OF PROVISIONS APPROVED IN PREVIOUS AGREEMENTS

The Act provides that "[a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). US West argues that the MPUC exceeded its authority by rejecting terms in the US West-OCI and US West-KMC Agreements, opt-in agreements under § 252(i), that it had previously approved in the identical US West-MFS Agreement. US West argues that the MPUC's approval of the US West-

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[5] The Plaintiffs also note that Minnesota law requires that the MPUC issue its decisions in writing. However, Minnesota law is inapposite to this court's determination as to whether the MPUC "acted" within the meaning of the Telecommunications Act.

In any event, the MPUC complied with the state requirement, because it ultimately issued its decision in writing. See Minn. Stat. § 14.62. The MPUC may meet a federal requirement and a state requirement via two separate actions, a vote at the meeting and the issuance of a written order.

MFS Agreement pre-determined that the provisions in the US West-OCI and US West-KMC Agreements met the non-discrimination and public interest requirements of § 252. US West essentially argues that the Act's requirement that an incumbent LEC must always accept the terms and agreements of a previously approved agreement requires that the MPUC must also approve any previously approved agreement. The MPUC responds that nothing in the Act mandates state commission approval of previously adopted agreements.

The mandates of § 252(i) are clearly directed at local exchange carriers, not state commissions. In evaluating negotiated agreements, state commissions are permitted by the Act to reject a negotiated agreement if it discriminates against a third-party telecommunication carrier or if it is not consistent with the public interest, convenience, and necessity. These are the only directives given by the Act concerning a state commission's evaluation of negotiated agreements. If Congress had wanted to further limit a state commission's ability to approve adopted agreements, it could have said so in clear language. It chose not to do so. There is no requirement in the Act, either explicit or implicit, that a state commission must approve an agreement or portion of an agreement that is identical to one previously approved.

The assumption that a provision that has already been approved would automatically meet the non-discrimination and public interest requirements of § 252 is also faulty. A state commission has the statutory latitude to determine, upon reflection and perhaps more evidence, that a previously approved provision of an agreement is actually contrary to the public interest. The arbitrary and capricious standard of review is predicated on the belief that rational people can disagree about the appropriate outcome in a given situation. See Mausolf v. Babbitt, 125 F.3d 661, 669 (8th Cir. 1997) ("'The [arbitrary and capricious] standard mandates judicial

affirmance if a rational basis for the agency's decision is presented, even though we might otherwise disagree'") (quoting Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C.Cir. 1981)). Therefore, it is not inherently arbitrary and capricious for the MPUC, whose membership changes over time, to decide that a provision protects the public interest at one point and then later determine that it does not. A commission should weigh the previous approval in its contemplations, and the evidence here does suggest that the MPUC was aware that identical provisions had already been approved. However, the fact of prior approval alone does not bind a state commission to its previous decision. If a certain latitude were not allowed, the MPUC would be forever precluded from correcting past omissions or errors even though it now believes them to be contrary to the public interest.

CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. US West's request that this Court find that the MPUC's determinations violate 47 U.S.C. §§ 251 and 252 is **DENIED**.

Ann D. Montgomery
UNITED STATES DISTRICT JUDGE

Dated: March 30, 1999