DECISION MEMORANDUM

TO:COMMISSIONER NELSON

COMMISSIONER SMITH

COMMISSIONER HANSEN

MYRNA WALTERS

TONYA CLARK

DON HOWELL

WELDON STUTZMAN

STEPHANIE MILLER

DAVE SCHUNKE

JOE CUSICK

JIM LONG

DAVID SCOTT

WORKING FILE

FROM:SUSAN HAMLIN

DATE:JANUARY 9, 1997

RE:USW-T-96-14/CTZ-T-96-2; APPLICATION OF CITIZENS TELECOM  AND U S WEST COMMUNICATIONS, INC. FOR APPROVAL OF AN AGREE­MENT FOR RESALE PURSUANT TO 47 U.S.C. §252(e).

On November 18, 1996, Citizens Telecommunications Company  dba Citizens Telecom (CTZ) and U S WEST Communications, Inc. (U S WEST) filed a joint Application for approval of an agreement for resale services.  The Agreement provides for CTZ to resell U S WEST local exchange service in Idaho and other states.  The Application indicated that this Agreement was reached through voluntary negotiations and is submitted to the Commission for approval pursuant to §252(e) of the Telecommunications Act.(footnote: 1)

The joint applicants ask for approval of this Agreement and claim that because this Agreement was reached through voluntary negotiations a hearing is not necessary.

On December 5, 1996, the Commission issued a Notice of Application and Notice of Modified Procedure. The following parties filed comments in this case: MCI, AT&T, Commission Staff, U S WEST and Citizens Telecom.  No party has asked for a hearing in this case. The following is a synopsis of the comments filed in this case.

MCI

On December 26, 1996, MCI filed comments on the Application for resale.  MCI recommends that the Agreement should not be precedential for other agreements that the Commission may review in the future and that the approval of the Agreement should not constitute a finding that U S WEST has met its obligation under § 251.(footnote: 2)

MCI further recommends that because of this Agreement does not involve an examination of § 251 compliance it follows by necessary implication that this Agreement could not in the future be considered as an approved Agreement for the purposes of § 271 relating to Bell operating company entry into interLATA services.

AT&T

On December 26, 1996, AT&T filed comments on the Agreement.  AT&T preliminary states that this Agreement contains several provisions which limit Citizens’ resale opportunity and thus may harm the public interest and violate the federal Act.  AT&T, like MCI, asks the Commission conclude that the Agreement has no precedential effect on the Commission’s future arbitrated interconnection and resale agreements between LECs and CLECs.

AT&T also asserts that the Agreement unreasonably prevents Citizens from opposing U S WEST’s requests for residential rate increases as described in  Section II(B)(footnote: 3).  AT&T explains that public interest harms when CLECs such as Citizens unconditionally agree to support U S WEST’s request for residential rate increases because (1) higher residential rates are not in the public interest especially when there is no evidence of increasing costs, and (2) higher residential rates could produce a price squeeze and anticompetitive effects on other CLECs by unfairly subsidizing the lowering of U S WEST’s business rates.  AT&T recommends that the Commission should reject the whole Agreement because it is harmful to the public interest or in the alternative the Commission should strike Section II(b) of the Agreement.  (See Attachment A.)

Further, AT&T suggests that the resale provisions of the Agreement on the public interest by preventing Citizens resale of certain U S WEST services.  Therefore, the Agreement should be rejected or the resale provisions of the Agreement should be modified.  AT&T points out that Section IV.A.2; Appendix A to the Agreement prevents Citizens from reselling lifeline service, concession service, technical trials and grandfathered products and services other than grandfathered customers.  (See Attachment B.)  AT&T further explains that, in the Agreement U S WEST does not give up anything in exchange for Citizens’ waiver of its federal right to resell such service.  AT&T claims that it is the public who ultimately will be harmed by this in this weak resale provision because the above services will only be available from U S WEST.  AT&T states that even the fact that a relatively low number of customers subscribed to these services does not mean that the public interest is not harmed by their unavailability from alternative providers.  The public interest is harmed whenever competition for particular services is not allowed to develop.  AT&T therefore argues that the Commission should reject the Agreement in its entirety or the Commission should modify the resale provisions of this Agreement.

U S WEST

On January 6, 1997, U S WEST Communications filed Reply Comments in this case.  The first issue U S WEST addressed is the “precedential” value of this Agreement, U S WEST concedes that this Agreement with Citizens does not create “binding legal precedent.”  U S WEST explains that in the competitive marketplace the results of on-length negotiations are viewed as indicators of market conditions and values.  Therefore, it cannot be said that it does not have precedential value when it comes to negotiations.

The next issue that U S WEST addressed was the issued raised by AT &T “opposition to future U S WEST rate increases.”  U S WEST explains that the language  contained in paragraph II(B) (see footnote 2 and Attachment A) is clear that Citizens’ obligation to support is merely permissive and its obligation to refrain from participation in rate proceeding is conditioned upon being “consistent with the Company’s policy positions of Citizens and its affiliates.”  Reply Comments at p. 5.  U S WEST asserts that AT&T mischaracterized the Agreement when it repeatedly referred to the provisions as the Agreement to “support” and the characterization obligation as “unconditional.”  U S WEST explains that the Agreement does provide that Citizens may participate in support of U S WEST’s rate increases and must refrain from intervention in opposition unless doing so is inconsistent with its corporate policy.  Reply Comments at 5.

U S WEST also addresses AT&T issue of “restriction on resale.”  AT&T argues that the Agreement should not be rejected in whole or in part because of the provisions which prevent the resale of certain U S WEST services.  U S WEST asserts that the Agreement was a product of successful negotiation.  Citizens has not complained about the very minimal restrictions on resale and there is nothing showing that the restrictions will inhibit any of Citizens’ business plans.  U S WEST asserts that this Agreement is the product of arms-length negotiation between competitors under the outline provided by the federal law.

Finally, U S WEST addresses the assertions by MCI to the obligations under § 251 and 272.  MCI argues that the approval of the opinion agreement should not be construed as a finding that U S WEST has met its obligations under § 251 or as the basis of a future determination that U S WEST has met the check list requirements contained in § 271.  U S WEST asserts that the Joint Petition does not seek a determination on these points.  U S WEST submits that any such determination should be addressed in appropriate proceedings in full hearings of those issues.

The Company requests that the Commission approve this Agreement in full.

CITIZENS TELECOM

Citizens Telecom submitted a letter in this case on January 9, 1997, addressing the issues raised in the comments of AT&T.  Like U S WEST, Citizens asserts that AT&T has mischaracterized  Section II(B) of the Agreement when it stated that Citizens has “unconditionally agreed to support any of U S WEST’s requests for residential rate increases in the next several years.” AT&T comments at 6.  Citizens asserts that it has retained discretion on whether to  intervene  in U S WEST’s rate proceedings in accordance with the Company’s policy provisions of Citizens and its affiliates.CTZ also asserts that AT&T has also incorrectly stated that Section II(B) will be in effect “for the next several years.”  Citizens explains that the Resale Agreement provides for termination after one year if the party so chooses.

Citizens also addresses the issue raised by AT&T of “availability of services for resale.”  AT&T objected to the fact that certain services as specified in Section 4 of Appendix A of the Agreement was not available for resale.  (See Attachment B.)  AT&T also claims that U S WEST gave up nothing in exchange for the Citizens’ waiver of its federal right to resale of such services (AT&T comments at 6).  Citizens asserts that all the provisions of the Citizens/U S WEST Agreement are the product of compromise and negotiation as authorized by the Telecom Act and the Commission can only reject a negotiated Agreement only if it finds that it discriminates against another carrier or is not consistent with the public interest.  Citizens further discusses that AT&T is mistaken in claiming that Citizens has waived its right to resale certain services.  Section IV(e)(1) of the Agreement explicitly provides for different scenarios in which certain services that may not be available for resale under this Agreement may become available or certain services currently available at no discount may become available at a discount as a result of Commission Orders.

Citizens also asks that the Commission approve the Agreement.

Commission Staff

Staff filed Comments on December 26, 1996, outlining the Agreement.  This Agreement allows CTZ to resell U S WEST local exchange services and other services in U S WEST’s Idaho service territory.  Some of the services are available at a wholesale rate while others are not.  The following services are available at a 12% discount:

Basic exchange business

PBX trunks

ISDN

Frame Relay

Directory listings

Central Office features

IntraLATA MTS is available at a rate of $.12 / minute

The following services are available for resale but not at a discount:

Basic exchange residence

Centrex

Private line/Special access

Public Access Line

Volume Discount plans or Term Agreements

The following services are not available for resale:

Lifeline

Concession service

Technical trials

Grandfathered products and services (except to customers currently served with such services)

The parties have submitted the Agreement for Commission approval in accordance with Section 252 (e) of the Telecommunications Act of 1996 (the Act).

Staff has reviewed the Agreement and finds no cause for rejection under the Act’s criteria.  However, there are two particular pieces of this Agreement which Staff finds notable and believes should be pointed out.  First, Staff wants to make it clear to the Commission that while residence service is available for resale, it is not included at a discount in this Agreement.  Second, Staff was initially concerned with the language contained in paragraph II(B) of the Agreement which appeared to limit Citizens right to participate in U S WEST’s filings before the Commission (discussed above).  However, after reviewing the comments filed by U S WEST and Citizens, Staff believes that there are adequate safeguards in the Agreement to protect the public interest.

Staff also echoes the concern that this Agreement may be viewed as a precedent by the Commission.  Staff agrees with U S WEST that the approval of the Agreement does not create binding legal precedence.  Staff views this Agreement as reflecting Citizens Telecom’s desire to enter into the local market as expeditiously as possible.  In fact, paragraph Z of the Agreement is a “Most Favored Nations” clause which will allow CTZ to accept any other agreement for resale service approved by the Commission under Section 252 of the Act.

CTZ currently has an application for a certificate of public convenience and necessity which is being processed by the Commission.  With that in mind, Staff would recommend prompt approval of this Agreement in order to expedite the beginning of local competition in Idaho.

Commission Decision

Does the Commission wish to approve the Agreement?

Does the Commission have another suggestion?

Susan Hamlin

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**FOOTNOTES**

1:

 Section 252(e) of the Act sets the guidelines for approval of interconnection agreements.  It states:

(e)APPROVAL BY STATE COMMISSION.—

(1)APPROVAL REQUIRED.—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.

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

(A)an agreement (or any portion thereof) adopted by negotiation under subsection (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;

2:

  Section 251 of the Telecommunications Act imposes several duties on incumbent local exchange companies all designed to make local competition a reality.  To approve agreements resulting from  arbitration, the Commission must determine if the Agreement is consistent with § 251 requirements (47 U.S.C. 253(e)(2)(B).  Agreements reached through voluntary negotiations, however, do not require a similar analysis.  Thus an Order to approve this Agreement the Commission is not required to make any finding that the Agreement is consistent with § 251.

3:

Language contained in paragraph II.B. of the agreement states:

(ii)  Scope of the Agreement

        Reseller agrees that, in any proceeding before a Commission, in any state to which this Agreement applies, in    which proceeding USWC is advocating increases in residential rates to recover costs accompanied by decreases in rates for competitive services to remove historical subsidies, Reseller will not participate in opposition to USWC’s advocacy and may intervene, file testimony, participate at hearing, and otherwise use its best efforts to support USWC’s advocacy in such proceeding before the state Commission to the extent such participation or lack of participation is consistent with the company policy positions of Reseller and its affiliates.  Agreement at 4.