Service Date: May 21, 1998

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

IN THE MATTER OF the Application of	)	
Tel-Link, LLC and	)	UTILITY DIVISION
U S WEST Communications, Inc.	)	DOCKET NO. D97.10.207
Pursuant to Section 252(e) of the	)	
Telecommunications Act of 1996 for	)	ORDER NO. 6038a
Approval of their Resale Agreement.	)	

ORDER ON FIRST AMENDMENT TO RESALE AGREEMENT

INTRODUCTION

This Order addresses the "First Amendment to Agreement for Service Resale (Montana)" (First Amendment) filed by U S WEST Communications, Inc. (U S WEST) on April 10, 1998. It follows the petition for approval of Tel-Link, LLC (Tel-Link) and U S WEST's interconnection agreement and the Montana Public Service Commission's (Commission) subsequent Final Order, Order No. 6038, dated January 12, 1998.

The Final Order rejected four contract terms relating to ordering and maintenance, construction, payment, and dispute resolution, and allowed the parties to redraft the rejected sections and file an amendment to the contract with the Commission for approval. The parties drafted four revised provisions to replace the rejected terms. These new provisions are addressed in this Order.

COMMISSION DECISION

Ordering and Maintenance - Section IV.C.4(d), First Amendment Section 1.1

1. Section IV.C.4(d) of the parties' agreement included a provision that Proof of Authorization (POA) for placing orders on behalf of the end user shall consist of documentation

acceptable to U S WEST, which may be obtained by "A prepaid returnable postcard supplied by Reseller which has been signed and returned by the end user." The Reseller then would have to wait 14 days after mailing the postcard before placing an order to change. The Commission rejected this section because it was not consistent with § 69-3-1303, MCA.

2. The parties amended Section IV.C.4 by deleting the first paragraph and sub-paragraphs a. through d., replacing subsection IV.C.4 with the following:

> Prior to placing orders on behalf of the end user, Reseller shall be responsible for obtaining and have in its possession Proof of Authorization ("POA"). POA shall consist of documentation acceptable to USWC of the end user's selection of Reseller. Such selection may be obtained in any manner consistent with Montana or federal law.

3. The Commission rejects this amended section. This section is no more consistent with Montana law than was the first draft which was rejected. Montana law on "slamming" is more prescriptive than the federal law. The Montana "slamming" law applies to unauthorized changes in local exchange service as well as unauthorized changes of a long distance carrier. The Commission stated clearly that the provision must conform to Montana law. The language drafted above would be acceptable if the words "or federal law" are deleted. The parties are referred to and may be guided by § 69-3-1303(1), MCA, in redrafting this section.

Construction - Section IV.E.7, First Amendment Section 1.2

4. The Commission stated that Section IV.E.7 in the parties' agreement, as drafted, could conflict with the public interest. The Commission rejected this section because it did not consider circumstances which may arise where U S WEST is required by law to construct facilities. However, the parties may agree to the terms as initially drafted where U S WEST is

not required by law to construct facilities. The Final Order omitted a significant word, and ¶ 15 of that Order is hereby clarified to read as follows:

> The Commission finds that this provision could conflict with the public interest and should be rejected. Circumstances may arise where U S WEST is required by law to construct facilities. The parties may agree to the terms in Section IV.E.7 for instances where U S WEST is not required to construct facilities, but the Commission rejects this section as presently written because it does not consider such instances. . . .

5. The parties redrafted Section IV.E.7 to state:

> 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 unless otherwise required by Montana Law.

Despite the ambiguity in the Final Order, the new section as drafted is acceptable.

6. However, as set forth in detail above and in the following paragraphs, the other three sections of the Amendment are not acceptable. The Commission rejects the entire First Amendment because it should include all changes made pursuant to the Final Order. The Commission concludes that the amendment should be approved or rejected *in toto* rather than piecemeal in this matter.

Payment - Section VII.C.5; First Amendment Section 1.3

7. Section VII.C in the parties agreement detailed the provisions for payment to U S WEST by Tel-Link. The Commission rejected subsection 5 because it was not consistent with the public interest. We expressed our concern that Tel-Link's failure to pay according to its terms could subject Tel-Link's end-user customers to disconnection by U S WEST through no

fault on their part. The Final Order rejected subsection 5 because it included no provision for timely notifying the Commission to enable the Commission to take appropriate action to protect Tel-Link's end user customers.

8. The parties' redrafted provision does not address the concerns expressed in the Final Order and is rejected. The new provision adds a sentence to the existing section, which states, "USWC will not disconnect an end user customer without first obtaining the approval of the Commission." We are concerned that the end user customers of Tel-Link be notified if tel-Link is going to be disconnected.

9. To address this concern, the Commission suggests that language be included to provide that U S WEST shall notify the Commission at the same time it notifies Tel-Link of a pending disconnection. The first sentence of Section 1.3 in the First Amendment could be revised to state that U S WEST "will notify Reseller and the Commission of such disconnection ten (10) days prior to the effective date of the disconnection." With this language, the Commission can ensure that the reseller's customers are notified and it can take action to notify the reseller's end user customers of options they have available to them, which could include an option to continue their service as a customer of U S WEST or to change to another competitive local exchange carrier.

10. As proposed, however, the customers of Tel-Link would essentially be "slammed" to U S WEST if U S WEST disconnected Tel-Link. Thus, if U S WEST continues to provide the service after it has disconnected a reseller, it may be in violation of § 69-3-1303, MCA, if it does not have the documentation required by that section. Accordingly, the Commission must reject Section 1.3 in the First Amendment.

Dispute Resolution - Section VII.Q, First Amendment Section 1.4

11. The Commission rejected Section VII.Q of the parties's agreement, the provision for dispute resolution. Section VII.Q contained detailed provisions for resolving disputes by an arbitrator. We expressed concern that the resolution determined by an arbitrator who is not the Commission may not be consistent with the public interest, convenience and necessity, as required by the 1996 Act. The agreement provides that arbitrations will be conducted in Denver, Colorado; thus, it is particularly important that the Commission review the decision to ensure that it complies with Montana law prior to its going into effect. The Commission rejected Section VII.Q because it did not provide for notification to the Commission of issues to be arbitrated or of the subsequent decision reached by the arbitrator.

12. The parties amended Section VII.Q; the replacement section, Section 1.4 in the First Amendment, is nearly identical to VII.Q, except that it includes the following changes:

> Q. Dispute Resolution
> . . . The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof *subject to review by the Commission. The Parties shall submit a copy of each arbitration opinion to the Commission. The arbitrator's decision shall remain in effect unless the Commission decides otherwise within forty-five (45) days. The prevailing Party, as determined by the arbitrator, shall be entitled to an award of reasonable attorneys' fees and costs.* ~~Each party shall bear its own costs and attorneys' fees, and shall share equally in the fees and expenses of the arbitrator.~~ The arbitration . . .

The new dispute resolution section goes beyond what the Commission identified as problematic in the agreement, in that it provides that the prevailing party will receive its reasonable fees and costs; the original section provided that each party will bear its own costs and the parties will share equally in the arbitrator's fees and expenses. Beyond that, the new section states, in

ambiguous language, that the award may be entered in a court with jurisdiction subject to review by the Commission. It states that the parties will submit a copy of the arbitrator's decision to the Commission, and that the arbitrator's decision shall remain in effect unless the Commission decides otherwise within 45 days.

13. This revision concerns the Commission for the following reasons: First, it does not provide for notice to the Commission prior to the arbitration. The Commission should have notice as early as possible that a contract term is being arbitrated; it is critical that the Commission receive such notice before the arbitrator makes its decision and, at the latest, when the arbitrator is retained.

14. Second, amendments to the contract may not go into effect unless the Commission approves them, and the Commission has 90 days according to § 252(e)(4) within which to review any resolution that changes the parties interconnection agreement. For such changes, the parties cannot sidestep the express law that governs their agreement, which is what the 45-day provision does. An arbitrated resolution reached by an arbitrator other than the Commission or its designee, is not affected by the 30-day provision in § 252(e)(4) for arbitrated agreements. Accordingly, this section should be revised to comply with the law and to provide that an arbitrated decision shall not go into effect before the Commission reviews it. It may well be that some arbitrated resolutions should go into effect very soon upon resolution, but the Commission believes that such decisions can be accommodated by the Commission on an individual case basis.

15. The Commission has included a detailed discussion in this Order so that the parties may be guided in their drafting of provisions that the Commission will approve. It is not

necessary that the parties file an amendment to their resale agreement; without an amendment the remainder of the agreement is in full force and effect. However, the four provisions that were rejected in Order No. 6040 remain stricken from the agreement and it is not necessary for the provisions to be replaced unless the parties wish to draft revisions pursuant to this Order.

CONCLUSIONS OF LAW

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA. Tel-Link, as a provider of regulated telecommunications services in the State of Montana, also will be regulated when it offers local exchange service in Montana as a competitive local exchange carrier.

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. Section 69-3-103, MCA.

3. The Commission has jurisdiction to approve amendments to the Interconnection Agreement negotiated by the parties and submitted to the Commission for approval according to Section 252(e)(2)(A). Section 69-3-103, MCA.

4. Commission approval of interconnection agreements and their amendments is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements.

ORDER

THEREFORE, based upon the foregoing, it is ORDERED that the First Amendment to Agreement for Service Resale between U S WEST Communications, Inc. and Tel-Link, LLC is rejected as discussed herein, and the sections it was intended to amend remain stricken from the Agreement.

DONE AND DATED this 18th day of May, 1998, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
DAVE FISHER, Chairman

_____
NANCY MCCAFFREE, Vice Chair

_____
BOB ANDERSON, Commissioner

_____
DANNY OBERG, 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.