

RENZ D. JENNINGS
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MARCIA WEEKS
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CARL J. KUNASEK
COMMISSIONER



0000000185

ARIZONA CORPORATION COMMISSION

DATE: January 2, 1997

DOCKET NO: U-3021-96-448, U-3245-96-448 and E-1051-96-448

TO ALL PARTIES:

Enclosed please find the recommendation of Hearing Officer Scott Wakefield. The recommendation has been filed in the form of an Order on:

American Communications Services, Inc., (Arbitration)
American Communications Services of Pima County, Inc. and
U S West Communications, Inc.

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Hearing Officer by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by 5:00 p.m. on or before:

January 13, 1997

The enclosed is NOT an order of the Commission, but a recommendation of the Hearing Officer to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

January 14, 1997 and January 15, 1997

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250.

A handwritten signature in cursive script that reads "James Matthews".

James Matthews
EXECUTIVE SECRETARY

JM
Enc.
cc: ALL PARTIES

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 RENZ D. JENNINGS
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3 MARCIA WEEKS
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4 CARL J. KUNASEK
COMMISSIONER
5

6 IN THE MATTER OF THE PETITION OF)
AMERICAN COMMUNICATIONS SERVICES,)
7 INC. AND AMERICAN COMMUNICATIONS)
SERVICES OF PIMA COUNTY, INC. FOR)
8 ARBITRATION OF AN INTERCONNECTION)
AGREEMENT WITH U S WEST)
9 COMMUNICATIONS, INC. PURSUANT TO 47)
U.S.C. § 252(b) OF THE)
10 TELECOMMUNICATIONS ACT OF 1996.)

DOCKET NO. U-3021-96-448
DOCKET NO. U-3245-96-448
DOCKET NO. E-1051-96-448

DECISION NO. _____

ORDER

11 Open Meeting
12 January 15, 1997
Phoenix, Arizona

13 **BY THE COMMISSION:**

14 On August 14, 1996, American Communications Services, Inc. and American Communications
15 Services of Pima County, Inc. (collectively, "ACSI") filed with the Arizona Corporation Commission
16 ("Commission") a Petition for Arbitration ("Petition") pursuant to 47 U.S.C. § 252(b) of the
17 Telecommunications Act of 1996 ("Act") to establish an interconnection agreement ("Agreement") with
18 U S WEST Communications, Inc. ("U S WEST"). By Procedural Order dated August 27, 1996, an
19 arbitration was scheduled for October 9, 1996, at the Commission's offices in Phoenix. On September
20 9, 1996, U S WEST filed its Response to the Petition.

21 The parties notified the Commission that they had resolved most of the issues regarding
22 interconnection, that a hearing was not necessary, and that the remaining issues would be submitted in
23 briefs and pre-filed testimony for the Commission's determination. The parties submitted closing
24 arguments in writing on December 16, 1996.

25 **DISCUSSION**

26 On February 8, 1996, President Clinton signed the Act into law which established new
27 responsibilities for the Federal Communications Commission ("FCC") as well as for the various state
28

1 commissions.¹ On July 2, 1996, the FCC issued *Telephone Number Portability*, CC Docket No. 95-116,
2 First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-268 ("TNP Order"), which
3 established rules so that a customer who changes his local exchange carrier ("LEC") in the same local
4 service area may keep the same telephone number. On July 22, 1996, the Commission in Decision No.
5 59762 adopted A.A.C. R14-2-1501 through A.A.C. R14-2-1507 ("Arbitration and Mediation Rules"),
6 which authorized the Hearing Division to establish procedures and conduct arbitrations. Also on July
7 22, 1996, the Commission in Decision No. 59761 adopted A.A.C. R14-2-1301 through 1311
8 ("Interconnection Rules"), to govern the interconnection of local exchange services between incumbent
9 LECs ("ILECs") and competing LECs ("CLECs"). On August 8, 1996, the FCC released *Implementation*
10 *of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First
11 Report and Order, FCC 96-325 ("Order") and *Implementation of the Local Competition Provisions of*
12 *the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Report and Order and Memorandum
13 Opinion and Order, FCC 96-333, in which the FCC adopted initial rules ("Rules") designed to
14 accomplish the goals of the Act.²

15 Pursuant to the Act, telecommunications carriers desiring to interconnect with the facilities and
16 equipment of an ILEC may negotiate the terms of such interconnection directly with the ILEC. If the
17 parties are unsuccessful in negotiating an Agreement, any party to the negotiation may request the
18 Commission to arbitrate any open issues regarding interconnection. The Act requires the Commission
19 to resolve any such issues within 180 days of a telecommunications carrier's initial request to the ILEC
20 for interconnection.³

21 Pursuant to § 252 of the Act, state commissions are required to determine just and reasonable
22 rates for interconnection and network elements based on the cost of providing the interconnection or
23 network element which are nondiscriminatory and may include a reasonable profit. For resale services,
24

25 ¹ As part of the Act, the FCC was ordered to issue regulations no later than August 8, 1996
26 interpreting many of the broad and general terms of the Act.

27 ² Unless otherwise noted, any reference to "Para." in this Decision is to Paragraphs in the
28 Order.

³ ACSI and U S WEST waived the 180 day requirement.

1 rates are to be the wholesale rates based on retail rates excluding costs of marketing, billing, collection
2 and other costs avoided by the LEC. The Commission's Interconnection Rules require the use of total
3 service long run incremental costs ("TSLRIC") to determine costs.

4 Our August 27, 1996 Procedural Order directed the parties to provide a joint pre-arbitration
5 statement which set forth their positions and the manner in which their disagreement should be resolved
6 by the arbitrators, a proposed Agreement, a list of witnesses and a summary of their testimony, as well
7 as exhibits. The FCC's Rules issued on August 8, 1996, required the use of total element long run
8 incremental costs ("TELRIC"). TELRIC includes the forward-looking costs that can be attributed
9 directly to the provision of services using that element, and includes a reasonable share of the forward-
10 looking joint and common costs.

11 On October 2, 1996, U S WEST filed cost studies, which included avoided cost as well as
12 TELRIC cost studies. The materials were voluminous and complex.

13 The arbitration in this matter was scheduled to begin on October 9, 1996. It was not reasonable
14 to expect ACSI to conduct discovery, review and respond to any of U S WEST's cost studies at the
15 arbitration. No continuance could be granted due to the time frame for final resolution of the disputed
16 issues contained in the Act.

17 Accordingly, on August 30, 1996, a Procedural Order was issued which consolidated the
18 appropriate portions of this proceeding with similar portions of the dockets of interconnection arbitrations
19 between U S WEST and several other CLECs to consider the cost studies submitted by U S WEST in
20 each of those dockets. The Procedural Order indicated that interim rates would be set in accordance with
21 the Order, at the proxy ceilings or mid-points of proxy ranges set forth by the FCC, unless a party showed
22 that an alternate interim price consistent with the proxies would be appropriate. The interim rates would
23 be subject to true-up upon establishment of prices based upon Commission-approved cost studies.

24 The cost studies will be used to set prices for all CLECs in U S WEST's service area.
25 Consolidating the cost study review allows input from the initial CLECs and provides for consistency
26 in the Commission's determination of costs. A separate review of the cost studies in each arbitration
27 could result in varying conclusions, depending upon the competitors' resources available to respond to
28 the studies and the capabilities of each party's witness. The CLECs need sufficient time to review and

1 prepare testimony in response to the cost studies, and the Commission needs to have adequate time to
2 review the conclusions reached by the parties.

3 U S WEST, as well as the CLECs, will not be harmed by the use of the interim prices. The cost
4 studies were analyzed at a consolidated arbitration commencing on November 18, 1996, with a Decision
5 expected in early 1997. ACSI indicated that it does not expect to be providing service before the
6 Commission issues its Decision in the consolidated cost proceedings, and therefore it does not require
7 that interim rates be established.

8 On September 27, 1996, the United States Court of Appeals for the Eighth Circuit ("Court")
9 issued an Order Setting Hearing and Imposing Temporary Stay. Oral arguments on the motions
10 requesting stay until judicial review of the FCC's Order were held on October 3, 1996, and on October
11 15, 1996, the Court stayed the operation and effect of the FCC's Rules' "pricing provisions and the 'pick
12 and choose' rule" pending the Court's final determination of the issues raised in the petitions for review.

13 Pursuant to § 252(b)(4)(C), the Commission hereby resolves the issues presented for arbitration.

14 Reciprocal Compensation

15 ACSI and U S WEST have been unable to agree on the rate which each company will pay to
16 transport and terminate traffic on each other's networks. The Commission's Interconnection Rules
17 provide that a bill and keep arrangement be used for 24 months from the time the Commission approves
18 the first interconnection agreement. A.A.C. R14-2-1304(A).

19 ACSI's position

20 ACSI proposed that the Commission order a reciprocal compensation mechanism between the
21 parties based upon bill and keep for the term of the parties' two-year contract. In the alternative, ACSI
22 proposed that bill and keep should be adopted for the first twelve months of the contract, and during the
23 second twelve months, if the amount of traffic exchanged between the parties is out of balance by more
24 than ten percent, then the party handing off the excess amount of traffic should be required to compensate
25 the other for the amount of excess traffic exchanged. ACSI proposed that such compensation be at a
26 symmetrical rate on a per-minute basis, to be agreed to by the parties at a later time.

27 U S WEST's position

28 U S WEST opposed the adoption of a bill and keep arrangement. U S WEST instead proposed

1 that the Commission adopt forward looking economic costs based upon the TELRIC studies which U S
2 WEST filed.

3 Commission's resolution

4 In accordance with our Interconnection Rules, we will adopt bill and keep as a reciprocal
5 compensation mechanism. A.A.C. R14-2-1304 provides that bill and keep be in place for 24 months
6 from our approval of the first interconnection agreement. However, we will permit either party to seek
7 an earlier termination of the bill and keep mechanism if it is able to show, based on six months of history,
8 that traffic terminated by ACSI and U S WEST is out of balance by more than ten percent. We will not
9 require a true-up upon termination of bill and keep, however we will evaluation whether a true-up of bill
10 and keep during the regulatory lag time is appropriate.

11 Most Favored Nations ("MFN")

12 Section 252(i) of the Act states as follows:

13 A local exchange carrier shall make available any interconnection, service, or network
14 element provided under an agreement approved under this section to which it is a party
15 to any other requesting telecommunications carrier upon the same terms and conditions
as those provided in the agreement.

16 The Order, Para. 1310, which is stayed pending the Court's ruling, indicates that the Act provides for
17 CLECs to elect to accept individual provisions of an ILEC's interconnection agreements with other
18 CLECs related to specific elements, rather than requiring the acceptance of the contract as a whole.

19 ACSI's position

20 ACSI proposed that its Agreement include a provision permitting ACSI to take the rates, terms
21 and conditions as a whole in another approved interconnection agreement, or all of the rates, terms and
22 conditions applicable to an entire section of another approved agreement, e.g. all the terms and conditions
23 associated with unbundled network elements. ACSI argued that its proposed MFN provision is less
24 liberal than the FCC's rule on MFN.

25 U S WEST's position

26 U S WEST claimed that ACSI's proposal is contrary to the Act and undermines the Act's focus
27 on the resolution of interconnection issues by negotiation. U S WEST indicated its willingness to make
28 an entire interconnection agreement available on a most favored nation basis to all CLECs, allowing

1 ACSI to operate under the same terms as negotiated with other CLECs.

2 Commission's resolution

3 The Court has stayed the FCC's interpretation of the Act's MFN provision, which would allow
4 a company to pick and choose contract terms among other parties' Agreements, pending resolution of
5 the issue on appeal. The Act § 252(i) requires U S WEST to make available to any other requesting
6 telecommunications carrier any interconnection, service, or network element on the same terms and
7 conditions as those provided in an Agreement. Pending the Court's determination of this issue, the
8 Commission interprets the terms and conditions upon which the interconnection, service or element was
9 offered to be the terms of the entire Agreement. Therefore, at this time, U S WEST is required to offer
10 its entire Agreement to CLECs. The Agreement should indicate that the Court's ruling regarding the
11 MFN provision will be incorporated into the Agreement.

12 The Commission has rendered its Decision regarding the parties to this arbitration proceeding.
13 Nothing in this Decision shall be considered to prejudge the outcome of the Commission's Decision in
14 any other arbitration proceeding regarding the applicability or interpretation of the MFN clause.

15 Cross-connection Between CLECs

16 Pursuant to a stipulation between the parties, ACSI and U S WEST presented evidence in the
17 consolidated cost proceeding on the manner in which ACSI should be permitted to cross-connect with
18 other collocated CLECs at U S WEST facilities. The parties agreed that the matter should be decided
19 based on the record established in the consolidated proceeding. Because the issue may affect other
20 CLECs wishing to cross-connect with ACSI or other CLECs, we will resolve the matter in the
21 consolidated cost proceeding docket.

22 The parties will be instructed to prepare for the Commission's review an interconnection
23 agreement incorporating the issues resolved by arbitration.

24 * * * * *

25 Having considered the entire record herein and being fully advised in the premises, the
26 Commission finds, concludes, and orders that:

27 FINDINGS OF FACT

- 28 1. ACSI has applied to the Commission for authority to provide competitive

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