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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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CARL J. KUNASEK  
Chairman  
JIM IRVIN  
Commissioner  
RENZ D. JENNINGS  
Commissioner

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IN THE MATTER OF THE PETITION OF  
MCIMETRO ACCESS TRANSMISSION  
SERVICES, INC. FOR ARBITRATION OF  
INTERCONNECTION RATES, TERMS, AND  
CONDITIONS PURSUANT TO 47 U.S.C. §  
252(b) OF THE TELECOMMUNICATIONS  
ACT OF 1996.

) DOCKET NO. U-3175-96-479  
) DOCKET NO. E-1051-96-479

IN THE MATTER OF THE PETITION OF  
AT&T COMMUNICATIONS OF THE  
MOUNTAIN STATES, INC. FOR  
ARBITRATION OF INTERCONNECTION  
RATES, TERMS, AND CONDITIONS WITH  
US WEST COMMUNICATIONS, INC  
PURSUANT TO 47 U.S.C. § 252(b) OF THE  
TELECOMMUNICATIONS ACT OF 1996

) DOCKET NO. U-2428-96-417  
) DOCKET NO. E-1051-96-417  
) **Application for**  
) **Expedited Relief From Order of**  
) **U S WEST Communications, Inc.**

U S WEST Communications, Inc. requests that the Arizona Corporation Commission immediately issue an Order pursuant to Arizona Rule of Civil Procedure 60 relieving U S WEST from the obligations imposed by Commission Decision No. 60353, requiring U S WEST to combine unbundled network elements for AT&T and MCI. Issuance of this Order on an expedited basis is necessary to terminate any remaining controversy that may exist with respect to U S WEST's obligation to combine unbundled network elements for AT&T and MCI in light of the Eighth Circuit's October 14, 1997 Order on Rehearing. In support of its Application, U S WEST states:

1                    On August 27, 1997, the Commission issued Decision No. 60353, which required  
2 U S WEST to combine unbundled network elements for AT&T and MCI. In that  
3 decision, the Commission rejected the U S WEST position on combination of unbundled  
4 network elements, relying on the fact that the United States Court of Appeals for the  
5 Eight Circuit in *Iowa Utilities Board v. FCC*, 1997 WL 403401 (8<sup>th</sup> Cir. 1997), had not  
6 vacated FCC Rule 51.315(b) when making its decisions on combinations of elements in  
7 its July 18, 1997 Opinion. That rule provides that "except upon request, an incumbent  
8 LEC shall not separate requested network elements that the incumbent LEC currently  
9 combines." U S WEST had argued that the Commission's reading of Rule 51.315(b)  
10 conflicted with the Court's Opinion.

11                    Subsequently, the Arbitrators approved addenda to the AT&T and MCI  
12 interconnection agreements that imposed a requirement on U S WEST to combine  
13 unbundled network elements for AT&T and MCI pursuant to Decision No. 60353.

14                    On October 14, 1997, the Eighth Circuit issued its Order on Petitions for  
15 Rehearing. In that Order, the Eighth Circuit vacated FCC Rule 51.315(b) and found that  
16 requiring incumbent LECs to combine unbundled network elements was contrary to  
17 section 251(c)(3) of the Telecommunications Act:

18                    Section 251(c)(3) requires an incumbent LEC to provide access to the  
19 elements of its network on an unbundled (as opposed to combined)  
20 basis. Stated another way, § 251(c)(3) does not permit a new entrant to  
21 purchase the incumbent LEC's assembled platform(s) of combined  
22 network elements (or any lesser existing combination of two or more  
23 elements) in order to offer competitive telecommunications services. To  
24 permit such an acquisition of already combined elements at cost based  
rates for unbundled access would obliterate the careful distinctions  
Congress had drawn in subsections 251(c)(3) and (4) between access to  
unbundled network elements on the one hand and the purchase at  
wholesale rates of an incumbent's telecommunications retail services for  
resale on the other.

Order on Petitions for Rehearing at p. 2.

1           The holding by the Eighth Circuit that Rule 51.315(b) conflicts with the Act is  
2 significant because it limits the Commission's ability to impose a state law requirement  
3 on U S WEST to combine elements for AT&T and MCI. Section 261(c) allows a State  
4 Commission to implement regulations necessary to further competition only "as long  
5 as ... not inconsistent with [sections 251 -261 of the Act]..." Any state Commission rule,  
6 decision or approved interconnection agreement requiring an incumbent LEC to  
7 combine unbundled network elements for CLECs will violate section 251(c)(3) of the Act,  
8 eliminating any legal or policy justification for such actions pursuant to either the Act or  
9 state law.

10 4.           The Eighth Circuit's recent Opinion removes all doubt that forcing U S WEST to  
11 combine elements for CLECs violates the Act. Accordingly, U S WEST requests that  
12 the Commission relieve U S WEST from its obligation pursuant to Decision No. 60353 to  
13 process combination of unbundled network element orders submitted by AT&T and MCI  
14 in light of the Eighth Circuit's Opinion, notwithstanding provisions approved by the  
15 Commission in U S WEST's interconnection agreements with AT&T and MCI.

16 5.           Arizona law allows the Commission "at any time... [to] rescind, alter or amend  
17 any order or decision made by it." Az. Rev. Stat. § 40-252.

18 6.           The Commission's Rules incorporate the provisions of the Arizona Rules of Civil  
19 Procedure where the Commission Rules do not specify a procedure. See R14-3-  
20 101(A). Rule 60 of the Arizona Rules of Civil Procedure provides: "On motion and upon  
21 such terms as are just the court may relieve a party ... from a final judgment, order or  
22 proceeding for the following reasons: ... (5) it is no longer equitable that the judgment  
23 should have prospective application; or, (6) any other reason justifying relief from the  
24 operation of the judgment." Ariz. R. Civ. P. 60(c). Courts have found that an  
intervening change in statutory or case law justifies relief from a judgment pursuant to

1 Rule 60(c). See 11 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* §  
2 2863 at 343-346 (2d ed. 1995); see also *In re Pacific Far East Lines, Inc.*, 889 F.2d 242  
3 (9<sup>th</sup> Cir. 1988).

4 7. Prior to the issuance of the Eighth Circuit's October 14 Opinion,  
5 U S WEST had received combination of unbundled network element orders from MCI.  
6 U S WEST will not accept and process such orders now that the Eighth Circuit has  
7 ruled. However, U S WEST does not want to be placed in a position of acting contrary  
8 to the terms of its interconnection agreements should AT&T and MCI, irrespective of the  
9 Eighth Circuit's Opinion, press for completion of pending orders or submit additional  
10 combination orders prior to the Commission's approval of contract language consistent  
11 with the Eighth Circuit's October 14 Opinion.

12 8. To remove the conflict between the Eighth Circuit's Opinion, Decision No. 60353  
13 and the parties' interconnection agreements, the Commission should modify Decision  
14 No. 60353 to remove any obligation on the part of U S WEST to combine unbundled  
15 network elements for AT&T and MCI. Section 40-252, in concert with Rule 60(c)(6),  
16 allows the Commission to relieve U S WEST from the obligation to combine unbundled  
17 network elements for AT&T and MCI pursuant to Decision No. 60353 and the parties'  
18 interconnection agreements pending the Commission's approval of modified language  
19 necessary to bring the parties' interconnection agreements into compliance with the  
20 Eighth Circuit's October 14 Opinion. U S WEST would welcome an opportunity to work  
21 with AT&T and MCI to expeditiously revise the interconnection agreements to conform  
22 with the Eighth Circuit's Opinion.

23 9. Given the importance of the combination of elements issue and the clarity of the  
24 Eighth Circuit's Opinion, the Commission should enter an Order granting U S WEST's  
Application on an expedited basis without further proceedings.

