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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission
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RENZ D. JENNINGS
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IN THE MATTER OF THE PETITION OF BROOKS FIBER COMMUNICATIONS OF TUCSON, INC. FOR ARBITRATION OF THE RATES, TERMS AND CONDITIONS OF INTERCONNECTION WITH US WEST COMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE TELE-COMMUNICATIONS ACT OF 1996

DOCKET NO. U-3009-96-479

DOCKET NO. E-1051-96-479

CLOSING STATEMENT OF BROOKS FIBER COMMUNICATIONS OF TUCSON, INC.

Brooks Fiber Communications of Tucson, Inc. ("BFC-Tucson"), hereby submits its written closing statement ("Closing Statement") pursuant to the direction of the Arizona Corporation Commission ("Commission") Arbitrators in the above-captioned matter. As part of its Closing Statement, BFC-Tucson will identify those portions of its pre-filed written testimony that address issues discussed herein. Where appropriate, BFC-Tucson will also provide citations to the arbitration hearing transcript.

I. INTRODUCTION

BFC-Tucson and US WEST Communications, Inc. ("US WEST"), have been successful, to varying degrees, in resolving a number of the issues identified in the original BFC-Tucson Petition. In some instances, that "resolution" simply has meant that a final decision on a still contested issue has been deferred by the Commission to another phase of the arbitration proceedings (e.g., final pricing issues, performance standards and measures, liquidated damages, etc.). For the most part, this Closing Statement will not address issues resolved during negotiations with US WEST or deferred to a later hearing.[1]

In its Closing Statement, BFC-Tucson has taken issues outstanding at the time of the arbitration hearing and divided them into the following categories:

1) Pricing Issues;

2) Collocation Issues;

3) Unbundling Issues; and,

4) Contractual Issues.[2]

Certain of these issues have already been litigated and decided in prior arbitration proceedings involving US WEST and TCG Phoenix ("TCG Arbitration"), MFS Communications Company, Inc. ("MFS Arbitration"), and AT&T Communications of the Mountain States, Inc. ("AT&T Arbitration"). BFC-Tucson will not extensively reargue those issues in its Closing Statement but will urge the Arbitrator to either adopt or reject its previous rulings on such issues based on the evidence in this proceeding.

II. PRICING ISSUES

A. Unbundled Loops - (Final Matrix Issue #25)

BFC-Tucson realizes that the Commission has consistently adopted $21.67 as the recurring monthly charge for unbundled local loops. Therefore, BFC-Tucson and US WEST have agreed on this monthly rate pending a final decision in the consolidated arbitration proceeding on costing studies and pricing ("Cost/Price Proceeding"). BFC-Tucson and US WEST have not reached agreement on the non-recurring charges ("NRC's") for unbundled loops, which are included in BFC-Tucson's general discussion of NRC's.

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[1] BFC-Tucson will, however, urge interim resolutions of these issues along the lines decided in prior arbitrations or in conformance with the evidence presented herein.

[2] BFC-Tucson will also identify these issues as they appear o the final issue matrix ("Final Matrix") filed jointly this day by US WEST and BFC-Tucson.

B. **Construction Charges - (Final Matrix Issue # 4)**

Both the 96 Telecommunications Act ("Act") and the Federal Communications Commission ("FCC") Order on Interconnection ("FCC Order") impose an obligation of cost-based interconnection charges on incumbent local exchange carriers ("ILEC's") such as US WEST. US WEST'S tariffs for construction charges are based on interconnection for IXC's, not competitive local exchange companies ("CLEC's") and further, the non-recurring and recurring elements that it wishes to impose for equal and reciprocal compensation are implicit in the balance struck by "bill and keep." CLEC's also have to engage in construction in order to receive and route traffic originated by ILEC customers. There is no demonstration that either party will bear more costs to interconnect than the other at this point, and no extraordinary requirement to compensate should be imposed absent such a demonstration. Therefore, Brooks urges the Commission to adopt the same position on construction charges as in the TCG Arbitration at page 20 and the MFS Arbitration at page 10. <u>See</u> BFC-Tucson Ex. No. 3 at pp. 13, 15, 17, and 23.

C. **Non-Recurring Charges - (Final Matrix Issue # 16)**[3]

NRC's are incurred both for resale of bundled retail services and for the purchase of unbundled network elements. At the very least, high non-recurring charges to new entrants, such as proposed by US WEST, represent a barrier to entry if not "trued-up" to some cost-based measurement. To maintain a level playing field, new entrants should only have to bear interim NRC's that are comparable to those that new customers of US WEST must pay until both the NRC's to retail customers and to new entrants can be reset at what the Commission determines to be appropriate cost levels. Therefore, these charges should not exceed those charged retail customers for comparable services, and both interim and final NRS's should include volume discounts <u>and</u>, in the case of resale services, a

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[3]Excepting the NRC for INP, concerning which there has been an agreement on interim prices as set forth herein at page 5.

wholesale discount. <u>See</u> BFC-Tucson Ex. No. 1 at pp. 15-16; Ex. No. 2 at pp. 20-22; and Ex. No. 3 at p. 19.

D. **Resale Discount - (Final Matrix Issue #'s 14 and 26)**

1. <u>Resale Restrictions</u>:

BFC-Tucson can accept the same resale restriction required by the Commission in the TCG, MFS, and AT&T Arbitrations, and believes it has reached agreement on this point with US WEST.

2. <u>Resale Discount</u>:

BFC-Tucson and US WEST have agreed to an across-the-board interim discount of 17% on recurring charges, as found in prior arbitration decisions. However, BFC-Tucson believes this interim discount should be increased to at least 20% for NRC associated with resale services because <u>all</u> the physical provisioning costs included in NRC's are avoided in the case of resale. <u>See</u> BFC-Tucson Ex. No. 1 at p. 15.

E. **Bill and Keep - (Final Matrix Issue # 27)**

BFC-Tucson recommends adoption of bill and keep for the two year period set forth in the Commission's regulations and in the TCG Arbitration. <u>See</u> BFC-Tucson Ex. No. 1 at p. 11.

F. **Interim Number Portability - (Final Matrix Issue #'s 11 and 12)**

BFC-Tucson and US WEST have come to an interim resolution of this issue pending a final order in the Cost/Price Proceeding. This interim resolution covers both cost recovery and terminating access charge division and is set forth in the Final Matrix. The interim resolution will be subject to true-up at the conclusion of Cost/Price Proceeding both as to the rates for INP itself and the rates and elements to be included in access charge division.

G. **Slamming Charges - (Final Matrix Issue # 15)**

Both the Commission and the FCC have the power to impose penalties for slamming customers. BFC-Tucson does not believe it appropriate for the ILEC to impose its own additional slamming charges on other companies in substitution for the regulator. Clearly, it is not in the interests of the industry or customers for companies to engage in slamming, and it is not BFC-Tucson's intent to do so. Indeed, BFC-Tucson realizes that there is a cost to "undo" a change of carriers not authorized by the customer or which was mistakenly handled. There should be a mechanism in place to recover from the carrier causing the mistaken change, but only to the extent of the associated costs. Non-cost based attempts to penalize a carrier for slamming should remain the prerogative of the regulator - not US WEST. Not withstanding this disagreement, US WEST and BFC-Tucson have come to agreement to defer the issue of monetary damages for slamming to the Commission's forthcoming quality of service and liquidated damages proceeding. Therefore, the Commission should decline to require such charges in the interim.

H. **True-Up**

This issue is not in the Final Matrix, but BFC-Tucson would ask that true-up be specifically set forth in any arbitration decision. All the prior Commission arbitration orders have required full true-up of <u>all</u> interim prices (including resale discounts) pending conclusion of the aforementioned consolidated cost/pricing proceeding. BFC-Tucson urges the Commission to continue this practice in the instant case. <u>See</u> BFC-Tucson Ex. No. 1 at pp. 17-19.

III. COLLOCATION ISSUES

A. **Remote Switching Modules ("RSM's") - (Final Matrix Issue #7)**

U S WEST'S position on the collocation of RSM's is directly contradicted by FCC Rules § 51.309 and 51.315 and the FCC Order at 580-581, wherein the Commission is given the responsibility to review and determine what specific equipment may be collocated, if collocation is objected to by the ILEC on the grounds that it is switching equipment.

In the AT&T Arbitration, the recommended decision to the Commission allows AT&T to locate, without restriction, RSM's in collocated offices. Id. at 6. BFC-Tucson witness Johnson presented compelling testimony as to why such collocation of RSM's was appropriate for each of the following reasons:

1) it reduces BFC-Tucson's costs;

2) it reduces US WEST's costs;

3) it improves quality of service for both US WEST and BFC-Tucson customers;

4) it improves network efficiency;

5) it reduces traffic on the US WEST tandem; and,

6) it reduces traffic on US WEST's direct trunking.

See Arbitration Transcript ("TR") at pp. 30-49 and p. 76, ln. 24-p. 77, ln. 22; pp. 195-201; and p. 202, ln. 23 - p. 203, ln. 16 and also BFC-Tucson Ex. No. 1, pp. 5-10 and BFC-Tucson Ex. No. 3, pp. 13 and 15.

B. **Resizing of Trunks - (Final Matrix Issue # 6)**

There is no provision of the Act, the FCC's Order, or of the Commission's regulations that requires resizing of interconnection trunks by US WEST. However, resizing, if done reasonably and rationally, will allow US WEST to utilize the interconnection trunking and ports on switches more efficiently. BFC-Tucson's position would allow the resizing to occur based upon a reasonable but very short range look at reasonably projected traffic volumes. U S WEST'S original position would use past traffic volumes, which will never be representative of volumes in the immediate future (especially during BFC-Tucson's early "ramp-up" period), to inappropriately resize trunking. This would cause CLEC's to incur these unnecessary costs twice, once to downsize the interconnection and then again to resize it upward shortly thereafter in order to accommodate the same growth in traffic clearly predictable at the time the original resizing was required by US WEST. This premature downward resizing could also cause traffic blocking on the public switched network as traffic grows, which is obviously not good for customers. See BFC-Tucson Ex. No. 3 at pp. 14-15; and also TR at p. 117, ln. 5 - p. 119, ln. 5; and p. 201, ln. 8 - p. 202, ln. 22. To resolve this issue, BFC-Tucson and US WEST have subsequently agreed on a compensatory mechanism should already established trunks fail to be utilized as projected by BFC-Tucson, which mechanism is set forth in the Final Matrix.

IV. UNBUNDLING ISSUES

A. Recombination of Unbundled Elements - (Final Matrix Issue #18)

The issue here is whether U S WEST may restrict the ability of a CLEC to combine unbundled network elements. It is clear from the Act that US WEST may not unreasonably restrict the use of elements of service. Properly priced unbundled elements will allow U S WEST to recover the appropriate costs of its network elements, and if other carriers can combine those elements in ways that make their network less costly or more efficient, the Act and the FCC Order allow them to do so at §§ 51.309 and 51.315. This has also been the consistent position of the Commission in the MFS, TCG and AT&T Arbitrations. US WEST presented no new arguments in the BFC-Tucson arbitration supporting a different conclusion as to BFC-Tucson. See BFC-Tucson Ex. No. 3 at p. 20.

B. Tandem Office Designation - (Final Matrix Issue #2)

U S WEST desires to charge two elements of switching to BFC-Tucson - one for tandem switching and one for end office switching, with the tandem rate the higher of the two. As BFC-Tucson witness Johnson amply demonstrated, BFC-Tucson's switch performs the same functions in terminating the calls as U S WEST'S two switches do, and thus BFC-Tucson should be able to charge U S WEST the same two elements of switching in the absence of bill and keep or in the case of intraLATA toll. Under a bill and keep scenario, the designation of a switch as one or the other is fairly irrelevant for purposes of local traffic compensation.[4] However, it may have an impact on compensation for intra- or interLATA toll and the associated access charges to IXC's and other local exchange companies. Moreover, the designation of BFC-Tucson's switch as tandem in the initial stages of its network development will eventually be important factor in determining whether there is reciprocal and equal compensation. In the absence of a cost study demonstrating that asymmetric compensation is warranted, the Commission should adopt policies which support reciprocal and <u>equal</u> compensation [FCC Rule 51.711(b) and 51.713].

BFC-Tucson realizes that the MFS and TCG Arbitrations have come to different conclusions on this issue. However, BFC-Tucson's situation is clearly distinguishable from that of MFS. Specifically, the testimony in this arbitration proceeding demonstrated that:

1) BFC-Tucson's tandem switch provides <u>all</u> the same functions and services as US WEST's tandem;

2) BFC-Tucson's tandem switch will allow <u>any</u> US WEST customer within BFC-Tucson's authorized service area to access <u>any</u> BFC-Tucson customer and vice versa;

3) BFC-Tucson's collocated end offices will serve some 82% of US WEST business customers and 68% of US WEST residential customers within BFC-Tucson's authorized service area; and,

4) BFC-Tucson's fiber network (either constructed or under construction) far exceeds that of MFS, both in absolute terms and in relation to their respective service area.

In addition, the FCC Order at 106 states that the Commission, when deciding the classification of the new entrant's switch as either end office or tandem, "shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar

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[4] A BFC-Tucson proposal to defer, in any agreement, the issue of the classification of BFC-Tucson's switch until after the end of "bill and keep" was rejected by US WEST.

to those performed by an incumbent LEC's tandem switch." See BFC-Tucson Ex. No. 1 at pp. 11-14; BFC-Tucson Ex. No. 3 at p. 12, Section III, Part 3-V. D. 1.; and also TR at p., 50 and at p. 62, ln. 20 - p. 65, ln. 5.

C. Enhanced Services Exemption - (Final Matrix Issue #3)

BFC-Tucson and US WEST have resolved this issue along the lines set forth in the Final Matrix.

V. CONTRACTUAL ISSUES

A. Most Favorable Terms and Conditions - (Final Matrix Issue #21)

Brooks would add a "most favorable terms and conditions" paragraph. Aside from Paragraphs 1310 and 1311 of the FCC Order, Section 252(i) of the Act requires that each individual network service or element be provided on a non-discriminatory basis.

BFC-Tucson witness Ken Solomon provided lengthy testimony on why such a contractual provision is necessary to prevent undue discrimination and that it is a common feature in agreements relating to industries facing rapidly declining costs or which are otherwise in an unsettled state. See BFC-Tucson Ex. No. 2 at pp. 22-34.

B. Expedited Installs - (Final Matrix Issue #19)

This issue is a practical one and involves both service quality and pricing concerns. Brooks believes it should have the opportunity, at its request, to expedite related installation orders on the same day at the same time rather than having to schedule separate times in the day for related orders to be worked. US WEST has refused to commit to expedite installations or even to commit to standard intervals for installation, claiming that these issues will have to be addressed next year in the quality of service proceeding.

BFC-Tucson also should not be charged both the tariff NRC and US WEST's installation labor rate when a coordinated installation (or "cutover") takes place (as US WEST'S proposed agreement would require). The latter charge reflects US WEST's actual time incurred in making whatever expedited installations as are requested by BFC-Tucson. To charge BFC-Tucson for both is duplicative and could well lead to double recovery. This issue is very significant to BFC-Tucson because it anticipates that the great majority of BFC-Tucson's customers will be hooked up through such coordinated cutovers. See BFC-Tucson Ex. No. 3 at p. 20; and also TR at p. 119, ln. 17 - p. 120, ln. 16.

C. **Service Quality Standards/Liquidated Damages - (Final Matrix Issue #20)**

The FCC Order at 225, 314 and 970 allows carriers to request and receive better service from the ILEC than it provides its general retail customers as long as they are willing to pay for it. Any final Commission decision in this matter should expressly clarify this point.

BFC-Tucson also urges the Commission to adopt its proposed performance criteria and liquidated damage provisions pending a final determination on these issues sometime next year in yet another generic consolidated phase of the various arbitration proceedings pending before this Commission. It would be especially appropriate to require specific performance standards for an ILEC with as dismal a record of service as U S WEST. Indeed, BFC-Tucson has similar liquidated damages clauses in its agreements with other ILEC's such as Ameritech. The issue of liquidated damages, as opposed to penalties, reduces the dispute over what should a penalty be in each case and eliminates the need for reporting and monitoring each element of service performance.

BFC-Tucson's proposed liquidated damage level is based upon the valuation of other local exchange companies' business and upon a revenue stream analysis. The level of liquidated damages should be set such that the ILEC has no incentive to perform badly in order to regain a customer. In addition, US WEST's proposed "limitation of liability" language is of concern to BFC-Tucson. BFC-Tucson does not believe that the ILEC can or should shelter itself from liability for antitrust or other penalties imposed by regulatory bodies.

The Commission must realize and take into consideration the particular vulnerability of new entrants such as BFC-Tucson to irreparable damage caused by poor US WEST service. The old saying that you never get a second chance to make a good first impression goes double in the telecommunications business - especially when you are a new company in town trying to compete with an over 100 year old monopoly provider with near universal name recognition. At the same time, proving specific damages in a court of law can be problematic (customers are not excited about being drawn into contractual disputes between telephone companies) and such a remedy may well fail to capture the loss by BFC-Tucson of future business due to a bad but undeserved reputation for poor service caused by US WEST's deficiencies. See BFC-Tucson Ex. No. 1 at pp. 19-21.

D. **Billing Period for Resold Service - (Final Matrix Issue #17)**

BFC-Tucson and US WEST have agreed on compromise language as set forth in the Final Matrix.

E. **Notice of Commencing Business - (Final Matrix Issue #23)**

There is no obligation under the Act for CLEC's to report to ILEC's what customers or when the CLEC begins to serve residential customers and US WEST has presented no evidence as to why such an obligation should be imposed on BFC-Tucson. Such information is available upon request by the Commission at the time it considers a Section 271 (of the Act) application by an ILEC seeking interLATA authority. BFC-Tucson should not have to provide its network data to US WEST for any reason other than assuring network integrity. See BFC-Tucson Ex. No. 3 at p. 13.

F. **Acknowledgement of Reserved Issues - (Final Matrix Issue #24)**

There is also no obligation under the Act for CLEC's to acknowledge any position taken by ILEC's with regard to network imbalances, universal service or any other position taken with regard to pending matters before this Commission, the courts or the FCC. As with the above issue, US WEST has presented no evidence supporting inclusion of such purely self-serving language in any BFC-Tucson/US WEST agreement. See BFC-Tucson Ex. No. 3 at p. 13.

VI. CONCLUSION

BFC-Tucson is a small facilities-based carrier authorized by this Commission to serve the Metro-Tucson area. The positions taken by BFC-Tucson throughout its long and difficult negotiations with US WEST and throughout these arbitration proceedings have consistently been with the following principles in mind:

1) minimize the costs of interconnection and resale to BFC-Tucson and its customers;

2) require no increased costs to US WEST for which BFC-Tucson is not willing to pay;

3) maximize the efficient use of both the BFC-Tucson and US WEST integrated network;

4) provide the highest quality of service to BFC-Tucson customers without degrading existing US WEST service; and,

5) provide contractual incentives (where market incentives do not exist and traditional regulatory oversight would be inadequate) for US WEST to live up to the commitments made to BFC-Tucson.

BFC-Tucson's positions are also consistent with many of the prior rulings of the Commission in the TCG and MFS Arbitrations and with the recommended decision in the AT&T Arbitration. BFC-Tucson urges the Commission to adopt each of the BFC-Tucson positions as set forth herein and in the Final Matrix.

RESPECTFULLY SUBMITTED THIS 22nd day of November, 1996.

SNELL & WILMER, L.L.P.

By Thomas L. Mumaw
Thomas L. Mumaw

Attorneys for Brooks Fiber Communications of Tucson, Inc.

CERTIFICATE OF SERVICE

The original and three (3) copies of the foregoing document were filed with the Hearing Division of the Arizona Corporation Commission, with a copy to Docket Control, on the 22nd day of November, 1996, and service was completed by hand-delivering or faxing a copy of the foregoing document this 22nd day of November, 1996, to all parties of record herein.

Dody Nunley

Dody Nunley