

EXCEPTION



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BEFORE THE ARIZONA CORPORATION COMMISSION

CARL J. KUNASEK
CHAIRMAN
JIM IRVIN
COMMISSIONER
RENZ D. JENNINGS
COMMISSIONER

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IN THE MATTER OF THE PETITION OF)
AMERICAN COMMUNICATIONS)
SERVICES, INC. AND AMERICAN)
COMMUNICATIONS SERVICES OF)
PIMA COUNTY, INC. FOR)
ARBITRATION WITH U S WEST)
COMMUNICATIONS, INC. OF)
INTERCONNECTION RATES, TERMS,)
AND CONDITIONS PURSUANT TO 47)
U.S.C. § 252(b) OF THE)
TELECOMMUNICATIONS ACT OF 1996)

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

IN THE MATTER OF THE PETITION OF)
AT&T COMMUNICATIONS OF THE)
MOUNTAIN STATES, INC. FOR)
ARBITRATION WITH U S WEST)
COMMUNICATIONS, INC. OF)
INTERCONNECTION RATES, TERMS,)
AND CONDITIONS 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

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

DOCKET NO. U-2752-96-362
DOCKET NO. E-1051-96-362

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

DOCKET NO. U-3016-96-402
DOCKET NO. E-1051-96-402

Arizona Corporation Commission

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1 IN THE MATTER OF THE PETITION OF)
2 MCIMETRO ACCESS TRANSMISSION)
3 SERVICES, INC. FOR ARBITRATION OF)
4 THE RATES, TERMS, AND)
5 CONDITIONS OF INTERCONNECTION)
6 WITH U S WEST COMMUNICATIONS,)
7 INC. PURSUANT TO 47 U.S.C. § 252(b))
8 OF THE TELECOMMUNICATIONS ACT)
9 OF 1996.)

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

7 IN THE MATTER OF THE PETITION OF)
8 BROOKS FIBER COMMUNICATIONS)
9 TUCSON, INC. FOR ARBITRATION OF)
10 THE RATES, TERMS, AND)
11 CONDITIONS OF INTERCONNECTION)
12 WITH U S WEST COMMUNICATIONS,)
13 INC. PURSUANT TO § 252(b) OF THE)
14 TELECOMMUNICATIONS ACT OF 1996)

DOCKET NO. U-3009-96-478
DOCKET NO. E-1051-96-478

11 IN THE MATTER OF THE PETITION OF)
12 SPRINT COMMUNICATIONS)
13 COMPANY, L.P. FOR ARBITRATION)
14 WITH U S WEST COMMUNICATIONS,)
15 INC. OF INTERCONNECTION RATES,)
16 TERMS, AND CONDITIONS PURSUANT)
17 TO 47 U.S.C. § 252(b) OF THE)
18 TELECOMMUNICATIONS ACT OF 1996.)

DOCKET NO. U-2432-96-505
DOCKET NO. E-1051-96-505

16 IN THE MATTER OF THE PETITION OF)
17 GST TUCSON LIGHTWAVE, INC. FOR)
18 ARBITRATION OF THE RATES, TERMS,)
19 AND CONDITIONS OF)
20 INTERCONNECTION WITH U S WEST)
21 COMMUNICATIONS, INC. PURSUANT)
22 TO § 252(b) OF THE)
23 TELECOMMUNICATIONS ACT OF 1996.)

DOCKET NO. U-3155-96-527
DOCKET NO. E-1051-96-527

21 **EXCEPTIONS OF BROOKS FIBER COMMUNICATIONS OF TUCSON, INC.,**
22 **TO RECOMMENDED OPINION & ORDER OF JUNE 13, 1997**

23 Brooks Fiber Communications of Tucson, Inc. ("Brooks"), hereby submits its Exceptions
24 to the Recommended Opinion and Order dated June 13, 1997 ("Recommended Order"), in the
25 above captioned consolidated arbitration proceeding. In the Recommended Order, the Arbitrators
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1 appointed in this matter by the Arizona Corporation Commission ("Commission") analyze the cost
2 of service studies ("COSS") provided by U S WEST Communications Company, Inc. ("U S
3 WEST"), and various Intervenors and attempt to establish both the prices for unbundled network
4 elements and the applicable wholesale discount for the wholesale purchase by U S WEST's
5 competitors of retail services offered by U S WEST.

6 7 **I. INTRODUCTION**

8 The instant phase of the Commission's consolidated arbitration proceeding under 47
9 U.S.C. § 252(b)¹ was one of the longest and certainly one of the most complicated proceedings
10 ever conducted before the Commission. This complexity is perhaps best reflected by the fact that
11 even with the direction provided by the Arbitrators in the Recommended Order, the parties are
12 unable to agree on many of the prices sought to be established by the Arbitrators. Consequently,
13 Brooks wishes to acknowledge the tremendous amount of thought and effort that went into the
14 drafting of the Recommended Order. That being said, the Recommended Order is deficient or at
15 least unclear in several key respects and should be amended and/or clarified either by the
16 Arbitrators or by the Commission.

17 Brooks will divide its Exceptions into three categories. The first category consists of those
18 areas where the Recommended Order is simply in error. The second category is comprised of
19 issues left unaddressed by the Recommended Order. Finally, there are portions of the
20 Recommended Order that Brooks finds ambiguous and which should be clarified before final entry
21 by the Commission of its decision in this matter.

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24 ¹ Section 252(b) is part of landmark federal legislation known as the Telecommunications
25 Act of 1996 ("the Act"). Under the Act, if a new competitive local exchange company ("CLEC")
26 wishes to interconnect with U S WEST and can not negotiate a voluntary interconnection
agreement, it may request mandatory arbitration of the disputed issues by state regulators, i.e, the
Commission.

1 lack of third-party input into an examination of these rates and the fact that these higher
2 depreciation rates will not have been used in setting U S WEST's retail prices - thus giving U S
3 WEST an unfair competitive advantage.

4 In addition to the lack of Intervenor input, Commission Staff and the Residential Utility
5 Consumers Office have had virtually no opportunity to review U S WEST's proposed new
6 depreciation rates nor have they offered any recommendation concerning their adoption. Yet, and
7 let there be no mistake about this, **the Commission would be all but committed to the use of**
8 **these same higher depreciation rates in U S WEST's next general rate case.** Aside from the
9 discriminatory implications of any subsequent attempt to maintain lower depreciation rates for U S
10 WEST's retail ratepayers than those previously used for U S WEST's competitors, the
11 Commission would have an even harder time explaining to a court why, for example, it believes a
12 copper cable will last 24 years when used by a retail U S WEST customer but only 20 years when
13 used by one of U S WEST's competitors.

14 **B. Cost of Capital**

15 The Recommended Order inexplicably grants U S WEST an 11.9% equity return on an
16 admittedly conservative (equity rich) capital structure (a 50 basis point increase over that last
17 found appropriate by the Commission in 1995) even though the sale of unbundled network
18 elements is, by definition, U S WEST's least competitive line of business.² The Recommended
19 order gives absolutely no reason for this paradox. An 11.4% return would be consistent with the
20 return on equity allowed in the price of the retail services of U S WEST with which Brooks must
21 compete and is more than reasonable given the lesser risk associated with selling unbundled
22 network elements.

24 ² Since 1995, U S WEST has made one of the largest **debt** offerings in U.S. history. See
25 Recommended Order at page 7, lines 15-17. This is hardly the act of a company being
26 overwhelmed by competitive pressures. Moreover, Brooks is not aware of any major utility that
has had its equity return **increased** in the past two years by this Commission.

1 C. Geographic Deaveraging

2 The Recommended Order states at page 21 that: "We do not find the record in this
3 proceeding provides a proper basis for geographic deaveraging." Yet it acknowledges that the
4 relevant portion of the Federal Communications Commission ("FCC") rules implementing the Act
5 **required** geographic deaveraging of unbundled local loops.³ The Recommended Order further
6 acknowledges that no party opposed geographic deaveraging and that all the intervenors (and their
7 witnesses) supported deaveraging.⁴ Thus, contrary to the assertion of the Arbitrators, the record
8 herein overwhelmingly supported geographic deaveraging of local loop prices.

9 The second reason for rejecting deaveraging cited by the Recommended Order concerns
10 the lack of deaveraged U S WEST retail rates. This disparity should not dissuade the Commission
11 from deaveraging unbundled local loops for two reasons. First, U S WEST has always had the
12 unilateral power to propose retail rate deaveraging at any time in the past and may do so at any
13 time in the future. Second, the Recommended Order previously showed no such similar concern
14 about saddling CLEC's with higher depreciation rates and capital costs than were used in setting U
15 S WEST's retail rates. Taken both individually and together, these two determinations (i.e, cost of
16 capital/depreciation and deaveraging) clearly serve to hurt competitive entry.

17 The failure of the Commission to deaverage local loop prices essentially means that as a
18 general proposition, there will be no facilities-based competition for residential customers. With
19 an average loop price that exceeds U S WEST's retail rate for such customers, no competitive
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21 ³ Brooks is certainly aware that on July 18th, the 8th Circuit overturned the specific
22 FCC rule described above as being beyond the FCC's authority under the Act. However, the 8th
23 Circuit's ruling will no doubt be reviewed by the U.S. Supreme Court, and thus it would be
24 premature to completely disregard the FCC mandate. Moreover, whether or not the FCC had
authority under the Act to **require** geographic deaveraging under the Act is a "states' rights" issue.
It does not affect the persuasiveness of the pro-competition arguments raised by the FCC in
support of deaveraging.

25 ⁴ The U S WEST position on geographic deaveraging was admittedly ambiguous.
26 However, Brooks believes it fair to describe U S WEST as supportive of local loop price
deaveraging if done contemporaneously with the deaveraging of U S WEST's retail rates.

1 carrier could afford to solicit their business. By deaveraging the local loop price, the rate in
2 Phoenix and Tucson might be brought down to the level where residential competition could be
3 feasible in the two areas in which most of the competitive carriers will be concentrating their
4 initial marketing efforts.

5 As presently written, the Recommended Order allows U S WEST to dictate the pace at
6 which deaveraging will be considered by the Commission in the future by tying the issue to U S
7 WEST's next general rate filing. At the very least, the Recommended Order should clearly
8 indicate that even if U S WEST does not file a general rate case seeking retail price deaveraging
9 within the next two years, it must file a proposal to deaverage unbundled local loops within two
10 years.

11 To facilitate the above timetable, the Commission should have the parties herein calculate
12 what appropriate deaveraged local loop prices would be under the assumptions and methodology
13 of the Recommended Order. Aside from avoiding a future dispute over how to determine
14 geographically deaveraged loop prices, this exercise would provide U S WEST with helpful
15 information in designing its deaveraged retail price proposal (should U S WEST in fact wish to
16 deaverage retail prices), provide useful information to CLEC's in planning future marketing and
17 investment decisions, and provide a hedge against the possibility that the Supreme Court will
18 reinstate the FCC rule requiring geographic deaveraging.

19 20 **III. OMISSIONS FROM THE RECOMMENDED ORDER**

21 The Recommended Order does not discuss the issue of whether Internet traffic will be
22 classified as local traffic for purposes of assessing transport and termination charges. Earlier
23 Commission orders (e.g., in the MFS Communications arbitration) appeared to so classify Internet
24 traffic. Brooks and other CLEC's had agreed with U S WEST to follow any binding FCC
25 determination of this issue, but the subsequent FCC order on Internet, although indicating that
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1 Internet traffic will not be considered interstate, did not specifically indicate that it was to be
2 considered local traffic. Therefore, there is a need for the Commission to clarify the point and
3 reaffirm its position that Internet traffic terminated on the public switched network is to be
4 considered local traffic for purposes of transport and termination charges.

5 The Recommended Order is also silent on the issue of who gets the SLCC and access
6 charge revenues for resold bundled services. There is similarly no discussion of the circumstances
7 under which they would be shared, as has been ordered in other jurisdictions. If U S WEST is
8 permitted to retain all of them, then the discounts established for resale are too low since they were
9 presumed calculated under the assumption that the reselling carrier would receive these
10 revenues.

11 The Recommended Order provides no guidance as to how parties are to calculate the total
12 element long-run incremental cost ("TELRIC") for unbundled services not specifically studied in
13 this proceeding. Brooks had hoped for some more generic guidance on this point. For example,
14 the Recommended Order could have specified generic fill factors for distribution, feeder, and main
15 frames and/or a fixed percentage of common costs to be used in future TELRIC studies.

16 The omission from the Recommended Order of an approved generic COSS methodology is
17 especially significant with regard to the unbundled elements needed by CLEC's to provide services
18 at higher band widths (e.g., network to network frame relay and ATM connections - both sold by
19 U S WEST under its retail tariff). As is noted below, it is even unclear whether Brooks can obtain
20 such service elements under the resale provisions of the Recommended Order.

21 22 **IV. AMBIGUITIES IN THE RECOMMENDED ORDER**

23 The Recommended Order establishes an 18.44% discount for "Business PBX." Brooks has
24 repeatedly sought clarification from the parties as to whether this language should have more
25 appropriately read "Business lines, including PBX" since if read literally it would only apply to
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1 PBX service. Other categories of retail service subject to discount are similarly ambiguous, as is
2 discussed below.

3 It is similarly unclear whether the resale discounts apply to unbundled network elements
4 also sold at retail by U S WEST. U S WEST has taken the position that these retail services need
5 not be discounted because they are not bundled services even though the Act requires that all
6 tariffed retail services be subject to resale at the appropriate level of discount. The Commission
7 should clarify that all services sold at retail should be eligible for wholesale discounts in addition
8 to the elements necessary to provide such services being offered at TELRIC-based rates as an
9 unbundled network element. Until such time as U S WEST can develop TELRIC prices for these
10 unbundled retail services and produce an avoided cost study to justify a specific wholesale
11 discount level - both of which should be determined in accordance with the methodologies and
12 assumptions adopted by this Commission - Brooks would ask that the Commission classify them
13 as "vertical services" that must be offered to CLEC's's at the corresponding discount from their
14 retail tariff price.

15 Third, Brooks would ask that the Arbitrators set a time certain for U S WEST to provide
16 the parties (and the Commission) with the "operable switching cost model" referenced in the
17 Recommended Order at page 25, line 16-17 and provide U S WEST with the key assumptions to
18 be employed by such model. The interim period of "bill and keep" is fast passing, and given the
19 numerous disputes herein over access to the parties' models and the lack of consistency in
20 important input assumptions, Brooks would like to see some additional structure provided to the
21 process that will determine the critical transport and termination charges to be utilized by the
22 parties in the future.

23 Next, Brooks asks for clarification of the loop conditioning charge established at page 26
24 of the Recommended Order. The Recommended Order appears to setting this charge at the retail
25 tariff rate less the ISDN discount level of 28.26%. Such a resolution of the loop conditioning issue
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1 appears reasonable. However, there is also a need for loop conditioning in regard to services other
2 than ISDN (see Recommended Order at page 25, lines 21-22), and thus the Recommended Order
3 should specify either that this rate is applicable to all CLEC requests for digital conditioning or
4 otherwise indicate what the rate for non-ISDN conditioning will be..

5 With regard to cross-connects (Recommended Order at page 29), it should be clear that it is
6 the CLEC's choice as to whether or not to cross-connect through an EICT and whether or not to
7 cross-connect via a pot bay when cross-connecting adjacent collocation cages. Otherwise, it has
8 been Brooks' experience that U S WEST will interpret the Recommended Order's use of the
9 permissive "may" in line 28 as yet another restrictive condition that U S WEST may now impose
10 on CLEC's.

11 Finally, and as incredible as it may seem, Brooks asks the Arbitrators for clarification of
12 the term "true-up" as used in the Recommended Order at page 39, lines 18-20. Although the
13 Commission's intent that this "true-up" be a retroactive price adjustment for all elements/services
14 purchased by CLEC's under the "interim prices" set in the individual "one-on-one" arbitrations
15 appears crystal clear to Brooks, several U S WEST representatives have indicated to Brooks that U
16 S WEST somehow "interprets" this term as requiring only **prospective** price adjustments, with no
17 refunds due for previous overcharges.

18 19 V. CONCLUSION

20 The Commission should ask the parties to recalculate the price of unbundled network
21 elements using U S WEST's presently authorized depreciation rates and cost of equity capital.
22 These are more than reasonable approximations of the forward-looking costs required to determine
23 U S WEST's TELRIC.

24 Deaveraged local loop prices are overwhelmingly supported by the record herein as both
25 cost-based and pro-competitive, Moreover, deaveraged local loop prices should be established or
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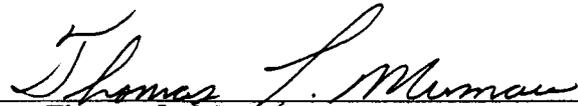
1 at least calculated even if the Commission decides that they should not be implemented until U S
2 WEST has (another) chance to seek deaveraging of its retail rates over the next two (2) years or
3 should the FCC regulations requiring deaveraging again become effective. In addition, the
4 Commission should set a firm two (2) year time period for reconsideration of the issue of
5 geographically deaveraged local loops.

6 Third, the Commission should address or at least set up a procedure for addressing in an
7 expedited fashion the issues left unresolved by the Recommended Order and identified herein.
8 This could perhaps be discussed at the July 30th conference.

9 Finally, the Commission should clarify the Recommended Order as set forth in these
10 Exceptions. Both these latter actions will hopefully minimize future disputes over issues which
11 the Commission believed it had resolved in this proceeding, or at the very least allow for their
12 expeditious resolution.

13 RESPECTFULLY SUBMITTED this 21st day of July, 1997.

14 SNELL & WILMER L.L.P.

15
16 By 
17 Thomas L. Mumaw

18 Attorneys for Brooks Fiber Communications
19 of Tucson, Inc.
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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 21st day of July, 1997, and service was completed by hand-delivering, faxing, or mailing a copy of the foregoing document this 21st day of July, 1997, to all parties of record herein.



Dody Nunley