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Arizona Corporation Commission
DOCKET

OCT 9 1996

U-3016-24 1248
September 6, 1996

DOCKETED BY **AT**

Mr. James Matthews
Executive Secretary
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

VIA FACSIMILE

Re: Dkt. No. U-3016-96-402

Dear Mr. Matthews:

Enclosed are the Comments of Sprint on Arbitrator's Recommendation in the MFS/US West arbitration proceeding. Copies of this submission are being sent by facsimile to the parties to the proceeding and will be sent overnight for filing with the Commission.

Thank you for your assistance.

Very truly yours,

Don Low

pc: Parties on service list

BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE PETITION OF TCG)
PHOENIX FOR ARBITRATION PURSUANT TO)
§252(B) OF THE TELECOMMUNICATIONS)
ACT OF 1996 TO ESTABLISH AN INTER-)
CONNECTION AGREEMENT WITH US WEST)
COMMUNICATIONS, INC.)

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

COMMENTS OF SPRINT ON ARBITRATOR'S RECOMMENDATION

Sprint Communications Company L.P. submits the following comments on the October 21, 1996, recommendations of the Arbitrator in the above captioned matter:

Sprint believes that with regard to the vast majority of the issues, the Arbitrator's recommended decisions are reasonable and sound interpretations and applications of the federal Telecommunications Act of 1996 ("Act"). Due to the press of other business, Sprint will limit its comments to one issue of vital importance to Sprint, where it believes that the recommendation is erroneous. However, Sprint does disagree with other aspects of the recommendations and it should not be inferred that Sprint agrees with the recommended decisions in all other respects because of the absence of comments on them.

The Arbitrator's recommended decision on issue 10(a), "Most Favorable Terms and Treatment suggests that a "most favored nation" provision will not be required for inclusion in the interconnection agreement because "We do not desire to subject US West to a most favored nations provision beyond that required by the Act." Sprint is not certain what that statement was intended to suggest but believes that the failure to require a MNF

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provision in the interconnection agreement is erroneous and should not be adopted by the Commission.

The recommended language could be read to suggest that the Act does not require MFN treatment in the same manner as required by the FCC and presumably reflected in TCG's proposed provision. If so, the recommended decision does not indicate the basis for such a conclusion other than to note the 8th Circuit Court stay of the FCC rules. However, that Court action should not be relied on for such a conclusion. First, of course, the Court stay was simply a preliminary decision based on the Court's "first look" at the issues, pending a full decision on the merits which will reportedly occur next year. Even that temporary "stay" is subject to review by the United States Supreme Court. Furthermore, it is evident from even a cursory reading of the stay order that the Court did make a fully considered decision regarding the FCC's "pick and choose" rule. Instead, that issue was overshadowed by the principle issue regarding the FCC's authority to promulgate "pricing" rules. Clearly, there is no definitive judicial decision on the interpretation of §252(i) of the Act, and the Commission should not suggest otherwise.

Most importantly, the Court's "first look" at the MFN issue resulted in an erroneous understanding of the Act and the purpose and nature of its nondiscrimination provisions. The requirements of §251(i) - to make available any interconnection, service, or network element contained in an approved agreement to any other carrier upon the same terms and conditions - must be interpreted in light of other provisions of the Act. §251(c)(2)(d) of the Act requires that incumbent Local Exchange Carriers (ILECs) must provide interconnection "on rates, terms and conditions that are just, reasonable and nondiscriminatory." As noted by the FCC, this "nondiscrimination" provision is unlike

§202 of the Communications Act of 1934 (and unlike most state statutes) in that it does not only prohibit "undue" or "unreasonable" discrimination but prohibits any discrimination. Congress, in imposing such an absolute standard, clearly recognized that the Act's goal of promoting development of local exchange service competition could only be achieved if all new entrants were treated equally by ILECs so that no entrant was provided a preference through unequal terms and conditions of interconnection. Such equal availability of interconnection terms and conditions, of course, includes rates and prices. Although the 8th Circuit's initial decision appears to find that "rates" are not "terms and conditions," it would make no sense to prohibit discrimination for "non-rate" terms and conditions but allow it for "rate" terms and conditions. Clearly, the rates for the various components of interconnection agreements are the most critical factors in ensuring that all new entrants have non-discriminatory opportunities to compete.

Furthermore, the nondiscrimination mandate of the Act means that the individual components of interconnection agreements, and not just an entire agreement, must be available. As the FCC recognized, the Congressional intent is evident from the fact that §252(i) makes a distinction between "any interconnection, service or network element" and an entire interconnection agreement. If Congress had meant to only require the nondiscriminatory availability of entire agreements, there would have been no need to include the words "interconnection, service or network element" in the provision.

The availability of individual components of an agreement is necessary to prevent discrimination by the ILECs as they resist the development of competition. As suggested by the FCC, without the "pick and choose" interpretation, the ILECs could use their greater bargaining power to insert in one agreement onerous provisions, which do not

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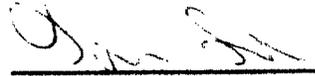
affect that particular new entrant, in order to discourage other new entrants from requesting interconnection under the same terms and conditions.

Thus, in agreeing with ILEC arguments that the FCC's interpretation of §252(i) interfered with the Act's mandate for negotiated or arbitrated interconnection agreements, the 8th Circuit appears to have ignored the Act's provisions which prohibit discrimination in interconnection, services and network elements. Although the Act clearly does mandate negotiations and arbitrations as a process for achieving interconnection agreements, it also just as clearly prohibits discrimination with regard to each element of those agreements. Sprint suggests that the two are not irreconcilable, as the 8th Circuit Court has apparently concluded. The FCC "pick and choose" rule would still permit parties to negotiate individual agreements, but would simply help prevent the ILECs from entering into discriminatory agreements. This Commission should therefore not make the same mistake as made by the 8th Circuit and should adopt the FCC's reasoning as its own in finding that TCG (and other new entrants) do indeed have rights to nondiscriminatory treatment by US West with regard to every element and component of its interconnection agreement.

It may be that the recommended decision was not intended to suggest disagreement with TCG's (and the FCC's) interpretation of the Act's MFN provision; but was meant only to find that a most favored nation (MFN) provision should not be required to be explicitly included in the interconnection since it would be redundant with rights granted by the Act. Such a finding by the Commission would not clearly inform interested parties of the Commission's interpretation of this provision of the Act. Given the uncertainty already created by the 8th Circuit's actions, Sprint respectfully suggests

that the Commission should ensure that the parties to an interconnection agreement are clearly aware of their MFN rights, by mandating a provision in the interconnection agreement which does spell out those rights.

Respectfully submitted,
Sprint Communications Company L.P.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served by sending, by facsimile, a copy thereof to the following on this 28th day of October, 1996.

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