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Arizona Corporation Commission

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AZ CORP COMMISSION

BEFORE THE ARIZONA CORPORATION COMMISSION

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CARL J. KUNASEK
CHAIRMAN
JAMES M. IRVIN
COMMISSIONER
RENZ D. JENNINGS
COMMISSIONER

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DOCUMENT CONTROL

IN THE MATTER OF THE PETITION OF)
TCG PHOENIX FOR ARBITRATION)
PURSUANT TO § 252(b) OF THE)
TELECOMMUNICATIONS ACT OF 1996)
TO ESTABLISH AN)
INTERCONNECTION AGREEMENT)
WITH U S WEST COMMUNICATIONS,)
INC.)

Docket Nos. U-3016-96-402 ✓
E-1051-96-402

RESPONSE OF TCG PHOENIX
TO APPLICATION FOR
REHEARING OF U S WEST
COMMUNICATIONS, INC.

TCG Phoenix ("TCG"), through its undersigned counsel, hereby submits its response to the Application for Rehearing filed by U S West Communications, Inc. ("USWC") on January 7, 1997 concerning Commission Decision No. 59937 and respectfully submits that the same should be summarily denied. The arguments contained in USWC's most recent filing have been variously made and rejected by the Commission on several prior occasions.* TCG will not in this response restate its previously set forth positions but incorporates by reference the points and authorities contained in memoranda, briefs and responses already on file herein, including specifically TCG's Response to Application for Rehearing of Decision No. 59873, a copy of which is attached hereto.

* Although the five arguments contained in the January 7, 1997 Application for Rehearing have appeared in several different forms, they have been urged to the Commission, without success, at least four different times. First, in USWC's response to the petition for arbitration; second, in USWC's post arbitration brief; third in USWC's exceptions to the recommended opinion and order; and fourth, in USWC's application for rehearing of the Commission's earlier order, Decision No. 59873.

1 DATED: January 21, 1997

2 Respectfully submitted,

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4 Vice President, Regulatory and External Affairs

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16 Attorneys for Petitioner TCG Phoenix

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19 Lex J. Smith
20 Michael W. Patten

21 Original and three (3) copies
22 hand-delivered January 21, 1997,
23 to:

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25 Chief Hearing Officer and
26 Chief Arbitrator
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30 Phoenix, Arizona 85007

31 Copy of the foregoing hand delivered
32 January 21, 1997 to:

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10 Dec. Watts

4-17-001-0001

BEFORE THE ARIZONA CORPORATION COMMISSION

RENZ D. JENNINGS
CHAIRMAN
MARCIA WEEKS
COMMISSIONER
CARL J. KUNASEK
COMMISSIONER

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ARIZONA CORP. COMM.
HEARING DIVISION

IN THE MATTER OF THE PETITION OF)
TCG PHOENIX FOR ARBITRATION)
PURSUANT TO § 252(b) OF THE)
TELECOMMUNICATIONS ACT OF 1996)
TO ESTABLISH AN)
INTERCONNECTION AGREEMENT)
WITH U S WEST COMMUNICATIONS,)
INC.)

Docket Nos. U-3016-96-402
E-1051-96-402

TCG PHOENIX'S RESPONSE TO
APPLICATION FOR
REHEARING OF DECISION NO.
59873

TCG Phoenix ("TCG"), through its undersigned counsel, hereby submits its response to the application of U S West Communications, Inc. ("U S West") for rehearing of Decision No. 59873 and requests that the same be summarily denied.

All of the various arguments raised by U S West in its application have been heard, considered and properly rejected by the Arizona Corporation Commission ("Commission"). TCG incorporates by reference its previous filings, briefs and memoranda herein. Specifically, in reply to the five arguments raised, TCG respectfully states:

1. The interim rates established by the Commission are just, fair and reasonable and are authorized to be established by Art. XV § 3 of the Arizona Constitution, A.A.C. R.14-2-1101, et seq., A.A.C. R.14-2-1501, et seq. and A.A.C. R.14-2-1301, et seq. Cf. Ariz. Rev. Stat. Ann. § 40-250; § 40-202; § 40-251. The rates established are neither confiscatory nor in violation of the United States or Arizona Constitutions.

2. The Decision permits the recovery of applicable reasonable costs by U S West and is in conformity with applicable state and federal law including the Telecommunications Act of 1996.

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1 3. The Decision is based on substantial credible evidence and is reasonable and
2 lawful.

3 4. The Decision does not exceed the authority established by the
4 Telecommunications Act of 1996.

5 5. The Decision is not arbitrary, capricious or an abuse of discretion but rather
6 represents the reasonable and lawful exercise of the Commission's jurisdiction and
7 authority under state and federal law.

8 On November 29, 1996, the parties submitted the final interconnection agreement
9 and that agreement is presently under review by the Commission under A.A.C.
10 R.14-2-1506 and 1507. Therefore, the Commission already is evaluating all aspects of the
11 agreement including U S West's positions with respect to the agreement.

12 As a preliminary matter, TCG submits that the legal basis for U S West's apparent
13 opposition to competition is simply non-existent. Even without recent federal legislation,
14 whether a state allows or prohibits competition among public utilities is purely a matter
15 of state policy--expressed and changeable by the state--in the interest of the public.
16 Tennessee Electric Power Company v. Tennessee Valley Authority, 306 U.S. 118, 139, 141
17 (1939). In short, "Freedom from competition is not constitutionally protected." Law
18 Motor Freight, Inc., et al. v. Civil Aeronautics Board, 364 F.2d 139, 144 (1st Cir. 1966)
19 [(citing inter alia Tennessee Valley Authority, supra, 306 U.S. at 138-142; Alabama Power
20 Co. v. Ickes, 302 U.S. 464 (1937) and Fugazy Travel Bureau, Inc. v. Civil Aeronautics
21 Board, 350 F.2d 733 (D.C. Cir. 1965)]. In Market Street Ry. Co. v. Railroad Comm'n, 325
22 U.S. 548 (1945), the United States Supreme Court rejected a similar constitutional claim
23 and stated:

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The due process clause has been applied to prevent governmental destruction of existing market values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.

Id. at 567.

The Commission's competitive telecommunications service rules were adopted in 1995 as a matter of state policy with these well established principles in mind. Earlier this year, the Telecommunications Act of 1996 mandated competition in telecommunications services as a matter of national policy and preempted any state law or policy to the contrary. Pub. L. No. 104-104, 110 Stat. 56 § 253(a). Therefore, the central legal theme of U S West's application--legal entitlement to continuing monopoly--has no foundation whatever.

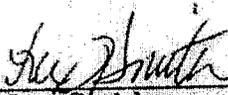
The basic factual argument running throughout U S West's application is similarly without support. U S West apparently claims that only its positions in the arbitration were correct and that the Commission's only proper course of action was to adopt all of U S West's arguments in their entirety. This argument is specious. The rates, charges and contract conditions proposed by U S West were a lop-sided effort to impose the incumbent monopolists' unreasonable terms on all--like TCG--who seek a fair opportunity to compete. If U S West's positions would have been adopted, surely no meaningful competition in the local telecommunications market would ever develop to be enjoyed by the public. The Commission was right in rejecting this "world according to U S West" view of the interconnection agreement arbitration and the Application for Rehearing should therefore be denied.

1 DATED: December 9, 1996

2 Respectfully submitted,

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