



0000132294

BEFORE THE ARIZONA CORPORATION COMMISSION

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

Arizona Corporation Commission

DOCKETED

NOV 28 1996

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 No.
U-3016-96-402
Docket No.
E-1051-96-402

DOCKETED BY *CM S*

**APPLICATION FOR
REHEARING**

Pursuant to A.R.S. § 40-253 and A.A.C. R14-3-111, U S WEST Communications, Inc. ("USWC") applies for rehearing of Decision No. 59873 (the "Decision"), entered by the Arizona Corporation Commission (the "Commission") on October 29, 1996, because the Decision is unlawful and unreasonable for the reasons set forth belcw.

As will be more fully described hereafter, USWC urges reconsideration of several of the findings and rulings in the Decision. The rulings cause substantial prejudice and harm to USWC in the following ways:

1. The rates will not allow USWC to recover the cost of providing the services. Therefore, the Decision constitutes a confiscatory taking under the 5th and 14th Amendments to the United States Constitution and Article II, Section 4 of the Arizona Constitution.

2. By not allowing USWC to recover the cost of providing the services or in not providing a mechanism for the recovery of certain costs, the Decision is inconsistent with the provisions of the Act. Therefore, the Decision directly

0000132294

474-004-0044

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

violates the statutes governing the Commission's actions in this matter and is in excess of the Commission's authority. As such, the Commission's actions are contrary to law.

3. In several instances, the findings in the Decision are not based on substantial evidence in the whole record before the arbitrator and the Commission. To the contrary, the substantial evidence in the record would mandate that the Commission find that proposals made by USWC must be adopted as fair and reasonable.

4. The scope of the Commission's authority to arbitrate issues is limited by § 252(c) to those open issues to (i) ensure compliance with § 251 and the FCC regulations, and (ii) establish rates pursuant to § 252(d) and to provide a schedule for implementation. No other authority is granted to the arbitrator by the Act. Thus, where the parties have not agreed on contract provisions, such as those involving indemnity or limitation of liability, the Commission may not impose these provisions in its final order because to do so would exceed the scope of the Commission's authority under the Act.

5. The provisions of the Decision challenged hereafter are arbitrary, capricious, an abuse of discretion and in violation of the Act.

1. GENERAL CONCERNS

As a general proposition, the Decision improperly defers to determinations made by the FCC in its First Interconnection Order that are contrary to the Federal Telecommunications Act of 1996 (the "Act"). In deciding the various issues before it, the Commission must look to and rely on the Act and then state law and policy where there is no inconsistency with federal law. If the Commission determines that the FCC First Interconnection Order conflicts with the Act, it must decline to follow the Order and instead comply with the Act. A federal agency must promulgate rules consistent with Congress' intent in enacting the enabling legislation from which authority to promulgate the rules is

11-001-000-111

1 derived. Federal Election Comm'n v. Democratic Senatorial
2 Campaign Committee, 454 U.S. 27, 31 (1981). Put simply, regula-
3 tions inconsistent or in conflict with provisions of the Act
4 cannot stand. NLRB Union v. Federal Labor Relations Authority,
5 834 F.2d 191, 195 (D.C. Cir. 1987); McNabb v. Bowen, 829 F.2d 787,
6 791 (9th Cir. 1987); Rakes v. Housing Authority of City of Dunbar,
7 765 F.Supp 318, 320 (S.D.W.Va. 1991). Ultimately, federal courts
8 must resolve any such conflicts pursuant to § 252(e)(6) of the
9 Act. Nonetheless, in issuing its Decision, the Commission must,
10 if it cannot reconcile the provisions of the FCC Order with the
11 Act, reject the offending portions of the Order and comply with
12 the Act.

13 Courts and quasi-judicial bodies are not required to adhere
14 to unlawful statutes or regulations. Accordingly, if the
15 provisions of the FCC orders are inconsistent with the Act or
16 exceed the FCC's authority, the Commission should exercise its
17 regulatory authority by not enforcing the unlawful provisions. In
18 determining whether the provisions of the FCC orders are unlawful,
19 the Arbitrators should analyze whether any of the provisions
20 improperly interfere with the Commission's authority over intra-
21 state matters. See, Louisiana Public Service Comm'n v. FCC, 476
22 U.S. 355, 374 (1986) (FCC regulations preempting state deprecia-
23 tion regulations are ultra vires).

24 The Decision also resolves issues without substantial
25 evidence to support its resolution. Under Arizona law the courts
26 will examine the Commission's Decision to determine if it is

174-001-0040

1 supported by substantial evidence. U S WEST Communications, Inc.
2 v. Arizona Corp. Comm'n, 185 Ariz. 277, 281-82, 915 P.2d 1232,
3 1236-37 (App. 1996); Tucson Elec. Power Co. v. Arizona Corp.
4 Comm'n, 132 Ariz. 240, 241, 645 P.2d 231, 232 (1982); Simms v.
5 Round Valley Light & Power Co., 80 Ariz. 145, 154-55, 294 P.2d
6 378, 384 (1956). Furthermore, a Commission order may be unlawful
7 even though supported by substantial evidence if the evidence is
8 improper or illegal. Arizona Corp. Comm'n v. Citizens Utility
9 Co., 120 Ariz. 184, 187-88, 584 P.2d 1175, 1178-79 (App. 1978).
10 Accordingly, those issues decided without substantial evidentiary
11 support are unreasonable and unlawful.

12 **2. USWC'S PROPOSED CONTRACT**

13 In numerous places throughout the Decision, the Commission
14 indicates that it adopts TCG's proposed contractual language
15 because USWC did not submit a proposal on that point. In this
16 regard, the Decision misstates the record. On August 12, 1996,
17 USWC filed a response to TCG's request for arbitration. Attached
18 as Exhibit B to that response was "U S WEST Communications
19 Proposed Interconnection Agreement," which set forth USWC's
20 proposed terms for the agreement to be reached following the
21 Arbitration (hereafter referred to as "USWC's proposed agree-
22 ment"). The Commission should grant rehearing and amend the
23 Decision to reflect the filing of USWC's proposed agreement.
24 Throughout this application, USWC will refer to the relevant
25 provision of its proposed agreement in reference to the portion of
26 the Decision discussed.

100-400-414

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

3. UNBUNDLED LOOP AND OTHER ELEMENT PRICES

The Decision orders an interim unbundled loop price of \$21.76, the average of USWC's proposed unbundled loop price of \$30.67 and the FCC proxy price of \$12.85 sought by TCG. It also determines the rate for other unbundled elements not on the basis of cost but by averaging the prices requested by each party.

Section 252(d) of the Act requires the Commission as arbitrator to determine just and reasonable rates for interconnection and unbundled elements -- "based on the cost" of their provision. The interim rates set in the Decision are not cost-based because they simply average the parties' proposed prices. Averaging of proposed prices violates the "cost-based" requirement in Section 252(d). The Commission should amend the Decision to delete the unbundled loop price of \$21.76 and to adopt USWC's proposed price for the unbundled loop and other elements as set forth in Ms. Mason's testimony.

Moreover, the rates ordered by the Decision are not based on substantial evidence in the record. Only USWC filed cost studies in this docket. USWC's proposed unbundled loop price and prices for other unbundled elements are based on the Total Element Long Run Incremental Cost ("TELRIC") study. USWC also filed cost studies based on the Total Service Long Run Incremental Cost ("TSLRIC") study. These studies support a higher unbundled loop rate and higher prices for other elements than ordered in the Decision. TCG filed no cost studies to provide a basis for interim rates and simply urged the use of the FCC proxy.

INT-001-0010

1 The Eighth Circuit Court of Appeals has stayed the FCC's
2 pricing rules, including the FCC's establishment of "proxy
3 prices." Consequently, the Commission may not use these proxy
4 prices to set rates. To the extent that the Decision leaves these
5 pricing issues for resolution following a later generic proceed-
6 ing, it is inconsistent with the Act.

7 Therefore, the Commission should grant rehearing and amend
8 the Decision to adopt the unbundled loop price of \$30.67 and
9 prices for other unbundled elements based on USWC's cost studies,
10 the only evidence of cost in the record. The Commission's
11 adoption of unbundled loop and other element prices less than the
12 rate established by USWC's TELRIC studies is inconsistent with the
13 mandate of the Act, unsupported by substantial evidence, and
14 constitutes an illegal taking of USWC's property. The Commission
15 should adopt Section VI and Appendix D of USWC's proposed
16 agreement and the prices set forth in Ms. Mason's testimony.

17 **4. RESALE WHOLESALE RATES**

18 The Decision adopts a discount rate of 17%, the low end of
19 the FCC proxy price range. The Eighth Circuit's stay precludes
20 the Commission's reliance on these proxy discounts. Section
21 252(d)(3) of the Act requires the Commission as arbitrator to
22 determine wholesale rates "on the basis of retail rates . . .
23 excluding the portion thereof attributable to . . . costs that
24 **will be avoided** by the local exchange carrier." (Emphasis added).
25 Thus, the discount price for resale services should be set at
26 USWC's retail rate for the relevant service less USWC's avoided

44-3887-100-44

1 to volume discounts, and (3) basic residential services. The
2 Decision misapplies the standards of the Act, reaches conclusions
3 unsupported by any substantial evidence, and sets confiscatory
4 rates.

5 USWC should not be required to provide private line services
6 to resellers at a discount because these services are already sold
7 at wholesale prices. In Arizona, private line services are sold
8 to carriers and end users from the special access tariff.
9 Further, private line services are already discounted in Arizona
10 as wholesale services and require no further discounts to set a
11 wholesale price. The FCC Order provides that exchange access
12 services are not subject to resale requirements even though these
13 services are offered to and taken by end users as well as
14 carriers. FCC Order, Paragraphs 873-874. The FCC also recognizes
15 that LECs do not avoid any retail costs if access services are
16 offered at wholesale to competitors. Id. Because private line
17 and special access are the same service, provided out of the same
18 tariff, they should not be available to resellers at a discount.

19 The Decision should also not require USWC to offer further
20 discounts on resellers services that are already offered at a
21 volume discount.² Services that are provided at discounts to

22
23 ¹The parties agreed that enhanced services, deregulated
24 services, and promotions of less than 90 days, need not be
provided to TCG for resale.

25 ²The FCC Order is unclear in its treatment of volume discount
26 services. The FCC requires that discounted services be provided
to resellers at the discount rate less the avoided costs.
However, to a large extent, the FCC has left the determination of
"the substance and specificity of rules concerning which discount

100-100-4-4

1 large customers, such as Motorola, are already priced to reflect
2 the fact that USWC avoids many of the usual costs of selling at
3 retail. Further, discounts are based primarily on commitments to
4 receive specified quantities of service for defined terms. The
5 discounts therefore reflect costs avoided because of the quanti-
6 ties and the term of the contract. For example, marketing
7 expenses such as advertising are avoided when selling a large
8 volume of service to a customer for an extended period. It makes
9 no sense to apply a further discount to these services on the
10 basis that USWC has avoided significant costs. If USWC contracted
11 to provide telecommunications services to Motorola at a 10%
12 discount because of the quantity purchased and the term of the
13 contract, and USWC must offer the same services to TCG at an
14 additional 10% discount, TCG will always be able to underbid USWC
15 for Motorola's business based on the margin between the volume
16 discount price and the price paid by TCG. If a new entrant is
17 allowed to compete with USWC, both by selling its own services and
18 by reselling USWC's service at a discount in excess of the avoided
19 costs, USWC will be unable to effectively compete.

20 USWC should not be required to offer basic residential
21 service for resale at a wholesale discount. The only evidence in
22 the record confirms that USWC's current 1FR rate of \$13.18 does
23 not cover its cost. Requiring USWC to discount a below-cost
24 service will force USWC to subsidize competitors, such as TCG,

25 _____
26 and promotion restrictions may be applied to resellers in
marketing their services to end users" to state commissions. FCC
Order, ¶ 951-952.

7-1-001-0010

1 with revenues from USWC's retail customers. Basic residential
2 service is priced below cost in order to ensure universal service.
3 Therefore, it is not appropriate for resellers to obtain this
4 below-cost service at a further discount not available to USWC.
5 Moreover, if USWC is required to provide residential service to
6 resellers at a price below cost, it will retard the development of
7 facilities-based competition. New entrants in the market will
8 have no incentive to build facilities if they can purchase USWC
9 services for less than their cost to construct new facilities.
10 The Commission should grant rehearing and amend the Decision to
11 remove the requirement that these services be provided to TCG on
12 a discount. The Commission should adopt Section XI of USWC's
13 proposed agreement.

14 **6. COMBINATION OF UNBUNDLED ELEMENTS ("SHAM UNBUNDLING")**

15 The Decision allows carriers, such as TCG, to purchase
16 unbundled elements and combine them into a service to be offered
17 for resale. The ability to combine unbundled elements and offer
18 the service for resale in this fashion is known as "sham
19 unbundling." Sham unbundling will lead to severe rate arbitrage
20 between resale prices and unbundled element prices. To prevent
21 rate arbitrage, sham unbundling should not be permitted until USWC
22 has been allowed to re-balance its retail rates.

23 Under the Decision, TCG may purchase the equivalent of a
24 "finished" service solely through the purchase of unbundled net-
25 work elements at "cost-based" rates. Thus, TCG can order USWC to
26 provide a finished retail service at a cheaper price than the

7-4-004-0004

1 Act's resale price (retail less cost avoided) by utilizing the
2 fiction that TCG is buying unbundled network elements -- when in
3 reality there is no unbundling.

4 In effect, sham unbundling upsets the balance between resale
5 and unbundling established in the Act. Congress realized that
6 both unbundling and resale are critical to the development of
7 meaningful competition. It therefore crafted a carefully balanced
8 mechanism to allow new entrants to enter local markets rapidly,
9 through resale, while developing their facilities-based networks
10 with the purchase of unbundled network elements from incumbent
11 LECs. The Decision misapplies the Act and is inconsistent with
12 it.

13 Congress also realized that the state commissions have set
14 prices for some retail services to include large contributions to
15 help support residence basic exchange service. Therefore,
16 Congress defined "margin neutral" resale rules in Sections 251(c)
17 and 252(d)(3) of the Act to allow the purchase of retail services
18 by resellers at wholesale rates, based on the retail price less
19 avoided costs. Thus, the margins that existed for these retail
20 services -- and the contributions to other services -- would be
21 preserved.

22 In summary, sham unbundling allows new entrants to arbitrage
23 the resale of local exchange service and violates the objectives
24 of the Act. The overwhelming weight of the evidence presented at
25 hearing mandates that the Decision prohibit sham unbundling and
26 there is no substantial evidence to support the Decision's

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

adoption of sham unbundling. The Commission should grant rehearing and amend the Decision to prohibit sham unbundling and adopt Section VI of USWC's proposed agreement.

7. RECIPROCAL COMPENSATION.

The Act requires that, in order for rates to be just and reasonable, reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination." Act, Section 252(d)(2)(A)(i). The FCC has determined that for shared transmission facilities between tandem switches and end offices, states may establish usage-sensitive or flat-rate charges to recover these costs. States may further use, as a default proxy, the rate derived from the incumbent LEC's interstate direct-trunked transport rates in the same manner that the FCC derives presumptive price caps for tandem switched transport under the interstate price cap rules. FCC First Order Section 822. The FCC has also determined that a bill and keep arrangement is appropriate only when rates are symmetrical and traffic is in balance, a situation not likely to occur in Arizona. FCC First Order Section 1111; see also, A.A.C. R-2-1304. Nonetheless, the Decision adopts bill and keep for two years from the date an agreement is approved. The Decision is contrary to the Act, is not supported by substantial evidence, and should be reconsidered.

Until TCG can directly trunk to each end office over its facilities, TCG's exchange of traffic with USWC will necessarily impose additional costs on USWC. The existing USWC network routes

47-204-004

1 traffic directly from end office to end office through the use of
2 direct trunks. Traffic during unusual calling patterns or peak
3 usage periods may overflow to the local tandem switches. TCG
4 would use trunks to the tandem not as overflow routers, but rather
5 as primary call routers, causing USWC to add capacity to its
6 tandem switches and tandem transport facilities to accommodate the
7 increased traffic. This will result in USWC's cost of terminating
8 TCG's traffic exceeding TCG's cost of terminating USWC's traffic
9 even if the volume were the same. Further, traffic that has
10 historically been intraoffice in nature (e.g., calls between
11 neighbors served by the same USWC central office) will be
12 converted to interoffice (e.g., calls between a USWC end office
13 and an interconnectors' end office), representing an increased
14 traffic load on the USWC interoffice transport network. Under the
15 Act, USWC must be allowed to recover the costs of this transport.
16 Bill and keep does not allow USWC to recover these costs.

17 **a. Bill and Keep**

18 Bill and keep is also inappropriate because it does not
19 permit USWC to recover the cost of terminating TCG's traffic. Any
20 assumption that USWC's terminating traffic and TCG's terminating
21 traffic would be in balance or that USWC's cost of terminating
22 calls is the same as TCG's, which are the key assumption under any
23 bill and keep system, is patently unreasonable. Because TCG can
24 choose to target particular types of customers (such as busi-
25 nesses), and because different customers have different patterns
26 of originating and terminating traffic, traffic is not likely to

STATE-400-434

1 be in balance between USWC and TCG. Further, given the different
2 network architectures, the cost of termination for each of the
3 carriers will not be the same.

4 Further, TCG is not required to and cannot provide ubiquitous
5 service on its network. The difference in size of networks and
6 number of customers served by the networks will create traffic
7 imbalance. Because bill and keep will prevent USWC from recover-
8 ing its real cost of terminating TCG's traffic, it will inevitably
9 result in under-recovery by USWC and is, therefore, confiscatory.

10 Other commissions have rejected bill and keep for a number of
11 compelling reasons in addition to its unwarranted assumption that
12 traffic will inevitably be in balance. First, these commissions
13 have recognized that bill and keep does not reflect the different
14 costs of the respective networks of the LECs and the new entrants.
15 Second, bill and keep creates the opportunity for new entrants to
16 shift costs to the LECs through selection of meet points. Third,
17 bill and keep assumes that costs will be equal and does not
18 recognize the additional cost incurred by LECs in providing
19 transport. The Decision's use of bill and keep is inappropriate,
20 and USWC's rates for call transit, transport and termination
21 should be adopted instead. The Commission should reconsider the
22 Decision, reject the use of bill and keep, and adopt Section IV.G
23 of USWC's proposed agreement. Alternatively, the Commission
24 should amend the portion of the Decision adopting bill and keep to
25 permit a true-up of charges after bill and keep terminates.

26

47-001-0014

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

b. Treatment of TCG's Switch as a Tandem Switch

USWC should not pay TCG tandem switching rates for the use of TCG's non-tandem switch as required by the Decision. In allowing TCG to charge USWC reciprocal rates including a tandem switching rate, the Decision does not properly consider whether: (1) TCG's switch performs a function similar to USWC's tandem switch, (2) TCG's and USWC's costs are symmetrical, and (3) TCG's switch serves a geographic area comparable to that served by USWC's tandem switch.

TCG's switch will not perform functions similar to USWC's tandem switch. TCG has a fiber ring network located predominantly in the central business area of Phoenix, which will not provide ubiquitous service. USWC's network is a tree and branch system that provides ubiquitous service throughout the Phoenix calling area. TCG's fiber ring and switch do not cover a geographic area comparable with the USWC network. Indeed, TCG's switch cannot handle all switched traffic within the Phoenix metropolitan area.

Further, TCG's fiber ring does not yet occupy the area served by all USWC wire centers in the Phoenix metropolitan area. Under these circumstances, the only way that TCG's switch could serve customers throughout the Phoenix metropolitan area as USWC's tandem switch does is to hook TCG's switch to USWC's tandem or directly trunk to each of USWC's 50 end offices. Any claim by TCG that its switch serves a geographic area comparable to that served by USWC's tandem is purely fiction.

Finally, USWC's position is supported by the FCC Order.

100-400-454

1 Paragraph 1090 of the FCC Order recognizes that an incumbent LEC
2 providing service through a tandem switch incurs greater switching
3 and transport costs than a new entrant not employing a tandem
4 switch. Based on the evidence presented at hearing, USWC should
5 receive tandem transport rates while TCG should receive end office
6 rates. Thus, the Decision is not based on substantial evidence,
7 is directly contrary to the evidence presented in this docket, and
8 should be amended to delete the requirement that TCG receive
9 tandem switching rates.

10 c. Interconnection

11 The Decision fails to limit the required points of
12 interconnection to those set forth in Paragraph 212 of the FCC
13 Order: (1) the line side of a local switch, (2) the trunk side of
14 a local switch, (3) the trunk interconnection point for a tandem
15 switch, (4) central office cross-connect points, (5) out of band
16 signaling transfer points, and (6) the points of access to
17 unbundled elements. Because TCG presented no evidence justifying
18 required interconnection beyond the points listed in the FCC
19 Order, the Decision is not supported by substantial evidence, and
20 should be reconsidered and amended to adopt Sections IV.A, IV.B,
21 and IV.G of USWC's proposed agreement.

22 8. CONSTRUCTION CHARGES AND OTHER EXPENSES

23 New entrants, such as TCG, who request additional unbundled
24 elements, require the construction of additional facilities for
25 resale. Other special construction is often desired in connection
26 with collocation. New entrants should pay for these construction

37200-700-44

1 costs incurred by USWC -- they should not be allowed to shift
2 these costs to USWC and its retail customers.

3 Requiring that any carrier requesting an additional network
4 element pay the cost that USWC incurs to unbundle and provision
5 that element, such as special construction charges, is consistent
6 with the FCC Order, which permits incumbent LECs to recover the
7 costs of unbundling network elements from requesting carriers. In
8 addition, the only way to insure that the benefits of unbundling
9 will exceed the costs is to have the requesting party pay.

10 The Decision provides that USWC may collect up-front
11 construction charges from a new entrant only if those charges
12 would be recovered from a USWC end user pursuant to USWC's
13 tariffs. This is both inconsistent with the Act and confiscatory.
14 The Decision should be reconsidered and amended to require that
15 USWC be compensated up-front by TCG for construction costs if USWC
16 has to construct new facilities to enable it to provide services
17 at resale or on an unbundled basis to TCG, and should not be
18 limited only to situations in which an end-user tariff is
19 involved. If USWC is required to build facilities, then TCG
20 should also pay a construction charge whether an end-user tariff
21 is involved or not.

22 Further, the Decision, in discussing several issues, provides
23 that USWC should recover specific costs of providing service to
24 new entrants but fails to provide for a recovery mechanism. For
25 example, the Decision provides that TCG should pay for the adjust-
26 ments USWC must make to its processes to provide physical inter-

11-004-0015

1 connection at USWC's access tandem, but fails to provide a
2 mechanism whereby USWC may recover these costs. Under the Act,
3 USWC is entitled to recover its cost of providing service to the
4 new entrants. The Decision does not grant USWC a means to recover
5 the costs due from TCG. The Decision is, therefore, contrary to
6 the Act and confiscatory. The Commission should grant rehearing
7 and amend the Decision to adopt Sections IV.H and XIII of USWC's
8 proposed agreement.

9 **9. SHARING REVENUES FROM JOINTLY PROVIDED SWITCHED ACCESS**

10 The Decision requires that when TCG provides tandem
11 switching³ and some portion of the tandem transport and USWC
12 provides end office switching and termination, TCG will receive
13 not only the rate chargeable to the interexchange carrier for
14 tandem switching and transport, but also 30% of the end office
15 charges that are payable by IXC to USWC under the applicable
16 interstate or intrastate tariff. This portion of the Decision is
17 contrary to the Act, inconsistent with tariffs on file with the
18 FCC and the Commission, and is not supported by any substantial
19 evidence. The Commission should grant reconsideration and amend
20 the Decision.

21 First, the Decision alters the compensation for switched
22 access service in clear violation of the Act. Section 251(G) of
23

24 ³As discussed earlier, the evidence established that TCG's
25 initial switch will act as an end office switch and not a tandem
26 switch. TCG indicated that at some point it will provide
competitive tandem service by connecting to interexchange carriers
and providing tandem switching between those carriers and USWC end
office switches.

01/20/88 4:00 PM

1 the Act provides for the continued enforcement of exchange access
2 and interconnection requirements. Under Section 251(G), LECs are
3 to provide exchange access under the same restrictions and obliga-
4 tions, including receipt of compensation, until the restrictions
5 and obligations are explicitly superseded by FCC regulations.
6 Further, the FCC in its First Interconnection Order expressly
7 states that reciprocal compensation does not apply to transport
8 termination of interstate or intrastate interexchange traffic.
9 FCC Order Section 1034. If TCG believes that providers of end
10 office access services are overcompensated and providers of tandem
11 switching for access termination are under compensated, it should
12 seek rate relief before the FCC and the Commission in access
13 restructure dockets. The Decision should be reconsidered on this
14 basis alone.

15 Second, the required division of switched access revenues
16 also violates the express terms of the interstate tariff and the
17 intrastate tariff concerning charges for provision of access
18 service. Both the interstate and the intrastate access tariffs
19 expressly set forth the charges that may be levied on the IXC by
20 the carrier providing tandem switching and transport and the
21 charges that may be levied on the IXC by the carrier providing end
22 office switching and call termination. When TCG and USWC provide
23 joint switched access service (with TCG providing tandem switching
24 and transport and USWC providing end office switching and termina-
25 tion), the tariffs explicitly provide that TCG receive the rates
26 set in the tariffs tandem switching, its portion of tandem

**Pages
20 & 21
are
Missing**

1 required. The Commission should amend the Decision to require
2 toll and local traffic be placed on separate trunk groups and to
3 adopt Section IV.C and Appendix A of USWC's proposed agreement.

4 **11. INTERIM NUMBER PORTABILITY COST RECOVERY**

5 USWC and TCG reached substantial agreement that interim
6 number portability be offered pursuant to remote call forwarding.
7 The parties agreed on the price of the service, but disagreed on
8 who should pay for the service. TCG argued that the service
9 should be offered to it at no charge with the cost borne by USWC's
10 retail customers. USWC countered that the cost of interim number
11 portability should be borne by the cost causer, TCG.

12 The FCC has adopted specific rules concerning the recovery of
13 interim number portability costs from carriers based on the number
14 of lines served. The Decision attempts to follow the FCC Order,
15 but omits a crucial part of the recovery formula. The FCC has not
16 established any mechanism for USWC to recover the portion of the
17 costs that are allocated to it.

18 USWC proposed non-recurring and recurring charges that apply
19 to USWC's proposed interim number portability service based on the
20 TELRIC studies submitted into evidence. The proposed charges for
21 interim number portability are described in Exhibit A to the Mason
22 testimony and Appendix D to USWC's proposed agreement. The
23 Decision should use these TELRIC-based rates for interim number
24 portability.

25 In addition, the FCC requires USWC to share with TCG switched
26 access charges received from interexchange carriers on calls

4-200-400-4-4

1 interexchange carriers deliver to USWC to numbers that are
2 'ported' to TCG. There are four charges that USWC assesses to
3 interexchange carriers for terminating traffic -- the local
4 transport, local switching, interconnection, and carrier common
5 line charges.

6 The Decision fails to reject these unreasonable provisions of
7 the FCC Order. USWC should be allowed to retain the local switch-
8 ing and local transport charges it receives from interexchange
9 carriers when calls are forwarded to TCG as a result of interim
10 number portability. USWC does not incur any less expense for the
11 local switching or local transport services it offers to an inter-
12 exchange carrier when USWC forwards an incoming call to TCG.
13 Sharing revenues for these services with TCG amounts to a further
14 unwarranted subsidy to TCG and is confiscatory.⁵

15 **12. COLLOCATION**

16 The Decision permits TCG to collocate at any technically
17 feasible point and rejects USWC's proposal that the space avail-
18 able to any single new entrant for collocation in a given central
19 office be limited so as to make space available for other new
20 entrants. This portion of the Decision is not supported by
21 substantial evidence and is contrary to sound public policy.

22
23 ⁵In the interest of compromise, USWC was prepared to
24 'forward' carrier common line charges to TCG. But, rather than
25 incurring the expense of identifying, recording and billing the
26 individual minutes of use that are forwarded to TCG under an
interim number portability arrangement, USWC proposed to provide
a credit on each TCG portable number equivalent to the effective
carrier common line rate times the average minutes of use of toll
use (both interstate and intrastate) per number per month.

67000 * 400 * 400

1 In order to protect the rights of all potential competitors,
2 USWC argued that the agreement must contain some limitation on the
3 amount of floor space in a central office, which is made available
4 to TCG for physical collocation. USWC will be obligated to
5 provide physical collocation to a number of new entrants, and
6 there will be limits on the available amount of floor space,
7 particularly in light of the space limitation problems USWC
8 already faces in some of its Arizona central offices. USWC
9 proposed that TCG and each other new entrant be limited to 400
10 feet in any single central office. TCG offered no reasonable
11 alternative suggestion at hearing, and the Decision simply fails
12 to address this issue.

13 An even more significant issue with respect to collocation is
14 the premises at which collocation should be offered. The Decision
15 simply adopts the FCC's broad definition of "premises" without
16 considering the significant evidence of problems created by a
17 general rule that new entrants can collocate at manholes, vaults
18 and other locations outside the central office. Although the FCC
19 Order states that USWC should offer collocation at its "premises,"
20 USWC proposed that the presumptive point of collocation be in
21 USWC's central offices, with other arrangements to be made on an
22 as-needed basis. Because the most efficient form of interconnec-
23 tion would be for TCG to interconnect at USWC's end office or
24 tandem switches, and because collocation at other points raises
25 serious issues concerning adverse service impacts, it makes sense
26 for collocation to occur in the central offices. TCG did not

0000-100-100

1 request collocation at any "premise" other than a USWC central
2 office, nor did it give any example about what such a request
3 might possibly be.

4 The Decision should be amended to adopt Section V of USWC's
5 proposed agreement.

6 **13. INDEMNITY/LIMITATION OF LIABILITY CLAUSES**

7 The Decision adopts TCG's position and includes a provision
8 relating to indemnity and limitation of liability. Nothing in the
9 Act, the FCC Order, the Commission's rules, or Arizona law allows
10 for the inclusion of such clauses. There is simply no legal basis
11 for the Commission to impose these clauses. A party's remedy
12 instead should be through a contract dispute resolution process,
13 a proceeding before the Commission or a court action for the
14 recovery of actual damages. The Commission should amend the
15 Decision to remove the indemnity and limitation of liability
16 provisions.

17 **14. DEFINITIONS**

18 The Decision opts for the use of the definitions contained in
19 the TCG Agreement because the parties allegedly focused on the TCG
20 Agreement. The Decision is in error in this regard and is not
21 based on substantial evidence. The parties did not focus on the
22 TCG Agreement but, instead, on the matrix of issues presented to
23 the arbitrators at hearing. The Decision should be amended to
24 adopt Sections III.B, III.C, III.E, III.H, III.K, III.N, III.P,
25 III.Q, III.Z, III.AA, III.BB, III.CC, III.DD, and III.EE of USWC's
26 proposed agreement. Alternatively, instead of mandating the use

74-001-0019

1 of TCG's definitions, the Commission should amend the Decision to
2 require the parties to negotiate mutually acceptable definitions
3 as part of the process of putting together a final agreement.

4 **15. OTHER ISSUES**

5 In addition to the issues specifically discussed in this
6 application, the Decision should be amended to adopt various
7 provisions of USWC's Contract which establish terms and conditions
8 for the contract. These sections of the contract are supported by
9 substantial evidence contained in the pre-filed testimony of
10 USWC's witnesses and there is no substantial evidence in the
11 record to support the Decision's failure to adopt them. These
12 sections include: Sections II.A, II.B, II.C, IX.E, IX.F, IX.G,
13 X.B, XII, XIV.A, XIV.B, XIV.E, XIV.I, XIV.J, XIV.K, XIV.M, XIV.O,
14 and XIV.P. and Appendices B, E, and F.

15 Further, the Commission should adopt the following language
16 for inclusion in the Agreement:

17 The Parties have agreed to certain provisions in this
18 Agreement, based, in large part, on (i) the FCC's First
19 Report and Order, In the Matter of Implementing of the
20 Local Competition Provisions in the Telecommunications
21 Act of 1996, CC Docket No. 96-98, rel Aug. 8, 1996 ("FCC
22 1st Order"); (ii) the Second Report and Order and
23 Memorandum Opinion and Order, In the Matter of
24 Implementation of the Local Competition Provisions of
25 the Telecommunications Act of 1996, CC Docket No. 96-98,
26 rel. Aug. 8, 1996 ("FCC 2d Order"); and (iii) the
"Opinion and Order", Decision No. 59873, issued by the
ACC, dated October 29, 1996 (the "Arizona Order"). To
the extent that the rules contained in the FCC 1st
Order, the FCC 2d Order, the Arizona Order, or
succeeding orders in those or related proceedings, are
deemed by the courts to be not effective, the Parties
shall negotiate a modification(s) of this Agreement to
comport with the final court decisions and subsequent
rules adopted by the FCC and the ACC to comply with the
courts' decisions.

1
2
3
4
5
6
7
8
9
10
11
12

16. CUSTOMER TRANSFER CHARGES

In adopting the Decision, the Commission altered the language of Section 7(e) of the Proposed Order to permit TCG to offset its costs of transferring customers against the customer transfer charges TCG must pay to USWC. This alteration defeats the purpose of the customer transfer charge, which is intended to compensate USWC for its costs of transferring customers to TCG. In effect, the Commission by permitting the offset has refused to permit USWC to recover a cost it would not incur but for the transfer of a customer. This refusal to permit USWC to recover its full cost amounts to an illegal confiscation of USWC's property.

13

CONCLUSION

14
15
16
17
18
19
20
21
22
23
24
25
26

The Commission should grant a rehearing and amend the Decision as set forth herein, thereby adopting a resolution to the disputed issues that fairly balances the interests of USWC and its ratepayers with the interests of TCG and the other new entrants. The Decision, with its use of uneconomic and unrealistic proxy prices and its authorization of price arbitrage through sham unbundling, unfairly disadvantages USWC and its customers. USWC has offered the only evidence of its costs of service that forms a just, reasonable and fair basis on which to establish interim prices and interim wholesale discounts. Because any interim rates are subject to true-up following the permanent pricing proceeding, TCG and the other new entrants will not be prejudiced by the use of interim rates based on USWC's cost studies.

Therefore, based on the reasons set forth herein, USWC asks

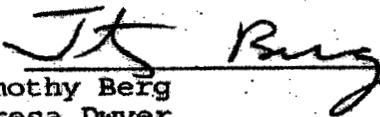
1 that the Commission grant USWC a rehearing to modify its Decision
2 as requested.

3 RESPECTFULLY SUBMITTED this 18th day of November, 1996.

4 U S WEST, INC.
5 LAW DEPARTMENT
6 Norton Cutler
7 Corporate Counsel
8 1801 California Street, Suite 5100
9 Denver, Colorado 80202
10 (303) 672-2720

11 AND

12 FENNEMORE CRAIG

13 By: 
14 Timothy Berg
15 Theresa Dwyer
16 Two North Central Avenue
17 Suite 2200
18 Phoenix, Arizona 85004
19 (602) 257-5421

20 Attorneys for
21 U S WEST Communications, Inc.

22 ORIGINAL AND THREE COPIES
23 of the foregoing filed
24 this 18th day of November,
25 1996 with:

26 Hearing Division - Arbitration
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing hand-
delivered this 18th day of
November, 1996 to:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

01000-400-444

- 1 Jerry Rudibaugh
Chief Hearing Officer
- 2 ARIZONA CORPORATION COMMISSION
- 3 1200 West Washington
Phoenix, Arizona 85007

- 4 Barbara M. Behun
Arizona Corporation Commission
- 5 1200 West Washington
Phoenix, Arizona 85007

- 6 Scott S. Wakefield
Arizona Corporation Commission
- 7 1200 West Washington
Phoenix, Arizona 85007

- 8 Bruce Meyerson, Esq.
Steptoe & Johnson, LLP
- 9 40 North Central Avenue, 24th Floor
- 10 Phoenix, Arizona 85004-4453

- 11 Lex J. Smith, Esq.
12 Michael W. Patten, Esq.
13 Brown & Bain, P.A.
2901 North Central Avenue
Phoenix, Arizona 85012-0400

- 14 COPY of the foregoing
- 15 mailed this 18th day of November,
- 16 1996 to:

- 17 Deborah S. Waldbaum, Esq.
Western Region Counsel
Teleport Communications Group, Inc.
- 18 201 North Civic Drive, Suite 210
Walnut Creek, California 94596

19 *Ellen Purdy*
20 _____
21

- 22
- 23
- 24
- 25
- 26