

RENZ D. JENNINGS
CHAIRMAN

MARCIA WEEKS
COMMISSIONER

CARL J. KUNASEK
COMMISSIONER



JAMES MATTHEWS
EXECUTIVE SECRETARY

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ARIZONA CORPORATION COMMISSION

DATE: DECEMBER 4, 1996

DOCKET NOS: U-3009-96-478 and E-1051-96-478

TO ALL PARTIES:

Enclosed please find the recommendation of Hearing Officer Jane Rodda. The recommendation has been filed in the form of an Opinion and Order on:

BROOKS FIBER COMMUNICATIONS OF TUCSON, INC. and
U S WEST COMMUNICATIONS, INC.

(PETITION FOR ARBITRATION)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Hearing Officer by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00 p.m.** on or before:

DECEMBER 13, 1996

The enclosed is NOT an order of the Commission, but a recommendation of the Hearing Officer to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

DECEMBER 16, 1996 and DECEMBER 17, 1996

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250.

A handwritten signature in cursive script that reads "James Matthews".

James Matthews
EXECUTIVE SECRETARY

JM

Enc.

cc: ALL PARTIES

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 RENZ D. JENNINGS
CHAIRMAN

3 MARCIA WEEKS
COMMISSIONER

4 CARL J. KUNASEK
COMMISSIONER

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

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

DECISION NO. _____

OPINION AND ORDER

10 DATES OF ARBITRATION: November 7, 1996

11 PLACE OF ARBITRATION: Phoenix, Arizona

12 PRESIDING ARBITRATORS: Jerry L. Rudibaugh, Scott S. Wakefield and Jane L. Rodda

13 APPEARANCES: Mr. Thomas Mumaw, SNELL & WILMER, attorneys, on behalf
14 of Brooks Fiber Communications of Tucson, Inc.; and

15 Mr. Norton Cutler, U S WEST LAW DEPARTMENT, and Mr.
16 Timothy Berg, FENNEMORE CRAIG, attorneys, on behalf of U
S WEST Communications, Inc.

17 **BY THE COMMISSION:**

18 On September 4, 1996, Brooks Fiber Communications of Tucson, Inc. ("Brooks") filed with the
19 Arizona Corporation Commission ("Commission") a Petition for Arbitration of Interconnection Rates,
20 Terms, and Conditions ("Petition") pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of
21 1996 ("Act"). By Procedural Order dated September 10, 1996, an arbitration was scheduled to
22 commence on November 6, 1996, at the Commission's offices in Phoenix. On September 30, 1996, U
23 S WEST Communications, Inc. ("U S WEST") filed its Response to the Petition. The scheduled
24 arbitration was continued for one day and was held on November 7, 1996, with the parties submitting
25 closing arguments in writing on November 22, 1996. The issues resolved in this Decision are those which
26 the parties indicated remain as of November 22, 1996.

27 ...

28 ...

DISCUSSION

1
2 On February 8, 1996, President Clinton signed the Act into law which established new
3 responsibilities for the Federal Communications Commission ("FCC") as well as for the various state
4 commissions.¹ On July 2, 1996, the FCC issued *Telephone Number Portability*, CC Docket No. 95-116,
5 First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-268 ("TNP Order"), which
6 established rules so that a customer who changes his local exchange carrier ("LEC") in the same local
7 service area may keep the same telephone number. On July 22, 1996, the Commission in Decision No.
8 59761 adopted A.A.C. R14-2-1301 through A.A.C. R14-2-1311 ("Interconnection Rules"), to govern
9 the interconnection of local exchange services between incumbent LECs ("ILECs" or "LECs") and
10 competing LECs ("CLECs"). Also on July 22, 1996, the Commission in Decision No. 59762 adopted
11 A.A.C. R14-2-1501 through A.A.C. R14-2-1507 ("Arbitration and Mediation Rules"), which authorized
12 the Hearing Division to establish procedures and conduct arbitrations. On August 8, 1996, the FCC
13 released *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*,
14 CC Docket No. 96-98, First Report and Order, FCC 96-325 ("Order") and *Implementation of the Local*
15 *Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Report
16 and Order and Memorandum Opinion and Order, FCC 96-333, in which the FCC adopted initial rules
17 ("Rules") designed to accomplish the goals of the Act.²

18 Pursuant to the Act, telecommunications carriers desiring to interconnect with the facilities and
19 equipment of an ILEC may negotiate the terms of such interconnection directly with the ILEC. If the
20 parties are unsuccessful in negotiating an interconnection agreement, any party to the negotiation may
21 request the Commission to arbitrate any open issues regarding interconnection. The Act requires the
22 Commission to resolve any such issues within 180 days of a telecommunications carrier's initial request
23 to the ILEC for interconnection.

24 Pursuant to § 252 of the Act, state commissions are required to determine just and reasonable
25

26 ¹ As part of the Act, the FCC was ordered to issue regulations no later than August 8, 1996
27 interpreting many of the broad and general terms of the Act.

28 ² Unless otherwise noted, any reference to "Para." in this Decision is to Paragraphs in the
Order.

1 rates for interconnection and network elements based on the cost of providing the interconnection or
2 network element which are nondiscriminatory and may include a reasonable profit. For resale services,
3 rates are to be the wholesale rates based on retail rates excluding costs of marketing, billing, collection
4 and other costs avoided by the LEC. The Commission's Interconnection Rules require the use of total
5 service long run incremental costs ("TSLRIC") to determine costs.

6 Our September 10, 1996 Procedural Order directed the parties to provide by October 25, 1996,
7 a joint pre-arbitration statement which sets forth their positions and the manner in which their
8 disagreement should be resolved by the arbitrators, a proposed interconnection agreement, a list of
9 witnesses and a summary of their testimony, as well as exhibits. The FCC's Rules issued on August 8,
10 1996, required the use of total element long run incremental costs ("TELRIC"). TELRIC includes the
11 forward-looking costs that can be attributed directly to the provision of services using that element, and
12 includes a reasonable share of the forward-looking joint and common costs.

13 On September 24, 1996, U S WEST filed cost studies which included avoided costs as well as
14 TELRIC cost studies. The materials were voluminous and complex.

15 The arbitration in this matter was scheduled to begin on November 6, 1996. It was not reasonable
16 to expect Brooks to conduct discovery, review and respond to any of U S WEST's cost studies at the
17 arbitration. No continuance could be granted due to the time frame for final resolution of the disputed
18 issues contained in the Act.

19 Accordingly, on September 10, 1996, a Procedural Order was issued which consolidated the
20 appropriate portions of this proceeding with similar portions of the dockets of interconnection arbitrations
21 between U S WEST and several other CLECs to consider the cost studies submitted by U S WEST in
22 each of those dockets. The Procedural Order indicated that interim rates would be set in accordance with
23 the Order, at the proxy ceilings or mid-points of proxy ranges, unless a party showed that an alternate
24 interim price consistent with the proxies would be appropriate. The interim rates would be subject to
25 true-up upon establishment of prices based upon Commission-approved cost studies.

26 The cost studies will be used to set prices for all CLECs in U S WEST's service area.
27 Consolidating the cost study review allows input from the initial CLECs and provides for consistency
28 in the Commission's determination of costs. A separate review of the cost studies in each arbitration

1 could result in varying conclusions, depending upon the competitors' resources available to respond to
2 the studies and the capabilities of each party's witness. The CLECs need sufficient time to review and
3 prepare testimony in response to the cost studies, and the Commission needs to have adequate time to
4 review the conclusions reached by the parties.

5 U S WEST, as well as the CLECs, will not be harmed by the use of the interim prices. The cost
6 studies were analyzed at a consolidated arbitration commencing on November 18, 1996, with a Decision
7 expected in early 1997. It is anticipated that the interim prices will be in effect a short time, and since
8 the interim prices are subject to a true-up at the conclusion of the cost study rulings, any deficiency will
9 be cured.

10 On September 27, 1996, the United States Court of Appeals for the Eighth Circuit ("Court")
11 issued an Order Setting Hearing and Imposing Temporary Stay. Oral arguments on the motions
12 requesting stay until judicial review of the FCC's Order were held on October 3, 1996, and on October
13 15, 1996, the Court stayed the operation and effect of the FCC's Rules' "pricing provisions and the 'pick
14 and choose' rule" pending the Court's final determination of the issues raised in the petitions for review.
15 Given the time constraints imposed by the Act in this proceeding; the fact that a Decision has not been
16 rendered on the cost study portion of this arbitration; and the Court's issuance of a stay of the pricing
17 provisions of the Rules, the Commission has no choice but to approve prices that we believe are the most
18 reasonable, based on the information provided, whether it is the cost studies submitted by the parties, or
19 the final offers of the parties which in some cases may reflect the proxy ranges set forth by the FCC.
20 Since these will be interim prices, and are subject to true-up after a decision on the cost-studies has been
21 issued, we find that there will be no irreparable harm to the parties.

22 Pursuant to § 252(b)(4)(C), the Commission hereby resolves the issues presented for arbitration.
23 The issues are listed as they appear in the parties' issue matrix.

24 **INTERCONNECTION ISSUES**

25 **Classification of Brooks' Switch, Issue No. 2**

26 **Brooks' Position**

27 Brooks requested that its initial Tucson switch be treated as a tandem switch, claiming that its
28 switch performs the same functions in terminating calls as U S WEST's tandem switches. Brooks

1 asserted that although under a bill and keep scenario for local traffic termination the designation of its
2 switch is irrelevant, its designation may have an impact on compensation for intraLATA toll and the
3 associated access charges to IXC's and may eventually be an important factor in determining if there is
4 reciprocal and equal compensation.

5 Brooks presented testimony that:

- 6 1) Brooks' switch provides all the same functions and services as U S WEST's tandem;
- 7 2) Brooks' switch will allow any U S WEST customer within Brooks' authorized service area to
8 access any Brooks customer and vice versa;
- 9 3) Brooks' collocated end offices will serve 82 percent of U S WEST's business customers and
10 68 percent of U S WEST residential customers within Brook's authorized service area; and
- 11 4) Brooks fiber network (either constructed or under construction) exceeds that of MFS³, both in
12 absolute terms and in relation to their respective services areas.

U S WEST's position

13 U S WEST asserted that Brooks' switch should be treated as an end office switch because it does
14 not service the same geographic area and provide the same tandem switching functions as U S WEST's
15 tandem. U S WEST claimed that Brooks' switch will serve only a small portion of the Tucson LATA
16 and Tucson calling area (only 75-100 square miles) out of a larger area serviced by U S WEST's local
17 tandem; Brooks will be connected to only six of U S WEST's 18 end offices in the Tucson metropolitan
18 area and will depend heavily on U S WEST's tandem to complete calls to customers in the offices to
19 which it is not directly connected.

Commission's resolution

20 Section 252(d)(2) of the Act requires the Commission to establish reciprocal compensation
21 arrangements for the transport and termination of traffic between LECs based on a reasonable
22 approximation of the additional costs of terminating such calls. Although Brooks' fiber network, as
23 initially configured, covers only a portion of the geographic Tucson calling area served by U S WEST,
24 the evidence indicates that Brooks' end offices will be able to serve 82 percent of U S WEST's business
25

26
27 ³ In *The Matter of the Petition of MFS Communications Company, Inc. For Arbitration of*
28 *Interconnection Rates, Terms and Conditions with U S WEST Communications, Inc. pursuant to §252(b)*
of the Telecommunications Act of 1996, Docket No. U-2752-96-362 et al., Decision No. 59872 (dated
October 29, 1996) the Commission determined that MFS' switch was not equivalent to a tandem.

1 customers and 68 percent of U S WEST's residential customers in Brooks' service area in the
2 metropolitan Tucson area. Brooks will be able to terminate calls on a comparable basis to U S WEST's
3 tandem switch within Brooks' service area. As a result, we find it just and reasonable for Brooks to
4 receive compensation for the use of its switch equivalent to that of U S WEST's tandem switch.

5 **Restrictions on Collocated Equipment, Issue No. 7**

6 **Brooks' Position**

7 Brooks initially sought to place remote switching units ("RSUs") in collocated spaces. Brooks
8 claims that U S WEST's opposition to the collocation of RSUs is directly contradicted by FCC Rules
9 §51.309 and 51.315 and the Order at 580-581, wherein the Commission is given the responsibility to
10 review and determine what specific equipment may be collocated if collocation is objected to by the
11 ILEC on the grounds that it is switching equipment. Brooks' witness testified that collocation of RSUs
12 is appropriate because : (1) it reduces Brooks' costs; (2) it reduces U S WEST's costs; (3) it improves
13 quality of service for both U S WEST and Brooks customers; (4) it improves network efficiency; (5) it
14 reduces traffic on U S WEST's tandem; and (6) it reduces traffic on U S WEST's direct trunks.

15 **U S WEST's position**

16 U S WEST objects to the collocation of RSUs because: (1) the Order indicates that there will not
17 be a general requirement for ILECs to allow collocation of switching equipment not used in actual
18 interconnection or access to unbundled elements (Order at paras. 580-81) ; (2) placing a trunking-capable
19 RSU in U S WEST's central office raises a significant prospect of deliberate or accidental access by-pass
20 which U S WEST cannot effectively monitor; and (3) collocation of RSUs will exacerbate space
21 limitation problems in U S WEST's central offices.

22 During the arbitration Brooks' witness Mr. Charles Johnson stated that Brooks had proposed that
23 as an alternative to collocating its RSUs within U S WEST's central offices, Brooks would locate its
24 RSUs at Brooks facilities located near U S WEST's central offices and connect them to Brooks facilities
25 collocated at U S WEST's facilities. During the course of the arbitration, the parties reported that U S
26 WEST had accepted Brooks' proposal.

27 U S WEST states that the only issue remaining is whether Brooks should be permitted to
28 interconnect its RSUs on copper wire. According to U S WEST, Brooks has requested that no restriction

1 be placed on the types of cable used for entry into collocated space. U S WEST wants Brooks to enter
2 the central offices on fiber facilities because the use of copper facilities will lead to a quicker exhaustion
3 of its conduits and ducts.

4 Commission's resolution

5 Prior to the conclusion of the arbitration, the parties had agreed that Brooks would locate its RSUs
6 in space located near U S WEST's end offices, consequently, we do not decide the issue of whether
7 Brooks should be able to collocate its RSUs in U S WEST's central offices. Brooks did not address the
8 issue of whether copper or fiber facilities should be required to interconnect its RSUs. Brooks' proposal
9 to locate its RSUs nearby U S WEST's central offices was a major concession. For that reason and
10 because neither the Act nor Order mandate the use or restriction of fiber versus copper facilities for
11 interconnection and because Act §251(c)(2) imposes a duty on ILECs to interconnect, we will not require
12 Brooks to interconnect its RSUs using fiber facilities.

13 **PRICING ISSUES**

14 Construction Charges, Issue No. 4

15 Brooks' position

16 Brooks opposed the imposition of up-front construction costs and argued that all construction
17 charges should be recovered through applicable TELRIC-based recurring rates. Brooks based its position
18 on the obligation imposed by the Act and Order for cost-based interconnection charges. Brooks claimed
19 that U S WEST's tariffs for construction charges are based on interconnection with IXC's, not CLECs
20 and that CLECs as well as ILECs will construct facilities to receive and route traffic originated by ILEC
21 customers and that there is no demonstration that either party will bear more costs to interconnect than
22 the other.

23 U S WEST's position

24 U S WEST argued that to the extent U S WEST is required to build facilities to provide
25 interconnection, resale or unbundled services to Brooks, Brooks must pay for those costs up-front.
26 Otherwise U S WEST would not be assured of recovering its construction costs, if for example, Brooks
27 later decides to serve a customer with its own facilities or through alternative technology.

28 U S WEST proposed that it should be permitted to pass along costs up-front to CLECs in all

1 instances in which it does so with end users, such as when the end user has agreed to make the payment
2 in a contract and where U S WEST is seeking permission from the Commission to revise a tariff to obtain
3 payment from an end user, and not only where a tariff authorizes up-front payment.

4 Commission resolution:

5 Requiring a reseller or purchaser of unbundled elements to pay up-front construction costs which
6 are not payable by an end user who requests such services from U S WEST could hamper competition.
7 Therefore, if the tariff for a specific service would pass construction costs up-front to an user, or if a
8 customer has agreed contractually to pay such costs, it is appropriate to charge Brooks up-front for the
9 construction. If another CLEC receives a benefit from the construction, Brooks is entitled to recover
10 contribution from the CLEC for a share of the construction costs.

11 Non-recurring Charges (NRCs), Issue No. 16

12 Brooks' position

13 Brooks argues that the high NRCs proposed by U S WEST for resale of bundled retail services
14 and the purchase of unbundled network elements represent a barrier to entry if not "trued-up" to a cost-
15 based measurement. Brooks proposes that, at most, new entrants should only have to bear interim NRCs
16 that are comparable to those that new customers of U S WEST must pay until the Commission
17 determines the appropriate cost levels. Furthermore, Brooks argues final NRCs should include volume
18 discounts and in the case of resale services, a wholesale discount.

19 U S WEST's position

20 U S WEST proposed billing NRCs at their tariffed rates and deferred further argument to the
21 generic cost proceedings.

22 Commission's resolution

23 If the tariff for a specific service would require a customer to pay an NRC for a service, it is
24 appropriate for U S WEST to charge Brooks the same NRC. If costs are not tariffed for payment up-
25 front, the costs should be recovered in the recurring price of a service. Cost-based NRCs will be
26 established as part of the generic cost study proceeding.

27 We will however permit U S WEST to charge a customer transfer charge for resale customers
28 switching to Brooks. The fee does not impose a burden on resellers which U S WEST would not bear

1 itself should a resale customer chose to transfer back to U S WEST. We will adopt U S WEST's
2 proposed charge as an interim rate. We will further permit Brooks to demonstrate what its own costs will
3 be upon termination of a resale customer, so that amount may be discounted from the customer transfer
4 charge payable to U S WEST.

5 **Unbundled Loop Price, Issue No. 25**

6 Based on our prior decisions, the parties have agreed on the monthly rate of \$21.67 for unbundled
7 local loops pending a final determination in the consolidated cost proceeding. The parties have not
8 reached agreement on the NRCs for unbundled loops.

9 **Brooks' position**

10 U S WEST's proposed NRCs are too high and discounts for volume are necessary.

11 **U S WEST's position**

12 See the general discussion of NRCs contained in issue no. 16 above.

13 **Commission's resolution**

14 See resolution of general NRCs contained in issue no. 16 above.

15 **Resale Discount, Issue No. 26**

16 Based upon our prior arbitration decisions, the parties have agreed to an across-the-board interim
17 discount of 17 percent on recurring charges.

18 **Brooks' position**

19 Brooks believes this interim discount should be increased to at least 20 percent for NRC
20 associated with resale services because all the physical provisioning costs included in NRCs are avoided
21 in the case of resale.

22 **U S WEST's position**

23 U S WEST proposed resale discounts ranging from 1.01 percent to 8.17 percent depending on the
24 service, but agreed in an interim discount of 17 percent subject to true-up after the Commission
25 determines a final rate as a result of the generic cost proceeding.

26 **Commission resolution**

27 The Commission has not had adequate time to review and analyze the cost studies submitted by
28 the parties to determine whether they comply with the requirements of the Act. Based on all the evidence

1 presented we find an across-the-board 17 percent wholesale discount to be just and reasonable as an
2 interim resale discount, subject to true-up upon the establishment of permanent rates.

3 **Reciprocal Compensation, Issue No. 27**

4 **Brooks' position**

5 Brooks recommended adoption of bill and keep for the longer of two year period set forth in the
6 Commission's regulations A.A.C. R14-2-1304 or until permanent number portability has been in place
7 for up to one year.

8 **U S WEST's position**

9 U S WEST opposes bill and keep, as not allowing it to recover its costs. U S WEST requested
10 that reciprocal call termination charges apply unless traffic in any given month is reasonably balanced.

11 **Commission's resolution**

12 In accordance with our Interconnection Rules, we will adopt bill and keep as a reciprocal
13 compensation mechanism. A.A.C. R14-2-1304 provides that bill and keep be in place for 24 months
14 from our approval of the first interconnection agreement. However, we will permit either party to seek
15 an earlier termination of the bill and keep mechanism if it is able to show, based on six months of history,
16 that traffic terminated by Brooks and U S WEST is out of balance by more than ten percent.

17 **UNBUNDLING**

18 **Recombination of Unbundled Elements, Issue No. 18**

19 **Brooks' position**

20 Brooks opposes any restriction on recombining unbundled elements. Brooks argued the Act and
21 Order §§51.309 and 51.315 are clear that U S WEST may not unreasonably restrict the use of network
22 elements.

23 **U S WEST's position**

24 U S WEST requested a ban on the ability of competitors to purchase unbundled elements and
25 combine them into a product which would then be offered for resale. U S WEST is concerned that such
26 a recombination of unbundled elements would enable a CLEC to avoid paying the resale prices specified
27 in the Act. U S WEST asserted that such practice creates significant opportunities for price arbitrage
28 between U S WEST's resale prices and the prices of unbundled elements and because of the subsidy that

1 U S WEST believes business customers have been providing residential customers, Brooks and others
2 can purchase services on an unbundled basis at a much lower price than the resale prices of these services
3 and undercut U S WEST. U S WEST argued that the stay of the FCC Rules permits the Commission to
4 impose additional opportunity cost on the recombination of unbundled elements that would reduce the
5 possibility of arbitrage. Alternatively, U S WEST requests that the Commission delay recombination
6 of unbundled elements until retail rates are rebalanced.

7 Commission's resolution

8 The Act, § 251(c)(3), requires ILECs to provide unbundled elements to CLECs for the CLECs
9 to combine the elements to provide telecommunications service. The Act does not exclude the
10 combination of elements for a service which otherwise is available for resale. The Commission will
11 allow carriers to purchase unbundled elements and combine them into a service also offered for resale.

12 **CONTRACT ISSUES**

13 Expedited Installations, Issue No. 19

14 Brooks' position

15 Brooks believes that it should have the opportunity to request expedited installation of related
16 orders on the same day and at the same time rather than having to schedule separate times in the day for
17 related orders to be worked. According to Brooks, U S WEST has refused to commit to expedite
18 installations or standard intervals for installation, claiming that these issues will have to be addressed in
19 the quality of service proceeding. Further, Brooks argued that it should not be charged both the tariffed
20 NRC and U S WEST's installation labor rate when a coordinated installation takes place.

21 U S WEST's position

22 U S WEST claims that it has no experience providing unbundled loops and elements as opposed
23 to finished services and is not able to establish a standard to serve as the baseline from which to expedite.
24 Without a baseline measure or a sense of whether expediting is even possible, U S WEST should not be
25 required to agree to expedite. U S WEST states that in the interim, U S WEST has agreed to treat Brooks
26 and all other competitors in a fair and nondiscriminatory fashion for purposes of expedited installation.
27 Further, U S WEST wants the agreement with Brooks to be clear that any expedition for Brooks would
28 not disadvantage U S WEST's other customers. Finally, the U S WEST asserted that the prices for

1 expedited installation should recover not only the cost of installation reflected in U S WEST's TELRIC
2 studies but also additional costs incurred in expediting the installation.

3 Commission resolution

4 Efficiency considerations support Brooks' desire to request expedited installations where
5 expedition is reasonable. Consequently, we direct the parties to negotiate expedited and coordinated
6 installations provided such installation is technically and reasonably feasible.

7 We agree with Brooks that U S WEST's tariffed rates for expedited installation should provide
8 for full recovery of its costs and that additional NRCs would result in double recovery of costs for U S
9 WEST.

10 Most Favorable Terms and Conditions, Issue No. 21

11 Brooks' position

12 Brooks would add a "most favored terms and conditions" paragraph that would allow Brooks to
13 opt into analogous provisions of other agreements. Brooks relies on Paras. 1310 and 1311 of the Order
14 and Section 252(i) of the Act that requires that each individual network service or element be provided
15 on a non-discriminatory basis.

16 U S WEST's position

17 U S WEST contends that most favored nation should be available on a contract as a whole, but
18 not on individual pieces of a contract. U S WEST cited the Eighth Circuit's stay of those portions of the
19 Order that permit a carrier to select individual terms from any interconnection agreement and argued that
20 such pick and choose provision would end meaningful negotiations.

21 Commission's resolution

22 The Court has stayed the FCC's interpretation of the most favorable terms provision, which would
23 allow a company to pick and choose contract terms among other parties' Agreements, pending resolution
24 of the issue on appeal. The Act § 252(i) requires U S WEST to make available to any other requesting
25 telecommunications carrier any interconnection, service, or network element on the same terms and
26 conditions as those provided in an Agreement. Pending the Court's determination of this issue, the
27 Commission interprets the terms and conditions upon which the interconnection, service or element was
28 offered to be the terms of the entire Agreement. Therefore, at this time, U S WEST is required to offer

1 its entire Agreement to CLECs. The Agreement should indicate that the Court's ruling regarding the
2 most favorable terms provision will be incorporated into the Agreement.

3 The Commission has rendered its Decision regarding the parties to this arbitration proceeding.
4 Nothing in this Decision shall be considered to prejudge the outcome of the Commission's Decision in
5 any other arbitration proceeding regarding the applicability or interpretation of the most favorable terms
6 clause.

7 **Notice of Commencing Business, Issue No. 23**

8 **Brooks' position**

9 Brooks does not want to be required to notify U S WEST when it begins offering exchange
10 services in Arizona through Brooks' facilities. Brooks argued the Act does not obligate CLECs to report
11 to ILECs when they begin to serve customers and Brooks should not have to provide its network data to
12 U S WEST for any reason other than assuring network integrity.

13 **U S WEST's position**

14 U S WEST requests that Brooks advise it when Brooks begins to provide facilities-based services.
15 U S WEST claims to need this information in order to apply to the FCC to provide interLATA service
16 under Section 271 of the Act and to permit U S WEST to have prior notice of the need to have facilities
17 available for interconnection and provision of unbundled elements.

18 **Commission's resolution**

19 We decline to impose obligations on the parties beyond those imposed by the Act and will not
20 require Brooks to notify U S WEST when it begins to provide facilities based service. We believe that
21 U S WEST can obtain this information through other means.

22 **Acknowledgment of Deferred Issues, Issue No. 24**

23 **Brooks' position**

24 Brooks opposed the inclusion of language that acknowledges deferred issues of universal service
25 support because there is no obligation under the Act for CLECs to acknowledge any position taken by
26 ILECs with regard to network imbalances, universal service or any other position taken with regard to
27 pending matters before the Commission, the courts or the FCC. Brooks claims that U S WEST has
28 presented no evidence supporting the inclusion of the language Brooks considers self-serving.

1 U S WEST's position

2 U S WEST wanted the inclusion of language that U S WEST characterized as reserving the rights
3 of the parties to raise issues before the Commission and on appeal.

4 Commission resolution

5 U S WEST has not presented authority to obligate, nor sufficient reason to warrant the inclusion
6 of its requested language. We will not require its inclusion in the final agreement between the parties,
7 however the Commission takes notice that issues of universal service remain outstanding.

8 **QUALITY OF SERVICE ISSUES**

9 In *The Matter of the Petition of TCG Phoenix for Arbitration Pursuant to § 252(b) of the*
10 *Telecommunications Act of 1996*, Docket No. U-3016-96-402 et al., Decision No. 59873 (October 29,
11 1996), the Commission established a generic proceeding to determine permanent quality of service
12 measurements/liquidated damages with respect to interconnections. By Procedural Order filed November
13 12, 1996, a consolidated hearing was scheduled for February 27, 1997.

14 Slamming Charges, Issue No. 15

15 The parties have agreed to defer the issue of monetary damages for slamming to the consolidated
16 proceeding on quality of service/liquidated damages.

17 Brooks' position

18 Brooks believes it is not appropriate for ILECs to impose slamming charges on companies in
19 addition to the penalties that the Commission and FCC may impose. Brooks believes there should be
20 a mechanism to recover associated costs from the carrier making the mistaken change. Brooks wants
21 the Commission to deny slamming charges in the interim, until the Commission takes up this issue in the
22 upcoming consolidated proceeding.

23 U S WEST's position

24 Because the parties have agreed to defer this issue, U S WEST did not address this issue in this
25 proceeding.

26 Commission resolution

27 In the interim we will accept Brooks' position and decline to require additional slamming charges,
28 subject to a true-up pending our ultimate determination on the issue.

1 **Liquidated Damages, Issue No. 20**

2 **Brooks' position**

3 Brooks asserts that the FCC Order at Paras. 225, 314 and 970 allows carriers to request and
4 receive better service from an ILEC than it provides its general retail customers as long as they are
5 willing to pay for it. Brooks proposes performance and liquidated damage provisions pending a final
6 determination.

7 **U S WEST's position**

8 U S WEST argues that nothing in the Act or Order empowers the Commission to impose
9 performance standards or liquidated damages or other penalties absent the parties' consent. U S WEST
10 encourages the Commission to adopt the nine performance measurements it proposed, and the
11 Commission adopted, on an interim basis in the TCG arbitration to determine whether U S WEST
12 provides the same level of service to CLECs as it provides to itself.

13 **Commission's resolution**

14 We adopt, in the interim, the nine measurements proposed by U S WEST as well as dedicated
15 access services to be measured and reported, as the proper measurement on which to gauge U S WEST's
16 performance. We find that, pursuant to the Act, the proper standard for each of those measurements
17 should be the quality of service which U S WEST provides to itself, its ten largest customers, to other
18 CLECs or other quality of service measurements imposed by the Commission whichever is higher.

19 We will not require that the agreement include automatic penalties for a party's failure to comply
20 with performance standards. The FCC declined to establish performance penalties. Order Paras. 307-
21 311. Instead the FCC stated that an aggrieved party may file a section 208 complaint with the FCC and
22 that the FCC will initiate a proceeding to develop expedited procedures to handle section 208 complaints.
23 In addition, a carrier could file a section 207 complaint seeking the recovery of damages. Paras. 126-129.
24 We will not establish performance penalties where the FCC declined to do so, and where other
25 procedures exist to remedy failures to comply with performance standards.

26 The Commission has rendered its Decision regarding the parties to this arbitration proceeding.
27 Nothing in this Decision shall be considered to prejudice the outcome of the Commission's Decision in
28 any other arbitration proceeding regarding U S WEST's performance standards or the applicability of

1 penalties.

2 The parties will be instructed to prepare for the Commission's review an interconnection
3 agreement incorporating in its terms the issues resolved by this arbitration.

4 * * * * *

5 Having considered the entire record herein and being fully advised in the premises, the
6 Commission finds, concludes, and orders that:

7 **FINDINGS OF FACT**

8 1. U S WEST is certificated to provide local exchange and intraLATA telecommunications
9 services to the public in Arizona.

10 2. Brooks is certificated to provide local exchange and intraLATA telecommunication
11 services to the public in the metropolitan Tucson area in Arizona.

12 3. On September 4, 1996, Brooks filed with the Commission a Petition pursuant to the Act.

13 4. By Procedural Order dated September 10, 1996, an arbitration was scheduled for
14 November 6, 1996, at the Commission's offices in Phoenix.

15 5. The November 6, 1996 hearing was continued for one day and commenced on November
16 7, 1996.

17 6. On September 30, 1996, U S WEST filed its Response to the Petition.

18 7. On October 25, 1996, the parties submitted a joint matrix of issues remaining to be
19 decided through arbitration.

20 8. On November 22, 1996, each party submitted a closing memorandum, which summarized
21 the issues still unresolved and presented each party's proposed resolution of the issues.

22 9. The Commission has analyzed the issues as presented by the parties and has resolved the
23 issues as stated in the Discussion above.

24 10. The Commission hereby adopts the Discussion and incorporates the parties' positions and
25 the Commission's resolution of the issues herein.

26 11. Pursuant to A.A.C. R14-2-1506.A, the parties will be ordered to prepare an
27 interconnection agreement incorporating the issues as resolved by the Commission, for review by the
28 Commission pursuant to the Act, within thirty days from the date of this Decision.

CONCLUSIONS OF LAW

1
2 1. U S WEST is a public service corporation within the meaning of Article XV of the
3 Arizona Constitution.

4 2. U S WEST is an ILEC within the meaning of 47 U.S.C. § 252.

5 3. Brooks is a public service corporation within the meaning of Article XV of the Arizona
6 Constitution.

7 4. Brooks is a telecommunications carrier within the meaning of 47 U.S.C. § 252.

8 5. The Commission has jurisdiction over Brooks and U S WEST and of the subject matter
9 of the Petition.

10 6. The Commission's resolution of the issues pending herein is just and reasonable,
11 consistent with the Act, the FCC Rules and Order, and the Interconnection Rules, and is in the public
12 interest.

ORDER

13
14 IT IS THEREFORE ORDERED that the Commission hereby adopts and incorporates as its Order
15 the resolution of the issues contained in the above Discussion.

16 IT IS FURTHER ORDERED that Brooks Fiber Communications of Tucson, Inc. and U S West
17 Communications, Inc. shall prepare an interconnection agreement incorporating the terms of the
18 Commission's resolutions.

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1 IT IS FURTHER ORDERED that the interconnection agreement shall be submitted to the
2 Commission for its review within thirty days of the date of this Decision.

3 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

4 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

5
6
7 CHAIRMAN

COMMISSIONER

COMMISSIONER

8 IN WITNESS WHEREOF, I, JAMES MATTHEWS, Executive Secretary of the
9 Arizona Corporation Commission, have hereunto set my hand and caused the
10 official seal of the Commission to be affixed at the Capitol, in the City of
11 Phoenix, this _____ day of _____, 1996.

12 _____
13 JAMES MATTHEWS
14 EXECUTIVE SECRETARY

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DISSENT _____
JR:

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