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9-2500-10661-2
PUC Docket No. P-3167,421/M-96-729

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of MFS Communication
Company's Petition for Arbitration of
Rates, Terms and Conditions for
Interconnection and Related
Arrangements with U.S. West

ORDER GRANTING MFS
COMMUNICATION COMPANY'S
MOTION TO STRIKE

During the telephonic prehearing conference in the above matter held on September 6, 1996, MFS made an oral motion to exclude U.S. West's TELRIC cost studies from consideration in this arbitration proceeding. MFS argued that the new cost studies, which are voluminous, were delivered to MFS Counsel's office during the Labor Day weekend, during the parties' exchange of pretrial testimony. Accordingly, MFS witnesses have been unable to address these new cost studies in their prefiled testimony, nor have they had sufficient opportunity to review the cost studies. MFS' oral motion was supported by DPS and OAG/RUD. MFS requests that the arbitrator exclude U.S. West's cost studies from consideration in the arbitration hearing and adopt instead, interim default proxy right ceilings and ranges as provided in 47 C.F.R. Section 51.513. U.S. West opposes the exclusion of the TELRIC studies filed by U.S. West. U.S. West argues that MFS is a large and sophisticated company and has familiarity with TSLRIC and TELRIC cost concepts. U.S. West argues that MFS has the resources and the expertise to evaluate the U.S. West cost studies.

The FCC places the burden of proof concerning its proposed pricing and preparation of a supporting cost study upon the incumbent LEC, which "must prove that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and Section 51.511 of this part." Interconnection order at Paragraph 679. The FCC recognized that it might not be possible for supporting cost studies to be performed, analyzed, and adopted by states within the statutory timeframe set out under the Telecommunications Act of 1996 to resolve interconnection arbitrations. Thus, the FCC adopted a variety of proxy cost-price ceilings for unbundled local groups, and various proxy prices and proxy ranges for reciprocal compensation and wholesale discounts resale. The states are directed to use these proxy cost-price ceilings in the interim until estimates of economic costs are developed and approved by the states. States have the discretion to set interim rates below the proxy cost/price ceiling or within default proxy ranges. As the FCC explained:

While every state should, to the maximum extent feasible, immediately apply the pricing methodology for interconnection and unbundled

elements that we set forth below, we recognize that not every state will have the resources to implement this pricing methodology immediately in the arbitration that will need to be decided this fall. Therefore, so that competition is not impaired in the interim, we established default proxies that a state commission shall use to resolve arbitration in the period before it applies the pricing methodology. In most cases, these default proxies for unbundled elements and interconnection are ceilings, and states may select lower prices. Interconnection Order at Paragraph 782.

The FCC also authorizes state commissions to set a rate outside the proxy ranges or above the proxy ceilings described in 47 C.F.R. Section 51.513 "Only if that commission has given full and fair effect to the economic cost based pricing methodology described in this section and Section 51.511 of this part in a state proceeding that. . . shall provide notice and an opportunity for comment to affected parties. . ." Interconnection at Paragraph 782. Further, 47 C.F.R. Section 51.513 states that any rate established through the use of proxy ranges or ceilings:

Shall be superseded once the state commission has completed review of a cost study that complies with the forward-looking economic cost based pricing methodology described in Section 51.505 and 51.511 of this part, and has concluded that such study is a reasonable basis for establishing element rates . . .

Section 51.513(a)(1).

The Administrative Law Judge recognizes that the Act imposes tight timeframes on all participants in this process. The Act allots nine months for completion of the process for establishing the terms of the contract under which an new entrant and an incumbent will do business. The Administrative Law Judge further recognizes that U.S. West was faced with an extraordinary lengthy and complex document when the FCC issued its first Interconnection Order, FCC Order #96-325, Paragraph 678 on August 8, 1996. U.S. West provided their TELRIC cost studies on August 31, 1996 and provided it to MFS as soon as practically possible. However, because of the tight constraints of the arbitration proceeding, it was not possible for any of the parties including MFS, DPS and OAG/RUD to respond to these voluminous cost studies within the prefiled testimony. Therefore it is impossible for the parties to this arbitration proceeding to properly analyze and scrutinize U.S. West's cost studies in time for this arbitration proceeding which is scheduled to begin on September 12, 1996. Nor have the parties had an opportunity to conduct any meaningful discovery with respect to these cost studies. The ALJ believes that the 1996 Act requires state commissions to conduct a careful and methodical review of an LEC cost studies to determine whether U.S. West's cost studies and rates comply with the forward-looking economic cost base pricing methodology required by 47 C.F.R. Sections 51.505 and 51.511.

The Minnesota Public Utilities Commission has mandated that the procedures established in this arbitration proceeding should facilitate completion of the arbitration

by the November 8 deadline, but still expects the procedures to protect the due process rights of the negotiating parties and lead to the development of a sound record for decision. Commission Order Granting Petition and Establishing Procedures for Arbitration, July 19, 1996, page 5. The Administrative Law Judge does not believe that consideration of the TELRIC rates in this arbitration proceeding will protect the due process rights of MFS and the other parties who are charged with the responsibility of protecting the public interest; nor will the consideration of the TELRIC rates in this proceeding lead to the development of a sound record for decision upon which the Commission must issue its final decision in this matter if the TELRIC rates are permitted in this arbitration proceeding without appropriate discovery and analysis.

The Administrative Law Judge believes, however, that an expedited proceeding should be scheduled to consider the U.S. West TELRIC rates. The Commission's staff during the prehearing conference on September 6, indicated the Commission would not object to an expedited proceeding to address the TELRIC rates. In the interim, rates consistent with the proxy should be used, until the review of U.S. West cost studies has determined that such studies are a reasonable basis for the establishment of element rates. In the event that the interim rates have underestimated or overestimated the appropriate economic cost based pricing methodologies provided in Section 51.511, the interim rates should be subject to a "true-up" after the rates are established pursuant to the expedited proceeding on U.S. West's cost studies.

It was suggested during the telephonic conference that perhaps U.S. West's TELRIC cost studies could be analyzed during the AT&T/MCI Metro v. U.S. West arbitration scheduled to commence on October 7, 1996. This suggestion poses some serious due process concerns. The Commission has stated in its Order Granting the petition of MFS and establishing procedures for arbitration that the Commission will not give presidential weight to its substantive decisions in the MFS arbitration. In addition, it has limited intervention in arbitration proceedings to the two statutory intervenors. Thus, MFS cannot intervene as a party in the AT&T/MCI Metro arbitration proceeding. Although MFS could gain "participant" status, see Order Granting Petition and Establishing Procedures for Arbitration dated July 19, 1996 at Page 7. Thus, the Administrative Law Judge believes that there must be a separate evidentiary proceeding outside of the FCC arbitration process to consider U.S. West's TELRIC studies. In light of the potential prejudice that U.S. West claims with respect to its prices, it is necessary that any interim rates set during this arbitration proceeding be subject to a true-up after rates are established in the expedited evidentiary proceeding concerning U.S. West's TELRIC rates.

For these reasons, the arbitrator excludes U.S. West's cost studies from consideration in the September 12, 1996 arbitration hearing and will adopt interim default proxy rate ceilings and ranges in accordance with the FCC Interconnection Order and the Telecommunications Act of 1996.

IT IS FURTHER ORDERED THAT an expedited proceeding be arranged following the arbitration hearing in this matter which will consider U.S. West's TELRIC

studies. Interim rates are subject to a true-up after rates are appropriately established in the expedited proceeding on U.S. West's cost studies.

Dated this 11th day of September 1996.

PHYLLIS A. REHA
Administrative Law Judge