BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, Termination, and Resale.	)	DOCKET NO. UT-003013 **PART B** COMMENTS OF WUTC STAFF ON EFFECT OF *IOWA UTILITIES BOARD v. FCC* (8th CIR, JULY 18, 2000) ON PART B

I. INTRODUCTION

In its Fifth Supplemental Order, the Commission gave the parties the opportunity to file comments on the effect of the recent decision of the Eighth Circuit Court of Appeals invalidating various rules of the Federal Communications Commission (FCC) relating to the local competition provisions of the Telecommunications Act of 1996 (the Act).[1] *Iowa Utilities Board v. Federal Communications Comm'n*, __ F.3d __, 2000 WL 979117 (8th Cir., July 18, 2000).

We conclude that the Eight Circuit's decision should not cause the Commission to disrupt its current course in implementing the local competition provisions of the Act and the complementary pro-competition provisions of state law. For the most part the Commission's

[1] Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in title 47, United States Code).

prior decisions in the generic proceeding, relating to costs studies and relevant to the Part B issues,[2] are consistent with the Eighth Circuit's interpretation of the Act. This Commission should not allow continued litigation over FCC rules to unduly interfere with this Commission's policy of effecting pro-competitive state and federal policies through the implementation of state and federal interconnection requirements.

II. THE EIGHTH CIRCUIT'S DECISION

After the United States Supreme Court reversed an earlier decision of the Eighth Circuit and held that the FCC has jurisdiction to adopt rules governing pricing decisions of state commissions when they implement the interconnection provisions of the Act, *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), *rev'g Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), the Eighth Circuit considered whether various FCC pricing rules were consistent with the Act.

The Eighth Circuit invalidated various FCC rules that established a forward-looking "total element long-run incremental cost" (TELRIC) methodology. The court held that the requirement of using substantially "hypothetical" factors in the determination of the costs of the incumbent local exchange carrier (ILEC) was contrary to the Act's requirement that the prices be based on the ILEC's cost. "Congress was dealing with reality, not fantasizing about what might be." *Iowa Utils. Bd.* slip op. at 7-8.

However, the Eighth Circuit reaffirmed the FCC's interpretation that the Act requires that rates not be determined by reference to historical costs. Rather, the state commissions, pursuant to FCC rule, must determine rates by a ILEC's "forward-looking" costs. The court stated:

[2] These Comments only relate to the issues reserved for Part B.

> Costs can be forward-looking in that they can be calculated to reflect what it will cost the ILEC in the future to furnish to the competitor those portions or capacities of the ILEC's facilities and equipment that the competitor will use including any system or component upgrading that the ILEC chooses to put in place for its own more efficient use.

Id. at 8.

In effect, the Eighth Circuit set an "actual forward-looking cost" standard. Of course, "forward-looking" costs are not actual and, in a sense, are hypothetical. They are predictions of the future. And it is appropriate to use cost models to make such predictions, so long as those cost models attempt to accurately predict actual future costs.

It is important to note the limits of this Eighth Circuit decision. It is neither the final, exclusive, nor definitive word on the meaning of the Act. While the Eighth Circuit has exclusive jurisdiction to review the validity of the FCC interconnection rules, it is not the final word on the meaning of the Act. It may be that the *Iowa Utilities Board* litigation will make a return trip to the United States Supreme Court, which could cast a different light on the Act. Likewise, other circuit courts of appeal, hearing appeals of state commission interconnection decisions pursuant to 47 U.S.C. §252(e)(6), may have a different interpretation.

Further, though the Eighth Circuit was reviewing a very detailed set of rules, it spoke only in general terms about the meaning of the Act. The court's objection to the use of a "hypothetical" network is only a minor limitation on the discretion of state commissions to act in facilitating interconnection under federal and state law. Indeed, with the FCC rules now vacated, the discretion of state commissions to implement the pricing provisions of the Act are constrained only by the broad terms of the Act and provisions of state law. *See MCI v. US West*, 204 F.3d 1262, 1265, 1268, 1270-71 (9th Cir. 2000).

III. THE COMMISSION NEED NOT DISRUPT THE COURSE OF THIS PROCEEDING TO ACCOMMODATE THE DECISION OF THE EIGHTH CIRCUIT

In its deliberations on the impact of the Eighth Circuit decision on this Part B proceeding, the Commission should assess the extent to which its prior decisions in the generic proceeding are consistent with the Eighth Circuit decision and whether the cost models filed by the ILECs predict such future costs, consistent with that decision.

Though it is always necessary to reassess cost models as assumptions change, we believe that the Commission in its earlier decisions generally was not inconsistent with the interpretation of the Act articulated by the Eighth Circuit. Cost models "should estimate the economic or prospective costs of providing services or elements." 8th Supp. Order, WUTC Dockets UT-960369, et al. ¶ 32. The Commission agreed with Qwest (then US West) that inputs in a cost model "must be *realistic, accurate estimates* of all of the *actual* costs a provider would incur if it built out a new network using the least cost, forward-looking technology." *Id.* ¶ 27. In the course of the earlier phase of this proceeding, the Commission has modified various cost inputs submitted by the parties in order to produce more accurate estimates of forward-looking costs. For example, the Commission adjusted cable size and lengths, *id.* ¶¶ 196-98, loop costs, *id.* ¶¶ 266-70, and costs of switching. *Id.* ¶¶ 275-310.

Verizon and Qwest, in their prefiled testimony, take different positions on whether their cost studies are consistent with the "actual forward-looking costs" standard of the Eighth Circuit. Qwest confidently states that its cost models conform to that legal standard. According to Qwest witness Million:

> It is clear that the [Eighth Circuit] Court believes an ILEC's rates should be based on the forward-looking cost of providing its existing facilities and equipment

> rather than an imaginary reconstructed local network. Thus, cost models that calculate unit costs using realistic, achievable and actual inputs to produce a realistic outcome would meet the requirements of the Telecom Act. The cost models presented by Qwest use assumptions based on actual experience or company practice and, therefore, already reflect this interpretation by the Court for the most part. While the Court's action and forthcoming rules from the FCC may impact Qwest's approach to future cost studies, I do not believe that it requires changes to the cost studies presented in this proceeding.

[Prefiled] Testimony of Teresa K. Million, Qwest Corp., at 5 (Aug. 4, 2000).

Verizon, on the other hand, seeks to use the Eighth Circuit's holding as an excuse to delay these proceedings, likely until after the Supreme Court has had the final say. [Prefiled] Phase B Direct Testimony of Dennis B. Trimble, Verizon Northwest, Inc., at 8 (August 4, 2000). However, another Verizon witness suggests that its cost model may not be in such great need of modification as it reflects the company's actual costs.

> Verizon NW's long run forward-looking costs are best estimated by its company-specific cost model, ICM. There are two main reasons for this. First, the objective of the Commission in this proceeding should be to estimate the forward-looking costs of provisions telecommunications services out of each company's own network. Second, only the ICM model reflects GTE's operating practices and characteristics, and only ICM is based on GTE's cost for material and labor.

[Prefiled] Phase B Direct Testimony of Kevin C. Collins, Verizon Northwest, Inc., at 6-7 (Aug. 4, 2000); *see also id.* at 22-24. This sounds like it is consistent with the Eighth Circuit's opinion.

However, to date, Commission Staff has only had a few days in which to review Verizon's cost study, so we cannot offer a thorough, independent view. But in any event, we urge the Commission not to simply acquiesce in Verizon's request to defer this for six to nine months.[3] It may be that some modest modification of the schedule is appropriate to allow some

[3] Comments of Verizon Northwest, Inc. on the Effect of the Eighth Circuit's Opinion in *Iowa Utilities Board v. FCC* on Phase B, at 3 (Aug. 15, 2000). Earlier, Verizon had requested a six week delay to study the impact of the Eighth Circuit's opinion. *See* Fifth Supp. Order at 1-2 (Aug. 3, 2000).

modifications to the cost models or to the direct testimony of Verizon. If Verizon's case in fact will be modified substantially, it may be inefficient to have various parties respond, only to have the rebuttal case become a new direct case.[4]

However, though it is important to set these prices properly, we urge the Commission to get on with this case. The Commission should make every effort to avoid turning this proceeding into a modern day *Jarndyce v. Jarndyce*,[5] by delaying again and again this proceeding waiting for the FCC or the federal courts to decide various issues.

DATED this 16th day of August, 2000.

CHRISTINE O. GREGOIRE
Attorney General

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JEFFREY D. GOLTZ, WSBA No. 5640
Senior Assistant Attorney General
Washington Utilities and Transportation Commission

[4] If the Commission defers the schedule somewhat, on some issues, we request that the parties be consulted so that accommodations can be made for personal and professional schedules that have been built around the current schedule.

[5] *See* Charles Dickens, *Bleak House*