BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination	)))))))	DOCKET NO. UT-003013 AT&T'S COMMENTS ON IMPACT OF EIGHTH CIRCUIT DECISION

AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively, "AT&T"), submit the following comments regarding the effect of the recent Eighth Circuit Court decision on the proceedings in Part B of this docket as authorized by the Commission in its Fifth Supplemental Order.

I. INTRODUCTION

The Commission in its First Supplemental Order established the schedule for the costing and pricing issues to be considered in this proceeding. In its Third and Fourth Supplemental Orders, the Commission further clarified the issues that would be addressed. Following the Eighth Circuit's opinion on remand in *Iowa Utilities Board v. FCC*, No. 96-3321, 2000 U.S. App. LEXIS 17234, Verizon Northwest, Inc., f/k/a GTE Northwest Incorporated ("Verizon") filed a motion to suspend all proceedings in this docket for at least six weeks for parties to analyze the impact of that opinion. The Commission denied Verizon's motion and provided this opportunity for parties to file comments regarding the effect of the Eighth Circuit's decision. As discussed in more detail below, that decision should not affect the Commission's procedural or substantive determinations in this proceeding.

II. COMMENTS

The Eighth Circuit's decision does not require a change in the issues to be addressed, the parties' proposals, or the Commission's determinations in this proceeding. Nothing in that decision requires the Commission to deviate from its plans to determine nonrecurring and recurring rates for various unbundled network elements ("UNEs") – both individually and in combinations, line sharing, collocation, loop conditioning, operations support system cost recovery proposals, and reciprocal compensation issues.

First, the judgment of the Eighth Circuit has no legal effect until the Eighth Circuit issues its mandate. *Finberg v. Sullivan*, 658 F.2d 93, 99 (3d Cir. 1980) (en banc); *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97-98 (3d Cir. 1988); *United States v. Samuels*, 808 F.2d 1298, 1299 n.1 (8th Cir. 1987) (en banc). The mandate does not issue until seven days after the deadline for filing a petition for rehearing, *i.e.*, until 52 days after the day the court's issued its opinion, or seven days after the court denies a petition for rehearing. Fed. R. App. P. 40(a). Hence, the Court's mandate could not issue before September 8, 2000, even if no party seeks rehearing.

Second, there is a strong possibility that the Eighth Circuit's mandate will *never* issue. The Eighth Circuit's decision has been widely criticized not only for the Court's failure to give due deference to the FCC's choice of a costing standard, but also for the illogic and internal inconsistency of the Court's economic reasoning. For example, the Court held that basing rates for UNEs on the estimated cost of providing them over an efficiently reconstructed network violated the "plain meaning" of the Act because the statutory reference to the "cost . . . of providing *the* interconnection or network element,"

47 U.S.C. § 252(d)(1)(A)(i) (emphasis added), "points inescapably" to the cost of providing it over the "existing" local network, not the cost of providing it over an efficiently "reconstructed" network. *Iowa Utilities*, 2000 U.S. App. LEXIS 17234, at *12.

The Court's misplaced focus on parsing the word "the" overlooked the real question: whether Congress meant to limit the *time horizon* that the FCC could prescribe for determining the "cost" of providing "the interconnection or network element." A well-established regulatory measure of the cost of a service is long run incremental cost ("LRIC"). *See Local Competition Order,* ¶¶ 677-78; *Nat'l Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810, 826 (1983); *Southern Pacific Communs. Co. v. AT&T*, 740 F.2d 980, 1005 (D.C. Cir. 1984); *Central Lincoln Peoples' Util. Dist. V. Johnson*, 735 F.2d 1101, 1116, 1121, 1124 (9th Cir. 1984); *MCI Telecoms. Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982). But the defining characteristic of any long-run measure of cost is the assumed passage of enough time to reconstruct existing assets into the most efficient configuration. Hence, the "long run" cost of *any* service, existing or hypothetical, is the assumed cost of producing it with assets that have been optimally reconstructed or reconfigured.[1]

Neither the language nor the legislative history of the 1996 Act suggests that Congress meant to limit the "cost . . . of providing the interconnection or network element" in Section 252(d)(1)(A)(i) to a "short-run" measure of cost. Significantly, the

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[1] In costing, the "long run" is the period in which "all of the firm's present contracts will have run out, its present plant and equipment will have been worn out or rendered obsolete and will therefore need replacement," and "all of a firm's costs" thus have "become variable or avoidable." *Local Competition Order,* **& 677 & n.1682; *id.*, ¶¶ 691-92.**

Eighth Circuit did *not* vacate the first sentence of 47 C.F.R. § 51.505, which states that forward-looking cost must be determined over "the long run." *See Iowa Utilities*, 2000 U.S. App. LEXIS 17234, at *59.

The notion that Congress intended to limit UNE cost studies to a short-run time horizon is also at odds with the Eighth Circuit's explanation for not requiring the use of embedded (historical) costs. The statutory term "cost," the court properly held, is "an elastic term that can be construed to mean either historical or forward-looking costs and that the FCC's interpretation of cost as forward-looking is reasonable." *Id.*, 2000 U.S. App. LEXIS 17234, *14. It would have been anomalous for Congress to leave the choice between forward-looking costs and embedded costs to the FCC's discretion while predetermining the subsidiary choice of the time horizon for estimating any forward-looking costs.

The Eighth Circuit's decision, if given effect, would require the use of a cost standard that would likely produce *lower* costs than TELRIC. In the short run (*i.e.*, the period when some or all of the investment in the existing network is assumed to be sunk), the incremental cost of using the network can be well below the long run cost, and can even approach *zero*. *See, e.g.*, *MCI Communs. Corp. v. AT&T*, 708 F.2d 1081, 1115, 1117-18 (7th Cir. 1983). This is particularly true if the increment of capacity to be costed is assumed to be only the volume of capacity needed to handle "the competitor's traffic" or the "specific network elements requested by a competitor," not the entire capacity or output of Qwest. *See Iowa Utilities*, 2000 U.S. App. LEXIS 17234, at *12.

It is likely that the FCC or other parties may petition the Supreme Court for certiorari and seek a stay order from the Court of Appeals or from the Supreme Court.

AT&T, for its part, intends to seek a stay on the grounds, *inter alia*, that (1) the Supreme Court has already decided to consider the issues raised by the FCC's forward-looking pricing methodology in GTE's appeal of the Fifth Circuit's universal service decision, *GTE Services Corp. v. FCC*, 112 S. Ct. 2214 (2000), a decision that increases the likelihood of certiorari in *Iowa Utilities Bd. II* as well, and (2) substantial confusion, disruption, and instability in the rate setting process would result if the Eighth Circuit's "interim" decision vacating one of the FCC's rules were given legal effect, only to be later reversed. Should the Eighth Circuit or the Supreme Court stay the mandate of the Eighth Circuit, the FCC's pricing rules would remain controlling law unless and until set aside by the Supreme Court.

Third, as a matter of law this Commission is not required to follow the interpretation of Section 252(d)(1) adopted in the Eighth Circuit's decision even if the Court issues its mandate. If the mandate issued, some of the FCC's pricing rules would be vacated and would no longer be binding upon the state commissions. However, Section 252(d)(1) would remain in effect, and this Commission would have an independent obligation to determine what rates should be adopted consistent with the standard of Section 252(d)(1).[2]

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[2] For example, the Ninth Circuit upheld an interconnection agreement requiring U S WEST to provide combinations despite the fact that the Eighth Circuit had struck down the FCC's rules upon which the Commission had relied in imposing the requirements. *MCI Telecomms. Corp. v. U S WEST Communications*, 204 F.3d 1262, 1268 (9th Cir. 2000). In so holding, the Court observed:

> The Eighth Circuit's decision to vacate the FCC regulation certainly still stands, and is immune under the Hobbs Act from collateral attack. All this means for the purposes of the present appeal is that the Act does not currently mandate a provision requiring combination. Our task is to determine whether such a provision "meets the requirements" of the Act, *i.e.*, to decide whether a provision requiring combination violates the Act.

The Eighth Circuit's interpretation of the Act is not binding on its sister circuits, including the District Courts and state commissions in those circuits. Pursuant to Section 252(e)(6), appeals from this Commission's pricing decisions would first be filed with the U.S. District Court in Washington and then with the U.S. Court of Appeals for the Ninth Circuit. Thus, unless the Supreme Court first authoritatively construes Section 252(d)(1), the lawfulness of rates set by this Commission will be determined not by the Eighth Circuit but by the Ninth Circuit, which will ultimately decide for itself what pricing standard should be used to set network element and interconnection rates under the Act. Accordingly, this Commission can, and should, adopt the pricing standard that it believes is correct (and therefore the most likely to be upheld on appeal) and the standard that is likely to minimize the amount of disruption to the industry.

Continuing to use the established TELRIC pricing standard is also the most practical alternative available to the Commission. The Supreme Court has already granted certiorari in a related case presenting issues associated with the FCC's forward-looking pricing methodology. *See GTE Services Corp.* v. *FCC*, 112 S.Ct. 2214 (2000). This fact, coupled with the national importance of the Eighth Circuit's decision, creates a strong likelihood that the Supreme Court will ultimately grant certiorari in the *Iowa Utilities Board* case. By the time the Washington District Court reviews the Commission's action in this case, the appeal is likely to be governed by the Supreme Court's decision, not the Eighth Circuit's semantic interpretation of the word "the." Therefore, the Commission should adopt the standard that it believes the Supreme Court

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Id. (citations omitted). Thus, finding the Eighth Circuit's analysis unpersuasive, the Ninth Circuit found that the Commission could mandate combinations under the Act. *Id.*

will ultimately adopt – which should be the same standard that the Commission believes the law requires.

Finally, due process forbids the Commission even from considering evidence based on the Eighth Circuit cost "standard" until the Commission first (1) obtains comments from interested parties on the meaning of that standard, (2) issues a decision that provides a clear interpretation of the standard (including a resolution of its apparent internal contradictions), (3) gives interested parties an adequate opportunity to submit evidence based on the standard, and (4) gives other interested parties an adequate opportunity to respond to any such evidence. *Morgan v. United States*, 304 U.S. 1, 18-19 (1938); *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1528-29 (D.C. Cir. 1984) (before resolving the role of fully allocated costs in setting oil pipeline rates, the FERC must first give the parties "adequate notice so that the issue can be fully debated before determination"); *United Gas Pipe Line Co. v. FERC*, 597 F.2d 581 (5th Cir. 1979), *cert. denied*, 445 U.S. 916 (1980); *Port Terminal R.R. Ass'n v. United States*, 551 F.2d 1336, 1345 (5th Cir. 1977) (overturning rate prescriptions based on retroactive application of new costing standards); *Hill v. FPC*, 335 F.2d 355, 362 (5th Cir. 1964) (overturning FPC decision disallowing proposed rate increases, where the ratemaking standards "were neither evolved nor announced until the decision holding them unsatisfied"). It is fundamentally unfair to "expos[e] parties to liability when they are confused as to what is required of them and the Commission declines to resolve doubts," *Southern Ry. v. United States*, 412 F. Supp. 1122, 1143 (D.D.C. 1976).

For these reasons, the Eighth Circuit's recent *Iowa Utilities Board* decision does not, and should not, affect this proceeding.

III. CONCLUSION

Any delay in establishing rates for UNEs and other facilities and services will further delay competition in Washington. Only after the Commission establishes truly cost-based rates will meaningful competition have a chance to emerge in this state. The Eighth Circuit decision does not alter the list of rates that need to be established or the need to establish those rates without further delay. The Commission has established a schedule for this proceeding, and the Eighth Circuit's decision should not cause the Commission and parties to deviate from that schedule.

Submitted this 16th day of August, 2000.

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