IN THE MATTER OF INVESTIGATION
INTO U S WEST COMMUNICATIONS,
INC.'S COMPLIANCE WITH CERTAIN
WHOLESALE PRICING REQUIREMENTS
FOR UNBUNDLED NETWORK
ELEMENTS AND RESALE DISCOUNTS

COMMISSION STAFF SUPPLEMENTAL COMMENTS
ON THE IMPACT OF THE RECENT EIGHTH CIRCUIT DECISION

On July 24, 2000, the Hearing Division issued a Procedural Order requesting comment on the impact of the July 18, 2000 Eighth Circuit Court of Appeals Decision No. 96-3321 in Iowa Utilities Board, et al. v. Federal Communications Commission, on the issues to be addressed in Phase II of this case. The Eighth Circuit had previously vacated the FCC’s pricing rules on jurisdictional grounds, however that decision was subsequently reversed resulting in reinstatement of the FCC rules. In its decision, the Eighth Circuit addressed, inter alia, the substance of the reinstated FCC pricing rules, including its forward-looking TSLRIC methodology, proxy rates and wholesale discount provisions. Overall, the Commission Staff believes, based upon its preliminary review, that the Eighth Circuit decision has little impact on the issues to be addressed in this case, although it may affect the outcome in limited instances.

In its decision, the Eighth Circuit vacated several provisions of the FCC pricing rules, including most importantly for purposes of this proceeding, 47 C.F.R. Sections 51.505(b)(1) and 51.609. Section 51.505(b)(1) provides as follows:

...
(1) Efficient network configuration. The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC’s wire centers.

The Eighth Circuit vacated this provision because it found that “Congress did not expect a new competitor to pay rates for a ‘reconstructed local network,’ [cite omitted], but for the existing local network it would be using in an attempt to compete.” Order at p. 8. Nonetheless, the Court also held that costs could 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.” Order at p. 8. The Court also stated that “it is the cost to the ILEC of carrying the extra burden of the competitor’s traffic that Congress entitled the ILEC to recover, and to that extent, the FCC’s use of an incremental cost approach does not do violence to the statute.” Order at p. 8. The Staff believes that the Eighth Circuit’s holding regarding rule 51.505(b)(1) on UNE rates should be evaluated in this case. While the Commission did not adopt either the Hatfield Model or the U S WEST model as presented since both used certain assumptions that were not acceptable, the Commission did appear to utilize the use of a hypothetical network based upon the “forward-looking, most efficient technology”, which the Eighth Circuit found problematic. See ACC Docket No. U-3021-96-488, et.al, Decision No. 60635.

In addition, the Commission Staff believes, given the obligations on ILECs such as Qwest imposed by recent FCC decisions, including the FCC’s UNE Remand Order and Advanced Services Orders, that the Commission should proceed to establish rates for any new UNEs or other affected services.

The Eighth Circuit also vacated and remanded rule 51.609 which governs the calculation of avoided retail costs. The Eighth Circuit found that under the relevant statutory provision, 47 U.S.C. Section 252(d)(3), “costs that are actually avoided, not those that could be or might be avoided, should be excluded from the wholesale rates.” Order at p. 17. Since the Commission will be
examining the issues involving the wholesale discounts remanded by the Arizona District Court in
US WEST v. Jennings, 46 F.Supp. 2d 1004 (D.Ariz. 1999), it should also request parties to consider
this aspect of the Eighth Circuit’s holding in their filings.

Finally, the Staff does not believe that the Eighth Circuit decision in any way affects the
Commission’s review of Qwest’s Statement of Generally Available Terms and Conditions
(“SGAT”) which review Staff supports being done within the context of this proceeding.

RESPECTFULLY submitted this 4th day of August, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that the original and 15 copies of the foregoing were filed this 4th day of August, 2000 with:

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