I. INTRODUCTION

On July 24, 2000, the Chief Administrative Law Judge ("ALJ") issued a Procedural Order which summarized the previous comments of the parties regarding recommendations for additional phases and corresponding issues to be addressed in this proceeding. The ALJ also noted that the Eighth Circuit Court of Appeals issued a decision on July 18, 2000, regarding the rules issued by the Federal Communications Commission ("FCC").¹

The ALJ gave the parties until August 4, 2000, and August 18, 2000, to file comments and responsive comments, respectively, on any recommended changes to the parties' earlier comments necessitated as a result of the recent Eighth Circuit decision.

II. COMMENTS

On April 21, 2000, AT&T, TCG Phoenix, MCI WorldCom, Inc., on behalf of its regulated subsidiaries, Sprint Communications Company, L.P. ("Joint Commentors") filed their recommendations for phases and corresponding issues. The Joint Commentors generally recommended 4 additional phases: 1) establish loop rates, including high frequency portion of the loop, switching and transport; 2) establish the rates for all remaining unbundled network elements ("UNE"), including the new network elements identified in the UNE Remand Order, and the direct costs identified in the Line Sharing Order; 3) establish collocation rates required by Advanced Services Order; and 4) establish resale discount and address any remaining cost issues. Joint Comments, at 19.

The Eighth Circuit decision does not require a change in AT&T’s recommendations for additional phases and the corresponding issues to be addressed in this proceeding. Furthermore, nothing in the decision requires the Commission to deviate from its plans to set new permanent rates for UNEs, line sharing, collocation and resold services.

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

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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.\(^5\)

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 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.

\(^5\) 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.
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 Commun. 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 Servs. 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).6

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 for Arizona 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

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6 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 state 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. See 28 U.S.C. § 2342; U S WEST Communications v. MFS Intelenet, 193 F.3d 1112, 1120 (9th Cir. 1999). 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." Id. Thus, finding the Eighth Circuit's analysis unpersuasive, the Ninth Circuit found that the state commission could mandate combinations under the Act. Id.
granted certiorari in a related case presenting issues associated with the FCC’s forward-looking pricing methodology. See GTE Svcs. 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 District Court for Arizona 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 will ultimately adopt – which should be the same standard that the Commission thinks the law requires.

Finally, elementary 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

The existing UNE rates in Arizona deny competitive local exchange carriers a meaningful opportunity to compete. Any delay in establishing new rates for UNEs will further delay competition in Arizona. The Commission recently established interim deaveraged loop rates that are not cost-based and make economic residential competition impossible. Only after the Commission establishes truly cost-based rates will meaningful competition have a chance to emerge in Arizona.

The Eighth Circuit decision does not alter the list of rates that need to be established, nor the need to establish the rates without further delay. The Commission should establish a schedule for the next phase of this proceeding to establish cost-based rates for the loop, including the high frequency portion of the loop, switching and transport.
Submitted this 4th day of August, 2000.

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.

By: Mary B. Tribby
Richard S. Wolters
1875 Lawrence Street, #1500
Denver, Colorado 80202
303-298-6741 Phone
303-298-6301 Facsimile
rwolters@att.com E-mail
CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of AT&T Communications of the Mountain States, Inc.'s Comments in Docket No. T-00000A-00-0194 were sent by overnight delivery on this 3rd day of August, 2000 to:

Arizona Corporation Commission
Docket Control - Utilities Division
1200 West Washington Street
Phoenix, AZ 85007

and a true and correct copy was sent by overnight delivery on this 3rd day of August, 2000 to:

Carl J. Kunasek, Chairman
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Jerry Porter
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

James M. Irvin, Commissioner
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Patrick Black
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

William A. Mundell, Commissioner
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Hercules Alexander Dellas
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Lyn Farmer
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Deborah Scott
Director - Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Mr. Jerry L. Rudibaugh
Chief Hearing Officer
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007
and a true and correct copy was sent by United States Mail, postage prepaid, this 3rd day of August, 2000, to:

Thomas Dethlefs  
Wendy M. Moser  
Qwest Corporation  
1801 California Street, Suite 5100  
Denver, CO 80202

Joan S. Burke  
Osborn Maledon, P.A.  
2929 North Central Avenue, 21st Floor  
P. O. Box 36379  
Phoenix, AZ 85067-6379

Richard L. Sallquist  
Sallquist & Drummond  
2525 E. Arizona Biltmore Circle  
Phoenix, AZ 85016

Thomas F. Dixon  
MCI WorldCom, Inc.  
707 17th Street, Suite 3900  
Denver, CO 80202

Peter A. Rohrback  
Mace J. Rosenstein  
Yaron Dori  
Hogan & Hartson, LLP  
555 Thirteenth Street, NW  
Washington, DC 20004-1009

Daniel M. Waggoner  
Gregory T. Diamond  
Davis Wright Tremaine  
2600 Century Square  
1501 Fourth Avenue  
Seattle, WA 98101-1688

Drake Tempest  
Qwest Communications International, Inc.  
555 Seventeenth Street  
Denver, CO 80202

Maureen Arnold  
Qwest Corporation  
3033 North Third Street, Room 1010  
Phoenix, AZ 85012

Michael W. Patten  
Brown & Bain  
2901 N. Central Avenue, Suite 2000  
Phoenix, AZ 85012

Thomas H. Campbell  
Lewis and Roca, LLP  
40 North Central Avenue  
Phoenix, AZ 85004

Raymond S. Heyman  
Randall H. Warner  
Roshka Heyman & DeWulf, PLC  
Two Arizona Center, Suite 1000  
400 North 5th Street  
Phoenix, AZ 85004

Gregory Kopta  
Davis Wright Tremaine  
2600 Century Square  
1501 Fourth Avenue  
Seattle, WA 98101-1688

David R. Conn  
McLeodUSA Telecommunications Services  
6400 C Street, S.W.  
Cedar Rapids, IA 52406

Jon Poston  
Arizonans for Competition in Telephone Service  
6733 E. Dale Lane  
Cave Creek, AZ 85331-6561
Scott Wakefield  
Residential Utility Consumer Office  
2828 North Central Ave., #1200  
Phoenix, AZ 85004

Douglas Hsiao  
Rhythms Links, Inc.  
6933 S. Revere Parkway  
Englewood, CO 80112

Diane Bacon  
Communications Workers of America  
5818 N. 7th Street, Suite 206  
Phoenix, AZ 85014-5811

Rex M. Knowles  
Nextlink Communications, Inc.  
111 E. Broadway, Suite 1000  
Salt Lake City, UT 84111

Thomas W. Hartman  
SBC Telecom  
175 E. Houston Street, Room 1256  
San Antonio, TX 78205

Robert S. Tanner  
Davis Wright Tremaine  
17203 N. 42nd Street  
Phoenix, AZ 85032

Gary Yaquinto  
GST Telecom, Inc.  
3003 N. Central Avenue, Suite 1600  
Phoenix, AZ 85012

Brian Thomas  
GST Telecom, Inc.  
4001 Main Street  
Vancouver, WA 98663

Penny Bewick  
New Edge Networks, Inc.  
P. O. Box 5159  
3000 Columbia House Blvd., Suite 106  
Vancouver, WA 98668

Michael M. Grant  
Todd C. Wiley  
Gallagher & Kennedy, P.A.  
2575 E. Camelback Road  
Phoenix, AZ 85016-9225

W. Clay Deanhardt  
Covad Communications  
2330 Central Expressway  
Santa Clara, CA 95050

Timothy Peters  
Electric Lightwave, Inc.  
4400 N.E. 77th Avenue  
Vancouver, WA 98662

Darren S. Weingard  
Sprint Communications  
1850 Gateway Drive, 7th Floor  
San Mateo, CA 94404-2467

Elizabeth Howland, National Director  
Regulatory and Interconnection  
Allegiance Telecom, Inc.  
1950 Stemmons Freeway, Suite 3026  
Dallas, TX 75207-3118

Carrington Phillip  
Cox Arizona Telecom, Inc.  
1400 Lake Hearn Drive  
Atlanta, GA 30319

Kath Thomas  
Advanced Telecom Group, Inc.  
100 Stoney Point Road, Suite 130  
Santa Rosa, CA 95401