QWEST CORPORATION'S RESPONSE TO STAFF'S MOTION FOR CLARIFICATION OF PROCEDURAL ORDER AND FOR EXTENSION OF THE DEADLINE FOR FILING TESTIMONY

I.  INTRODUCTION

Qwest Corporation ("Qwest"), formerly U S WEST Communications, Inc., hereby responds to Staff's motion for clarification of the Arizona Corporation Commission's ("Commission") August 21, 2000 Procedural Order that establishes the schedule for Phase II of this proceeding. Staff seeks to have the Commission declare that Phase II of this cost docket will include full reconsideration of the rates that the Commission established for unbundled network elements ("UNEs") in a separate, previously concluded docket, Docket No. U-3021-96-448 et al., Decision No. 60635. In effect, Staff is asking the Commission to undo the many months of effort and the tremendous investment of resources that the Commission, Qwest, and the participating competitive local exchange carriers ("CLECs") put into the previous cost docket. For several reasons, the Commission should deny Staff's request.

First, contrary to what Staff seems to imply, the parties and the Commission followed the

1 For convenience, this brief uses the name "Qwest" to refer to both Qwest Corporation and the former U S WEST Communications, Inc.
FCC's pricing rules in establishing UNE rates in the earlier cost docket, even though those rules had been stayed by the United States Court of Appeals for the Eighth Circuit. Second, the Commission established the UNE rates after considering hundreds of pages of pre-filed testimony and exhibits, voluminous cost studies from multiple parties, detailed live testimony presented over many days, and extensive briefing by the parties. Given the comprehensive nature of the first cost docket and the thorough consideration the Commission gave to the rates it established in that proceeding, it would be extremely wasteful to require the parties and the Commission to duplicate this substantial effort in Phase II, and it also would be contrary to the strong public interest in giving finality to the Commission's orders. Third, as Qwest reads the Commission's Phase II procedural order, the order does not suggest that rates from the earlier docket are to be revisited. To the contrary, the network elements and other items that are enumerated in that order for consideration in Phase II only include network elements and issues that were not addressed in the previous docket or in Phase I of this docket relating to establishing deaveraged loop rates. Moreover, revisiting the rates from the previous docket defeats the purpose of having separate and distinct cost dockets, as the Commission has ordered.

Lastly, Qwest has no objection to extending the deadline for filing direct testimony into early January, as long as all parties, including Staff, are required to file their direct testimony at the same time. Qwest does object to Staff's request that it be permitted to file its direct testimony

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2 The Commission's Procedural Order of August 21, 2000 provides that Phase II will address "rates for unbundled network elements and interconnection, including the high frequency portion of the loop and the unbundling of network elements in the UNE Remand Order, inter-carrier reciprocal compensation structure, wholesale discount rates, and permanently geographically deaveraged UNE and other wholesale rates." With the exception of wholesale discount rates, none of these specifically enumerated items was decided in the previous cost docket. The Commission's ruling relating to wholesale discount rates was remanded to the Commission by a federal district court, which is presumably why the Procedural Order lists that issue as part of Phase II. See U S WEST Communications, Inc. v. Jennings, 46 F. Supp.2d 1004,
after Qwest and the intervenors have filed their testimony. All parties, including Staff, should be required to comply with the same filing schedule. Staff appropriately states that it would like to preserve the opportunity to consider and respond to "the various proposals put forward by all parties." It will have that opportunity when it files rebuttal testimony in this proceeding. There is no need to give Staff a filing schedule different from the schedule that will apply to the other parties.

II. DISCUSSION

A. The Rates For Unbundled Network Elements That The Commission Established In Decision No. 60635 Comply With The FCC's Pricing Rules.

Staff's motion suggests that the UNE rates the Commission established in the previous cost docket may not be consistent with the FCC's pricing rules because those rules had been stayed by the Eighth Circuit when the Commission conducted that docket. Staff's motion fails to recognize that although the rules were stayed, the cost studies the parties presented in the first cost docket were based on the FCC's pricing rules, including the FCC's requirement of cost-based pricing using Total Element Long Run Incremental Costs ("TELRIC"). Indeed, the parties emphasized throughout that proceeding that their cost studies and pricing proposals were based on TELRIC. Accordingly, the rates from Decision No. 60635 in the previous cost docket are indisputably based upon TELRIC and, therefore, are consistent with the FCC's pricing rules.

Statements from this Commission, AT&T, and Qwest during Docket No. U-3021-96-448 leave no doubt that the cost studies and the resulting rates from that docket were TELRIC-based. The Commission specifically found that the UNE rates from that proceeding complied with TELRIC: "The prices for unbundled network elements are intended to recover the costs of a
forward-looking, least cost, efficient network, not embedded costs." Decision No. 60635 at 39, Conclusion of Law No. 9. Further, Qwest’s expert economist, Dr. Robert Harris, explained in considerable detail that Qwest's cost studies were designed to comply with the TELRIC methodology. When asked whether Qwest's proposals were consistent with the FCC's pricing rules, Dr. Harris responded that Qwest's prices "do comply . . . because the prices are based on the FCC's prescribed TELRIC costing methods." (Testimony of Robert G. Harris, Docket Nos. U-3021-96-448 et. al.).

Additionally, the Commission adopted (with some modifications) the Hatfield model, version 2.2.2., submitted by AT&T for UNE pricing. AT&T's witnesses emphasized repeatedly that the Hatfield model complies with TELRIC and the FCC's pricing rules. For example AT&T witness, R. Glen Hubbard, testified that "The Hatfield model meets both the criteria of economically efficient pricing principles and the criteria set forth by the FCC." See Direct Testimony of R. Glen Hubbard at 56 lines 3-13. (Docket Nos. U-3021-96-448 et. al.); see also Direct Testimony of Stephen E. Siwek at 4-5 (Docket Nos. U-3021-96-448, et. al.) ("The methodology underlying the Hatfield Model fully implements the definition of TELRIC adopted by the FCC."). Further, AT&T's witness stated that the stay of the FCC rules did not impact AT&T’s proposals. See Direct Testimony of R. Glen Hubbard at 46 (Docket Nos. U-3021-96-448 et. al.) ("Whether or not the FCC Order continues to be stayed, the methodology adopted by the FCC largely is consistent with the economic principles I have described in this testimony. The Commission thus may safely adopt AT&T’s proposals, secure in the knowledge that they are consistent with the FCC Order if it is upheld and consistent with proper economic theory. ."). Based on this record, the federal district court that reviewed the Commission's pricing
Furthermore, Staff has not identified any FCC rule that was violated or any rate that would change through strict application of the pricing rules. Consequently, the Staff's suggestion that the UNE rates from the previous docket must be reviewed for consistency with the FCC pricing rules just because the rules were stayed at the time the rates were established is without merit.

B. Revisiting The Rates From Decision No. 60635 Would Be Wasteful And Inconsistent With The Interest In Finality Of Commission Orders.

A principle that is fundamental to regulatory law and to American jurisprudence as a whole is that, as a general rule, issues which have been fully and fairly litigated to a final conclusion should not be litigated again. See, e.g., Baldwin v. Iowa State Traveling Men's Assn., 283 U.s. 522, 525 (1935); Panzino v. Phoenix, 999 P.2d 198, 204 (Ariz. 2000). This basic principle is rooted in the need for finality of agency and judicial determinations. Finality is a necessity because it provides predictability as to what the law is and eliminates the substantial burdens parties would face if they could be forced as a matter of course to relitigate issues that were already determined.

In this case, the rates from the previous cost docket should be accorded the finality that is due orders from this Commission that are the product of properly conducted hearings and proper application of the law. The rates that were established in the previous docket are based on a voluminous record in a proceeding that provided for full participation by all interested parties. The record from the previous docket includes testimony from more than 20 witnesses, more than 900 hundred pages of pre-filed testimony, live testimony spanning 8 hearing days, more than
(approximately) 22 cost studies comprising thousands of pages, and extensive briefing by the
parties. As the size of the record demonstrates, the parties poured substantial time and resources
into the previous docket for the express purpose of establishing permanent rates. The
Commission evaluated the record and issued rulings that it concluded were consistent with the
law and the public interest. As described by the federal court that reviewed the Commission's
rulings, "the Commissioners approached their task seriously and made a good faith effort to
resolve conflicting evidence and reach a decision that complied with the law while protecting the
public interest." U S WEST Communications, Inc. v. Jennings, 46 F. Supp.2d at 1009.3 While
there may be cases where rates established by a state commission should be revisited because of
procedural irregularities or other flaws, the previous cost docket is not one of those cases.

To revisit and relitigate the rates from the previous cost docket would be to undo the
substantial effort that the parties and the Commission put into that proceeding and to require the
parties and the Commission to duplicate resources they already have invested. The law relating
to the finality of judgments and administrative orders is designed to avoid precisely this type of
result.

C. The Procedural Order Does Not Contemplate Reviewing The Present
Unbundled Network Element Rates For Compliance With The
Reinstated FCC Pricing Rules.

As Qwest reads it, the Commission's August 21, 2000 Procedural Order does not
contemplate revisiting and relitigating the rates that the Commission established in the previous
cost docket. As stated earlier, the network elements and other issues listed at page 6 of the
Procedural Order for inclusion in Phase II are new and are not duplicative of the elements and

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3 This statement by the federal court is specifically in connection with the Commission's ruling relating to
the price of the 2-wire loop.
issues that the Commission addressed in the first cost docket. If the Commission had intended to undertake the monumental task of revisiting and relitigating the permanent rates it has already established, it presumably would have said so.

Instead, the Procedural Order’s identification of new elements, services, and other issues suggests that the Commission intends to continue the existing process of establishing permanent rates through distinct and separate phases. It does not suggest, as Staff would have it, that the Commission intends to conduct a retrospective reconsideration of the rates from the previous docket. Indeed, if all the rates that the Commission established in the first docket were added to the new issues that the Commission has identified for Phase II, this significant expansion of the proceeding could compromise the level of attention and that should be given to the important issues that this docket presents. The volume of issues would present significant manageability concerns. The Commission's phased approach to establishing permanent prices avoids these risks.

III. CONCLUSION

Based on the foregoing, Qwest requests that the Commission deny Staff’s attempt to include previously established rates in this proceeding. Further, the Commission should extend the filing date for direct testimony to early January 2001, as long as all parties are required to comply with the same date.

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4 As stated earlier, the lone exception is the Commission's inclusion of wholesale discount rates in the Procedural Order. Because the Commission's ruling relating to that issue was remanded in U S WEST v. Jennings, the Commission appropriately included that issue in the Procedural Order.
RESPECTFULLY SUBMITTED this 4th day of December, 2000.

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