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May 7, 2004

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Verizon Telephone Companies Petition For Reconsideration, "In the Matter of Stale or Moot Docketed Proceedings", CC Docket Nos. 93-193, 94-65 and 94-157***

Dear Ms. Dortch:

On May 6, 2004, on behalf of Verizon, Ed Shakin and Joe Dibella met with Tamara Preiss, Deena Shetler, Laurel Bergold, Debra Weiner, and Andrea Kearney of the Wireline Competition Bureau and the Office of General Counsel to discuss the above captioned proceeding. The attached presentation was used during the discussion.

Please do not hesitate to contact me with any questions.

Sincerely,

/s/ Frederick E. Moacdieh

Attachment

cc: T. Preiss
D. Shetler
L. Bergold
D. Weiner
A. Kearney

Verizon Followed the Commission's Accounting Rules

These cases go back over ten years. The issue in each case is whether Verizon complied with the Commission's accounting rules as they existed at that time, not as they were later amended. In all cases, Verizon followed the Commission's rules. The Commission should not do again what it has already been criticized by the D.C. Circuit for doing in the context of OPEB accounting requirements – "concocting a new rule in the guise of applying the old." *Southwestern Bell v. FCC*, 28 F.3d 165, 173 (D.C. Cir. 1994).

Pre-1993 OPEB costs. This deals with the exogenous adjustment associated with the OPEB accounting rule change. In 1990, the Financial Accounting Standards Board adopted the "OPEB" accounting rule, which required companies to accrue liabilities for "Other Post-Employment Benefits," consisting mainly of health care benefits for retirees. The Commission approved this change for USOA accounting purposes on December 26, 1991, requiring carriers to make it effective "on or before January 1, 1993," and stating that "earlier implementation is encouraged." *Southwestern Bell GTE Service Corp. Notification of Intent to Adopt Statement of Financial Accounting Standards No. 106*, 6 FCC Rcd 7560, ¶¶ 2, 3 (1992). Bell Atlantic informed the Commission on December 31, 1991, that it had implemented that accounting practice starting with the year 1991. In 1993, after the Commission indicated that the carriers could file tariffs seeking exogenous adjustments for certain types of OPEB costs, Bell Atlantic filed tariffs for its 1991 through 1993 OPEB costs. In the meantime, in the *Southwestern Bell* decision, the D.C. Circuit recognized that the Commission's "control" test for exogenous costs – that a cost must be beyond the control of the carrier – was met for the OPEB change "simply by the fact of the exogenous imposition of the accounting rule." 28 F.3d at 170. This meant that Bell Atlantic had met the test once the Commission approved the accounting change. The fact that Bell Atlantic may have had some "control" over the year in which it adopted the accounting change – after being encouraged by the Commission to adopt it early – does not change that result.

RAO 20. This concerns the calculation of the interstate rate base, which affects the rate of return and in turn the price cap carriers' sharing obligations under the old rules for the period 1993-1996. The Commission's rules in effect during that period explicitly defined the rate base. Section 65.800 stated that it consists of the specific asset accounts listed in section 65.820 minus the deductions listed in section 65.830 (the text of the two provisions are attached). In 1996, the deductions in section 65.830 included accrued pension liabilities, but they did not include OPEBs, which by definition are benefits *other* than pensions.

This issue is called "RAO 20" because the Common Carrier Bureau issued an advisory letter entitled RAO 20 in 1992 instructing the carriers to deduct OPEB liabilities from the rate base. This increased their rate of return and their sharing obligations. In 1996, the Commission issued an order reversing RAO 20, because there was no way to interpret section 65.830 as requiring deduction of OPEB liabilities. *RAO 20 Rescission Order*, 11 FCC Rcd. 2957 (1996) (¶¶ 25-32 are attached). In the same order, the

Commission proposed a rule change to require such deductions, but in the meantime the carriers had to file their 1996 annual access tariffs. In those tariffs, they followed the ruling of the *RAO 20 Rescission Order* and reversed the deduction of OPEB liabilities for the prior years' rate of return to calculate the sharing obligations for 1996. It was not until 1997 that the Commission finalized the rulemaking and changed section 65.830 to require deduction of OPEB liabilities from the rate base. Since rulemakings only have prospective effects, Verizon applied this rule in the 1997 and later tariff filings. In the 1997 rulemaking order, the Commission specifically found that the previous rules could not be interpreted to allow deduction of OPEB liabilities from the rate base. ***See*** *RAO 20 Rulemaking*, 12 FCC Rcd 2321, ¶¶ 25, 28 (1997) (attached). Since the Commission has already found that, under the terms of its rules in effect during the period at issue, "[s]ections 65.820 and 65.830 of our rules define explicitly those items to be included in, or excluded from, the interstate rate base" (*RAO 20 Rescission Order*, ¶ 25) and that "accrued OPEB liabilities are not removed from the rate base" (id., ¶ 32), there is no basis to impose such a requirement.

Add-Back. "Add-back" is a procedure under which the rate of return that was used to compute a price cap carrier's sharing obligation included an adjustment to the previous year's revenues to add sharing amounts or deduct lower formula adjustment amounts that were included in the prior rate case. In 1993, the Commission changed the form used to calculate rate of return in the prior regime and removed the line for calculation of an add-back adjustment. At the time, add-back was neither required nor prohibited – the Commission explained that "this issue was neither expressly discussed in the LEC price cap orders, nor clearly addressed in our Rules." *Price Cap Regulation of LEC Rate of Return Sharing and Lower Formula Adjustment*, 8 FCC Rcd 4415, ¶ 4 (1993). While it had proposed a rule requiring add-back, the Commission deliberated two years as to the correct rule. In 1995, the Commission adopted a rule for the first time explicitly requiring add-back for sharing calculations. When the D.C. Circuit upheld a challenge to the 1995 rule change, it noted that the rule change was not impermissibly retroactive because it was prospective only – it applied only to the 1995 and later tariff filings. *Bell Atlantic v. FCC*, 79 F.3d 1195, 1206 (D.C. Cir. 1996). As a result it did not "change or invalidate any current tariffs" and so only had secondary retroactive effect, which could be upheld if reasonable. *Id.* This contrasts with the period prior to the rule change, where an add-back requirement would "change the past legal consequences" of carriers' decisions. *Id.*

The issue here is whether add-back was required for the 1993 and 1994 annual access tariff filings. Since it was not addressed in the price cap rules, some carriers did it while others did not. Either approach was a reasonable interpretation of the accounting rules prior to the time that the Commission adopted the add-back rule, because neither approach was guaranteed to maximize a carrier's revenues – it would depend on whether a carrier would be in an under-earning or over-earning situation in the future, which no carrier could predict. The Commission should not penalize carriers that did not apply the add-back requirement prior to the rule change.

§69.121; Common Line, §§69.104–69.105; and an aggregated category consisting of Line Termination, §69.106, Intercept, §69.108, Local Switching, §69.107, Transport, §§69.110–69.112, 69.124, 69.125, and Information, §69.109. The Billing and Collection access element shall not be included in any access service category for purposes of this part. The Commission will also separately review exchange carrier overall interstate earnings subject to this part for determining compliance with the maximum allowable rate of return determined by §65.700(b).

(b) For exchange carriers, earnings shall be measured for purposes of determining compliance with the maximum allowable rates of return separately for each study area; provided, however, that if the carrier has filed or concurred in access tariffs aggregating costs and rates for two or more study areas, the earnings will be determined for the aggregated study areas rather than for each study area separately. If an exchange carrier has not utilized the same level of study area aggregation during the entire two-year earnings review period, then the carrier's earnings will be measured for the entire two-year period on the basis of the tariffs in effect at the end of the second year of the two-year review period; provided, however, that if tariffs representing a higher level of study area aggregation were not in effect for at least eight months in the second year, then the carrier's earnings will be measured on the basis of the study area level of aggregation in effect for the majority of the two-year period; provided further, that any carrier that was not a member of the National Exchange Carrier Association or other voluntary pools for both years of the two-year review period will have its earnings reviewed individually for the full two-year period.

[51 FR 11034, Apr. 1, 1986, as amended at 57 FR 54719, Nov. 20, 1992; 58 FR 48763, Sept. 17, 1993; 60 FR 28546, June 1, 1995]

Subpart G—Rate Base

SOURCE: 53 FR 1029, Jan. 15, 1988, unless otherwise noted.

§65.800 Rate base.

The rate base shall consist of the interstate portion of the accounts listed in §65.820 that has been invested in plant used and useful in the efficient provision of interstate telecommunications services regulated by this Commission, minus any deducted items computed in accordance with §65.830.

§65.810 Definitions.

As used in this subpart ''account xxxx'' means the account of that number kept in accordance with the Uniform System of Accounts for Class A and Class B Telecommunications Companies in 47 CFR part 32.

§65.820 Included items.

(a) *Telecommunications Plant.* The interstate portion of all assets summarized in Account 2001 (Telecommunications Plant in Service) and Account 2002 (Property Held for Future Use), net of accumulated depreciation and amortization, and Account 2003 (Telecommunications Plant Under Construction), and, to the extent such inclusions are allowed by this Commission, Account 2005 (Telecommunications Plant Adjustment), net of accumulated amortization. Any interest cost for funds used during construction capitalized on assets recorded in these accounts shall be computed in accordance with the procedures in §32.2000(c)(2)(x) of this chapter.

(b) *Material and Supplies.* The interstate portion of assets summarized in Account 1220.1 (Material and Supplies).

(c) *Noncurrent Assets.* The interstate portion of Class B Rural Telephone Bank stock contained in Account 1402 (Investment in Nonaffiliated Companies) and the interstate portion of assets summarized in Account 1410 (Other Noncurrent Assets), Account 1438 (Deferred Maintenance and Retirements), and Account 1439 (Deferred Charges) only to the extent that they have been specifically approved by this Commission for inclusion. Otherwise, the amounts in accounts 1401–1500 shall not be included.

(d) *Cash Working Capital.* The average amount of investor-supplied capital needed to provide funds for a carrier's day-to-day interstate operations. Class

A carriers may calculate a cash working capital allowance either by performing a lead-lag study of interstate revenue and expense items or by using the formula set forth in paragraph (e) of this section. Class B carriers, in lieu of performing a lead-lag study or using the formula in paragraph (e) of this section, may calculate the cash working capital allowance using a standard allowance which will be established annually by the Chief, Common Carrier Bureau. When either the lead-lag study or formula method is used to calculate cash working capital, the amount calculated under the study or formula may be increased by minimum bank balances and working cash advances to determine the cash working capital allowance. Once a carrier has selected a method of determining its cash working capital allowance, it shall not change to an optional method from one year to the next without Commission approval.

(e) In lieu of a full lead-lag study, carriers may calculate the cash working capital allowance using the following formula.

(1) Compute the weighted average revenue lag days as follows:

(i) Multiply the average revenue lag days for interstate revenues billed in arrears by the percentage of interstate revenues billed in arrears.

(ii) Multiply the average revenue lag days for interstate revenues billed in advance by the percentage of interstate revenues billed in advance. (Note: a revenue lead should be shown as a negative lag.)

(iii) Add the results of paragraphs (e)(1) (i) and (ii) of this section to determine the weighted average revenue lag days.

(2) Compute the weighted average expense lag days as follows:

(i) Multiply the average lag days for interstate expenses (*i.e.*, cash operating expenses plus interest) paid in arrears by the percentage of interstate expenses paid in arrears.

(ii) Multiply the average lag days for interstate expenses paid in advance by the percentage of interstate expenses paid in advance. (Note: an expense lead should be shown as a negative lag.)

(iii) Add the results of paragraphs (e)(2) (i) and (ii) of this section to determine the weighted average expense lag days.

(3) Compute the weighted net lag days by deducting the weighted average expense lag days from the weighted average revenue lag days.

(4) Compute the percentage of a year represented by the weighted net lag days by dividing the days computed in paragraph (e)(3) of this section by 365 days.

(5) Compute the cash working capital allowance by multiplying the interstate cash operating expenses (*i.e.*, operating expenses minus depreciation and amortization) plus interest by the percentage computed in paragraph (e)(4) of this section.

[54 FR 9048, Mar. 3, 1989, as amended at 60 FR 12139, Mar. 6, 1995]

§ 65.830 Deducted items.

(a) The following items shall be deducted from the interstate rate base.

(1) The interstate portion of deferred taxes (Accounts 4100 and 4340).

(2) The interstate portion of customer deposits (Account 4040).

(3) The interstate portion of unfunded accrued pension costs (Account 4310).

(4) The interstate portion of other deferred credits (Account 4360) to the extent they arise from the provision of regulated telecommunications services. This shall include deferred gains related to sale-leaseback arrangements.

(b) The interstate portion of deferred taxes, customer deposits and other deferred credits shall be determined as prescribed by 47 CFR part 36.

(c) The interstate portion of unfunded accrued pension costs shall bear the same proportionate relationship as the interstate/intrastate expenses which give rise to the liability.

[54 FR 9049, Mar. 3, 1989]

PART 68—CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

Subpart A—General

Sec.

68.1 Purpose.
68.2 Scope.
68.3 Definitions.

Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pensions in Part 32 Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base,
11 FCC Rcd 2957 (1996)

25. After reviewing the record on this issue, we find that RAO 20 exceeded the Bureau's delegated authority to the extent that it directed exclusions from and additions to the rate base for which the Part 65 rules do not specifically provide. Sections 65.820 and 65.830 of our rules n62 define explicitly those items to be included in, or excluded from, the interstate rate base. The Bureau cannot properly address any additional exclusions in an RAO letter, which under Section 32.17 of our rules n63 must be limited to explanation, interpretation, and resolution of accounting matters. Accordingly, the portion of RAO 20 that addresses the rate base treatment of prepayments and accrued liabilities related to OPEBs is rescinded.

n62 47 C.F.R. §§ 65.820, 65.830.
n63 47 C.F.R. § 32.17.

IV. PETITION FOR RECONSIDERATION

26. Bell Atlantic filed a Petition for Reconsideration of RAO 20 on June 3, 1992. Since this Order addresses the issues raised in that petition, we dismiss it as moot.

V. NOTICE OF PROPOSED RULEMAKING

A. Preliminary Matters

27. Today, we rescind that portion of RAO 20 addressing the rate base treatment of prepayments and accrued liabilities related to OPEBs. n64 In ordering such rescission, we base our action solely on procedural grounds, and render no decision on the substantive merits of the ratemaking practices at issue. n65 In this Notice of Proposed Rulemaking, we propose amendments to Part 65, Subpart G of our rules, to revise the rate base treatment of prepaid OPEB costs recorded in Account 1410, Other Noncurrent Assets, and all items in Account 4310, Other Long-Term Liabilities, including accrued liabilities related to OPEBs.

n64 See supra part III.B.3, para. 25.
n65 See supra part III.B.

28. Several investigations of LEC tariffs that include exogenous adjustments for OPEB costs are pending. n66 The applicants and some commenters have suggested that we defer modifying our Part 65 regulations until the conclusion of these investigations. n67 Although we do not agree that we should delay our action proposing to modify Part 65 to require the exclusion from the rate base of all items in Account 4310, including accrued liabilities related to OPEBs, we invite comment on this issue.

n66 See discussion supra part II, paras. 8-10.
n67 See discussion supra part III.B.2, paras. 22-24.

29. RAO 20 instructed carriers to include in their rate bases the interstate portion of prepaid postretirement benefits recorded in Account 1410, Other Noncurrent Assets, and to remove from their rate bases the interstate portion of unfunded, accrued postretirement benefits recorded in Account 4310, Other Long-Term Liabilities. n68 The stated rationale for this treatment was that "postretirement benefits are similar to pension expenses . . . and as such should be given the same rate base treatment." n69 Under our current rules, unfunded accrued pension costs recorded in Account 4310 are removed from the rate base, n70 and prepaid pension costs in excess of the SFAS-87 periodic pension cost calculation recorded in Account 1410 are included in the rate base. n71 The FASB has commented on the similarity between SFAS-106, Employers' Accounting for Postretirement Benefits Other Than Pensions, and pension accounting statements SFAS-87 and SFAS-88. n72 "Different accounting treatment is prescribed [in SFAS-106] only when the [FASB] Board has concluded that there is a compelling reason for different treatment." n73 We tentatively agree with the conclusion in RAO 20 that the similarity between OPEB amounts and pension expenses recorded in Accounts 4310 and 1410 justifies this rate base treatment for OPEB amounts, as well as pension expenses, recorded in each of the accounts.

n68 RAO 20, supra note 1, at 2873.
n69 Id. at 2872-73 (emphasis added).
n70 47 C.F.R. § 65.830(a)(3).
n71 See Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Report and Order, 3 FCC Rcd 269, para. 43 & n.32 (1987) (citing Use of Certain Generally Accepted Accounting Principles in Part 32 of the Commission's Rules, Memorandum Opinion and Order, 2 FCC Rcd 6675 (1987) (discussing in paragraphs 14 and 15 the inclusion of prepaid pension costs exceeding the SFAS-87 cost calculations in the rate base)), recon., Order on Reconsideration, 4 FCC Rcd 1697 (1989), remanded sub nom. Illinois Bell Tel. Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990), on remand, Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).

n72 SFAS-106, para. 11 n.6.
n73 Id. (discussing similarities in subheading "Similarity to Pension Accounting" in Summary and identifying major similarities and differences in Appendix B).

B. Proposed Rule

1. Account 1410

30. At this time, under Section 65.820(c), amounts recorded in Account 1410 are included in the rate base "only to the extent that they have been specifically approved by

this Commission for inclusion." SFAS-87 and SFAS-106 set forth standards for calculating the future pension and OPEB costs companies should accrue in the current period. When companies prepay these costs by, for example, paying amounts in excess of the current period expense into employee pension funds, they record these excess contributions in Account 1410. Under our current rules, with the rescission of the rate base portion of RAO 20, prepaid pension costs recorded in Account 1410 are included in the rate base, n74 but prepaid OPEB costs recorded in Account 1410 are not included in the rate base. n75 Both types of excess prepayments, however, produce returns that reduce the pension amounts companies must accrue in future periods. Because investors fund these excess prepayments, we propose to include both types of excess prepayments in the rate base. We invite comment on this proposal.

n74 See Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Report and Order, 3 FCC Rcd 269, para. 43 & n.32 (1987) (citing Use of Certain Generally Accepted Accounting Principles in Part 32 of the Commission's Rules, Memorandum Opinion and Order, 2 FCC Rcd 6675 (1987) (discussing in paragraphs 14 and 15 the inclusion of prepaid pension costs exceeding the SFAS-87 cost calculations in the rate base)), recon., Order on Reconsideration, 4 FCC Rcd 1697 (1989), remanded sub nom. Illinois Bell Tel. Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990), on remand, Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).
n75 47 C.F.R. § 65.820(c).

31. We have allowed prepaid pension costs to be included in the rate base, because pension fund prepayments in excess of the SFAS-87 cost calculation earn a return, which benefits the ratepayer by reducing later expenses. n76 The proposed modification to our rate base rules governing prepaid OPEB costs recorded in Account 1410 is premised on our belief that the rationale underlying the rate base treatment of prepaid pension costs recorded in Account 1410 applies equally to prepaid OPEB costs recorded in that account. We invite comment on our tentative conclusion that prepaid OPEB costs in excess of the SFAS-106 cost calculation benefit the ratepayer and thus justify the inclusion of these prepayments recorded in Account 1410 in the rate base.

n76 See Use of Certain Generally Accepted Accounting Principles in Part 32 of the Commission's Rules, Memorandum Opinion and Order, 2 FCC Rcd 6675, paras. 14-15 (1987), cited in Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Report and Order, 3 FCC Rcd 269, para. 43 (1987), recon., Order on Reconsideration, 4 FCC Rcd 1697 (1989), remanded sub nom. Illinois Bell Tel. Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990), on remand, Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).

2. Account 4310

32. Under our current Part 65 rules, unfunded accrued pension costs recorded in Account 4310 are removed from the rate base, n77 although other items recorded in Account 4310, such as accrued OPEB liabilities, are not removed from the rate base. We propose amending our Part 65 rules to accord to all items in Account 4310 the same rate base treatment presently accorded unfunded accrued pension costs. We would modify Section 65.830(a), which enumerates specific items to be removed from the rate base, by broadening the current reference to the interstate portion of unfunded accrued pension costs in Section 65.830(a)(3) to include the interstate portion of all items in Account 4310. We also propose conforming amendments to Section 65.830(c), broadening the current reference to the interstate portion of unfunded accrued pension costs to include the interstate portion of all items in Account 4310. We invite comment on these proposals.

n77 47 C.F.R. § 65.830(a)(3).

Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pensions in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base, 12 FCC Rcd 2321 (1997).

B. MCI Petition for Reconsideration of the Order to Vacate

1. Positions of the Parties

25. In our *Order to Vacate*, we rescinded the rate base instructions contained in *RAO 20*. Our decision was based on our determination that the Bureau did not have the delegated authority to change the Part 65 rules in an RAO letter.[1] MCI asks us to reconsider our decision and to reinstate the rate base instructions related to OPEB.[2] MCI states that we have broad discretion in interpreting our rules and that a rule change is not needed to determine the rate base treatment of OPEB.[3] MCI believes that because the rate base treatment of pensions was already established, and because pensions are similar to OPEB, we can apply the pension rate base rules to OPEB through an interpretation.[4] Southwestern states that our authority to interpret our rules does not include the right to change rules at will without notice and comment.[5]

26. The opposing parties state that we correctly concluded in the *Order to Vacate* that the Bureau has no delegated authority to modify the rate base provisions of Part 65.[6] The opposing parties also assert that it is unreasonable for MCI to conclude that we can interpret Section 65.830 of our rules as currently including the interstate portion of OPEB among those items that must be removed from the interstate rate base. The opposing parties state that the only item recorded in Account 4310, Other long-term liabilities, that should be removed from the rate base is the interstate portion of unfunded accrued pension costs.[7]

27. In reply, MCI states the oppositions failed to demonstrate that a rulemaking proceeding is required to change the rate base treatment of OPEB and that the oppositions failed to refute the principle that administrative agencies are afforded broad

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[1] *Order to Vacate*, *supra* n.1 at para. 25.

[2] MCI Petition at 2.

[3] *Id.*

[4] *Id.*

[5] Southwestern Reply at 2-3.

[6] Ameritech at 2; Bell Atlantic at 1; US West at 2; Southwestern Reply at 2-3.

[7] Ameritech at 2; Bell Atlantic at 1-2; US West at 3.

discretion in interpreting their rules.[8] MCI also argues that, because Section 65.830(a)(3) currently lists pension costs as a rate base adjustment and because pensions are similar to OPEB, it is not unreasonable to interpret this section to require the removal of OPEB costs.[9]

2. Discussion

28. We have reviewed MCI's Petition and find that it provides no basis on which to change our *Order to Vacate* decision rescinding the ratemaking guidance for OPEB contained in *RAO 20*. As we stated in the *Order to Vacate*, the Bureau did not have the delegated authority to amend the Part 65 rules. MCI's Petition does not refute this conclusion. We also are not persuaded by MCI's argument that the Commission can amend Part 65 through an interpretation without providing affected parties with any notice of or chance to comment on the amendment.[10] Giving rate base recognition to OPEB in Part 65 would constitute a rule change for which proper notice and comment must be given. Accordingly, for the reasons stated above, we deny MCI's Petition.

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[8] MCI Reply at 2.

[9] *Id.* at 3.

[10] 5 U.S.C. §553.