

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

<b>In the Matter of the Petition of</b>	)	
	)	No. UT-991476
<b>Advanced Telecommunications, Inc.,</b>	)	
<b>Advanced TelCom Group, Inc., et. al.</b>	)	<b>Comments of U S WEST</b>
	)	<b>Communications, Inc. opposing the</b>
	)	<b>initiation of a fresh look rule-making</b>
	)	<b>and opposing the adoption of new fresh</b>
	)	<b>look rules.</b>
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**I. INTRODUCTION**

**On September 24, 1999 several competitive local exchange carriers (petitioners) filed a petition with the Washington Utilities and Transportation Commission (Commission) asking that the Commission adopt “fresh look” rules in Washington. The proposed rules would void every customer contract with an incumbent local exchange carrier (ILEC) containing early termination provisions and allow customers to exit those contracts without paying the contracted for fee. This would occur without any compensation to ILECs, which agree to special contracts based on their ability to cover costs over a specified period of time. U S WEST strongly urges the Commission to reject this petition because the parties have provided no evidence to support their request. They offer no evidence that early termination provisions in Washington contracts have ever been abused, no evidence that this Commission has failed in its duty to scrutinize and approve tariffs, price lists or contracts which include termination fees, no evidence of customer confusion or misleading practices in the state of Washington – in short, no evidence whatsoever of the misuse of termination fee provisions by ILECs or anyone else in this state. To U S WEST’s knowledge, no customer has ever filed a complaint in Washington about a contract that contained conditions they were unaware of, or that they would not have signed had they known the competitive alternatives. The evidence is simply not present here. Further, the petitioners fail to explain why the provisions they so vehemently oppose are the same provisions typically contained in CLEC contracts with customers, including their own.**

**II. ARGUMENTS**

**What Are Early Termination Clauses?**

Early termination clauses are provisions in a fixed term contract that require payment of a fee if a customer terminates a contract prior to the end of the mutually agreed upon contract term. The purpose of these provisions is to allow a telecommunications provider to offer the customer a discounted price for service over the life of the contract. Providers are able to do this when they are assured that despite discounting their price, they will recover their costs because the customer has agreed to purchase the service for a specified period of time (long enough to cover the cost) or to pay a fee (high enough to cover the cost) for terminating the agreement early. Ordinarily a customer will continue to purchase service over the life of a contract and enjoy a discounted rate. However, with the early termination clause, customers also have the option of ending the contract early understanding that if they choose to do so they will pay a termination fee to allow the provider to recover its costs. Without the fee, a provider would generally take a loss on the service. Ultimately, that loss may be borne by other ratepayers in the form of higher rates for their service.

Most customers who enter into these contracts are business customers. Often they are large business customers. These customers are savvy, having experience with the telecommunications environment in Washington. They are well aware of the extensive competitive alternatives available to them. In fact, it is often in response to a lower price offered by competitors that a customer will request a discounted rate. Contrary to the assertions of the petitioners, who provide no evidence to suggest that Washington customers have been misled, these customers understand and embrace term contract pricing and the benefits of lower pricing it offers them. The petitioners seem to suggest that these sophisticated business customers who negotiate for better pricing do not even read the contracts they themselves have asked for. There is simply no evidence to suggest this is true. These customers understand the need for termination fees to cover costs and they know about the options available to them from other providers in the market.

### **Early Termination Clauses Are Widely Used And Accepted In Most Industries.**

In today's competitive telecommunications market, early termination provisions are used by almost every provider of telecommunications service as a means of lowering their prices for service. By lowering their rates, competitors are able to attract customers to their services. This type of pricing is the hallmark of a competitive market in which competitors are constantly looking for ways to offer discounted rates for services to beat the competition while still covering costs. The petitioners argue—without providing any evidence—that these provisions are a function of monopoly power. The petitioners are wrong. These provisions are used by almost every competitive local exchange carrier (CLEC) and ILEC because sophisticated customers demand customer specific services and rates.<sup>1</sup>

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<sup>1</sup> In fact, if the Commission were to review the confidential contracts of the petitioners in this case, it would almost certainly find that these same providers use early termination fees in their term contracts in Washington in the same way in which almost every other

Contrary to the assertions of the petitioners, a monopolist has very little incentive to provide discounted prices to customers. Only in a competitive market, such as the one that exists in Washington today for business services, are competitors scrambling to find ways of lowering prices for consumers in order to win business and beat the prices of competitors. These are the same business practices and the same standard provisions that are used in almost every competitive industry in the country. There is nothing sinister in the termination provisions of telecommunications contracts nor is there any evidence that incumbents in this state have ever used these clauses differently than any other provider here. Simple economics dictate that where customers agree to a fixed term or volume of service, providers do not need to recover as much of their costs up front and are able to reduce monthly fees. Consumers pay lower prices and the provider still recovers its investment.

### **The Use Of Early Termination Provisions By ILECs Is Reasonable.**

**The petitioners would have the Commission believe that when an incumbent uses an early termination provision in a contract, this use is unreasonable and anti-competitive. Given the competitive climate which has existed in Washington business markets for several years now, the petitioners assertions are unfounded. U S WEST serves in the same markets as over 70 competitors in Washington. Business customers who enter into term contracts are well aware of the many alternate providers of telecommunications services available to them. Incumbents are only a few of many competitors serving business customers in this state. As demonstrated above, the reason that incumbents and all other providers have turned to the use of early termination provisions is that competition is pushing providers to find ways of lowering prices to match those of the competition.**

The early termination provisions in incumbents' tariffs, price lists and contracts are reasonable business practices that benefit consumers. They bring lower prices to customers, they give customers a choice of how they want to purchase service and allow customers to tailor providers' offerings to their own business needs. If one customer projects a five year need, they can negotiate for the best rate among several providers. This negotiation puts downward pressure on all competitors' rates while contracts with early termination provisions allow the chosen provider to cover its costs over the extended period of time. Even if a customer chooses to invoke the early termination clause of their contract, most would agree that deferring the payment of fixed costs until the end of their use of the service, or escaping the payment of higher rates during their use of the service has saved them money and has thus benefited them.

### **If The Commission Were To Adopt Fresh Look Rules, Consumers Would Be**

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provider of telecommunications service in Washington utilizes these provisions. *See e.g.* GTE, Fresh Look Petition Comments, November 4, 1999, attachment, showing pricelists of six of the seven petitioners offering the special term pricing they complain about here.

**Harmed.**

**Consumers are the beneficiaries of special contracts for services. All providers, incumbents and competitors alike, are able to offer consumers special prices because early termination clauses insure that providers will recover their costs. If the Commission were to abrogate these contracts by voiding early termination clauses such contracts would be devalued and perhaps meaningless. Providers would certainly not have any incentive to continue entering into these types of contracts. This would directly harm consumers who would then be forced to pay higher rates without any discounts for term or volume purchases. This would also eliminate a customer's right to choose what they believe to be of value.**

**Limiting The Use Of Early Termination Clauses For Some Competitors But Not All Competitors Would Be Discriminatory, Competitively *Unneutral*, And Unfair.**

**Petitioners request that the Commission only remove early termination clauses from ILEC contracts and not from those of CLECs. Essentially, the competitors ask that the Commission advantage CLECs in the market by enabling only CLECs to offer special pricing. This would clearly disadvantage incumbents and effectively eliminate them from the market for term services. Had petitioners provided any evidence to suggest that early termination clauses should be banned from contracts, they would have to be banned for all providers in order to meet the requirement of Telecommunications Act of 1996 that regulation of telecommunications providers must be competitively neutral.**

The Petitioners request instead that this Commission embrace the self-serving interests of CLECs looking for an advantage in the market to the detriment of competition and against the interest of ratepayers who may bear the cost of this scheme. They would have the Commission virtually handcuff one segment of the market, ILECs, meaning less competition, fewer options for business customers and potentially significant losses to incumbents which may ultimately have to be borne by ratepayers.

**Petitioners Abuse The Commission Process By Making This Filing With No Evidence To Support Their Sweeping Allegations.**

**Petitioners base their filing on broad statements about the supposed detriments of early termination provisions without one example of misuse of these provisions by an incumbent in Washington. They point to an example of a Sprint customer in Florida and give another example of an alleged abuse of these provisions in Nevada. They also lump one example about a church that was charged \$12,000 as an early termination fee with a discussion of a U S WEST tariff in Washington without so much as mentioning that the church is located in California, and is not even a U S WEST customer let alone a Washington customer. The petitioners provide no facts and no substance to support their lofty discussion**

**of competition and their broad bashing of incumbents in this state. The only abuse to be found here is that of the petitioners in asking this Commission to consider this baseless petition.**

*The Commission already supervises the tariffs and contracts of incumbents to ensure that they are fair and reasonable.*

**Because the Commission reviews almost every incumbent contract with customers and every tariff filed in the state of Washington, the interests of customers and those of competitors are sufficiently protected by the current system. The potential for abusive contract terms or anti-competitive rate schemes is thoroughly mitigated by the regulation and review process to which incumbents are subjected. This is most likely why the petitioners fail to cite any evidence of abuse of early termination fees by incumbents in Washington. Such abuse does not exist. Incumbents are not able to use these fees as a means of stifling competition because this Commission would never allow it.**

**Requesting that the Commission undo every contract of every incumbent and review again every already approved tariff which contains early termination fees, is excessive at best. Absent evidence that the Commission has failed to satisfy its responsibility with respect to supervising the tariffs and contracts of incumbents and all carriers, or some evidence that the Commission failed to act according to its own stated policy goal of promoting competition throughout Washington's telecommunications market in reviewing tariffs and contracts, the request of petitioners should be denied. There is absolutely no such evidence of Commission failure here. For that reason, this petition should be denied.**

*Undoing all customer contracts with incumbents is unconstitutional.*

**The United States Constitution protects the rights of citizens to contract. It also protects the rights of citizens to be free from the taking of their property without just compensation. Both of these rights of customers and ILECs would be violated if under the conditions presented by petitioners, the suggested rules were adopted by this Commission.**

### III. CONCLUSION

Petitioners should be held to a far higher standard than the baseless and sweeping statements made in the instant petition before this Commission will spend its time and taxpayer money on issues such as this. To accede to the whims of the petitioners here would be to send a message that this Commission is available to anyone looking to advance its own economic interests without regard to the public interest. Evidence is required showing some abuse or misdeed in this state before sweeping rules of the type proposed here deserve consideration. The only interest of the public here is to allow consumers to continue to purchase services from all providers in the market at the best

rates available with Commission intervention only in the case of abuse. The petitioners proposal not only hurts customers who would no longer have the option of incumbents for term contracts, but all ratepayers who would bear the burden of the unpaid costs associated with contracts broken without remuneration for costs to the incumbent.

For the foregoing reasons U S WEST suggests that the Commission reject the petitioners request to open a rulemaking on this subject.