BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of	)	DOCKET NO. UT-991737
	)	
	)	
Rulemaking Concerning Line Extension	)	
Tariffs, Draft WAC 480-120-071	)	
	)	

COMMENTS OF U S WEST

INTRODUCTION AND SUMMARY

Pursuant to the Commission's Notice of Opportunity to File Written Comments, U S WEST Communications, Inc. ("U S WEST") files these comments regarding the proposed rules. U S WEST appreciates this opportunity to comment and further appreciates the efforts of Commission Staff to work with the industry on this issue. U S WEST asserts that the proposed rule revisions[1] are unnecessary and inappropriate in today's telecommunications environment. However, if the Commission determines to proceed with the rule, U S WEST also addresses the need for certain changes in the proposed draft that was issued in the above docket February 18, 2000.

U S WEST believes that the provision in the proposed rule that would purport to restrict U S WEST from charging its filed and effective line extension tariff rates to

[1] The Notice of Opportunity cites WAC 480-120-071, which addresses the same subject matter as the proposed draft. The draft is not in bill drafting style, however, U S WEST assumes that the Commission's intent is that the current WAC 480-120-071 would be repealed and the proposed draft would be adopted in its place.

applicants who request line extensions is unlawful because the Commission cannot rescind or change a filed and effective tariff rate through rulemaking. U S WEST is also concerned that this proposed rule which would substantially reduce the amounts U S WEST can charge to applicants for line extensions, defies the express command of the Legislature in RCW 80.36.600(1) in that the amounts previously charged are replaced with a universal service measure, that the Commission proposes to implement without advance approval by the Legislature. Parties may further contend that the proposed rule violates §253 and §254 of the Telecommunications Act of 1996 and RCW 80.36.610(2)(a) because fewer than all providers of intrastate telecommunications will be called on financially to support universal service under the proposed rule.

U S WEST submits that the proposed rules are unnecessary and counterproductive to the Commission's goal of improving the ability of prospective telecommunications customers who have chosen to live in remote areas, to obtain some form of telecommunications service from regulated providers. The Commission should, in U S WEST's view, work with the individual companies to find solutions to situations in which tariffed charges to extend service appear prohibitive, rather than attempting to create a one size fits all measure which contains several features that contravene existing statutes in Washington, and imposes discriminatory obligations on regulated companies. The approach that U S WEST suggests provides an outcome in which prospective customers who want service receive it and the companies who extend facilities to provide service, recover their costs. Recovery of costs is extremely important in this context in light of the current and continuing introduction of widespread fixed wireless and other

alternative "last mile" connections to the network. As these technologies are introduced, customers for whom the ILEC has extended copper facilities under this rule, are not required to continue to use those facilities and pay rates to the ILEC. Thus, the Commission must provide a realistic means by which the cost of extending wireline facilities into remote, high cost areas, can be recovered and not charged only to ILECs who happen to have the areas within their exchange boundaries.

SUBSTANTIVE COMMENTS

1. Section 1(A): U S WEST submits that the scope of the rule must be broad enough to include all providers of telecommunications services, not just those carriers which are still subject to tariff regulation. The proposed rules acknowledge in section 3 that the rules address universal service. Under §253 and §254 of the Federal Act and under RCW 80.36.610(2)(a), every provider of intrastate telecommunications services must contribute to the support of universal service on an equitable and nondiscriminatory basis. Therefore, the phrase "or price lists under RCW 80.36.320" should be inserted in the first sentence after "RCW 80.36.100."

U S WEST also submits that the clause "and must extend service consistent with this rule," should be deleted. The rule does not, and cannot by its nature, address the essentially factual question that must be addressed under RCW 80.36.090 in order to determine what "persons or corporations" are "reasonably entitled" to service and to whom, for this reason, telecommunications companies "shall furnish suitable and proper facilities and connections." The statute does not say that the companies must furnish service to all persons and corporations who apply. The "reasonably entitled" requirement

is fact based and requires a fact based standard. The proposed rule contains no such standard. The requirement to "extend service consistent with this rule" is therefore an empty requirement and it should be deleted.

The proposed rule should be modified, as set forth in U S WEST's suggested revision, to specify the point from which an extension should be measured. The appropriate point is the end of the company's facilities on the proposed route, which should be interpreted as the last point at which there are facilities that are designed to serve multiple customers. This is because it is to such point that facilities must actually be extended in order to provide a connection that electrically joins the applicant's property with the central office. The full cost of this distance is the proper cost of the extension. The proposed rule should also provide that the "free" one tenth of a mile extension, applies only where the extension is either wholly or partly on public right of way. When the extension is completely on private roads, there should not be a "free" one tenth of a mile.

The proposed rule defines extensions of service with regard to county urban growth areas established under RCW 36.70A.100. There is no necessary correlation between the exchange base rate area, which is the basis in U S WEST's tariff for the assessment or non assessment of line extension charges, and any county's urban growth area. The rationale for line extension charges is that the network is designed to radiate from the central office to meet forecasted growth within a reasonable distance from the central office, known as the base rate area, at the time the network is built, and people who cause extensions beyond the base rate area, should pay the reasonable cost of those

expensive extensions, rather than burdening the utility or its other ratepayers with such costs. Urban growth areas may or may not include portions of the incumbent telecommunications company's base rate areas, but there is no correspondence between the reasons for creating the urban growth area and the reasons for the base rate area. U S WEST should have the right to charge for extensions that are outside the base rate area, even if they are within an urban growth area.

Further, the proposed rules' use of urban growth areas is actually counter to the intent of the Legislature in the Growth Management Act (GMA), Chapter 36.70A RCW. The proposed rules would explicitly subsidize the cost faced by those who apply for service that requires extending telecommunications facilities to property located outside the urban growth area. This subsidization will promote growth in these rural areas. In RCW 36.70A.070(5)(c), the Legislature commanded that the comprehensive plan that would result in the "urban growth area" and conversely the locations outside of such an area, should contain measures to contain or otherwise control rural development outside the urban growth area. Nothing in the proposed rule addresses the need to contain or otherwise control rural development in the context of subsidizing the buildout of telecommunications infrastructure extensions for such development as the rule requires. Also, according to the Trade and Economic Development Department, ten of the most rural counties do not even fully plan under the GMA and so they would have no urban growth areas. The proposed rule is unclear whether this means that all extensions in these counties are "extensions of service," or none are within the rule's definition. These issues should be resolved by substituting the phrase "base rate area" for the phrase "county

urban growth area established under RCW 36.70A.110."

The proposed rules should also make it clear that the scope of the extensions that are subject to the rules includes only extensions within the extending company's exchange boundary. The Commission lacks power to force a utility to extend service beyond its filed exchange boundaries, outside of a §214(e)(3) proceeding under the Federal Act. Nothing in the proposed rule contemplates the procedures involved in a §214(e)(3) proceeding. Other than in a §214(e)(3) proceeding, a utility cannot be compelled to dedicate its property to public use in an area in which it has not chosen to serve. Amdt. XIV, United States Const., *Southern Bell Tel. Co. v. Town of Calhoun,* 287 F. 381 (W.D. S.C. 1923). The phrase "within the extending company's exchange boundary" should be inserted in the definition as shown in the attached revisions.

U S WEST recommends deleting the reference to extensions to another company's exchanges in section 4, consistent with U S WEST's recommendation that section 4 be deleted. U S WEST recommends deleting the final sentence of the subsection because it incorrectly applies only section 5 of the proposed rules to companies that file price lists, instead of the entire rule. Taken with U S WEST's proposed revision to the first sentence of the subsection, this sentence would be superfluous.

2. Subsection 1(B). U S WEST recommends deleting the entirety of proposed subsection 1(B) as written and replacing it with the text shown in the attached revisions. There are several reasons for this proposal. The Commission has never asserted that it has, and U S WEST does not agree that the Commission has, the authority to dictate with what

form of technology, U S WEST or any other regulated telecommunications company, must provide service. U S WEST especially disagrees that the Commission has power to regulate the quality or price of service that is not even defined as telecommunications service in RCW 80.04.010. This rule subsection appears to have no benefit to customers or companies. The company that is required to extend service gains no benefit by using the option that this section offers. There is no financial incentive for the company that would choose to use a "cooperative agreement" with its competitor, the radio communications company, to use such an agreement. The rule fails to acknowledge that where equivalent radio communications service is available, the wireline service is no longer "affected with a public interest," and market forces should resolve from which carrier the prospective customer obtains service. This proposal is a poor substitute for the designation of a wireless carrier as an ETC under §214(e) of the Federal Act.

3. Subsection 2(A). U S WEST proposes to amend subsection 2(A) to make it conform with the law, by removing the attempt within this rule to engage in rate setting, and to make it clear that the rule refers to the telecommunications company's filed and effective tariff or price list. Thus U S WEST proposes the insertion of the phrase "and may include subsequent payments all as provided in the extending company's filed and effective line extension tariff or price list" after the word "order" in the first sentence of the subsection. As U S WEST's tariff provides today, U S WEST supports the concept of a payment plan which could include initial and subsequent payments over a period of months. This issue should be worked out through the tariff process. U S WEST submits that it is not within the Commission's power to change a tariff through rulemaking.

In this provision, the Commission is purporting not only to set rates in a rulemaking without any findings that the rates are just and reasonable, it is also setting rates that are different from and in most instances lower than the rates in U S WEST's filed and effective line extension tariff. The formula in the rule, though it allows discrimination between customers, would allow the computation of a total "maximum" charge for a given customer, based on the basic service that the customer chooses. To the extent that this charge is lower than the charge that would be computed by applying the tariffed rate per foot in U S WEST's tariff to the actual number of feet of line extension, then the rule would purport to render unlawful U S WEST's charges that are made in accordance with its filed and effective tariff. The Commission does not have the power to make rates through rulemaking or to make unlawful a filed tariff and its rates, through rulemaking. RCW 80.04.110 prescribes the complaint as the means by which the WUTC may change filed rates on the basis that they are unreasonable. The statutory test for rates under RCW 80.36.080, is that they must be fair, just, reasonable and sufficient. In a complaint case, the Commission would have to meet the burden of proof with evidence. There must be findings to support a determination that the existing rates are not fair, just and reasonable, and then the Commission has power to fix the new rates by order under RCW 80.36.140. This must only occur after a hearing. The notion that a formula of twenty times the monthly rates up front plus twenty charges equal to the monthly rate would produce just and reasonable rates for line extension for one company, let alone all companies, is completely contrary to this statutory scheme.

The proposed rule has the additional defects that it is vague and unreasonably

discriminatory. It prescribes a "maximum initial payment," as an amount equal to twenty times the basic monthly service rate, but it does not say what any lesser than the maximum payments may be, nor under what circumstances should there be less than the maximum payment. This is unacceptably vague. A consumer could insist that he or she was entitled to less than the maximum, but no standards appear in the rule to say whether that would be true. Similar concerns apply to the "maximum per-month payment." The rule would also discriminate unreasonably in that two customers, side by side, who obtained identical line extensions from the same point but who chose different basic services with different monthly service rates, would pay different line extension charges.

U S WEST proposes to delete the third paragraph of the subsection in its entirety and replace it with the language shown in the proposed revision. This revision is for clarity, and expresses the principle that if U S WEST extends facilities for one customer and the extension runs past another customer who subsequently applies for service that would not have existed without the prior extension, the later customer pays the tariffed line extension charge.

4. Subsection 2(B). U S WEST submits that paragraphs (i) and (ii) are unnecessary because the definition of an extension of service (as corrected pursuant to U S WEST's comments in paragraph 1 above) already excludes extensions within the base rate area or those which are less than one tenth of a mile in length, where the extension includes some public right of way. However, if the paragraphs are retained they should be modified as shown in the attached revisions to refer to the company's filed and effective line extension tariff or price list as the source of the charges involved. Similarly, paragraph

(iii) should be modified as shown in the attached revision. The rule in paragraph (iii) should be modified to provide that the utility may enter into a contract under RCW 80.36.150 to charge the direct cost of extension to applicants who have available radio commmunications facilities. This establishes legal authority for the charges. The term "reasonably comparable" should be deleted. This term is too vague to permit a reasonable person to know whether a particular service is permitted as a substitute for wireline service or not. During the workshop, it became apparent that some commenters argue that wireless service is not "reasonably comparable" to wireline service unless the wireless bit rate for data transmission is equal to that of wireline service. This illustrates the pitfalls of the proposed rule. Basic service as defined in RCW 80.36.600 does not provide for any particular rate of data transmission. In addition, commenters claimed that analog wireless service lacked the same privacy safeguards as a wireline connection, while digital wireless was an equivalent to wireline service in terms of privacy.
U S WEST submits that the unauthorized interception of all wireless communications is just as unlawful as the interception of wireline service, and it is not appropriate to use the anticipated failure of legal safeguards to establish a lack of "reasonable comparability" for purposes of determining when the full line extension costs may be charged to persons who have wireless service available to them.

Direct cost should be defined to include the necessary cost of reinforcing the network to make the electrical connection between a customer's premises and the central office. These changes are necessary to provide recovery of the actual cost of extension.

U S WEST also submits that the concluding sentence of the paragraph should be

changed by inserting “the cost of right-of-way access and permitting” after “facilities” and deleting the phrase “does not include.” Without these modifications, the rule would clearly confiscate the property of the utilities. Under the current network design, distribution plant is tapered, with more pairs at the center near the central office, and fewer pairs at the ends of the cable routes. This is the “forward looking, efficient” design that has been used in the cost docket, UT-960369 et al., to determine the prices U S WEST may charge for loops. This design contemplates an ultimate demand over the forecast horizon on the network from the ends of the routes back to the central office. If that demand is exceeded on any route, then the network must be reinforced. Such reinforcement is costly. If U S WEST is not free to decline to extend service where there are not available pairs that run all the way back to the central office, and it is required to provide service that actually connects to the central office, then it must reinforce. This is as much a cost of extension (if not more) as is the so-called direct cost of providing an electrical connection from the customer’s property boundary to the extremes of the existing network. For the rule to refuse any recovery, either from the applicant or from interexchange carriers through the section 3 tariff, for this forced investment, is a taking of the utility’s property without just compensation and is unconstitutional. The need for this recovery is more critical today than at any time in the past. Many new technologies are becoming available for the provision of telephony, including cable, local multipoint distribution, fixed wireless, and satellite telephony. As these technologies become more cost effective, consumers to whom U S WEST has extended facilities under the auspices of the proposed rule will be free to discard the expensive long copper loops and use the

other technologies. This is as it should be. But since U S WEST will not have been free to decline to risk its capital in the face of these new competitors according to the rule, the rule must provide for recovery of that capital.

If U S WEST is not permitted to recover the cost of network reinforcement that is made necessary by line extensions pursuant to the proposed rule, then the only ways in which U S WEST can receive compensation are that its rates for UNEs and other services must recover these costs, or it must recover a judgment against the state in the Court of Claims. The rates for UNEs are to be based on costs determined without including the massive spare capacity at the outer ends of cable routes, that would be required under the rule, to make extensions without network reinforcement. U S WEST's existing retail rates are based on embedded network costs which also do not reflect this increment of spare capacity that would be necessary under the proposed rule as written. In order to avoid a constitutional issue, the rule should be amended to provide that necessary costs of network reinforcement and upgrades may be recovered in line extension charges and/or section 3 unserved area additive tariff filings.

5. Subsection 2(C). U S WEST submits that subsection 2(C) should be deleted in its entirety. The error in this subsection as in the previous provisions is that under the law in this state, rates charged by a tariff-regulated utility such as U S WEST must be contained in filed and effective tariffs or contracts pursuant to RCW 80.36.150. The Commission has no power to "waive" a filed and effective tariff or contract rate. By calling its ratemaking a rule, the Commission purports to assert power to tax and spend for universal service, deciding who shall pay and who shall benefit. The Legislature has clearly

forbidden the WUTC this power in RCW 80.36.600(1). As discussed above, U S WEST submits that the Commission cannot set aside U S WEST's filed line extension tariff in a rulemaking. If the Commission were to file a complaint against that tariff and carry its burden of proof, it would then have a new tariff for U S WEST that prescribed specific end user charges for line extension, (which might be lower than U S WEST's existing tariffed rates) and it might have another "unserved area additive" tariff chargeable to carriers if U S WEST chose to file such a tariff under proposed section 3 to recover the balance of the cost of line extension. The Commission could not, however, lawfully "waive" the latter and somehow ignore the former in order to charge the end users the "direct cost" of the extension in a particular case.

6. Section 3. Assuming that the WUTC determines to designate line extension costs as universal service costs by rule as this section proposes, U S WEST proposes that the costs that may be recovered in a section 3 tariff filing be expanded as shown in the attached revisions to include the cost of necessary network upgrades and reinforcement where the most recent extension from which service is drawn, is more than two years old. As discussed above, such recovery is necessary to avoid constitutional issues with the rule. The two year cutoff is a reasonable compromise that balances the interests of ratepayers with those of investors, and reflects the realities of the difficult task of attempting to forecast demand at the fringes of the network.

U S WEST proposes that in order to minimize delay in construction, it be permitted to file its proposed section 3 tariff before it has obtained all necessary permits for construction. This is consistent with the treatment the Commission gave CenturyTel

in the Libby Creek case. U S WEST also proposes that the rule be modified as set forth in the proposed revisions to make it clear that pursuant to RCW 80.36.110, tariff changes may become effective on statutory notice without approval and that if the line extension unserved area additive tariff is suspended or disapproved, then the line extension need not be made.[2] Such changes are necessary to preserve the rule's constitutionality against claims that it results in a taking of property without just compensation. U S WEST also proposes that the wording in the attached revisions be added at the end of the section to make it clear that applicants are responsible to enter into contracts under RCW 80.36.150 which provide that they bear the entire cost of any trenching or cabling on their own private property for customer drops, which the definition of "extensions of service" in Section 1(A) excludes.

7. Section 4. U S WEST proposes that this section be deleted in its entirety. The section is ambiguous. It appears to provide that a company in a neighboring exchange to that in which an applicant is located, may elect to extend service across the exchange boundary to serve such an applicant, and that if this happens, the line extension charge and unserved area additive tariff may be as set forth in sections 2 and 3. That a telecommunications company may extend service across a filed exchange boundary has been the law since *In re Electric Lightwave, Inc.*, 123 Wn. 2d 530, 869 P. 2d 1045 (1994) A rule is not required to establish this. The proposed rule provides that: "The newly

[2] U S WEST has not receded from the arguments that it has made concerning the relationship between switched access charges and toll rates under RCW 80.36.160. However, pursuant to the settlement agreement in Docket No. UT-991358, pending action by the Commission on that agreement, U S WEST holds those arguments in abeyance.

constructed facilities will become the property of the serving company." This language should be deleted because the Commission has no authority to decide who has title to property.

During the workshop, the WUTC staff indicated that despite the wording of this section that appears to give the election to the company extending facilities across the exchange boundary, whether or not to do so, the intent of the rule is that the company in whose exchange the applicant resides, may *force* a neighboring company to extend service into the "forcing company's" exchange to serve the customer. This is patently illegal. The wording of the rule does not say this, and any attempt to reword the rule to conform with this stated intent would result in the rule being held unlawful as an unconstitutional attempt to delegate government power to a private entity, namely the "forcing company." The Commission cannot delegate whatever power it has, to a private company. Such an attempt would exceed the Commission's statutory authority and it would violate Art. XIV, U.S. Const. *State of Wash. ex rel. Seattle Trust Co. v. Roberge,* 278 U.S. 116, 121, 122, 73 L. Ed. 210, 49 S. Ct. 50, 51, 52 (1928). Further as discussed above, the Commission has no power to force one company to extend facilities into another company's exchange area. This is also a proposal that is based on a fundamental misconception of how a network is designed. A network is composed of multi pair cables that are connected to a central office and radiate to the edges of the exchange. The number of pairs in the cable is reduced as the locations served are further from the central office, a principle called "taper." The fact that one company may have a cable pair that serves a customer near the common boundary with another company's exchange does not

mean that there are actually available pairs at that location that could be used to serve the customers of the neighboring company. The cost to the company that would be forced to extend service across the boundary may be many times the cost that the incumbent company would incur, once necessary reinforcement costs are included.

8. Subsection 5(A). U S WEST proposes that the same change described above for Section 1(A) be made in this section, namely the substitution of the phrase "base rate area" for the phrase "urban growth area." U S WEST also proposes that the previously corrected definition of "direct cost" be incorporated in this section by reference, and the contradicting language be deleted as shown in the attached proposed revisions.

U S WEST points out that this section uses the term "extending service" inconsistently with the definition of the term "extension of service" in subsection 1(A) by applying the responsibility of developers to pay the cost of extending to developments which are defined as including property within the base rate area (as corrected by U S WEST).

U S WEST proposes that the modifications in the attached revisions to the first clause of the second sentence, be made. The insertion of the word "residential" before the word "lots" clarifies the intent in light of the fact that many substantial developments of commercial or industrial property may occur on fewer than four lots. The addition of "all commercial developers" reflects the intent that substantial developments on fewer than four lots should pay the cost to extend facilities to the property boundary.

U S WEST proposes that the last clause of the second sentence, which reads "and the direct cost of extending distribution facilities within the development," be deleted. The business of extending facilities within developments is intensely competitive. No

Commission action is required in this area to insure that regulated companies recover their costs. U S WEST has tariffs in effect requiring Provisioning Agreements for Housing Developments (PAHD), that were worked out after intensive debate with affected developer representatives. These tariffs provide for the developer to provide open trench and place conduit, and for U S WEST to provide conduit for placement to living units, at no charge up to a company established cap. These tariffs recognize that an agreement with the developer is the appropriate vehicle to spell out the rights and responsibilities of the parties. The tariffs provide that if the developer fails to enter into an agreement and U S WEST receives a request for service, the developer must pay charges as if there had been an agreement, including applicable line extensions.

U S WEST also has in effect a detailed tariff governing Intra-Premises Network Cable and Wire (IPNCW). The proposed rule would create great uncertainty about the interpretation of the specific provisions of U S WEST's tariff which delineate responsibility of the property owner and U S WEST based on where facilities are located electrically vis a vis the Minimum Point of Entry. The proposed rule obliterates these distinctions which were worked out at great length with industry representatives.

9. Subsection 5(B). This subsection duplicates the requirement of U S WEST's PAHD tariff. Also, the rule confusingly refers to a situation in which the developer "after the effective date of this rule failed to order and pay for extension of facilities within the development *as required by this rule. . .*" Nothing in the rule purports to require developers to do anything, and this provision of the rule is therefore a *non sequitur.*

For the reasons discussed above in connection with section 5(A), and based on

U S WEST's filed and effective tariffs for PAHD and IPNCW, U S WEST proposes that this subsection be deleted.

Conclusion

Based on the foregoing comments, U S WEST urges the Commission to suspend its efforts to amend the line extension rule to address the perception that prospective customers in high cost areas are unable to obtain line extensions at affordable rates, in the face of Legislative inaction on the Commission's proposed universal service program. U S WEST submits that the current proposal is unwieldy, incapable of lawful execution and presents illusory promises of recovery of the cost of line extensions to utilities. A far better approach is for the Commission to work with the affected utilities to resolve cases where service is needed and ensure that companies providing extensions will recover their costs.

Respectfully submitted,

U S WEST COMMUNICATIONS, INC.

Lisa A. Anderl, WSBA 13236
Senior Attorney

LAW OFFICES OF DOUGLAS N. OWENS

_____
Douglas N. Owens, WSBA 641

Of Attorneys for U S WEST Communications, Inc.

Dated March 14, 2000