BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, Termination, and Resale	))))))	Docket No. UT-003013 PART B

PART B POST-HEARING REPLY BRIEF OF

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.

ELECTRIC LIGHTWAVE, INC.

FOCAL COMMUNICATIONS CORPORATION OF WASHINGTON

XO WASHINGTON, INC.

June 19, 2001

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I. INTRODUCTION

1. AT&T Communications of the Pacific Northwest, Inc. ("AT&T"), Electric Lightwave, Inc., Focal Communications Corporation of Washington, and XO Washington, Inc., ("XO") (collectively "Joint CLECs") provide this brief in response to the Part B Post-Hearing Briefs filed by Qwest Corporation ("Qwest"), Verizon Northwest Inc. ("Verizon"), and Commission Staff. The Joint CLECs fully briefed their position on the issues listed in the Post-Hearing Brief outline and will not repeat those positions here. Rather, the Joint CLECs will address only those issues on which a response to another party or clarification would benefit the Commission's consideration of that issue.

II. UNE COSTS/PRICES

A. Qwest.

1. In General.

2. Qwest freely concedes that its cost models are "based on actual experience or company practice." Exhibit T-1001 (Million Direct) at 5. This is the crux of the substantial differential that exists between the rates proposed by Qwest in this proceeding and the rates proposed by the Joint CLECs. Based upon the FCC's existing Rules, the Joint CLECs have proposed that rates should be based on the practices of an efficient carrier using efficient network design. See 47 C.F.R. § 51.505(b)(1). In contrast, Qwest has proposed to enshrine its existing monopoly practices in the rates it will charge to new entrants. Accepting Qwest's proposals, therefore, will necessarily impede competitive entry, to the detriment of competition and consumers in the state of Washington.

3. Qwest attempts to justify its approach to calculating costs by citing the opinion of the Eighth Circuit in *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000) ("Iowa Utilities II"). This decision is presently pending before the United States Supreme Court. Moreover, the

Eighth Circuit has stayed issuing any mandate on this decision pending Supreme Court review. Because no mandate has issued, the Eighth Circuit's decision has no legal effect. *See Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989); *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97-98 (3d Cir. 1988); Wright, Miller and Cooper, Vol. 16A, *Federal Practice and Procedure*, at ¶ 30987. The decision, therefore, has no effect on this Commission, and the Commission remains bound to follow the FCC's existing rules. Qwest's failure to abide by the requirements of the FCC in constructing its cost studies means that this Commission cannot rely on Qwest's cost studies in setting rates in this docket.

2. Nonrecurring Costs.

4. Qwest's approach to calculating its nonrecurring costs demonstrates how far it has strayed from the requirements of the FCC. As Qwest states directly, the assumptions in its nonrecurring cost models are based upon Qwest's current operational support systems and Qwest's estimates of the activities and times required to provision network elements using these existing systems. TR 1828 (Qwest – Million). This approach ignores the FCC's requirement that costs should be based upon the "most efficient telecommunications technology currently available." *See* 47 C.F.R. § 51.505(b)(1). In fact, Qwest's studies do not even take into account efficiencies that Qwest has already incorporated into its systems and into cost studies filed in other states. TR 1842-43, 1879 (Qwest – Million). The nonrecurring charges proposed by Qwest far exceed TELRIC and necessarily act as a barrier to competitive entry.

5. Qwest's proposal to use Customer Transfer Charge ("CTC"), adopted in the prior cost docket demonstrates the problems that would occur if the Commission accepted Qwest's recommendations to establish non-recurring charges based upon Qwest's current practices and procedures. Although Qwest contended in the prior docket that the proposed CTC was forward-looking, Qwest has now admitted that it actually currently experiences more efficiencies in

provisioning than it assumed in calculating the CTC. Tr. 1879-81 (Qwest – Million). As the initial brief in this proceeding by WorldCom demonstrated, applying Qwest's admitted efficiencies to the existing CTC calculation results in a nonrecurring charge substantially below that now proposed by Qwest.

6. The purpose of the FCC's TELRIC methodology is to replicate the conditions of the competitive market. *See In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, First Report and Order (Aug. 8, 1996) ("*Local Competition Order*") at ¶ 679. In a competitive market, Qwest would have no choice but to adopt systems, procedures, prices for providing wholesale services that reflected efficient operations. Qwest's proposals here, in contrast, hold new entrants hostage to the existing inefficiencies of Qwest's network. This is in direct conflict with the FCC's directives and prior orders of this Commission and justifies rejecting Qwest's non-recurring cost studies.

7. Finally, Qwest has provided no real response to the concern raised by the Commission in the prior cost docket that the estimates upon which Qwest's nonrecurring cost studies are based depend upon Qwest's subject matter experts who may have a tendency to bias those estimates upward. *See In the Matter of Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Consolidated Docket Nos. UT-960369, et al., Eighth Supplemental Order at ¶ 450-51. Qwest contends simply that the opinions of its subject matter experts should be "deemed valid" unless they are contested. In fact, Qwest has missed the point. Qwest has the burden of proving that the prices it has proposed here are do not exceed forward-looking economic cost. *See* 47 C.F.R. § 51.505(e).

3. Recurring Cost Studies.

8. Qwest's recurring cost models suffer the same deficiencies as its nonrecurring models. Qwest contends that the recurring studies "are designed to produce the forward-looking replacement costs of reproducing the telecommunications network using the most efficient, least cost technologies." Qwest Post-Hearing Brief at 30. What Qwest actually relies upon, however, are its embedded costs, practices and procedures.

9. Qwest's total installed factors ("TIFs") are a good example of the problem presented by Qwest's recurring cost analyses. The TIFs are designed to load material investments with installation and other costs. While claiming that these TIFs are forward-looking, Qwest admits that its TIFs "reflect actual average costs." Qwest Post-Hearing Brief at 33. Qwest has provided no evidence demonstrating that the "actual" costs it has presented bear any relation to those that would be experienced by a least cost, most efficient provider. Similarly, Qwest has relied upon "fill assumptions grounded in actual conditions," *id.*, rather than making an effort to determine what a competitive provider should achieve for utilization on a forward-looking basis. Qwest has not met its burden of proof under 47 C.F.R. 51.505(e), requiring rejection of its recurring cost studies as well.

III. RECIPROCAL COMPENSATION

B. Jurisdiction

10. Most parties have acknowledged that the FCC's *Reciprocal Compensation Remand Order* preempts this and other state commissions' consideration of the appropriate compensation for ISP-bound traffic. Commission Staff, however, interprets the Order differently, contending that the FCC only established "caps" on the per minute of use compensation for such traffic, leaving open the opportunity for the Commission to establish a lower rate. Brief of Commission Staff at 34-36. The Order is not subject to such an interpretation.

11. The FCC expressly stated, "Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue." No authority means no authority. The FCC's establishment of "caps" on the compensation rates for ISP-bound traffic was to make clear that *existing* state commission rates *below* those levels would not be preempted. State commissions that established such rates did so under the authority of the Act or the FCC's prior reciprocal compensation order, which expressly authorized state commissions to make such determinations. The FCC has now taken back that authority, and established a transition mechanism that precludes any further state commission establishment of compensation rates for ISP-bound traffic, including rate reductions below the levels set by the FCC. The Commission, having previous set rates above the FCC levels, cannot establish *any* rates for ISP-bound traffic other than those the FCC authorized.

12. Only two circumstances exist in which the Commission could revise its existing minute of use reciprocal compensation rates: (1) If Qwest or Verizon declines to offer to exchange local and ISP-bound traffic at the same rates, or (2) the FCC's *Reciprocal Compensation Remand Order* is stayed, vacated, or otherwise rendered ineffective. Neither Qwest nor Verizon has stated that it will not "opt in" to the FCC rates. To the contrary, both Qwest and Verizon have notified CLECs that existing interconnection agreements need to be modified in light of the FCC's *Reciprocal Compensation Remand Order*, which currently is in full force and effect. The Commission should not proceed to make a determination that will be moot when made. The Commission, therefore, should not revise or otherwise take any action on minute of use reciprocal compensation rates.

C. Rate Structure

13. Even if the Commission were to proceed with establishing new rates for reciprocal compensation for local traffic, additional proceedings would be necessary to compile a record sufficient to implement Staff's proposal for a bifurcated rate structure. Not only is there insufficient evidence to establish appropriate rates under such a structure, but adoption of such a rate structure would have significant public policy impacts beyond compensation for the exchange of local traffic.

14. The concerns that underlie Staff's proposed rate structure, *i.e.*, that a single minute of use rate does not accurately reflect the costs of longer calls, is not confined to local exchange traffic. To the contrary, the concern arose in the specific context of ISP-bound calls. As discussed above, the Commission no longer has authority to address any issues with respect to compensation for such calls, including the structure, as well as level, of that compensation. Adoption of a bifurcated rate structure for local traffic thus would have no practical impact on the rates local exchange companies pay each other to exchange such traffic in light of the intention of both Qwest and Verizon to exchange both local and ISP-bound traffic at the rates the FCC established for ISP-bound traffic,

15. Adoption of a bifurcated rate structure for local traffic, however, could have a significant impact on other switching rates. Unbundled switching currently is priced on a per minute of use basis, which would be inconsistent with a Commission determination that switching costs are incurred on a call set-up and call duration basis. The Commission's switched access rule also requires that the cost element of terminating switched access must be based on forward-looking costs and be no higher than the lowest rate that a carrier charges for local interconnection service. WAC 480-120-540. If the Commission determines that switching costs are incurred on a bifurcated basis and establishes local interconnection rates accordingly, the

blended switched access rates currently charged would be inconsistent with that determination and with the Commission's rule. The Commission should not fundamentally alter the rate structure for reciprocal compensation when that alteration would have no effect on the rates for the exchange of local traffic but could have profound effects on other rates based on switching costs.

D. Tandem Switching Issue

16. Qwest and Commission Staff advocate limiting the ability of CLECs to charge the tandem interconnection rate when the CLEC switch is considered to be a tandem switch, and Verizon maintains that a CLEC switch cannot be considered a tandem switch unless it is used for the same purposes tandem switches are used in the ILECs' networks. The Joint CLECs addressed these issues in their opening brief, explaining that such proposals are inconsistent with FCC rules, Commission precedent, and common sense. The Joint CLECs do not repeat those arguments here but note that the FCC's *Reciprocal Compensation Remand Order* has likely rendered this issue moot. The FCC has established a single rate for the transport and termination of ISP-bound traffic without regard for whether that traffic is delivered at a tandem or end office. When Qwest and Verizon adopt that rate, they must do so for both local and ISP-bound traffic, resulting in a single rate for terminating traffic within a local calling area. To the extent that CLECs' transport and termination charges must mirror that single rate, there would no longer be any distinction between tandem and end office rates and, accordingly, no need for the Commission to determine whether tandem or end office rates apply. At least until the FCC clarifies this issue, therefore, the Commission should not address the ILECs' and Commission Staff's proposals on this issue in this proceeding.

E. Interconnection Cost Sharing

17. Both Verizon and Qwest incorrectly contend that the issue of compensation for interconnection facilities when the CLEC is collocated in the ILEC central office is moot based on a misinterpretation of Mr. Knowles' statements during the hearings. Mr. Knowles agreed that, in light of the Commission's decision in Part A of this docket on collocation, XO is no longer proposing that the ILEC pay a share of the collocation element prices the ILEC charges for facilities used for interconnection. Instead, as Mr. Knowles also made clear, XO proposes to use the rates the ILEC charges for interconnection facilities as a surrogate for the costs the CLEC incurs to provide interconnection through collocation. Tr. at 3083-85. Mr. Knowles did not testify that the CLECs should not be compensated for providing interconnection facilities via collocation in the ILEC wire center. Mr. Knowles simply narrowed the issue of *how* the CLEC should be compensated for the ILEC's use of those facilities. XO has never conceded the issue of *whether* the ILEC should compensate the CLEC for the interconnection facilities the CLEC provides, and that issue remains in dispute. As the Joint CLECs explained in their opening brief, federal and state law require that the ILECs pay for their proportionate share of interconnection facilities, without regard to which party provides those facilities. Accordingly, Verizon and Qwest should pay CLECs for the interconnection facilities the CLECs provide – both in the CLEC's switching center and via collocation in the ILEC wire center – at the same rates Verizon and Qwest charge the CLECs for the interconnection facilities that the ILECs provide.

18. Qwest also claims that because the FCC has once again concluded that ISP-bound traffic is jurisdictionally interstate, Qwest is no longer obligated to pay for the proportion of interconnection trunking it uses to deliver ISP-bound traffic to CLECs. Qwest's position finds no support in the FCC's *Reciprocal Compensation Remand Order*. That order addresses only the minute of use compensation rates for ISP-bound traffic and expressly does not alter carriers'

interconnection facility cost-sharing obligations: "This interim regime affects only the intercarrier compensation (i.e., the rates) applicable to delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection." *Id.* ¶ 78 n.149. Qwest's position that all cost sharing of interconnection facilities used to exchange ISP-bound traffic be terminated immediately is also fundamentally inconsistent with the FCC's approach of gradually reducing compensation over a three year time period. At least until the FCC clarifies the impact of this Order on interconnection facilities, the Commission should require that each carrier be responsible for the costs of interconnection facilities used to deliver that carrier's local and ISP-bound traffic to the other carrier for termination.

IV. DSL Issues.

19. Qwest contends that it should not be required to continue providing DSL service to a customer when the customer chooses to use a voice carrier other than Qwest. *See* Qwest Post-Hearing Brief at 55. Qwest claims that "as a matter of policy, an ILEC should not be held 'hostage' by being required to continue providing this service." *Id.* at 56. Qwest bases its argument on a claim that the market for data services is "highly competitive" and the customers will be able to choose among multiple providers if Qwest stops providing DSL service. *Id.*

20. Qwest is ignoring reality. In fact, Qwest's proposal would hold customers "hostage" with Qwest as the only real alternative for both voice and DSL services. As Qwest's own advertising indicates, "DSL providers are falling left and right." *See* Attachment A. There simply is no readily available alternative for most consumers who desire DSL service. If Qwest is permitted to deny service to a customer simply because the customer chooses another voice provider, the reality is that the customer is likely to remain a customer of Qwest for all services.

21. In fact, "as a matter of policy", Qwest and Verizon have identified no legitimate business reason that would justify denying service to a customer who wants to continue purchasing DSL service. As the Joint CLECs indicated in their opening brief, the only reason for the ILECs to refuse to continue providing service to those customers is an anti-competitive desire to prevent these customers from changing their underlying voice carrier.

22. Qwest also argues that the FCC has already rejected the proposition that an ILEC should continue providing DSL service when a customer chooses to obtain voice service from a competing carrier. In fact, the FCC found only that its prior Line Sharing Order did not contain such a requirement. As the Joint CLECs stated in their opening brief, the FCC made a specific determination that an ILEC's refusal to provide service under these circumstances could be a violation of Section 201 or 202 of the Act. *In the Matter of Deployment of Wire Line Services Offering Advanced Telecommunications Capability*, FCC Docket No. 98-147, Third Report Order on Reconsideration, FCC 01-26 (rel. Jan. 19, 2001) at 25.

A. OSS Costs.

23. Qwest's position on the issue of OSS cost recovery in this proceeding is unclear. Although Qwest identified costs for which it appears it will seek recovery, Qwest admits that it did not submit a cost study in this phase of the docket and did not propose any specific cost recovery mechanism. *See* Qwest Post-Hearing Brief at 67. Joint CLECs respond to Qwest's proposal only to point out that Qwest apparently intends to seek recovery of costs already submitted to the Commission and disapproved in Part A of this proceeding. *See* Qwest Post-Hearing Brief at 67, n.57. The Commission should recognize the potential for mischief created by allowing Qwest and Verizon to make multiple filings for OSS cost recovery. The Commission's findings regarding cost recovery in Part A of this docket should place a cap on the amounts Qwest and Verizon may recover for OSS development.

V. CONCLUSION

24. For the reasons and as discussed above and in the Joint CLECs' Part B Post-Hearing Brief, the Joint CLECs urge the Commission to adopt the Joint CLECs' proposed UNE recurring and nonrecurring rates, reciprocal compensation, DSL, and OSS recommendations, and policy positions.

RESPECTFULLY SUBMITTED this 19th day of June, 2001.

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