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Carole J. Washburn, Secretary
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Re: Telecommunications Rulemaking, Docket Nos. UT-990146, *et al*.

Dear Ms. Washburn:

Pursuant to the Commission's Notice of Opportunity to File Comments (January 14, 2000) in the above-referenced docket, NEXTLINK Washington, Inc. ("NEXTLINK"), Electric Lightwave, Inc. ("ELI"), Advanced TelCom Group, Inc. ("ATG"), GST Telecom Washington, Inc. ("GST"), NorthPoint Communications, Inc. ("NorthPoint"), and Focal Communications Corporation of Washington ("Focal") (collectively "Joint Commenters") provide the following comments.

Summary

The Joint Commenters have three primary areas of concern with the proposed revisions and additions to the existing telecommunications company rules. First, the rules revise or create retail service quality guarantees and performance standards that are applicable to all local exchange companies. The rules are necessary only for incumbent local exchange companies ("ILECs") who remain *de facto* monopoly service providers. Retail service quality rules should not apply to competing local exchange companies ("CLECs") because market forces will ensure that CLECs provide adequate and timely service to consumers. CLECs, moreover, are unable to comply with those service quality rules if ILECs do not provide wholesale facilities to CLECs

that meet or exceed the retail service standards. The ILECs currently are not providing CLECs with facilities and services that meet the proposed standards, much less that would allow CLECs to meet those standards.

If the rules nevertheless are applied to CLECs, the Commission should modify those rules to make the ILECs responsible for their actions that impact CLEC retail service quality, including inadequate provisioning of unbundled network elements and other facilities on which CLECs rely to provide service to their end-user customers. The Commission should also promulgate rules that require the ILECs to provide facilities and services to CLECs in a manner that enables CLECs to comply with the Commission's rules.

The Joint Commenters' second concern is that the Commission should codify its past decisions requiring ILECs to impute into their retail rates the prices for unbundled network elements and the costs of other facilities used to provide that service. The Commission has proposed a rule that addresses price ceilings for ILEC retail rates, and the Commission should adopt a complementary rule that precludes an ILEC from engaging in anticompetitive behavior by pricing retail services below an appropriate price floor.

Finally, the Joint Commenters propose that the Commission codify its recent decision on how affected parties may seek relief from termination liability when customers in long-term contracts with ILECs seek to obtain service from a competing carrier. The Joint Commenters have proposed a rule that would authorize the complaint proceedings the Commission found to be the appropriate vehicle for obtaining such relief.

Comments

Service Quality Guarantees and Performance

Commission regulation of telecommunications service quality substitutes for natural market forces that would otherwise discipline service providers. If customers can readily choose among telecommunications service providers, those companies will have every incentive to ensure that they provide adequate and timely service. Joint Commenters and other CLECs can only compete successfully with the ILECs if the CLECs meet or exceed the service quality customers receive from the ILECs (and can transition to the CLEC without service outages or other obstacles). ILECs that are not subject to competitive pressures, however, have no such incentives, and their customers need Commission action to ensure proper service quality.

The Commission has proposed service quality guarantees in a new rule, proposed WAC 480-120-X08, which is applicable to all local exchange companies. This rule, however need only apply to ILECs, not just because such regulation substitutes for effective competition but because competitors must meet or exceed whatever service quality the incumbents provide. CLECs will not survive if they do not meet the minimum standards the Commission establishes for ILECs. Washington public policy is to "[p]ermit flexible regulation of competitive telecommunications companies and services." "RCW 80.36.300(6). The Commission thus should not impose retail service quality requirements on CLECs when the market, rather than regulation, will more effectively accomplish the Commission's goals.

As a practical matter, moreover, ILECs can and do prevent CLECs from being able to comply with many of the Commission's requirements. Even facilities-based CLECs must rely on ILEC facilities to provide service to many end-user customers. At least one ILEC, however, frequently fails to provision facilities to CLECs in Washington on a timely basis and often does not notify the CLEC that the ILEC will miss a due date until on or after that date. The Commission has consistently refused to impose carrier-to-carrier service quality guarantees in interconnection agreements, and has yet to promulgate carrier-to-carrier service quality rules. ILECs thus already have the incentive to delay facility provisioning to CLECs as a means of undermining competitors' service quality. Application of WAC 480-120-X08 to CLECs would only increase ILECs' anticompetitive opportunities, because not only will customers blame the CLECs for the delay caused by an ILEC, but CLECs would be required to provide bill credits or substitute services to customers without having any recourse against the ILEC causing the delay.

Similarly with respect to WAC 480-120-051(5)(a), CLECs cannot complete 95% of access line orders within five business days when using unbundled network elements if, as currently is the case, the ILECs do not provision those UNEs in substantially less than five business days. Other retail service quality standards are subject to the same concerns that CLEC compliance will depend in large measure on how the ILEC provisions network facilities to competitors. *See, e.g.*, WAC 480-120-500 (requiring sufficient facilities to meet forecasted demands); WAC 480-120-515 (establishing network performance standards); WAC 480-120-525 (establishing network maintenance requirements). CLECs cannot satisfy many of these standards if the ILECs do not meet or exceed these standards with respect to the facilities they provide to competitors.

CLECs, moreover, are using or may use different technologies to provide service, including fixed wireless technology and cable telephony. Provisioning intervals may be different

for service using such technologies, particularly if local service is only part of a bundled service offering. Even more traditional provisioning may be impacted – for example, provisioning multiple lines through a DS-1 circuit that includes the customer's primary business line could be interpreted to violate the Commission's rules if not provisioned in 5 business days. Application of the proposed rules to CLECs ignores these technological and market differences and would discourage broad availability of innovative service offerings.

The Commission's retail service quality rules, therefore, are only necessary to constrain the ILECs' behavior and, if applied to CLECs, would discourage development of competitive alternatives and afford ILECs further opportunity to undermine the development of effective local exchange competition. Accordingly, the Joint Commenters recommend that the Commission's retail service quality rules be applicable only to ILECs, and that those rules be amended by inserting "incumbent" before "local exchange company" in each rule.

If the Commission ignores these concerns and applies these rules to CLECs, the rules should be revised, at a minimum, to make ILECs responsible for their actions. With respect to proposed WAC 480-120-X08, the Commission should modify the proposed rule to require an ILEC to reimburse a CLEC for the expenses the CLEC incurs to comply with the rule if the ILEC caused the delay or missed appointment or commitment. Subsection (4) could be construed to exonerate the CLEC under these circumstances because the ILEC's actions are "beyond the control of the company," but the end-user customer would be deprived of bill credits or substitute service to which it would otherwise be entitled. That customer should not be denied appropriate relief – nor should the CLEC be perceived as evading its customer service obligations – simply because the ILEC was indirectly, rather than directly, responsible for the poor service quality provided the customer. Accordingly, the Joint Commenters propose that the Commission add the following subsection to the draft rule:

> (5) If a competing local exchange company ("CLEC") delays establishing service or fails to keep appointments or commitments because an incumbent local exchange company ("ILEC") delays provisioning facilities or fails to keep appointments or commitments to the CLEC, the ILEC shall reimburse the CLEC for any and all reasonable expenses the CLEC incurs to comply with this rule. The CLEC shall notify the ILEC of the amounts to be reimbursed, and that reimbursement shall be in the form of cash or a credit on the CLEC's bill from the ILEC, at the option of the CLEC. The ILEC and the CLEC shall resolve any disputes over the ILEC's responsibility to reimburse the CLEC or the amount of

the reimbursement according to the terms of the parties' Commission-approved interconnection agreement.

The Commission's other retail service quality rules are not as readily revised. Whether or not required by Commission rule, CLECs must equal or exceed the service quality the ILECs provide to attract customers, and ILECs will continue to have an economic incentive to retain their customers by providing poor service to CLECs. The Commission needs to make clear – both in this rulemaking and in the pending carrier-to-carrier service quality rulemaking – that CLECs will not be held responsible for the deficiencies in the facilities or provisioning they receive from the ILECs. More important for the development of effective local exchange competition, however, the ILECs must provision unbundled network elements and other wholesale facilities in a manner that will enable CLECs to compete effectively, regardless of whether the Commission applies its retail service quality rules to CLECs. ILECs must be accountable for the quality of service they provide to competitors, just as they are accountable for retail service quality. The Joint Commenters, therefore, urge the Commission to expedite adoption of carrier-to-carrier service quality rules – including strong financial incentives for ILECs to comply with their service obligations – as a means of ensuring that all customers will receive adequate telecommunications service.

Imputation

Proposed WAC 480-120-X09 addresses retail price ceilings and would require refunds for excessive rates for noncompetitive services, but a complementary issue of appropriate price floors arises in the context of services subject to some level of existing or potential competition. The Commission has adopted imputation as a means of establishing an appropriate price floor in orders resolving litigated cases, including the U S WEST rate case in Docket No. UT-950200. The Commission, however, has never included this requirement in its rules. Accordingly, Joint Commenters propose that the Commission adopt the following rule on imputation to codify the existing price floor requirement:

WAC 480-120-X19 Imputation

(1) An incumbent local exchange company may not price any telecommunications service at a level that is less than the sum of:

(a) the prices of the network elements that the company uses to provide

that service charged to competitors when provided on an unbundled basis; and

(b) the total service long-run incremental cost of facilities and services (including but not limited to retailing operations) other than the network elements the company uses to provide that service that are provided to competitors on an unbundled basis.

(2) For purposes of this rule, the following definitions shall apply:

(a) "unbundled network elements" include all network facilities designated by the Federal Communications Commission or the Commission as unbundled network elements pursuant to 47 U.S.C. § 251(d)(2) & (3).

(b) "price" is the amount the incumbent local exchange company charges customers for a telecommunications service or competitors for unbundled network element and includes both recurring and nonrecurring charges, including but not necessarily limited to charges for access to operations support systems, charges for ordering, installation, and disconnection of facilities, and charges for line conditioning. Until the Commission approves geographically deaveraged rates for both unbundled network elements and retail services, the price of unbundled network elements shall not be considered to exceed the statewide averaged recurring and nonrecurring charges approved by the Commission.

(3) Nothing in this rule shall be construed to limit the Commission's ability to require service quality guarantees or the incumbent local exchange companies' obligations to comply with any such guarantees.

(4) Nothing in this rule shall require an increase in the retail price of residential basic local exchange service if the incumbent local exchange carrier demonstrates that the price established or approved by the Commission for this service is below the company's total service long-run incremental cost in order to ensure affordable universal service, at least until such time as the Commission modifies the pricing of residential service as part of any universal service funding reform.

<u>Fresh Look</u>

The Commission denied a petition for rulemaking in Docket No. UT-991476 that would have provided customers who had signed long term agreements with an ILEC with a "fresh look" to enable them to obtain service from a competitor without incurring termination penalties. In denying the petition, the Commission stated that "the appropriate vehicle to contest such contracts would be a formal complaint brought by the customer or competitor." Ordinarily, however, a customer may not challenge a regulated company's actions if those actions are consistent with tariffs on file with the Commission. To codify the Commission's decision and to remove potential jurisdictional impediments to filing a complaint, the Joint Commenters recommend that the Commission adopt the following rule:

WAC 480-120-X20 Fresh Look Complaint

A customer that has signed a contract for telecommunications service with an incumbent local exchange company, or a competing local exchange company on behalf of one or more such customers, may file a complaint with the Commission seeking to terminate the contract(s) without incurring termination liability in order to permit the customer(s) to obtain service from a competing local exchange company. Such complaint proceedings shall not be precluded simply because the incumbent local exchange company's tariff authorizes the termination liability and shall be conducted on an expedited basis. The Commission may grant the relief requested if it finds that enforcement of termination liability under the circumstances presented would be anti-competitive, discriminatory, or otherwise inconsistent with the public interest.

NEXTLINK, ELI, ATG, GST, NorthPoint, and Focal appreciate the opportunity to provide comments to the Commission on these issues. Please contact me if you have any questions about these comments.

Sincerely yours,

DAVIS WRIGHT TREMAINE LLP

Gregory J. Kopta

Attorney for NEXTLINK Washington, Inc., Electric Lightwave, Inc., Advanced TelCom Group, Inc., GST Telecom Washington, Inc., NorthPoint Communications, Inc., and Focal Communications Corporation of Washington.

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