BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Request for Competitive Classification of High Capacity Circuits Provisioned at Capacities of DS-1 and Above within the Greater Seattle, Greater Vancouver, and Greater Spokane Areas	)	No. UT-990022 Comments of TRACER

On June 11, 1999, U S WEST Communications, Inc. ("USWC") filed an amended petition seeking competitive classification of its high capacity services in only the following wire center areas: Seattle Campus, Seattle Main, Seattle Elliot, Seattle Duwamish, Bellevue Glencourt wire centers, and downtown Spokane (the business district wholly within the Riverside and Keystone wire centers, bounded on the north by the Spokane River, on the east by Perry Street, on the south by 11th Avenue, and on the west by Ash Street). The amended petition was the result of a settlement between USWC and the Commission Staff.

In these comments TRACER responds to the arguments raised by USWC and the Commission Staff in their respective Reply Comments submitted in support of the Amended Petition. In addition, TRACER addresses the FCC's recent decision in its Access Charge Reform Proceeding establishing a new pricing flexibility framework for incumbent LEC ("ILEC")special access and dedicated transport services.[1] In short, the FCC framework is seriously flawed, fails to satisfy the statutory mandates set forth in Washington law, and is largely irrelevant to this inquiry.

Although the geographic area in which USWC seeks competitive classification has been significantly reduced over that originally requested, the company still has failed to demonstrate that effective competition exists in the newly defined relevant market. Indeed, evidence submitted by USWC and developed by other parties demonstrates clearly that USWC retains market power and a significant captive customer base in the areas covered by the Amended Petition.

Accordingly, the Washington Telecommunications Ratepayers Association for Cost-based and Equitable Rates ("TRACER") recommends that the Commission (i) deny the Amended Petition or (ii)only grant it subject to the express condition that prices for high capacity services in the relevant geographic market <u>not be increased above present tariff rate levels</u>. Such a limitation on upward pricing flexibility would effective constrain USWC and prevent it from abusing its market power.

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[1] Fifth Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Access Charge Reform, CC Docket No. 96-262, FCC 99-206, released August 27, 1999 ("Pricing Flexibility Order").

DISCUSSION

USWC'S Approach to Satisfying the Statutory Test for Competitive Classification Fails to Provide Any Meaningful Demonstration That the Company Lacks Market Power Over High Capacity Services; In Fact Clear Evidence Exists That USWC Retains Market Power Over These Services

As noted in TRACER's Comments on USWC's original petition, under the terms of the Regulatory Flexibility Act, a regulated carrier may only be granted competitive classification for services that are shown to be subject to effective competition. Competitive classification carries with it considerable pricing; the only limitation is that competitive services not be priced below cost.[2] Contracts for competitive services are also exempt from the statutory prohibitions against undue discrimination and preference.[3]

RCW 80.36.330 provides that "[e]ffective competition means that customers of the service have reasonably available alternatives and that the service is not provided to a significant captive customer base." That statute sets forth the following factors that the Commission should consider, among others, in evaluating whether a service is subject to effective competition:

(a) The number and size of alternative providers of services;

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[2] RCW 80.36.330(2),(3).

[3] RCW 80.36.170; RCW 80.36.180.

(b) The extent to which services are available from alternative providers in the relevant market;

(c) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions; and

(d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

The purpose of requiring a regulated carrier to demonstrate the existence of effective competition is to ensure that: (1) the carrier cannot use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior; and (2) the carrier cannot increase rates to unreasonable levels for customers that lack competitive alternatives. However, USWC's approach to satisfying the statutory test of showing that effective competition exists fails to provide any meaningful demonstration that the company lacks market power.

While USWC asserts that it has satisfied the statutory test of showing that effective competition exists for these services, as with its original petition, the company’s comments and accompanying exhibits offered in support of the Amended Petition demonstrate little more than the fact that alternative sources of supply exist for <u>some</u> high capacity service customers in the areas covered by the Amended Petition. In short, the Amended Petition suffers from the same shortcomings that the original petition did. Accordingly, TRACER believes that the criticisms it made of USWC’s original petition and demonstration also apply to the company’s Amended Petition. It, therefore, incorporates those comments here.

As discussed in TRACER’s original comments[4], the appropriate test for the presence of effective and price-constraining competition is the absence of market power on the part of the dominant firm, USWC. According to economic theory, the degree of market power enjoyed by a dominant firm is indicated by the firm's ability to raise and sustain prices above the competitive level (i.e., marginal cost). If the market for a service is subject to effective competition, a firm could not successfully or profitably sustain prices above the competitive level by even a small but significant amount (e.g., a price increase in the range of 5-10%); customers would simply turn to an alternative provider charging the competitive price.

There are several objective analytical approaches identified in the literature that can be used to evaluate a firm's market power, i.e., its ability to price above cost. Three of these approaches involve variations of the so-called "Lerner Index," and are based upon consideration of such factors as the dominant firm's market share, the market price elasticity of demand, the elasticity of supply of the competitive fringe, and the firm price elasticity of demand.[5] A fourth approach, the Herfindahl-

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4 Comments of TRACER at 4-8, dated April 9, 1999.

5 The first measure is the original Lerner Index formulated by A. B. Lerner in his classic work, "The Concept of Monopoly and the Measurement of Monopoly Power," Review of

Hirschman Index (HHI) involves the level of concentration in the market. While it is not a measure of market power, it can provide useful information about the nature of the market in question.[6]

Economic Studies 1 (June 1934), at 157-175. The Lerner Index is defined as:

(Price - Marginal Cost)/Price.

This is essentially a measure of the price/cost relationship. In a competitive market, the Lerner Index would be zero, as firms could not price above the competitive level. The greater that price exceeds marginal cost, the higher the value of the Lerner Index, with the upper bound being 1.

The second measure is the Lerner Index as formulated by William M. Landes and Richard A. Posner in their paper, "Market Power In Antitrust Cases," Harvard Law Review, Vol. 94 (March 1981), at 937-995. The Lerner Index is defined as a function of market share, market elasticity of demand, and elasticity of supply:

$$\frac{\text{Market Share}}{\text{Market Demand Elasticity} + [\text{Supply Elasticity} \times (1\text{-Market Share})]}$$

This essentially means that a firm's market power varies directly with its own market share, and varies inversely with the relevant elasticities of demand and supply. Stated another way, the ability of a firm to price above cost is greater, the greater its own share of market, and the lower either the market elasticity of demand or the elasticity of supply of competing firms.

The third measure is the "firm elasticity of demand." The lower the price elasticity of demand facing the firm in question, the smaller the loss in sales it will suffer if it raises prices, and the greater the ability of the firm to set prices above cost.

[6] The fourth measure is the HHI Index, which is the sum of the squares of the shares of the firms in the market in question. For example, a monopoly market would produce an HHI of 10,000; a market split by two firms would produce an HHI of 5,000. The Department of Justice in its Horizontal Merger Guidelines considers an industry with an HHI of 1,800 to be highly concentrated.

While some data is available on market shares, reliable data about elasticity of supply, and elasticity of demand have not been provided. In fact, USWC objects to TRACER's criticism that the company has provided no objective measure of its market power. It first objects to providing price elasticity measures, arguing that they are difficult to generate and require the observation of the effects of price changes over a long period of time. In the past USWC has routinely provided elasticity estimates for its services, including private line services, in order to support repression and stimulation adjustments required by rate adjustments.[7] Moreover, USWC has been providing private line and special access services, including high capacity services, for a considerable period of time. It also enjoys the benefit of being able to observe customers' responses to price changes in several states. For the most part, it has been the sole provider of private line and special access services in the marketplace. It has also demonstrated in this proceeding that it is capable of assembling the prices charged by its competitors from the Commission's Record Center. Thus, while it may be difficult to produce reliable elasticity estimates for the firm and for the market, USWC is in the best position to do so. The only conclusion that can be drawn is that USWC has not produced objective evidence of its market power because it does not like what that evidence would show.

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7 Evidence in Docket No. U-88-2052-P indicated that past elasticity studies showed PNB's private line services to be price inelastic.

Instead of presenting evidence showing that high capacity services are price inelastic, USWC relies on an FCC statement indicating that “the demands of business customers are highly elastic, because they are sophisticated buyers who typically receive and evaluate competing proposals from several vendors.”[8] However, this FCC observation deals with interstate toll services, which are fundamentally different than the services at issue here. Moreover, the observation applies, if at all, only in situations where there are in fact several vendors. As with much of its presentation in this case, USWC starts with the conclusion it wants to reach and then works fitfully backward in an attempt to justify it. Here, however, the evidence is strong that multiple suppliers are not available to may customers. In that case, it does not make any difference whether a customer is large or small. If it has no choices, it is a captive of the incumbent LEC, USWC.

The point remains that USWC's comments and supporting documentation offer no objective demonstration of the absence of market power. Notwithstanding this failure on USWC’s part, there is objective evidence in this record that suggests that USWC retains a high degree of market power over high capacity services. As discussed in TRACER’s original comments, one objective measure of market power is the Lerner Index as

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8 USWC’s Reply Comments at 37-38, dated June 11, 1999, quoting Attachment L, Alfred E. Kahn & Timothy J. Tardiff, Economic Evaluation of High-Capacity Competition in Seattle, page 12.

originally formulated.[9] This is a measure of the price/cost relationship and is expressed as: (Price - Marginal Cost)/Price. In a competitive market, the Lerner Index would be zero, as firms could not price above the competitive level. The greater that price exceed marginal cost, the higher the value of the index, with the upper bound being 1. Here, USWC effective suggests the comparison to make: the rates charged by USWC and its competitors for channel terminations v. the cost for a four-wire loop.[10] The price of a four-wire unbundled loop approved by the Commission in its 17th Supplemental Order in Docket No. UT-960369, ¶¶ 525, 527, is $33.60. The USWC DS-1 channel termination price of $150.00 is 4.46 times that. This implies a Lerner Index in the range of .776. This high Lerner Index provides a strong indication that the market for high capacity services, at least that for channel terminations, is not competitive.

Clearly, the price prevailing the market for high capacity channel termination services is well above the competitive level. Whatever competition there is for such services is certainly not exerting much of a constraint on USWC. Moreover, the competitors

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9 Comments of TRACER at 6, n.5, dated April 9, 1999.

10 At page 12, line 18 through page 13, line 2 of its Reply Comments, dated June 11, 1999, USWC asserts that the market rates for DS-1 channel terminations range from $103.50 (GST) to $150.00 (U S WEST) to $550.00 (Teligent, Inc.). The DS-3 channel termination rates range from $1,215.00 (GST) to $1282.00 (U S WEST) to $5,000.00 (Teligent, Inc.). At page 16 of its Reply Comments, USWC asserts that its unbundled element prices are substantially less than its current high capacity tariff rates, thereby providing a large margin for competitors. At n.29 USWC makes the direct comparison between the price of a four-wire unbundled loop and the DS-1 channel termination rate.

such as Teligent, by charging prices well in excess of USWC’s, is not constraining USWC ability to charge supra-competitive prices.

The company's comments continue to focus mainly on the existence of backbone CLEC networks in the geographic markets covered by the Amended Petition and speculations as to the potential for competitive buildout.

While no one would dispute that there exist some alternatives to USWC high capacity services in the covered areas, the important point is not that such alternatives exist (they do, in limited situations), but that there has been no real demonstration that the alternatives exist throughout the covered areas or that they provide constraints on USWC's ability to price high capacity services. The mere existence of alternative sources of supply for some customers does not equate to effective competition in any meaningful economic sense of the term.

Because USWC’s and the Staff’s emphasis on the existence of fiber backbone networks in the defined geographic areas and the lack of evidence about the actual availability of CLEC facilities over the “last mile” to the customers’ premises, there has been an abject failure to demonstrate that more than just a select number of customers actually have facilities-based alternatives available to them.

With USWC’s original petition there was considerable uncertainty about where CLECs were actually providing facilities to the end-user. That is one reason why TRACER originally recommended that the size of the relevant market be reduced to focus on the area of highest concentration of multi-tenant, high-rise buildings, and the highest concentration of backbone facilities. Evidence available in connection with USWC's original petition suggested that CLECs served only 4.5% to less than 12% of the existing high capacity customer locations.[11]

More specific information about the number of high capacity service locations served by USWC and by CLECs in each of the wire center areas covered by the Amended Petition is now available.[12] That information shows that CLECs serve less than 10% of the buildings with high capacity service customers in the Seattle Main wire center area, less than 1% of those in Seattle Duwamish, 12% in Seattle Elliot, none in Seattle Campus[13], .2% in Bellevue Glencourt, and insufficient data for a comparison was provided for Spokane. This evidence alone is sufficient to compel a conclusion that USWC retains a significant captive customer base in the relevant geographic market.[14]

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11 Comments of TRACER at 13-14, dated April 9, 1999.

12 Staff Revised Confidential Attachment B.

13 The information provided in Revised Confidential Attachment B refers to the Seattle Lakeview wire center, not Seattle Campus. At this point it is unclear whether the data was simply mislabeled or actually refers to the wrong wire center. Pending further clarification, TRACER assumes the data relates to Seattle Campus but was mislabeled.

14 It should also be noted that these figures refer only to present high capacity customer locations and do not reflect the fact that any new customer located in a different building would also be a captive of USWC. Further, the figures for the number of CLEC buildings in Staff's Revised Confidential Attachment B represent a summation of the information provided by individual CLECs. It is likely that multiple CLECs serve the same buildings; therefore, the figures in the attachment overstate the

USWC objects to reliance on evidence of the number of buildings served by CLECs in deciding whether to grant competitive classification.[15] However, if CLECs are not in a particular building, the customers in that building do not have a choice of providers. Plain and simple. Just because USWC wants competitive classification does not excuse abandoning the standards for deciding whether effective competition exists.

As TRACER and other intervenors have pointed out previously, the mere existence of backbone facilities does not mean that there are CLEC facilities connecting end-user locations to the backbone. Stated another way, just because the freeway passes near your house does not mean there is an exit ramp to your driveway. For example, the PACCAR headquarters building in downtown Bellevue has no CLEC facilities entering it, even though CLEC backbone facilities pass nearby, according to the USWC maps submitted in this proceeding.[16] Without the availability of an alternative provider's facilities and services, on reasonably comparable terms and conditions, a customer is effectively an

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actual presence of competition.

15 USWC's Reply Comments at 24, dated June 11, 1999.

16 This is not because PACCAR refuses or would impose any burden on an entering CLEC; nor is it because of any agreement restricting access to its building. CLECs have simply been unwilling to extend facilities to the building unless PACCAR agrees to pay the costs of extending the facilities or agrees to a long-term contract to ensure recovery of the required investment. Even assuming a CLEC would extend its facilities to the PACCAR building under those circumstances, that does not mean that PACCAR would have a reasonable alternative to USWC's service or that the offer of the CLEC's service would act as a constraining influence on USWC's pricing.

economic captive of the incumbent LEC. It makes no difference why a CLEC does not extend its facilities; the key point from the customer's perspective is that the facilities are not available.

USWC points to information from WAISP that 5 ISPs subscribe to 12 DS-1s from NEXTLINK, 7 from ELI, and 19 from USWC as evidence that competitive alternatives are widely available. What USWC fails to mention is that a number of ISPs, at least in the Seattle area, are located in the same building. Just because one building is served by multiple CLECs does not translate into effective competition throughout that or any other wire center area.

The Availability of Unbundled Network Elements Cannot Be Relied Upon As the Basis for a Finding of Effective Competition Until a Number of Service Quality, Provisioning, Interconnection, and Collocation Issues Have Been Resolved

USWC complains that intervenors argue that Section 271 relief and resolution of interconnection, collocation, carrier-to-carrier service quality standards, and MCI provisioning complaint issues must be resolved before competitive classification can be granted.[17] The company claims these issues are the subjects of other dockets and are irrelevant to this proceeding.

USWC misunderstands the point being made. If competitive classification is to be based, even in part, on the availability of unbundled elements, as USWC suggests at page 16 of its Reply Comments, the issues surrounding the timely, adequate, and

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17 USWC's Reply Comments at 4-5, dated June 11, 1999.

nondiscriminatory availability of UNEs, interconnection, and collocation must be resolved before it can be said that UNE availability can provide the basis for a finding of effective competition. In their absence, only the actual availability of facilities-based alternatives can produce and justify a finding of effective competition.

Further, for some high capacity services, the UNEs that have been ordered to date are not sufficient to constitute reasonable substitutes–e.g., four-wire copper loops will not suffice for DS-3 or SONET services. Fiber is required.

In Addition to the General Inadequaty of USWC's Demonstration of Effective Competition, There Is a Complete Lack of Evidence About the Availability of Substitutes for Alternate Route Protection and SONET Services

In addition to the general inadequacy of the demonstration of effective competition presented by USWC, there is a complete lack of evidence, analysis, or discussion of the availability of substitutes for specific services covered by the Amended Petition. For example, while USWC's self-healing alternate route protection services ("SHARP") and self-healing network services ("SHNS") apparently are covered by the Amended Petition, no discussion is presented about the availability of reasonable substitutes for them. This is particularly true for alternate route protections services between multiple locations. Moreover, as recognized by the Staff in its Reply Comments:

> [I]t is important to recognize that for the services at issue here the presence of a single alternative

> provider is unlikely to provide price-constraining competition. Because every network will fail on occasion, diversified service has great value. US West provides diversified routes at great expense. The opportunity to obtain service from another competitor has this same value, so prices would not be forced down. Two providers could still exercise market power.

The same is true for SONET services. There has been no analysis of the extent of options for requiring SONET services (services delivered in an optical v. electronic format).

USWC Misunderstands TRACER's Point About the Danger to Consumers of Prematurely Granting Upward Pricing Flexibility When Only Some Customers Have Choices

USWC asserts that full regulation of its high capacity services in the Seattle and Spokane areas is not necessary to protect consumers. It then notes TRACER's argument that, given the fact that competitive classification includes exemption from the prohibitions against undue discrimination and preference[18] for individual customer contracts, premature competitive classification of a geographic market that had competitive alternatives for only some, but not all, customers could damage the customers with no alternatives. As noted in TRACER's original comments, USWC could lock-in with long-term contracts those customers with choices and increase the prices (through price list changes) charged to those customers who lack

18 RCW 80.36.170; 80.36.180.

alternatives.[19] USWC asserts: “The fallacy of this argument is that it assumes that customers will not have a choice. However, if the Commission classifies a service as competitive, that means that there are choices.”

USWC misses the point of TRACER’s argument. The point is that if the relevant market does not have alternatives for all customers, the customers without choices can be harmed USWC unreasonably raising prices. As Staff points out in its Reply Comments: “While it might be impractical to vary prices among customers in a mass market service such as long distance calls, it would be relatively easy to do so for these services, which are typically designed and provisioned on a customer-by-customer basis anyway.” In other words, if there is any sizable number of customers in the relevant market who do not have competitive choices, premature competitive classification would permit USWC to abuse its market power over those customers.

Here there is not sufficient evidence to conclude that there is no significant captive customer base. Indeed, the evidence on the number of buildings served by CLECs discussed above is clear and convincing proof that USWC retains a significant captive customer base in the areas covered by the Amended Petition. TRACER understands that, having reached a partial settlement with USWC, the Staff is obligated to support the Amended Petition; however, that does not justify ignoring clear evidence of the lack of effective competition in the revised relevant market.

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19 Comments of TRACER at 19, dated April 9, 1999.

Given the fact that CLECs serve such a small percentage of even present high capacity service customer locations, the potential harm to captive customers from unjustified price increases is a real threat. That is emphasized by the fact that USWC refuses to agree to a price cap for its high capacity services at levels that it acknowledges are well above cost.

TRACER would agree with USWC and Staff that no price cap would be necessary if effective, price-constraining competition really existed for these services. However, this is not a case where it is simply uncertain whether effective competition exists. The evidence demonstrates conclusively that effective competition does <u>not</u> exist in the relevant market at this time.

USWC claims that a number of public benefits could flow from granting pricing flexibility, including the elimination of the tariff notice requirements and reduction of administrative costs. These public benefits can be achieved by TRACER’s recommendation that any competitive classification be conditioned on a price cap. Downward pricing flexibility for services which USWC acknowledges are priced well above cost is all that competition requires. The price cap also would protect against USWC’s abuse of its market power, thereby protecting consumers. What the price cap would not do, however, is prevent USWC from using pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior. The Commission would have to conclude that other facts would ensure that the likelihood of such behavior has been eliminated or is minimal.

The FCC's Pricing Flexibility Framework for Special Access and Dedicated Transport Services Is Fundamentally Flawed, Does Not Satisfy Washington Statutory Requirements, and Is Irrelevant for This Proceeding.

In its recent Pricing Flexibility Order the FCC adopted a new framework for granting price cap LECs flexibility in the pricing of their services. Previously, the FCC has required incumbent LECs to demonstrate that they no longer possess market power in the provision of access services to receive pricing flexibility. It based non-dominance findings on several criteria, including market share and supply elasticity. Because these showings are not administratively simple and generate controversy that is difficult to resolve, the FCC decided to adopt a simpler, "bright-line" test to avoid administrative burdens.[20]

The FCC's pricing flexibility framework consists of two phases; relief is granted on an MSA (Metropolitan Statistical Area). In order to obtain Phase I regulatory relief, ILEC's must show that unaffiliated competitors have made irreversible or "sunk" investments in the facilities needed to provide the services at issue. For example, for dedicated transport and special access services, ILECs must demonstrate that unaffiliated competitors have collocated in at least 15 percent of the LEC's wire centers within an MSA or collocated in wire centers accounting for 30 percent of the LEC's revenues from these services within in MSA. Higher thresholds apply for channel

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20 FCC's Pricing Flexibility Order ¶¶ 78, 90.

terminations between a LEC end office and an end-user customer: LECs must demonstrate that unaffiliated competitors have collocated in 50 percent of the LEC's wire centers within an MSA or collocated in wire centers accounting for 65 percent of the LEC's revenues from this service within an MSA. With Phase I relief, ILECs may offer contract tariffs, as well as volume and term discounts. However, Phase I requires ILECs to maintain their generally available price cap-constrained tariffed rates to protect customers that lack competitive alternatives, and prohibitions against undue discrimination still apply. Phase I relief is basically equivalent to the flexibility ILECs enjoy under Washington law without competitive classification.

Phase II relief requires ILECs to demonstrate that competitors have established a significant market presence in the provision of the service at issue (i.e., that competition for a particular service within the MSA is sufficient to preclude the ILEC from exploiting any individual market power over a sustained period). Phase II relief for dedicated transport and special access services is available when an ILEC demonstrates that unaffiliated competitors have collocated in at least 50 percent of the LEC's wire centers with an MSA or collocated in wire centers accounting for 65 percent of the LEC's revenues from these services within an MSA. Again, a higher threshold applies to channel terminations: an ILEC must show that unaffiliated competitors have collocated in 65 percent of the LEC's wire centers within an MSA or collocated in wire centers accounting for 85 percent of the LEC's revenues from this service within an MSA. Once ILECs have made that showing, they will be allowed to raise and lower their rates on one day's notice.

The specific thresholds are not based on any formula, but literally picked from the air, as a policy decision, from proceeding comments. Moreover, the FCC justifies its decision through a determination that sunk investments in facilities is an appropriate standard for determining whether price flexibility is warranted because a substantial investment indicates a willingness (at the lowest ebb) to compete with the incumbent carrier.[21] The Commission does not consider resale services that employ only ILEC facilities to be considered sunk investments.[22]

While TRACER understands the FCC's desire for simple tests that avoid administrative burden, the simple fact is that the benchmarks adopted the FCC tell very little, if anything, about the true state of competition for the kind of services involved in this proceeding. Whether a competitor has collocated in a USWC wire center doesn't tell anything about whether that carrier has extended facilities to end-user locations, or which ones. The CLEC could be relying entirely on using USWC's unbundled loops, which would not provide adequate alternatives for all of the services covered by the Amended Petition. Further, until the outstanding issues surrounding service quality, facilities

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21The FCC concludes that collocation "usually represents a financial investment by a competitor to establish facilities within a wire center."¶ 81

22*See* ¶111.

provisioning, interconnection, and collocation have been resolved, it cannot be said that the adequate, nondiscriminatory availability of unbundled loops will support a finding of effective competition. Unfortunately, the FCC's pricing flexibility standards, while simple, are nonsensical.

More importantly, the FCC's pricing flexibility framework does not comply with the requirements of RCW 80.36.330. The FCC may believe that, in the name of avoiding work, it has the authority to relieve ILECs of the requirement of demonstrating that they no longer possess market power in the provision of the services to receive pricing flexibility. Washington law does not permit this Commission to do the same. In short, the FCC's pricing flexibility framework is not only ill-suited to measuring the true extent of competitive pressure on ILECs, it is irrelevant to the inquiry required in this proceeding.

CONCLUSION

TRACER acknowledges that proving the absence of market power can be difficult. However, the evidence that is available here shows that USWC retains market power over the services it wants to competitively classify. In an effort to simplify the process and grant the only pricing flexibility that is really required by competition, while protecting consumers from the potential exploitation of market power by USWC, TRACER proposed that competitive classification could be granted if it were conditioned on capping USWC's high capacity service prices at their present level. This would at least protect against harm to consumers from unjustified price increases. Other measures would have to be taken or the Commission would have to be convinced that exclusionary pricing behavior against developing competition would not occur. In any case, USWC has rejected that suggestion. TRACER submits that leaves only denial of the Amended Petition as a viable option.

DATED this 10th day of September, 1999.

Respectfully submitted,

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