**BEFORE THE**
**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| Policy Statement to Review State Universal Service Policies | Docket UT-100562 |

# CLEC COMMENTS ON WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSOCIATION USF CONCEPT PAPER

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Integra Telecom of Washington, Inc., Eschelon Telecom of Washington, Inc., Electric Lightwave, LLC., Advanced TelCom, Inc., Shared Communications Services, Inc., Oregon Telecom, Inc., and United Communications, Inc. (collectively referred to as "Integra" or "Integra Telecom"), **tw telecom of washington llc**, and XO Communications Services, Inc. ("CLECs") respectfully submit the following comments in response to the Commission's invitation to provide written comments on the "USF Concept Paper"[1] provided by the Washington Independent Telecommunications Association ("WITA").[2]

### *Introduction*

As stated in the Integra reply comments, there appears to be universal agreement and a desire among the rural carriers that rural carrier access rates be addressed.[3] The WITA *USF Concept Paper* covers the issue of rural carrier access rates, but goes well beyond this by mandating access reductions and state USF funding for large ILECs. It is unclear that the large ILECs need or desire such a change, and as a result the CLECs generally object to the proposal.

The WITA *USF Concept Paper* is broken into four sections: (1) Washington Universal Service Reform - Contributions; (2) Access Reform Track (Independent Local Exchange Carriers ("ILECs") with less than 2% of the state access lines); (3) High Cost Track (ILECs with more than 2% of the state access lines); and (4) Access reform all participating providers.

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1 Washington Universal Service / Access Reform Package (filed on behalf of WITA), September 1, 2010 ("USF Concept Paper").

2 Notice Seeking Comments on Washington Independent Telecommunications Association USF Concept Paper and Tentative Notice of Third Workshop, September 1, 2010.

3 Integra Telecom's Reply Comments, July 15, 2010, p. 3.

***Contributions***

Assuming it is necessary to create a state Universal Service Fund ("USF"), the first section of the WITA *USF Concept Paper, "Contributions"*, does not appear to be problematic. This section merely states that support should be defined broadly, such that, all carriers who use the network should pay to support the network.[4] Frontier and Qwest generally support this concept.[5] In addition, the Commission would develop the contribution mechanism,[6] designate a fund administrator,[7] define and establish contribution amounts[8] and enforce payment.[9]

***Small ILECs***

The second and third sections of the WITA *USF Concept Paper* are divided between discussions of ILECs with fewer than 2% of the state access lines[10] ("small ILECs") and ILECs with greater than 2% of the state access lines[11] ("large ILECs"). Those companies with fewer than 2% of the state access lines appear to be all ILECs in Washington with the exception of CenturyLink, Frontier and Qwest. Those companies with fewer than 2% of the state access lines

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4 WITA *USF Concept Paper*, Section 1.a.

5 See Frontier Comments, July 15, 2010, p. 2, and Qwest's Reply comments, July 15, 2010, p. 6. It should be noted that Qwest suggests that, due to recent court decisions, the states wait for the FCC resolve the issue of whether state commissions can require nomadic VoIP providers to contribute to a state universal service fund.

6 WITA *USF Concept Paper*, Section 1.b.

7 WITA *USF Concept Paper*, Section 1.c.

8 WITA *USF Concept Paper*, Section 1.d.

9 WITA *USF Concept Paper*, Section 1.d.

10 WITA *USF Concept Paper*, Section 2.a.

11 WITA *USF Concept Paper*, Section 3.

make up about 3% of the ILEC access lines in the state and CenturyLink, Frontier and Qwest have the other 97% of ILEC access lines.[12]

The Small ILEC proposal trades access reductions for local rate increases[13] and state universal service funding.[14] This essentially takes a declining revenue source[15] and moves it, at least in part,[16] to a universal service fund that will not naturally decrease. Small ILECs must pass a "simplified earnings review"[17] which is based only on regulated revenues. The CLECs support the concept of an "earnings threshold" before a carrier can draw from a state universal service fund, but the CLECs believe that if a carrier is going to tax the end user customers of other carriers in the state of Washington, through universal service fund contributions, then **all** ILEC revenues should be considered as part of the threshold test for eligibility to draw from the fund. Since non-regulated revenues, such as revenues from broadband offerings, have played some role in the reduction in access lines and access minutes, and these revenues are derived, in part, from the same network used to provide basic service to end user customers, the revenues generated from these services should be included. Further, the ability to "promote and preserve a network which brings vitality into rural Washington,"[18] is not dependent solely upon regulated revenues received as a result of that network, but all revenues generated from that network.

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12 This is an estimate based on the FCC Monitoring Report Table 3.31, ILEC High-Cost Loop Support Data for 2007 by Study Area.

13 Local rate increases may be phased in over time. See WITA *USF Concept Paper*, Section 2.e.

14 WITA *USF Concept Paper*, Section 2.b.

15 Comments of the Washington Independent Telecommunications Association, June 16, 2010, p. 12.

16 This may be a large part since WITA has argued it has limited ability to increase local rates. See Comments of the Washington Independent Telecommunications Association, June 16, 2010, p. 16.

17 WITA *USF Concept Paper*, Section 2.d.

18 WITA *USF Concept Paper*, p. 1. Note, the CLECs do not necessarily agree that this is an appropriate goal for universal service and access reform. Certainly if "vitality" is to be a goal, it needs to be measurable and the USF support should then be tied to performance.

The Small ILEC proposal further appears to carve out additional opportunities for state universal service funding through high cost support[19] This proposed provision would also allow the small ILECs the opportunity to request additional funding in high cost areas[20] without an "earnings threshold." Further, the high cost provision is proposed to be limited to "one supported carrier per area."[21] The CLECs support limiting payments through a universal service fund, but believe that if multiple carriers are competing in a high cost area, then the Commission should first question whether high cost subsidies are necessary at all rather than selecting a single carrier to subsidize and thereby risk the elimination of competitive options, in effect, picking the winner.

The Small ILEC proposal also has a section on the transition to broadband.[22] The CLECs are not opposed to broad legislation that gives the Commission the authority to define broadband goals[23] and create, if necessary, support mechanisms[24] for a transition to broadband in underserved areas. However, broadband should not be blindly supported through a tax on the end users of telecommunications carriers without the clear determination of the benefit and need for such a tax. The Federal Communications Commission's ("FCC's") National Broadband Plan outlines the FCC's intention to dramatically reform Federal Universal Service goals and funding as well as the current intercarrier compensation ("ICC") mechanism.[25] Since the WITA *USF Concept Paper* contemplates a broadband transition that takes place over ten years after

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[19] WITA *USF Concept Paper*, Section 2.f.
[20] WITA *USF Concept Paper*, Section 2.f.i.
[21] WITA *USF Concept Paper*, Section 2.f.iii.
[22] WITA *USF Concept Paper*, Section 2.g.
[23] WITA *USF Concept Paper*, Section 2.g.i.
[24] WITA *USF Concept Paper*, Section 2.g.iii.
[25] National Broadband Plan, Recommendations pp. 135-136.

access reform is complete,[26] it does not make sense to develop the details of how a broadband support fund would work while these issues are still under consideration at the federal level.

***Large ILECs***

The CLECs generally object to all of the proposals concerning the creating of state universal service funding of large ILEC local or broadband networks. First, it is not clear that a state universal service fund is necessary or that mandated reform is even desirable. Second, the benefits of rushing ahead of FCC reform on universal service and intercarrier compensation are unclear.

The large ILEC proposals of WITA's *USF Concept Paper*, are broken into two phases. The first phase creates funding for high cost areas through the use of an undefined forward looking cost model, capable of producing accurate cost estimates at the sub-wire center level.[27] High cost areas are defined as "service areas where forward-looking cost per line is greater than $45 per month or in the alternative exceeds any national benchmark established through a federal USF/national broadband proceeding."[28] As with the small ILEC proposal, the fund is essentially an access revenue replacement fund[29] though support is targeted to specific geographic areas and, in theory, available to all carriers serving that area.[30] In addition, the Phase 1 proposal would automatically classify low-cost areas with alternative providers as competitive.[31] Phase 2 is the implementation of a broadband fund based on a technologically neutral, forward looking,

[26] WITA *USF Concept Paper*, Section 2.g.iv.
[27] WITA *USF Concept Paper*, Sections 3.b.i and 3.b.ii.
[28] WITA *USF Concept Paper*, Section 3, Definitions.
[29] WITA *USF Concept Paper*, Section 3.b.iv.
[30] WITA *USF Concept Paper*, Section 3.a.i and 3.a.ii.
[31] WITA *USF Concept Paper*, Section 3, Regulatory Treatment under Phase 1.

carrier specific, cost model.[32] Funding will be available to a single carrier of last resort[33] and in this phase, rate of return regulation will be eliminated and replaced with stream lined regulatory protection rules, which are yet to be identified or implemented.[34] As with the Phase 1 proposal, low-cost areas with alternative providers would automatically be classified as competitive.

Frontier, one of the large ILECs, recognizes the "challenge of balancing affordable voice and broadband services in high-cost areas without creating either market distortions or an onerous burden on other customers in the state."[35] Qwest states, "[a]t this time, intrastate access reform does not need to be addressed in order to ensure universal service."[36] Frontier suggests, "a practical approach for carriers to stabilize revenues would be to give carriers the option of rebalancing switched access charges and basic service rates."[37] Frontier further notes that these actions should not be mandated as carriers "can determine for themselves whether rebalancing would be helpful."[38] Qwest also suggests access revenue can be replaced by "local rate increases without an earnings review."[39] Neither Frontier nor Qwest appear to be calling for a state universal service fund for large ILECs at this time. The CLECs also see no reason to move ahead on access reform, the creation of a state USF for large ILECs, or a detailed broadband plan at this time.

The CLECs also believe it is premature and inefficient for the Commission or legislature to take any further substantive steps regarding access charge or universal service reform,

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32 WITA *USF Concept Paper*, Section 3, Phase 2.
33 WITA *USF Concept Paper*, Section 3, Phase 2.
34 WITA *USF Concept Paper*, Section 3, Phase 2.
35 Frontier Comments, July 15, 2010, p. 1.
36 Qwest's Reply comments, July 15, 2010, p. 1.
37 Frontier Comments, July 15, 2010, p. 1.
38 Frontier Comments, July 15, 2010, p. 1.
39 Qwest's Reply comments, July 15, 2010, p. 2.

especially for large ILECs, at this time. The FCC has issued its National Broadband Plan, which will likely modify the landscape of universal service and intercarrier compensation such as access charges. The FCC has set a detailed schedule for this reform and is already moving forward with rulemakings and other proceedings. Given the proposed scope of the FCC National Broadband Plan, it does not make sense for Washington to devote resources to legislation, rulemakings or other proceedings that may be contrary to, or incompatible with, the Plan and its resulting federal rules and programs. Frontier and Qwest also point out that moving ahead of the FCC on these issues may be unwise. Frontier notes that the FCC, "is exploring access reform which may ultimately impact not only interstate access rates but may also affect state oversight of intrastate access rates."[40] Qwest notes that the "FCC has not yet described how its plans affect intrastate access reform… so immediate state action may not be complementary to the reform plans the FCC proposes and may even be counter productive when combined with FCC reforms."[41] Public Counsel also recognizes that it "would be premature to design a state universal service fund based on the National Broadband Plan."[42]

Besides these many compelling reasons not to move ahead with the creation of a state universal service fund for large ILECs, CLECs have other concerns with WITA's *USF Concept Paper*. The basis for a $45 per month high cost definition is unclear and to the extent a state fund is established by the Commission for large LECs, the definition of a high cost area should be left to the Commission. The WITA *USF Concept Paper* does not identify where the time, effort and cost for the creation of a technologically neutral, forward-looking cost model capable

[40] Frontier Comments, July 15, 2010, p. 1.

[41] Qwest's Reply comments, July 15, 2010, p. 3.

[42] Initial Comments of Public Counsel, June 16, 2010, p. 5.

of producing accurate sub wire center cost estimates will come from. From the CLECs perspective it appears unwise to subsidize a single carrier in a high cost area when multiple carriers are willing to compete for customers. This does not further competition, but instead can effectively eliminate all but a single player from the market. In addition, the CLECs are wary of an automatic competitive classification for certain areas in the state. This designation should be determined as the result of a market specific detailed analysis by the Commission involving the carriers potentially impacted by this classification. Finally, CLECs are opposed to using a state universal service fund to finance access revenue reductions, especially if access reductions are going to be advocated to apply to CLECs. CLECs traditionally do not have the ability to draw from a revenue "make whole" fund. It would be inappropriate to create a revenue "make whole" mechanism that protects the revenues of only a subset of carriers in the state. Finally, CLECs have concerns with the creation of a fund for the large ILECs in Washington as these ILECs are also competitors of the CLECs. CLECs, along with other carriers in the state, will be required to tax their end users, to support the networks of their competitors. Further, the large ILECs have advocated and the FCC has implemented a number a policies that allow ILECs to limit CLEC access to these very last mile connections. For example, in certain Fiber to the Home builds CLECs cannot lease last mile connections to end users[43] (cite to CFR) and in fiber-copper hybrid networks CLECs are limited to voice connections.[44] As a result, the proposed expansion of universal service to support the deployment of broadband networks would, in essence, require

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43 See for Example, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et. al., CC Docket No. 01-338 et. al., released August 21, 2003, ("Triennial Review Remand Order" or "TRRO"), ¶ 273.

44 See Triennial Review Remand Order, ¶ 296.

CLECs and their end user customers to fund their competitors' networks, to which CLECs are then denied access. In other words, CLECs are being asked to pay a tax that will be used to eliminate CLECs from the market. This is terrible public policy and certainly an improper use of a tax.

***Access Reform***

The forth section of the WITA USF Concept Paper deals with access reform applicable to all carriers in the state. This calls for all carriers to reduce intrastate access charge rates to the interstate levels[45] and cap CLEC access rates at ILEC access rates.[46] The change from intrastate rates to interstate rates would be phased in over a maximum of four years[47] and ILECs, not CLECs, would have the ability to make up lost access revenue, net of local rate increases, through a state universal fund (without a rate case).[48]

The Commission should be cautious of taking the radical step of price regulating CLECs – small players in the market whose existence is due to the pro-competitive provisions of the Telecommunications Act of 1996. A decision to ***price regulate CLECs*** would be exceedingly ironic given that the policies that gave birth to CLECs were intended to reduce price regulation. Further, price regulating CLECs would also run counter to (1) the continuing deregulation of the incumbent local exchange carriers ("ILECs") in both retail and wholesale markets; (2) the Regional Bell Operating Companies ("RBOCs") entry into long distance markets; (3) the

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[45] WITA *USF Concept Paper*, Section 4.a.

[46] WITA *USF Concept Paper*, Section 4.b.

[47] WITA *USF Concept Paper*, Section 4.a.

[48] WITA *USF Concept Paper*, Section 4.c.

megamergers of the largest ILECs; and (4) the emergence of intermodal competition between landline, cable and wireless companies.

To the extent reductions in access charges are mandated, the CLECs support a gradual and predictable approach that extends over a number of years. An extended transition period is necessary to minimize impacts on both carriers and their end-user customers and allow carriers the time to alter business plans. The task of altering business plans would be more difficult for CLECs than many rural ILECs. CLECs, by definition, operate in retail markets that are competitive. As a result, CLECs have limited ability to individually increase rates to their end users – in other words they are essentially price-takers in the market. Even if the market was forgiving enough to permit rate changes, CLECs typically have term agreements with their end-user customers that limit the CLECs' ability to modify rates. A gradual transition will help to provide carriers the ability to fully adjust business plans and mitigate rate shock to end user customers.[49]

***Conclusion***

For the reasons set forth above, the CLECs are generally opposed to the WITA *USF Concept Paper*.

[49] The National Broadband Plan (p. 148) recommends a 10 year transition period for the reduction of access rates.