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September 29, 2004

By E-Mail and Federal Express

Ms. Carole J. Washburn
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504

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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

Re: Recurring Cost Proceeding, Docket No. UT-023003

Dear Ms. Washburn:

AT&T Communications of the Pacific Northwest, Inc., TCG Seattle, and TCG Oregon (collectively "AT&T") and XO Washington, Inc. ("XO") provide the following comments in response to the Notice of Opportunity to Comment issued in the above-referenced docket on September 22, 2004 ("Notice"). Developments on the federal level have created a great deal of uncertainty with respect to the unbundling obligations of incumbent local exchange carriers ("ILECs"), including Verizon Northwest Inc. ("Verizon"). One such area of uncertainty, as the Notice observes, is the extent to which the Commission can establish unbundled network element ("UNE") rates that are lower than the existing rates. That uncertainty, however, should not affect the rates the Commission establishes for the UNEs at issue in this proceeding.

As an initial matter, the Commission should be aware that the Federal Communications Commission's ("FCC's") *Interim Rules Order* addresses only those unbundling requirements that were vacated, or arguably vacated, by the D.C. Circuit in *USTA II*, specifically mass market switching and high capacity loops and transport. Other UNEs, most notably analog loops, are unaffected. Accordingly, the Commission retains full authority under Section 252 of the Telecommunications Act of 1996 and applicable FCC rules to establish appropriate costs and prices for analog loops and other unaffected UNEs, and the Commission should exercise that authority.

The Commission should also proceed to estimate costs and establish prices for Verizon high capacity loops and transport without consideration of whether those prices are above the rates

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that the Commission previously established. In addition to the Petition for Emergency Clarification and/or Errata referenced in the Notice, Verizon and other ILECs have filed a petition for mandamus with the D.C. Circuit asking the court to invalidate the *Interim Rules Order* as inconsistent with the requirements of *USTA II*. In addition, those same ILECs have filed a petition for review of the *Interim Rules Order* with the same court on much the same grounds. The FCC also has scheduled adoption of permanent unbundling rules for December, which would supercede the *Interim Rules Order*. By the time the Commission issues a decision in this case, therefore, the *Interim Rules Order* may very well be ineffective or modified to remove any restriction on the Commission's pricing authority.

The parties to this docket spent well over a year compiling a factual record for the Commission to establish modified UNE rates for Verizon. Much of that effort, as well as Commission resources, would be wasted if the Commission declined to establish modified rates for high capacity loops and transport and mass market switching – particularly if the FCC and/or a reviewing court determines that Section 252 means what it says and that the Commission is not otherwise restricted in establishing UNE rates. As a practical matter, moreover, the vast majority of issues related to costing high capacity loops and transport are the same issues that the Commission must resolve for analog loops and transport. The Commission thus will not spend significant extra resources to establish prices for the elements governed by the *Interim Rules Order*, even if the law is clarified to limit the Commission's ability to do so.

AT&T and XO, therefore, strongly recommend that the Commission establish appropriate costs and prices for all of the UNEs at issue in this proceeding.

Very truly yours,

Davis Wright Tremaine LLP



Gregory J. Kopta

cc: Service List