BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Review of:	)	
Unbundled Loop and Switching Rates;	)	Docket No. UT-023003
the Deaveraged Zone Rate Structure; and	)	
Unbundled Network Elements,	)	XO AND PAC-WEST PETITION
Transport and Termination	)	FOR RECONSIDERATION OF
(Recurring Costs)	)	24TH SUPPLEMENTAL ORDER
	)	

Pursuant to WAC 480-07-850, XO Washington, Inc. ("XO"), and Pac-West Telecomm, Inc. ("Pac-West") petition for reconsideration of the Commission's Twenty-Fourth Supplemental Order Establishing Recurring Costs and Rates for Unbundled Network Elements, Transport, and Termination ("24th Supp. Order"). In support of their Petition, XO and Pac-West state as follows:

Discussion

1. The 24th Supp. Order establishes new rates for reciprocal compensation to be paid to Verizon Northwest Inc. ("Verizon") and to carriers that exchange local traffic with Verizon. The Commission refused to align those rates with the unbundled network element ("UNE") switching rate that was also established in the Order and adopted Verizon's proposal to set reciprocal compensation rates substantially lower than the UNE switching rates. The 24th Supp. Order states three reasons for this determination: (1) XO and Pac-West's position that federal law and the Commission's prior order on this issue require that those rates be aligned "was not properly supported on the record"; (2) XO and Pac-West's arguments were not "timely raised in this proceeding"; and (3) the Telecommunications Act of 1996 ("Act") "allows the price of call termination to be lower than the cost of ordinary switching." 24th Supp. Order ¶528. Each of these determinations is based on an error of law that should be corrected on

reconsideration.

2. The Commission's first basis for setting the reciprocal compensation rate lower than the UNE switching rate is that XO and Pac-West's position that federal law and the Commission's prior order require them to be set at the same rate allegedly was not properly supported on the record. Presumably the Commission means that XO and Pac-West did not prefile testimony or present a witness on this issue. The issue XO and Pac-West raised, however, is one of law, not fact. Testimony on legal issues is improper under both federal and Washington rules of evidence. *E.g.*, *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996); *Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003), *review denied*, 151 Wn. 2d 1010, 89 P.3d 712 (2004); ER 704, Comment. These rules of evidence guide Commission evidentiary rulings and should apply in the absence of a compelling reason to the contrary. *See* RCW 34.05.452 (incorporated by reference into WAC 480-07-470(5)).

3. The Commission has *allowed* factual witnesses to opine on legal requirements, but nothing in the Commission's procedural rules or past practice has *required* a party raising a purely legal issue to submit testimony on that issue. Such a requirement in this case would be particularly inappropriate given that the bulk of any legal testimony would have been devoted to a description of the Commission's resolution of this issue two years ago. Imposition of a requirement to file legal testimony now, without prior notice and opportunity to be heard, is inconsistent with Washington rules of evidence and fundamental due process and thus is contrary to law.

4. The Commission's second basis for rejecting XO and Pac-West's position to

maintain the status quo of setting reciprocal compensation at the same level as UNE switching is that XO and Pac-West allegedly did not timely raise the issue in this proceeding. The Order, however, fails to identify any earlier point in the proceeding at which XO and Pac-West were required to raise this legal issue. The procedural schedule did not include prehearing briefing. XO and Pac-West raised the issue during cross-examination of Verizon's Switching Panel, TR at 913-18, which was the first opportunity they reasonably could have raised it. Verizon had the opportunity on redirect examination to address any factual issues that Verizon believed were relevant to the issue. XO and Pac-West also filed an opening post-hearing brief devoted to the issue of reciprocal compensation rates. Again, Verizon had the opportunity to respond to these legal issues in its reply brief. No party was denied the full opportunity to respond to XO and Pac-West's legal arguments. Accordingly, there is no basis for the Commission's determination that XO and Pac-West did not timely raise their issue.

5. The third and only substantive basis for the Commission's determination is that "the Act makes a distinction between switching and termination rates," which the Commission explained as follows:

> The Act allows the price of call termination to be lower than the cost of ordinary switching. Termination involves a call originating on another carrier's switch and terminating on the ILEC's switch. The Act indicates that this activity can be priced at the incremental cost of service with no markup for common or shared costs. On the other hand, if the call originates and terminates on the ILEC's switching platform, via UNE-P, the price can be the incremental cost of switching plus a common and shared cost mark-up.

24th Supp. Order ¶ 528 (footnotes omitted).

6. The most glaring omission from the Commission's brief discussion of this issue

is any reference to the Federal Communications Commission ("FCC"). The Act requires the FCC to establish regulations to implement the requirements of Section 251 of the Act, including reciprocal compensation obligations. 47 U.S.C. § 251(d)(1). The FCC did just that in its Order in *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"). Paragraph 528 of the 24th Supp. Order directly conflicts with the FCC's Local Competition Order, rendering unlawful the Commission's reciprocal compensation rate determination. The Commission's failure even to address applicable FCC requirements, moreover, on its face represents arbitrary and capricious decision-making.

7. The FCC has determined "that the pricing standards established by section 252(d)(1) for interconnection and unbundled network elements, and by section 252(d)(2) for transport and termination of traffic, are sufficiently similar to permit the use of the same general methodologies for establishing rates under both statutory provisions." Local Competition Order ¶ 1054. More specifically, the FCC requires "that, once a call has been delivered to the incumbent LEC end office serving the called party, the '**additional cost**' [under Section 252(d)(2)] to the LEC of terminating a call that originates on a competing carrier's network primarily **consists of the traffic-sensitive component of local switching**." *Id*. ¶ 1057. The FCC Order expressly contradicts, and thus preempts, the Commission's interpretation of the Act as making a distinction between the rates for unbundled local switching and end office call termination.

8. The Commission's rationale for its determination to establish the reciprocal

compensation rate substantially below the UNE local switching rate similarly cannot be reconciled with the Local Competition Order. The FCC stated,

> Rates for termination established pursuant to a TELRIC-based methodology may recover a reasonable allocation of common costs. A rate equal to incremental costs may not compensate carriers fully for transporting and terminating traffic when common costs are present. **We therefore reject the argument by some commenters that "additional costs" may not include a reasonable allocation of forward-looking common costs**.

Local Competition Order ¶ 1058 (emphasis added). For purposes of the Local Competition Order, the FCC used the term "common costs" to include both shared or "joint costs"[1] and "common costs."[2] *Id*. ¶ 676. The FCC thus specifically and expressly rejected the Commission's interpretation of the Act as permitting termination to "be priced at the incremental cost of service with no markup for common or shared costs."

9. The Commission's refusal to consider the FCC's binding and effective legal requirements is all the more problematic given that the Commission's decision on the issue in the last cost docket was based on those requirements. The Commission stated, "The FCC's Local Competition Order contemplates that local and tandem switching rates are applicable to Section 251(b)(5) reciprocal compensation. . . . **The FCC further stated that the cost of call termination consists of the traffic sensitive component of local switching**." *In re Continued*

[1] The FCC used "the term 'joint costs' to refer to costs incurred when two or more outputs are produced in fixed proportion by the same production process (*i.e.*, when one product is produced, a second product is generated by the same production process at no additional cost"). Local Competition Order ¶ 676.

[2] "The term 'common costs' refers to costs that are incurred in connection with the production of multiple products or services, and remains unchanged as the relative proportion of those

Costing and Pricing of Unbundled Network Elements, Transport, and Termination, Docket No. 003013, Thirty-Second Supplemental Order ¶ 91 (June 21, 2002) (emphasis added). The Commission "conclude[d] and order[ed] that a per-MOU reciprocal compensation rate structure **based on permanent UNE switching and transport rates** must replace interim reciprocal compensation rates in existing interconnection agreements." *Id*. ¶ 92 (emphasis added).

10. Federal law on this issue has not changed since the Commission's last order. Even Verizon, the proponent of the proposal that the Commission adopted, made no claim to the contrary but similarly relied entirely on its own interpretation of the Act without even acknowledging the FCC's Order. Verizon Reply Brief at 56-57. Accordingly, there is no reasonable basis on which the Commission's determination should have changed, nor has the Commission even attempted to explain its change in position. "Lodged deep within the bureaucratic heart of administrative procedure, however, is the equally essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." *Columbia Broadcasting System, Inc. v. F.C.C.*, 454 F.2d 1018, 1026 (D.C. Cir. 1971). Paragraph 528 in the 24th Supp. Order does not satisfy this essential obligation.

11. Although not an explanation, the Commission stated the following at the end of footnote 403 in the 24th Supp. Order:

> We acknowledge that the Commission has reached different conclusions

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products or services varies (e.g., the salaries of corporate managers)." *Id*.

> on this issue in the past. In Docket No. UT-003013 we set the termination rate equal to the UNE switching rate. However, in Docket No. UT-950200, the Commission found, consistent with Verizon's position in this case, that shared costs should not be included in the estimate of the incremental cost of a service.

With all due respect to the Commission, it has not reached different conclusions on this issue until now. Docket No. UT-950200 was the last US WEST rate case. The Commission issued its Final Order in that docket on April 11, 1996 – two months after passage of the Act and four months *before* the FCC issued its Local Competition Order. A rate case order – setting retail rates using the Commission's own costing methodology before the FCC developed the applicable costing methodology under the Act – is irrelevant to how the Commission should implement federal legal requirements for establishing reciprocal compensation rates. Indeed, the Commission never referenced the US WEST rate case order as having any bearing on its decision in Docket No. UT-003013 setting reciprocal compensation rates equal to the UNE local switching rates.

12. The Commission correctly recognized and followed the FCC's interpretation of the Act when establishing reciprocal compensation rates in the last cost docket. Paragraph 528 in the 24th Supp. Order does not even recognize the requirements of the Local Competition Order and is inconsistent with federal law and the Commission's own precedent. XO and Pac-West, therefore, strongly urge the Commission to reconsider its decision to set the reciprocal compensation rate for end office termination lower than the UNE local switching rate.

Prayer for Relief

WHEREFORE, XO and Pac-West request the following relief:

A. An Order from the Commission reconsidering the 24th Supp. Order and establishing the reciprocal compensation rate for end office termination at the same level as UNE local switching consistent with federal law and the Commission's determination in Docket No. UT-003013; and

B. Such other or further relief as the Commission finds fair, just, reasonable, and sufficient.

DATED this 22nd day of February, 2005.

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By _____
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