BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of	)	DOCKET NO. UT-991737
	)	
	)	
Rulemaking Concerning Line Extension Tariffs, Draft WAC 480-120-071	)	
	)	

COMMENTS OF U S WEST

INTRODUCTION AND SUMMARY

Pursuant to the Commission's Notice of Opportunity to File Written Comments, U S WEST Communications, Inc. ("U S WEST") files these comments regarding the proposed rules. U S WEST appreciates this opportunity to comment and further appreciates the efforts of Commission Staff to work with the industry on this issue. The approach that U S WEST suggests below, provides an outcome in which prospective customers who want service receive it and the companies who extend facilities to provide service, recover their costs. U S WEST encourages the Commission to refrain from adopting the proposed rule and recommends the Commission direct its staff to continue to work with individual local exchange companies to accomplish the goal of maintaining and advancing the efficiency and availability of telecommunications service to unserved areas, as appropriate. The Commission should work with the individual companies to find solutions to situations in which tariffed charges to extend service appear prohibitive, rather than attempting to create a one size fits all measure which contains several features

that contravene existing statutes in Washington, and imposes discriminatory obligations on regulated companies.

By creating a "one size fits all" measure, the proposed rule fails to recognize the current evolution of technology and does not acknowledge that consumers may not wish to commit to traditional wireline service for a period of twenty months. Traditional "hard wired" telecommunications service is rapidly becoming a technology of the past. The proposed rule encourages increased deployment of traditional service to unserved areas when it is highly unlikely that customers will retain such service over the long run. Customers for whom the ILEC has extended copper facilities under this proposed rule, are not required to continue to use those facilities and pay rates to the ILEC[1]. Recovery of costs is extremely important in this context in light of the current and continuing introduction of widespread fixed wireless and other alternative "last mile" connections to the network. Thus, the Commission must provide a realistic means by which the cost of extending wireline facilities into remote, high cost areas, can be recovered and not charged only to ILECs (and ultimately their ratepayers) who happen to have the areas within their exchange boundaries. The proposed rule also discourages competition and alternative choice by preserving below cost traditional telecommunications service.

U S WEST joins WITA in its suggestion that the Commission adopt an Interpretive and Policy Statement in lieu of the proposed rules[2]. Such a Policy Statement

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[1] While the rule proposes that the cost associated with serving an unserved area be recovered over a specified period of time, it does not address the need for complete payment by a customer if they choose an alternative service arrangement prior to expiration of the twenty month payment period.

[2] See WITA March 14, 2000 Comments in Docket No. UT-991737.

could include many of the same mechanisms incorporated in the proposed rule, while allowing local exchange companies some latitude in cost recovery proposals. This approach would allow the Commission to consider when and where traditional service should be deployed and allows the local exchange provider the necessary flexibility to propose alternative cost recovery mechanisms specific to the unserved area circumstances. This approach would also eliminate the legal issues with the proposed rule revisions which U S WEST addresses below. ~~asserts that the proposed rule revisions are unnecessary and inappropriate in today's telecommunications environment.~~

The legal issues presented by the proposed rule encompass primarily five areas:

The proposed rules establish a regime of retroactive ratemaking.

The proposed rules violate state statutes and the Telcommunications Act of 1996.

The proposed rules revise established ILEC rates through rulemaking.

The proposed rules create discriminatory rates.

The proposed rules are anticompetitive in that they single out ILECs to bear the burden of service to unprofitable customers.

~~U S WEST believes that t~~ U S WEST submits that the proposed rules are ~~unnecessary and counterproductive to the Commission's goal of improving the ability of prospective telecommunications customers who have chosen to live in remote areas, to obtain some form of telecommunications service from regulated providers. The Commission should, in U S WEST's view, work with the individual companies to find solutions to situations in which tariffed charges to extend service appear prohibitive, rather than attempting to create a one size fits all measure which contains several features~~

~~that contravene existing statutes in Washington, and imposes discriminatory obligations on regulated companies. The approach that U S WEST suggests provides an outcome in which prospective customers who want service receive it and the companies who extend facilities to provide service, recover their costs. Recovery of costs is extremely important in this context in light of the current and continuing introduction of widespread fixed wireless and other alternative "last mile" connections to the network. As these technologies are introduced, customers for whom the ILEC has extended copper facilities under this rule, are not required to continue to use those facilities and pay rates to the ILEC. Thus, the Commission must provide a realistic means by which the cost of extending wireline facilities into remote, high cost areas, can be recovered and not charged only to ILECs who happen to have the areas within their exchange boundaries.~~

SUBSTANTIVE COMMENTS

The Commission cannot lawfully establish a regime of retroactive ratemaking as is contemplated by the proposed rule.

In *State ex rel Standard Oil Co. of Calif. v. Dept. of Pub. Works*, 185 Wash 235, 238, 53 P. 2d 318 (1936), the court affirmed the superior court's judgment that had upheld an order of the commission dismissing a claim for reparations for shipments made prior to the date on which a complaint was filed, challenging rates as being unreasonable. The court based its holding on its line of precedent that "Under the statute law all carriers are mandatorily required to charge rates and fares as specified in its schedules filed and in effect at the time...and are prohibited from charging or collecting other or different rates."

The proposed rule would establish a pass through mechanism for a portion of the cost of line extension above that paid by the end user. The rule provides that the so called direct and indirect service extension cost that exceeds the charges paid by the end user may be recovered by the filing of a tariff to collect the cost from long distance carriers, on a per minute of use basis, through terminating access charges. Under one alternative, the company may file such a tariff to recover fifty percent of the estimated cost of an extension after it has obtained all necessary construction permits, but the tariff will be "null and void" and amounts collected under it must be "offset" by the filing of another tariff (apparently that reduces terminating access below cost) if the extension has not been completed within twelve months, unless the Commission "for good cause shown" permits the tariff to remain in effect after the twelve months. This provision dispenses entirely with the complaint process under RCW 80.04.110 and findings under RCW 80.36.140 of a rate's unreasonableness as legal basis for determining that it is unlawful. Instead, by the passage of time without a particular event having occurred, the rate is by rule deemed "null and void." The Commission does not have power to make a filed tariff "null and void" by rule.

In addition, although according to *Standard Oil, supra,* while the rate was effective it will have been deemed the only lawful rate, after the twelve months without extension having occurred, the amounts collected under it must be "offset" by reducing presumably terminating access charges below cost. This is the essence of unlawful retroactivity in ratemaking. The utility is by statute commanded to collect only the tariffed rate during its effective period, and yet having obeyed the law by collecting this

rate it is nonetheless required by the rule to refund the amounts collected by reducing rates prospectively. Of course, there is no guarantee that the recipients of the refund are the same entities who paid the service extension element. The prospective rates are to be reduced without any finding that they are unreasonably high, based solely on the perceived overrecovery of costs in past collections. The rule is ambiguous in that it is unclear how or against what the "offset" is to apply.

The second alternative is equally retroactive. Under the second alternative, the carrier may file a tariff to recover in prospective rates, dollar for dollar, investments it has made in line extensions during the preceding two years. Moreover, this program exacerbates the existing implicit cross subsidies in the pricing of telephone service.

2. The proposed rule violates RCW 80.36.090, RCW 80.36.600, RCW 80.36.610, the Telecommunications Act of 1996 and the equal protection clauses of the state and federal constitutions.~~, and is arbitrary and capricious~~ Furthermore, the proposed rule ~~in singling~~ singles out ILECs to bear the burden of ~~inadequately compensated forced line extensions to serve~~ service to unprofitable customers.

RCW 80.36.090 provides in part:

> Every telecommunications company shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto suitable and proper facilities and connections for telephonic communication and furnish telephone service as demanded.

The proposed rule singles out telecommunications companies that are required to file tariffs under RCW 80.36.100 ~~under RCW 80.36.100 for the requirement~~ to have on file an extension of service tariff and to extend service consistent with its tariff and the proposed rule. This is inconsistent with the plain language of ~~the statute~~RCW 80.36.090.~~A rule that is inconsistent with the plain language of the statute will not be upheld.~~

The rule also violates ~~the statute~~RCW 80.36.090 because it establishes a requirement that dispenses with the fact based determination under the statute of reasonable entitlement to service. The CR-102 summary states that the rule provides that "unreasonable extensions are not required." This is incorrect. The only exceptions to the blanket requirement to extend facilities on request are where the need for service is temporary or the local authorities have not approved construction. There is no evidence that all extensions other than those for temporary use or for which authorities have not yet approved construction, are reasonable. The rule does not provide for any determination of reasonableness for a given extension.

Especially given the advent of new wireless technologies such as local multichannel multipoint distribution systems and low earth orbit satellite systems (which provide ubiquitous service in Washington), it is unreasonable to require wireline carriers to extend facilities, investing significant amounts on facilities that are likely to be stranded in the relatively near future. In fact, even existing cellular and PCS services are substitutable for wireline service, given the Commission's designation of such carriers as Eligible Telecommunications Carriers under the Federal Act. Where there is substitute service available, the Commission lacks authority to force one group of carriers, the wireline ILECs, to extend facilities.

Section 254(f) of the Telecommunications Act of 1996 provides in part:

> A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State.

The WUTC's authority to adopt a regulation that provides for the extension of service to unserved areas, is subject to this limitation. The proposed rule violates the limitation because it exempts entirely a class of telecommunications providers that provide intrastate telecommunications services, from any obligation to participate in the in-kind support of universal service through the forced construction of line extension facilities ~~without adequate cost recovery~~. That class is the class of telecommunications carriers that have been exempted from the requirement to file tariffs.

Section 254(f) also conditionally preempts states as follows:

> A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

The Washington legislature codified this restriction in RCW 80.36.610(1) by two separate barriers to the proposed WUTC action in this rulemaking. First, the WUTC is limited to the actions *expressly authorized* under RCW 80.36.600. Second, the legislature in two separate places, that is in RCW 80.36.600(1) and RCW 80.36.610(1), forbade any such rules to preserve and advance universal service to take effect until the legislature has approved a state universal service program. The legislature has not as of today, approved such a program. Therefore, the WUTC is moving to adopt a rule that introduces a new explicit USF charge (the service extension element), that is specifically prohibited by Washington law. ~~Courts will not defer to an agency where the statute is clear. [cite] The WUTC has previously attempted to expand its authority by~~

interpretation, and the courts have struck down those attempts. [cite] The proposed rule violates both RCW 80.36.600(1) and RCW 80.36.610(1) because the legislature has not approved a program that contains the rule.

Nothing in RCW 80.36.600 expressly authorizes the WUTC to adopt a rule that forces wireline ILECs to extend service on demand, restricts the charges they can make of the end users for such extensions, and provides for recovery of a portion of the cost of the extension in terminating access charges to interexchange carriers. The proposed rule violates RCW 80.36.610(1) for this separate reason as well. The proposed rule is clearly a universal service measure. The WUTC's own CR-102 identifies 47 USC §254(b) as a source of authority for the rule. That subsection is entitled "Universal Service Principles."[3] To the extent the WUTC would argue that 47 USC §254(b) preempts the Washington legislature's specific command to the WUTC not to act in this area without advance legislative approval or express authorization in RCW 80.36.600, U S WEST submits that the WUTC lacks authority to determine that a Washington statute has been preempted by federal legislation. Such a decision is the province of the courts.

In the event that the WUTC argues that the proposed rule is not a universal service support measure (which would be anomalous given that the proposed rule acknowledges

[3] If the Commission does not believe that the proposed rule is a universal service support measure subject to §254(f), then the proposed rule is clearly a requirement that is allegedly "necessary to ...protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers" and as such is subject to the requirement in §253(b) of the Act that such requirements be "competitively neutral." Clearly the proposed rule is not competitively neutral and it violates this prohibition. The rule exempts from its burden, carriers that are not required to file tariffs. Those carriers compete with carriers who are required to file tariffs, and the proposed rule therefore burdens the latter while shielding the former from any burden.

~~that federal universal service funds may be collected for such required extensions of service and the CR-102 cites §254(b) of the federal act as authority for the rule), that would not save this proposed rule. If the rule is not a universal service support measure that is subject to §254(f), then it is clearly a requirement allegedly "necessary to ...protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers" and as such is subject to the requirement in §253(b) of the Act that such requirements be "competitively neutral." Clearly the proposed rule is not competitively neutral and it violates this prohibition. The rule exempts from its burden, carriers that are not required to file tariffs. Those carriers compete with carriers who are required to file tariffs, and the proposed rule therefore burdens the latter while shielding the former from any burden.~~

~~The proposed rule is inconsistent with the "Universal Service Principles" in 47 USC §254(b) on which it is purportedly based.~~ One of the principles in ~~that~~ section 47 USC §254(b) is that there should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service. U S WEST has already addressed the fact that the proposed rule fails to meet the requirement of §254(b) that all providers of service should make equitable and nondiscriminatory contributions to the support of universal service.

In addition, ~~T~~the WUTC's proposed rule specifically excludes any support for a significant element of the cost of line extensions that the rule requires in the name of universal service. That element is the cost of reinforcing cable facilities in order to provide a working telecommunications circuit that runs from the extremities of the

network back to the central office. Under the current network design, outside plant is tapered, with more pairs in cables at the center near the central office, and fewer pairs in cables at the ends of the cable routes furthest from the central office. This is the "forward looking, efficient" design that has been used in the cost docket, UT-960369 et al., to determine the prices U S WEST may charge for loops. This design contemplates an ultimate demand over the forecast horizon on the network from the ends of the routes back to the central office. If that demand is exceeded on any route, then the network must be reinforced. That means that additional cables must be laid from the extreme end of the cable route, back to at least a taper point where the cable size was reduced, and there are available pairs that can connect to the central office.

In some cases, the routes are served by digital loop carrier, which again is a forward looking, efficient technology whose function is to increase efficiency by getting the most possible use from expensive copper loops, especially loops of great length. Digital loop carrier systems are sized to meet the expected load on the route. If the load on the route in terms of number of customers unexpectedly increases because of governmental requirements to extend service where service was never forecasted, then the customers will not receive service unless the digital loop carrier systems are replaced with larger systems. Such reinforcement is costly.

If U S WEST is not free to decline to extend service where there are not available pairs that run all the way back to the central office or sufficient digital loop carrier capacity, and it is required to provide service that actually connects to the central office, then it must reinforce. This is as much a cost of extension (if not more) as is the so-called

direct cost of providing an electrical connection from the customer's property boundary to the extremes of the existing network.

In fact, in most cases what the rule calls the direct and indirect service extension cost will be a very small fraction of the necessary cost that ~~U S WEST~~ an ILEC must incur to provide a service that will function. Absent the line extension rule requirement, the reinforcement would not be required. This places the burden of cost for reinforcement on the ILEC's ratepayers. It is ~~arbitrary and capricious for~~ essential that the costs of reinforcement be included in any cost recovery mechanism for service to unserved areas. ~~t~~The ~~WUTC to approve the~~Commission's own recognition and adoption of a tapered network design as efficient and forward looking for the purpose of setting prices for unbundled network elements reinforces this ILEC practice. ~~and~~ The proposed rule unfairly fails to recognize this same principle ~~to ignore the effect of that design~~ in setting the terms of cost recovery for ~~forced~~ line extensions required under the ~~proposed~~ rule. ~~For the rule to refuse any recovery, either from the applicant or from interexchange carriers through the proposed section 3 tariff, for this forced investment, is a taking of the utility's property without just compensation and is unconstitutional.~~

The need for this recovery is more critical today than at any time in the past. Many new technologies are becoming available for the provision of local telephony, including cable, local multichannel multipoint distribution, fixed wireless, and satellite telephony. As these technologies become more cost effective, consumers to whom U S WEST will have extended facilities under the auspices of the proposed rule will be free to discard the expensive long copper loops and use the other technologies. This is as

it should be. But since ~~U S WEST~~ the ILEC will not have been free to decline to risk its capital in the face of these new competitors according to the rule, the rule must provide for recovery of that capital. The current rule does not provide for such recovery, for most of the relevant cost.

If U S WEST is not permitted to recover the cost of network reinforcement that is made necessary by line extensions pursuant to the proposed rule, then the only ways in which U S WEST can receive compensation are that its rates for UNEs and other services must recover these costs ~~or it must recover a judgment against the state in the Court of Claims~~. The rates for UNEs are to be based on costs determined without including the massive spare capacity at the outer ends of cable routes, that would be required under the rule, to make extensions without network reinforcement. U S WEST's existing retail rates are based on embedded network costs which also do not reflect this increment of spare capacity that would be necessary under the proposed rule as written.~~The requirement that only carriers that must file tariffs, also extend service against their wills without adequate cost recovery, violates the federal and state equal protect~~

The CR-102 states that the purpose of the regulation is to maintain and advance the efficiency and availability of telecommunications service, and it claims that the rule is authorized by RCW 80.36.300. One of the policies in RCW 80.36.300 is to encourage diversity of supply.

By reason of the federal Telecommunications Act of 1996, carriers that are required to file tariffs must also unbundle their networks and provide access to the unbundled elements at cost based rates. The FCC has extended this requirement to

provide that individual portions of the loop must be unbundled.[4] There is no legitimate reason to exempt competing carriers who have access to the unbundled elements, including subloop elements, at cost based rates, from the social obligation to serve customers in high cost areas who are unprofitable without adequate cost recovery, if that is a social obligation.

The classification adopted by the rule serves no proper state purpose because it is clearly contrary to the policy of the state as expressed in its statutes, to encourage diversity of supply. Obviously diversity of supply in areas that are outside of UGAs or municipal boundaries will be discouraged because only the incumbent can be compelled to extend facilities under the proposed rule. The classification is invidiously discriminatory because it subjects carriers whose only sin is that they are incumbents, to a costly obligation (which is unrelated to any issue raised by incumbency) from which their competitors are exempted. The classification is completely unnecessary to serve the purported purpose of the rule, namely to maintain and advance the efficiency and availability of telecommunications service at fair, just and reasonable rates. Some form of bidding system or a lottery to distribute the burden of extending service to unprofitable customers fairly among all providers who can use the same facilities, would serve the purported purpose equally well as the discriminatory imposition of that burden on incumbents alone.

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[4] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, Nov. 5, 1999 at ¶205.

3. The proposed rule fails to comply with requirements of the Administrative Procedure Act that provide that the Commission must maintain copies of the Urban Growth Area designations that are incorporated by reference and state where, within the agency, they are available. The Commission must also continually modify the rule as UGAs change from time to time, if it uses UGAs as incorporated rules.

RCW 34.05.365 authorizes the Commission to incorporate by reference and without publishing in full, all or any part of a code, standard, rule or regulation that has been adopted by a political subdivision of this state if incorporation of the full text would be unduly cumbersome, expensive, or otherwise inexpedient. Nothing in the CR-102 or the proposed rule, addresses the issue of whether incorporating in full in the text of the rule, the urban growth areas and municipal boundaries that are made the basis of the application of line extension charges, would be unduly cumbersome expensive or otherwise inexpedient. There is thus no basis on which such matters could be properly incorporated by reference, as a first issue.

Aside from this, the rule completely fails the requirement of RCW 34.05.365 that such regulations of other rulemaking entities that are incorporated by reference in the Commission's rules, be "fully identified." The proposed rule also fails to state where in the agency, copies of the incorporated matter are available. This is specifically required by RCW 34.05.365.

The proposed rule clearly uses these urban growth areas and municipal boundaries as a rule. ~~U S WEST~~ ILECs, according to the proposed rule, will be allowed to charge line extension charges to the requesting customers (subject to the other provisions in the proposed rule) for locations that are outside urban growth areas and municipal boundaries, but not for those that are inside. Thus these items "establish...[a]

qualification or requirement relating to the enjoyment of benefits or privileges conferred by law..” within the meaning of RCW 34.05.010(15). As such, these rules of political subdivisions may be incorporated by reference, but only if the requirements of RCW 34.05.365 are met. The proposed rule does not meet the requirements, and the incorporation by reference of these qualifications to the enjoyment of the benefit of charging a tariffed rate for line extensions, would be invalid.

The incorporation by reference in the rule of such things as growth management act urban growth areas and municipal boundaries would also be unwise, even if the Commission corrected the above problem and complied with RCW 34.05.365. The Commission would be faced with the task of monitoring the cities and continually updating the rule by reissuing notice and providing opportunity for comment, each time one of the political subdivisions changed its urban growth area (UGA) or municipal boundaries. The Commission cannot lawfully incorporate by reference in a rule, a future legislative act of a rulemaking entity, such as an urban growth area designation or a municipal boundary change. Any attempt to do so would unlawfully delegate the Commission’s rulemaking authority to the municipality. *State ex rel. Kirschner v. Urquhart*, 50 Wn. 2d 131, 310 P. 2d 261 (1957)

Without constant updating, the UGAs and municipal boundaries would soon be outdated and would fail to meet the purpose stated in the CR-102 of encouraging growth inside the UGA because of course the UGA or municipal boundaries in the rule would not match the true UGA or municipal boundaries. The CR-102 also fails to recognize that the proposed rule vastly reduces the charge faced by prospective customers of line

extensions outside of UGAs or municipal boundaries compared to what they face today, and it therefore greatly encourages uncontrolled growth outside of these areas. This is directly contrary to the purpose of the Growth Management Act.

It would be far wiser for the Commission to recognize that it already has on hand, in the tariffs, the geographical boundaries that define the application of line extension charges.

4. The proposed rule would, if applied to prevent ~~U S WEST~~ ILECs from charging ~~its~~ filed tariff rates for line extensions, violate RCW 80.36.140.

In *Washington Independent Tel. Assoc. et al. v. W.U.T.C.*, Thurston County No. 98-2-02413, Opinion, April 21, 2000, the court ruled that WAC 480-120-540 was not a rule that made rates, but the court reserved determining whether a rule that actually made a rate would exceed the Commission's ratemaking authority. ~~U S WEST respectfully disagrees with the court's conclusion. But the court reserved decision on the issue that the proposed rule in this proceeding raises.~~

The proposed rule not only "unmakes" existing filed and effective tariff rates, it "makes" new maximum rates that can in some cases be calculated to the dollar. U S WEST's existing basic exchange tariff WN U-31, provides on Sheet 47 that the residence flat rated service shall be charged at $12.50 per month. Under the proposed rule, U S WEST would be limited to a charge to the end user for a line extension outside of a UGA or municipal boundary of $250 initially and $12.50 per month for twenty months, for a total of $500. U S WEST's existing line extension tariff prescribes a charge of $0.83 per foot for each foot after one tenth of a mile outside the base rate area. For any line

extension of more than 603 feet beyond the "free" one tenth of a mile as long as the customer chose residential flat rated service, the rule would prescribe a lower charge than that in U S WEST's filed and approved tariff. The CR-102 states that the purpose of the rule is necessary to provide services that are priced at rates that are fair, just, reasonable and sufficient. The CR-102 also states that the rule is authorized by RCW 80.36.080, which provides that all rates shall be fair, just, reasonable and sufficient. This is a ratemaking statute. By issuing a rule that effectively prescribes a rate in dollar terms, and relying on a ratemaking statute for authority, the Commission has acted to make rates by rule.

The rule also "unmakes" U S WEST's existing rates. U S WEST is placed on the horns of a dilemma by this rule. RCW 80.36.130 commands U S WEST to charge only tariffed rates. RCW 80.04.380 subjects U S WEST to monetary penalties for failing to obey Commission rules. The court failed to consider this issue in its decision in *Washington Independent Telephone, supra.* By "unmaking" existing rates through a rule, if the rule were applied to prevent the charging of U S WEST's filed and effective tariff rates, the rule would violate *North Coast Power Co. v. Kuykendall*, 117 Wash. 563, 201 P. 780 (1921), in which the court held that once a rate has gone into effect, the burden is on the party challenging the rate to demonstrate its unreasonableness with evidence. In this case, the Commission is effectively the party challenging a filed rate by adopting a rule that purports to invalidate that rate. The Commission cannot, according to the above Supreme Court precedent, avoid having to present evidence in order to meet its burden of proof.

Under the proposed rule, U S WEST would be required, according to the Thurston County court, to initiate a proceeding to change its rates to conform to the rule. But this would place the burden of proof on U S WEST, not on the Commission as the Supreme Court said was required when a tariff was in effect. Also, the adjudicative proceeding could not result in a rate higher than forty times the basic service rate, no matter what evidence was presented. There would in no way be a true determination of "just and reasonable rates" based on evidence, in such a proceeding.

5. The proposed rule would create discriminatory rates in violation of RCW 80.36.180.

RCW 80.36.180 forbids the collection by a telecommunications company of a greater or less compensation for any service except as authorized in Title 80, than it collects from another person for doing a like and contemporaneous service under the same or substantially the same circumstances and conditions. The proposed rule would limit line extension charges to forty times the basic monthly rate. U S WEST's basic flat residence rate as discussed above is $12.50 per month. The maximum charge to an end user for a line extension if the customer chose flat rated residential service would be $500. U S WEST's tariffs provide for budget measured service in WN U-31, Sheets 43-44 for a rate of $8.95 per month plus usage at $.025 per minute for initial minutes and $.01 per minute for additional minutes. Usage can be purchased optionally as a block of three hours for $1.75 per month, with additional minutes at two cents apiece. Assuming a customer chose the budget measured alternative, one question is how would the line extension charge be computed? Would it be forty times the $8.95? That would be $358.00 Thus

for two identical line extensions, at the same location, two customers would pay differently based only on the type of basic local service they chose.

That method of charging for line extension would discriminate against the flat rated customer, in whose monthly charge is an element for average assumed usage. The measured customer's line extension charge would not contain any amount attributable to the usage part of basic local exchange service under this scenario. How then would the usage element be handled? Since the rule provides that the initial twentyfold payment must be made before the extension is made, there would be no way to measure the customer's actual usage, and hence no way to calculate the required initial payment.

The proposed rule would invite gamesmanship in which customers would initially choose the lower rated service in order to obtain a cheaper line extension, and then having paid the lower line extension charge would be free to obtain the premium flat rated service. This is clearly contrary to the public interest.

6. There is no evidence whatsoever to justify the maximum limit on line extension rates that the proposed rule imposes.

Nothing in the rule indicates the source of the limit to a total of forty times the monthly charge for whatever basic service a customer chooses. In all cases except extensions of a total distance that is less than two tenths of a mile, the charge allowed under the rule would be substantially less than that which is contained in U S WEST's filed and effective tariff, which is presumed to be just and reasonable by law. There is also no evidence whatsoever to justify the restriction against full recovery, through a combination of the line extension charge to the customer and the Section 3 terminating access tariff, of

the entire cost of the extension~~. In addition to being confiscatory as discussed above, t~~ There is no evidence that such a restriction is reasonable or serves any proper state purpose. It appears that the only purpose is to transfer costs through ~~implicit~~ explicit subsidies from one group of ratepayers to another. This type of ~~implicit~~ cross subsidization is hopelessly out of date, as well as being unlawful under both state and federal statutes.

7. The proposed rule is completely inconsistent with tariff based rates as prescribed by law.

The proposed rule provides that the Commission may "waive" charges to interexchange carriers under certain circumstances. U S WEST submits that subsection 2(C) should be deleted in its entirety. The error in this subsection as in the previous provisions is that under the law in this state, rates charged by a tariff-regulated utility such as U S WEST must be contained in filed and effective tariffs or contracts pursuant to RCW 80.36.150. The Commission has no power to "waive" a filed and effective tariff or contract rate. If the Commission were to file a complaint under RCW 80.04.110 against U S WEST's currently effective line extension tariff and carry its burden of proof, then it would have a new tariff for U S WEST that prescribed specific end user charges for line extensions (which hypothetically might be lower than U S WEST's existing tariffed rates) and it might have another "service extension element" tariff in terminating access charges to carriers if U S WEST chose to file such a tariff under the rule's section 3. The Commission could not, however, lawfully "waive" the latter and somehow ignore the former in order to charge end users the "direct cost" of the extension in a particular case.

~~By calling its ratemaking a rule, the Commission purports to assert power to tax and spend for universal service, deciding who shall pay and who shall benefit. The Legislature has clearly forbidden the WUTC this power in RCW 80.36.600(1). As discussed above, U S WEST submits that the Commission cannot set aside U S WEST's filed line extension tariff in a rulemaking. If the Commission were to file a complaint against that tariff and carry its burden of proof, it would then have a new tariff for U S WEST that prescribed specific end user charges for line extension, (which might be lower than U S WEST's existing tariffed rates) and it might have another "unserved area additive" tariff chargeable to carriers if U S WEST chose to file such a tariff under proposed section 3 to recover the balance of the cost of line extension. The Commission could not, however, lawfully "waive" the latter and somehow ignore the former in order to charge the end users the "direct cost" of the extension in a particular case.~~

Conclusion

Based on the foregoing comments, U S WEST urges the Commission to suspend its efforts to amend the line extension. ~~rule to address the perception that prospective customers in high cost areas are unable to obtain line extensions at affordable rates, in the face of Legislative inaction on the Commission's proposed universal service program.~~ U S WEST submits that the current proposal is unwieldy, incapable of lawful execution and presents ~~illusory promises~~ an increased burden on all ratepayers ~~of~~ to recover~~y of~~ the cost of line extensions~~ to utilities~~. A far better approach is for the Commission to work with the affected utilities to resolve cases where service is needed and ensure that companies providing extensions will recover their costs.

Respectfully submitted,

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