BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. AND TCG SEATTLE, With QWEST CORPORATION Pursuant to 47 U.S.C. § 252(b)	)	DOCKET NO. UT-033035 AT&T'S PETITION FOR REVIEW

Pursuant to WAC 480-09-780, AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively "AT&T") hereby submit their Petition for Review of the Arbitrator's Report, Order No. 4, issued in the above captioned proceeding. As grounds therefore, AT&T states as follows:

INTRODUCTION

AT&T appreciates the Arbitrator's efforts to resolve the disputed issues placed before him and it further acknowledges that many of these issues present challenging questions. Nevertheless, AT&T needs, for the purpose of implementing this agreement, clearer or alternative resolution to the few disputed issues that follow. Thus, AT&T respectfully requests that the Commission review the Arbitrator's decisions in light of the discussion that follows and alter the Arbitrator's determination in accordance with AT&T's requests contained herein.

DISCUSSION OF ISSUES FOR REVIEW

ISSUE 3 – Definition of Tandem Office Switch and AT&T's Switches.

Introduced through the definition of "'Tandem Office Switch,[1]' the issue in dispute here is essentially: when may AT&T designate its switches as tandem office-type switches for which Qwest should pay tandem rates?"[2] While the Arbitrator adopted Qwest's definition, he stated "the parties agree that geographic comparability is the only real question when determining whether the tandem rate should be paid."[3] He also made it clear that: (a) consistent with the FCC's directives, a "CLEC need not prove that it is actually serving customers,"[4] and (b) a CLEC need not employ Qwest's test for determining when AT&T's switch serves a comparable geographic area. In describing Qwest's test, which it did not advocate he adopt, he mistakenly concluded, "Qwest proposes to measure infrastructure that is capable of serving customers (owned or contracted for by AT&T), not whether AT&T is actually serving customers."[5] In fact, Qwest's test demands that AT&T prove it has customer loops in 80 % of the wire centers subtending Qwest's tandems; that is nothing more than proving AT&T is actually serving customers.[6] It is not an objective measure of "infrastructure" capable of serving a geographic area equal to Qwest's tandem; rather, it is Qwest reverting to the "actually serving customers" requirement it lost in the 271 proceeding.

In any event, the Arbitrator concluded "if the parties cannot mutually agree to a measure or a test for geographic comparability after their interconnection agreement is in

[1] Qwest's definition states that the switch "serves a comparable area" while AT&T's definition states that the switch "is capable of serving a comparable area."
[2] AT&T's Closing Brief at 1.
[3] Order No. 4, Arbitrator's Report at 10, ¶ 20.
[4] *Id*. at 11, ¶ 22.
[5] *Id. at* 10, ¶19.
[6] Exhibit 36, Talbott Rebuttal Testimony at p. 9.

place, they will have to return to the Commission to have the question resolved for prospective application."[7] As Qwest well knows, the parties have been arguing about this question from the beginning of the negotiation[8] and AT&T specifically placed the issue before the Arbitrator with evidence demonstrating the reach of its switches,[9] but the Arbitrator chose not to resolve the issue. Instead he suggests that the parties return yet again to resolve this issue in another proceeding.[10] AT&T requests that the Commission resolve the issue and determine whether Qwest should compensate AT&T at the tandem rate because its switches are capable of serving a comparable geographic area to Qwest's tandem switches.

> In fact, the FCC's rules state that when the CLEC's switches provide comparable geographical coverage to the ILEC's tandem switches, the ILEC is to compensate the CLEC at the tandem rate for the termination of traffic through those CLEC switches. The specific regulation, set forth in, 47 C.F.R. § 51.711 (a)(3), states:
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> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

During this proceeding and others, Qwest has conceded that AT&T's switches are capable of serving the same geographic area as Qwest's tandem switches,[11] and interestingly, Qwest in its Triennial Review testimony now cites AT&T's arbitration

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[7] *Id. at* 12, ¶ 23.

[8] **Exhibit A**, attached hereto, shows the history of this issue and demonstrates that AT&T has properly placed the issue of whether its switches qualify for tandem treatment before this Commission for resolution. Qwest's has cited no law that limits the issues arbitrating parties place before the state commissions to "conceptual" contract language only; rather the Act states that commission should resolve only those issues placed before them.

[9] In fact in its recently filed Triennial Review testimony, Qwest relies upon such evidence to conclude that it should no longer have to provide unbundled switching.

[10] *Id.*at 12, ¶23.

[11] WA Exhibit 80, CO Transcript at 167, ln. 9 – ln. 13.

testimony in support of its claim to withdraw unbundled switching and concedes that these switches can serve the area comparable to the tandems.[12]

Switch capability alone, however, is not the only evidence AT&T relied upon to demonstrate the geographic comparability. Mr. Talbott, AT&T's witness, explained the following, in his direct and rebuttal testimony:

> AT&T offers service in Washington utilizing two separate networks. One network is operated on behalf of AT&T Communications of the Mountain States, Inc. ("AT&T Communications"). A second network is operated on behalf of TCG Washington, Inc. ("TCG"). These networks provide distinct services and products to distinct classes of customers and are not integrated. For this reason, AT&T proposes that each network may be judged independently for purposes of determining whether such network meets the standard under 47 C.F.R. § 51.711 (a)(3).
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> AT&T Communications has deployed 4ESS switches, which function primarily as long distance switches, and 5ESS switches, which act as adjuncts to the 4ESS switches.
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> TCG provides local exchange services using Class 5 switches.[13]
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> * * *
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> To assist the Commission in resolving this issue, we have prepared a series of maps that are identified as AT&T Exhibits DLT-2 through DLT-5.[14] The first map, AT&T Exhibit DLT-2, provides the number of tandem switches Qwest currently operates and the areas these switches serve in Washington on a LATA-by-LATA basis. The second map, AT&T Exhibit DLT-3, shows the number of switches AT&T Communications currently operates and the areas these switches serve in Washington on a LATA-by-LATA basis. The third map, AT&T Exhibit DLT-4, shows the number of switches TCG currently operates and the areas these switches serve in Washington on a LATA-by-LATA basis. It should be noted that two of

[12] Docket No. UT-033044, Direct Testimony of Joseph H. Weber on behalf of Qwest, at 21, lns. 4-20.
[13] Exhibit 31**,** Talbott Direct Testimony at p. 10.
[14] Statewide and LATA-specific maps were created by using data contained in the Local Exchange Routing Guide ("LERG"). The LERG, produced by Telcordia Technologies, contains routing data that supports the current local exchange network configuration within the North American Numbering Plan (NANP) as well as identifying reported planned changes in the network. The LERG data in conjunction with MapInfo V-4.1.1.2, a commercial mapping software package, was used to prepare the attached statewide and LATA-specific maps.

TCG's switches, DNVRCOMDDS1 and AURRCOBUDS0, serve both LATA 656 and LATA 658. Finally, AT&T Exhibit DLT-5 shows the same three maps on a single page, for easier comparison.

When all three maps are viewed together, it becomes clear that AT&T Communications and TCG switches cover a comparable geographic area as that covered by the corresponding Qwest tandem switches.

In addition to the maps, AT&T Exhibit DLT-8 provides a detailed comparison of the number of Qwest's Washington rate centers that are served by the Qwest tandem switches and the AT&T Communications and TCG switches. Whether one compares the geographic rate center coverage on a LATA-by-LATA or a statewide basis, both the AT&T Communications and TCG switches serve a comparable or greater number of rate centers as the Qwest tandem switches.

This evidence demonstrates that the AT&T Communications and TCG networks each meet the requirement of the FCC tandem rate rule, 47 C.F.R. § 51-711(a)(3). The Commission should affirm that AT&T Communications and TCG are entitled to receive the tandem rate for terminating Qwest's traffic.[15]

* * *

To help me explain how AT&T's switches are capable of serving a comparable geographic area to Qwest's tandems, I created AT&T Exhibit DLT-9, which depicts Qwest's network and AT&T Exhibit DLT-10, which depicts AT&T's network.

As shown on Exhibit DLT-9, Qwest's network in Washington consists of a two level hierarchical network with many locally deployed end office switches, each of which provides dial tone to customers located within a compact geographical area, or wire center, served by the switch. These switches are in turn interconnected via Tandem switches. The end office switches may also be directly connected to each other where traffic volumes justify such direct interconnections.

As shown on Exhibit DLT-10, AT&T has deployed a flat network structure with transport replacing additional switches, including the tandem switches. AT&T can and does use one switch to serve an area equal to that served by many Qwest end-office switches and their associated tandem switch or switches. AT&T has a variety of options that collectively provide AT&T the ability to serve any qualified customer. For example, AT&T has deployed 38 GHz radio and fiber optic rings to serve customers in Washington. AT&T can and does serve its

[15] Exhibit 31**,** Talbott Direct Testimony at p. 11. Attached hereto as **Exhibit B**, are the maps cited in the testimony references, above.

> customers by leasing special access facilities from Qwest and or third parties. And AT&T can obtain access to UNE loops through collocations in Qwest's offices. AT&T need not deploy additional switches or replicate Qwest's network to serve customers.
>
> In addition to its switching and network facilities, AT&T has obtained local routing numbers for its switches and has established interconnection trunking with Qwest in each LATA within which AT&T offers service.
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> In summary, AT&T has deployed switching *and network facilities, obtained local routing numbers for its switches, established interconnection trunking with Qwest and has available or is able to obtain loop facilities to reach customers*. With these capabilities, AT&T is able to port in and serve telephone numbers from geographic areas comparable to Qwest's tandems, which is the basis for the coverage areas shown on AT&T Exhibits DLT-2 through DLT-5 and the Comparison of Washington Rate Center Quantities Served by Switch, AT&T Exhibit DLT-8. Thus, as shown on AT&T exhibits DLT-2 through DLT-5 and exhibit DLT-8, AT&T's switches are capable of serving a geographical area comparable to the areas served by Qwest's tandems.[16]

Finally and contrary to the suggestion that an infrastructure or some 80% loop test is required, the Ninth Circuit in *U S WEST v. WUTC*[17] re-affirmed the applicable test which was whether the competitor's switch could serve "a comparable geographic area as that served by U S West's tandem switches … ."[18] Thus, the appropriate test is clear: are the CLEC's switches capable of serving a comparable geographic area as those of the ILEC's tandem switches? If the answer is yes, the CLEC may charge the tandem transport and termination rates to the ILEC. That is, Qwest should pay, under reciprocal compensation, the costs incurred by AT&T at the tandem rates. Consequently, AT&T requests that the Commission find AT&T's switches serve a comparable geographic area and order Qwest to pay the tandem rate.

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[16] Exhibit 36, Talbott Rebuttal Testimony at 13 (emphasis added).
[17] *U S WEST Communications, Inc. v. Washington Utilities and Transportation Commission*, 255 F.3d 990 (9th Cir. 2001).
[18] *Id*.at 998.

ISSUE 5 – Definition of Exchange Service and Imposing Access on Competing Foreign Exchange (FX) like Services.

There were basically two issues associated with Issue No. 5. They were: (a) should the parties determine the nature and compensation of a call based upon the NPA-NXX of the originating and terminating numbers or the physical location of the end users (*i.e.*, which definition of "exchange service" should the parties adopt); and (b) should Qwest be allowed to preclude competing foreign exchange ("FX") services through its desire to apply access charges to AT&T's virtual NXX ("VNXX" or "FX-like") service and no access charges to its competing retail FX service (*i.e.*, may Qwest implement its definition if adopted, in a discriminatory fashion)?

In his Report the Arbitrator determined that AT&T's definition was—although consistent with industry practice—too broad and consequently raised "too many imponderables" to adopt.[19] He reluctantly adopted Qwest's definition, but noted that Qwest should not be allowed to implement its definition in a manner that would impose access charges upon AT&T's FX-like service.[20] In fact, he determined that FX and FX-like traffic exchange between the parties should be compensated on a bill and keep basis.[21]

Although adopting Qwest's proposed definition, the Arbitrator encouraged the parties to continue negotiation on this issue in an effort to resolve it consistent with the reasoning offered in the Report.[22] In an effort to resolve the issue and make Qwest's

[19] Order No. 4, Arbitrator's Report at 15-16, ¶¶ 30-34.
[20] *Id.* at 18, ¶ 38.
[21] *Id.* at 17, ¶ 35.
[22] In paragraph 38 of the Report, the Arbitrator encourages the parties to negotiate agreeable language consistent with his reasoning, but he states that if the parties cannot agree the Qwest definition should be adopted. Unfortunately, leaving Qwest's definition as a default provides Qwest with little to no incentive to negotiate any changes, which has been born out in their rejection today of AT&T's proposal.

definition address the Arbitrator's concerns, AT&T offers **Exhibit C**, its three-part proposal as sent to Qwest. Briefly, AT&T's proposal attempts to address the Arbitrator's concerns and implement his proposal with the exception of employing a bill and keep compensation scheme because of the difficulty in segregating the FX and FX-like traffic from other traffic. Thus, the first part of AT&T's proposal is to modify only slightly Qwest's definition of Exchange Service to ensure each party is equally entitled to offer FX and FX-like service such that there exists no opportunity for Qwest to discriminate in favor of its service over that of its competitors.[23] AT&T proposes the following underlined addition, and asks that the Commission adopt this proposal as resolving the Arbitrator's concerns over Qwest's potential for discriminatory treatment of AT&T:

> "Exchange Service" or "Extended Area Service (EAS)/Local Traffic" means traffic that is originated and terminated within the same Local Calling Area as determined for Qwest by the Commission. <u>This definition does not prevent either party from providing FX or FX-like Service and shall not affect the compensation between CLEC and Qwest for such traffic.</u>

Merely adopting the Qwest definition and nothing more leaves open Qwest's ability to employ the definition in a way that is inconsistent with the Arbitrator's Report.

The second part of AT&T's proposal offers a definition of FX and FX-like service. AT&T believes this definition is consistent with the Arbitrator's analysis of the issue. Adding this definition ensures that the use of this term in the definition of Exchange Service is clearly understood such that it limits CLECs opting into this agreement to the FX and FX-like service at issue. The proposed definition is as follows:

[23] *Id.* at 16, ¶ 33 (noting that Qwest intends to apply its definition in a restrictive manner that would eliminate for AT&T, the "very exceptions to the definition that Qwest allows itself when offering services to customers (*e.g.*, FX service and provisioning for ISP services …).")

> "FX and FX-like Service" means service provided to an End User Customer under which such customer is assigned a number associated with a rate center in which the customer is not physically located. Traffic exchanged in the provision of such service is FX or FX-like Traffic.

This language clearly indicates the type of service for which the exception to the Exchange Service definition applies and thereby limits the exception to address the Arbitrator's concern.

The third part of AT&T's proposal addresses how FX and FX-like traffic should be compensated. It is written to ensure that each party's FX and FX-like traffic is given equal treatment. This new Section 7.3.4.3.1separates FX and FX-like voice traffic from FX and FX-like ISP-bound traffic. With FX and FX-like voice traffic, AT&T proposes that such traffic be compensated in the same manner as other local voice traffic – reciprocal compensation. The Arbitrator recommended bill and keep for this traffic, but because this traffic is difficult to identify, AT&T believes the same treatment as other local voice traffic is appropriate and more efficient. The FX and FX-like ISP-bound traffic will be treated the same as all other ISP-bound traffic pursuant to Section 7.3.6 of the interconnection agreement. Section 7.3.6 calls for the use of the 3:1 presumption established by the FCC in the ISP Remand Order to identify ISP-bound traffic. All such traffic would be treated the same way under Section 7.3.6 – bill and keep. The last sentence of proposed Section 7.3.4.3.1 is included to capture the notion of functional equivalency discussed by the Arbitrator in paragraphs 35 and 36 of the Report. AT&T believes this sentence should satisfy the Arbitrator's concern about the breadth of AT&T's original proposal.

> 7.3.4.3.1 When either Party provides FX or FX-like Service, the Parties shall compensate one another for the exchange of such traffic as follows: (i) FX and FX-like voice traffic shall be compensated at the same rate as non-FX and non-

FX-like voice traffic (e.g., if 1+ is not dialed to complete the call, local rates apply), and (ii) ISP-bound-FX and FX-like traffic shall be compensated as ISP-bound traffic pursuant to Section 7.3.6. This compensation arrangement applies to all FX and FX-like Traffic exchanged between the parties where the Parties offer FX or FX-like Services that are functionally equivalent from an End User Customer's perspective to Qwest's FX retail service offering(s) as of January 1, 2004 (FX and FX-like Services need not be provisioned in the same manner by each company in order to be functionally equivalent).

For all of the reasons stated above, AT&T requests that the Commission adopt the new language proposed by AT&T for Issue 5. If the Commission does not accept the definition proposed by AT&T herein, AT&T encourages the Commission not to use Qwest's definition as the default because it does not capture the Arbitrator's reasoning and is not written in a way that will prohibit the discrimination that the ALJ described as anticompetitive.[24] Rather, AT&T requests that the Commission direct the parties to negotiate to incorporate the Arbitrator's reasoning and if they cannot agree on language, to present their disagreements to the Commission for resolution.

ISSUE 17 – Inclusion of Internet Traffic on Two-way Dedicated Interconnection Facilities & Its Consistent Application for All Interconnection Facilities.

Generally, within the context of contract language,[25] the issue here was: whether Qwest may exclude Internet related traffic from the cost-sharing obligation for two-way dedicated transport facilities.[26] AT&T and Qwest generally agreed to share the cost of two-way dedicated interconnection facilities when they exchange traffic using such facilities, but Qwest wanted to exclude Internet related traffic from the computation of such cost sharing for these two-way facilities. The computation of costs for two-way

[24] Order No. 4, Arbitrator's Report at 16, ¶ 33.
[25] Proposed Agreement Sections 7.3.1.1.3.1 & 7.3.2.2.1.
[26] AT&T's proposed language in Section 7.3.1.1.3.1 makes express the law related to two-way dedicated transmission facilities used for interconnection by applying the law regarding sharing the cost of such facilities to all facilities that function as interconnection facilities for the exchange of traffic whether they are called private line facilities or entrance facilities.

traffic traversing shared facilities is typically done through what's known as "relative use factors." Such factors are a method to "designate the percentage of trunks in the trunk group that carry each Party's traffic."[27] In addition, AT&T proposed that where private line transport facilities ("PLTS") are used, in part, as two-way interconnection facilities, the law also requires that such cost be apportioned between the parties' respective use of such facilities. AT&T did not propose to alter the tariffed cost of PLTS, but rather suggested that each party pay their respective share of those tariffed costs for their respective use of the facility. In contrast, Qwest proposed to pay nothing to AT&T when Qwest's traffic uses some of the capacity in the PLTS, leaving the cost of the entire facility on AT&T even where Qwest employs the facility to transport its own originating traffic.

As found in previous Washington arbitrations, the Arbitrator concluded that "[i]n general, ISP-bound traffic should be included in relative use calculations."[28] Nonetheless, he went on to recite Qwest's position as follows:

> Qwest argues that although the Commission in the 271 proceedings held that Qwest must adjust intrastate PLTS circuits to TELRIC rates to the extent those spare circuits are used to carry interconnection traffic, the FCC's recent *Triennial Review Order* provides that CLECs are not entitled to adjustment of the rates for special access circuits to account for local usage. In addition, Qwest argues that to the extent PLTS is purchased out of a federal tariff, the Commission lacks jurisdiction to order proportional pricing to these facilities because this would effectively alter FCC-tariffed rates, terms and conditions.[29]

Apparently based upon Qwest's argument recited above, the Arbitrator concluded that "AT&T's proposed language that would apply relative use factors to 'other comparable

[27] Exhibit 31, Talbott Direct Testimony at 13 – 14.
[28] Order No. 4, Arbitrator's Report at 20, ¶ 42.
[29] *Id.* at 20, ¶ 43.

facility[ies] providing equivalent functionality' potentially results in a sort of 'blended rate' for PLTS circuits rejected by the FCC in its Triennial Review Order."[30]

Perhaps the Arbitrator misunderstood AT&T's proposal because, under AT&T's proposal, no tariffed rates, terms or conditions are altered. Rather, AT&T would pay the tariffed rate for PLTS and, where Qwest employed part of that spare capacity to carry its traffic to AT&T's network, Qwest would reimburse AT&T—at the exact same tariffed rates—for Qwest's proportionate share of its use of the PLTS trunk. This is not contrary to the Triennial Review Order. The Order states, in pertinent part:

> We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (e.g., switched and special access services offered pursuant to tariff), and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request.
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> * * *
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> As explained below, however we do not require incumbent LECs to "ratchet" individual facilities. Thus, we do not require incumbent LECs to implement any changes to their billing or other systems necessary to bill a single circuit at multiple rates (e.g., a DS3 circuit at rates based on special access services and UNEs) in order to charge competitive LECs a single, blended rate.
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> * * *
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> We decline, however, to require "ratcheting," which is a pricing mechanism that involves billing a single circuit at multiple rates to develop a single, blended rate.[31]

AT&T is not proposing "ratcheting" the rates for the PLTS such that a blended rate of TELRIC and special access exists for one PLTS; AT&T proposes only that Qwest comply with the FCC's rules regarding commingling and pay its proportionate share of

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[30] *Id*. at 21, ¶ 44.

[31] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 (Rel. Aug. 21, 02) at ¶¶ 579 – 582 (citations omitted)[hereinafter "***TRO***"].

its proportionate use of the trunk at whatever the tariffed rate requires. Qwest, on the other hand, wants a free ride for its traffic, and the Arbitrator gave away use of AT&T's leased facilities for free by finding in Qwest's favor. Not only is this wrongfully taking AT&T's property, but it is also an inequitable solution creating the unjust enrichment[32] of Qwest. Moreover, it is absolutely contrary to the FCC's rules that require a carrier to bear the cost of transporting its originating traffic.[33] Therefore, AT&T requests that the Commission alter the Arbitrator's finding to require Qwest to pay its proportionate share of its tariffed PLTS rates when it uses such facility to exchange traffic with AT&T.

CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Commission review the Arbitrator's Report and adopt AT&T's proposals to alter that decision as offered herein.

[32] "A respondent is unjustly enriched when he or she profits at the expense of another, contrary to equity." *Ginsberg v. Gulledge*, No. 51994-8-I, slip op., 2003 WL 23020217 at * 2 (Wash. Ct. App. Dec. 29, 2003). Unjust enrichment is established here because AT&T confers a benefit upon Qwest, which it realizes and retains (*e.g.*, the use of AT&T's PLTS facilities to transport Qwest's originating traffic), but Qwest does not pay for its value. *Bailie Communications, Ltd. v. Trend Business Sys., Inc.*, 810 P.2d 12, 17-18, *review denied*, 820 P.2d 511 (Wash. 1991).

[33] 47 C.F.R. §§ 51.703(b) & 51.709.

Respectfully submitted this 9th day of January, 2004.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. AND TCG SEATTLE

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