BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELCOM GROUP, INC., et al, Respondents.	UT-033011 FAIRPOINT CARRIER SERVICES, INC.'S MOTION FOR SUMMARY DISPOSITION

COMES NOW Respondent, FairPoint Carrier Services, Inc. f/k/a FairPoint Communications Solutions Corp. ("FairPoint"), by and through its attorneys of record, Richard A. Finnigan and B. Seth Bailey, attorneys at law, and files this Reply in Support of FairPoint's Motion for Summary Disposition with the Washington Utilities and Transportation Commission (the "Commission").

INTRODUCTION

The Public Counsel Section of the Office of the Attorney General of Washington ("Public Counsel"), Commission Staff ("Staff"), Qwest Corporation ("Qwest") and Time Warner Telecom of Washington LLC ("Time Warner Telecom") each filed a response in opposition to one or more of

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

1 the motions to dismiss or motions for summary determination filed by the parties on November 7,
2 2003. Additionally, AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle
3 (collectively "AT&T"), Advanced TelCom, Inc., dba Advanced TelCom Group ("Advanced
4 TelCom") and Covad Communications Company ("Covad") each filed an answer in opposition to
5 Staff's Motion for Partial Summary Determination. Of these briefs, FairPoint concurs in the
6 answers of AT&T, Advanced TelCom and Covad. Additionally, the response of Time Warner
7 Telecom has no bearing on FairPoint. As a result, this Reply is meant to address the arguments
8 posed by the responses of Staff, Public Counsel and Qwest.
9
10 **CAUSES OF ACTION**

11 In Staff's Amended Complaint, it asserted that causes of action 1, 2 and 4 were applicable
12 against FairPoint. See, generally, Amended Complaint. In its Response, Staff admitted that cause
13 of action 4, citing violations of RCW 80.36.150, is not well-taken in this matter. See, Staff's
14 Response, at 13, ¶ 25.[1]

15 Additionally, Staff admits that, with respect to causes of action 1 and 2, involving alleged
16 violations of §§ 252(a) and (e): "A violation of one provision is a violation of the other provision[.]"
17 See, Staff's Response, at 13, ¶ 25. Staff erroneously claims that the Commission should keep both
18 causes of action, even though it admits the duplicative nature of causes of action 1 and 2.[2] Because
19 Section 252(a) does not contain any filing requirement, but merely makes reference to Section
20 252(e), cause of action 1, concerning Section 252(a), should be dismissed. Thus, only cause of
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22 [1] Despite this admission, Public Counsel still argued that the cause of action for violation of RCW 80.36.150 was valid.
23 See, Public Counsel's Response, at 5. Clearly, Public Counsel's argument concerning the fourth cause of action is in error.
24 [2] Public Counsel also admits that these two causes of action are duplicative and states: "It would be preferable to consider these two claims in the Complaint to be reflections of the same required action on the part of the carrier, . . . The Commission at a minimum should preserve one or the other claim." See, Public Counsel's Response, at 6.
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Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

action 2, alleging a violation of 47 U.S.C. § 252(e), could legally be deemed a valid cause of action. However, as demonstrated below, FairPoint has not violated Section 252(e), and the filing requirements are not applicable to FairPoint in this matter for numerous reasons.

ARGUMENT

1. The FairPoint/Qwest Settlement Agreement is Not the Type of Agreement that Needs to be Filed with the Commission:

Of Qwest, Public Counsel and Staff, the only one that addresses the actual facts of the FairPoint/Qwest Settlement Agreement[3] is Staff. Even then, Staff only devotes a single paragraph to the topic and only addresses the facts in a cursory manner. Aside from all of the legal arguments in FairPoint's Motion for Summary Disposition, and those provided below, the facts demonstrate that the Settlement Agreement is not the type of agreement that the Commission, the Federal Communications Commission ("FCC") or Congress intended to be filed with the state commissions. As a result, based solely on the undisputed facts recited in FairPoint's Motion for Summary Disposition and the accompanying Declaration of John La Penta, FairPoint is entitled to prevail on its Motion for Summary Disposition.

a. The Settlement Agreement is a "Backward Looking" Agreement that Need Not Be Filed with the Commission:

In the FCC Filing Requirements Order,[4] the FCC made specific mention of billing dispute settlements as the type of settlement that did not need to be filed with a state commission. The

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[3] A copy of the Settlement Agreement was attached to FairPoint's Motion for Summary Disposition as Exhibit 1. That Exhibit 1 will be referred to herein as the "Settlement Agreement."

[4] In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd. 19,337, ¶ 8 (Oct. 4, 2002) (the "FCC Filing Requirements Order").

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

Settlement Agreement in this case is a resolution of a billing dispute. Public Counsel urges that any "ongoing" provision, no matter how minor, should take a settlement agreement out of the category of one that need not be filed and place it in the category of the types of agreements that should be filed under the FCC's Filing Requirements Order.[5] See, Public Counsel's Response, at 2.

However, Public Counsel admits that even settlement agreements that contain some "ongoing" requirements are not subject to the filing requirements if they do not involve "provisions subject to the obligations of §252(a)(1) and (e)." See, Public Counsel's Response, at 2. This is not an accurate reading of the FCC Filing Requirements Order. However, even if it were accurate, as demonstrated below, there is nothing about the Settlement Agreement, including the escalation clause in paragraph 7, that requires that the Settlement Agreement be filed. As a result, the Settlement Agreement between FairPoint and Qwest is the type of "backward-looking" agreement that does not need to be filed with the Commission.

b. The Escalation Clause Does Not Involve Any "Interconnection" Requirement:

Staff asserts that the FCC Filing Requirements Order holds "that dispute resolution and escalation provisions are within the scope of the filing requirement." See, Staff's Response, at 18, citing the FCC Filing Requirements Order, at ¶ 9. This is not an accurate reading of the Order. Paragraph 9 states, in relevant part:

> We are not persuaded by Qwest that dispute resolution and escalation provisions are *per se* outside the scope of section 252(a)(1). Unless this information is generally available to carriers (*e.g.*, made available on an incumbent LEC's wholesale web site), we find that agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements.

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[5] Staff never addresses the "backward looking" nature of the Settlement Agreement or any of the other agreements at issue in this matter. Instead, Staff simply argues that each of the agreements contain some provision, no matter how minor, that require it to be filed with the Commission.

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

FCC Filing Requirements Order, at ¶ 9 (italics in original, underlining added). Based on the actual language of paragraph 9, it is apparent that the escalation clause in the Settlement Agreement need not have been filed because the same escalation provisions were generally available to other carriers, as demonstrated below. Also, there are no obligations relating to sections 251(b) or (c) in the Settlement Agreement that the escalation clause modifies.

Further, the FCC emphasized the fact that an escalation clause is not "*per se*" outside the scope of section 252(a)(1). This emphasis implies that most escalation clauses are outside the scope of section 252(a)(1). It is only those escalation clauses that are not generally available to other carriers or that are "related to the obligations set forth in sections 251(b) and (c)" that are within the bounds of the filing requirements. Thus, Staff's reliance on the broad language of the FCC's Filing Requirements Order while ignoring the actual facts of the Settlement Agreement is not adequate to prevent FairPoint from prevailing on summary disposition in this matter.

c. The FairPoint/Qwest Interconnection Agreement Demonstrates that the Settlement Agreement Need Not Be Filed with the Commission:

Perhaps the best evidence that the escalation clause does not trigger the filing requirements for the Settlement Agreement is found in the fact that the escalation clause in the FairPoint/Qwest interconnection agreement contains virtually identical terms and conditions to the escalation clause in the Settlement Agreement. FairPoint pointed this fact out in its Motion for Summary Disposition and no other party disputed it. See, FairPoint Motion for Summary Disposition, at 8-9. Also as demonstrated in FairPoint's Motion for Summary Disposition, FairPoint merely opted into a previously negotiated interconnection agreement between AT&T and Qwest (then U S West). See, FairPoint Motion for Summary Disposition, at 8-9.

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

The FCC's Filing Requirements Order states that if the "information is generally available to carriers," then an escalation clause is the type of clause that is *per se* outside the filing requirements established by Section 252. FCC Filing Requirements Order, at ¶ 9. Given the fact that FairPoint has demonstrated by its own adoption of the escalation clause through its interconnection agreement that the terms of the escalation clause in the Settlement Agreement are "generally available" to any other carrier, the escalation clause in the Settlement Agreement cannot be the type of provision that would subject it to the filing requirements. Further, given the fact that Staff only argues that the escalation clause subjects the Settlement Agreement to the filing requirements, without this there is no reason why the Settlement Agreement is subject to the filing requirements. See, Staff's Response, at 18. Thus, the Settlement Agreement did not need to be filed with the Commission, and FairPoint is entitled to summary disposition.

d. The Same Escalation Procedures Are Available to All Other Similarly Situated CLECs Through Qwest's SGAT, Available on its Web Site:

Public Counsel argues that even if the escalation clause is available to other similarly situated CLECs, any agreement reached prior to July 10, 2002, cannot take advantage of this provision of the FCC's Filing Requirements Order because it was not until July 10, 2002, that the Commission approved Qwest's SGAT.[6] See, Public Counsel's Response, at 3. The Settlement Agreement was entered into on September 4, 2001, so under Public Counsel's rationale, FairPoint would not be entitled to rely on the fact that the escalation clause is available through Qwest's SGAT to other CLECs as a means of avoiding the filing requirements.

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[6] See, In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s (nka Qwest) Compliance With Section 271 of the Telecommunications Act of 1996, Docket Nos. UT-003022 and UT-003040, 39th Supplemental Order; Commission Order Approving SGAT and QPAP, and Addressing Data Verification, Performance Data, OSS Testing, Change Management, and Public Interest (July 1, 2002).

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

However, as demonstrated above, even though the Commission had not approved Qwest's SGAT at the time the Settlement Agreement was executed, the same escalation procedures in the Settlement Agreement were still available to other CLECs through the pick-and-choose options available under the Telecommunications Act of 1996 (the "Act"). Thus, even if Public Counsel's "timing" argument is right, it is inapplicable to FairPoint. FairPoint has conclusively demonstrated that the terms of the escalation provisions of the Settlement Agreement were publicly available to all other similarly situated CLECs, whether through Qwest's web site or otherwise. As a result, regardless of the timing of the Commission's approval of Qwest's SGAT, FairPoint is still entitled to prevail on summary disposition.

2. Public Counsel's Arguments Concerning Public Policy are Wrong:

Of Qwest, Staff and Public Counsel, Public Counsel was the only party to address FairPoint's public policy arguments concerning the negative impact that an overly broad requirement to file all types of agreements with the Commission would have on companies attempting to resolve disputes in an economical and efficient manner. See, Public Counsel's Response, at 5. Even then, Public Counsel failed to address the legal citations provided in FairPoint's Motion for Summary Disposition. Instead, Public Counsel merely asserted, without support or legal citation, that if Staff's overly broad filing requirements have "a 'chilling effect' on carriers which seek to violate state[7] and federal law in the future, then such a 'chilling' is entirely appropriate." See, Public Counsel's Response, at 5. This argument is erroneous for two reasons.

[7] As mentioned, Staff has conceded that the only state law cause of action alleged to be applicable to FairPoint, RCW 80.36.150, is not appropriately included in this matter. Thus, in reality, there is no "violation of state law" that could be asserted against FairPoint.

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

First, Public Counsel repeatedly makes reference in its Response to "secret" agreements. See, e.g., Public Counsel's Response, at 3, 4. Although FairPoint cannot speak for each of the other Respondents in this matter, the Settlement Agreement was not a "secret" agreement. FairPoint had no sinister motive in entering into or refraining from filing the Settlement Agreement. To the contrary, FairPoint believed and still believes that the Settlement Agreement did not need to be filed and, even if it did, it was not FairPoint's obligation to do so. Thus, the underlying basis of Staff's overly broad attempt to punish FairPoint – an effort to prevent future violations of state and federal law – misses the mark. Since there was no sinister motive to keep the Settlement Agreement "secret," Public Counsel's criticism of FairPoint's public policy arguments also misses the mark.

Second, Public Counsel's arguments erroneously presuppose a "violation of state and federal law." See, Public Counsel's Response, at 5. However, it is only through an overly broad application of the filing requirements that the Commission can arrive at the conclusion that the Settlement Agreement should have been filed. Thus, Public Counsel's assumption of a "violation of state and federal law" is wrong. As a result, Public Counsel's willingness to accept the "chilling effect" resulting from Staff's interpretation of the filing requirements as "entirely appropriate" is also wrong.

As cited in FairPoint's Motion for Summary Disposition, Washington state law and Commission precedent both favor the resolution of disputes through settlement. See, e.g., WAC 480-09-466; State v. Noah, 103 Wn. App. 29, 42, 9 P.3d 858 (2000). See, also, In the Matter of the Investigation Into U S West Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996, Docket Nos. UT-003022 & UT-003040, 39th Supplemental Order (July 1, 2002). The Commission should not be persuaded to abandon the well-established law designed to foster reasonable settlement agreements, especially of matters such as billing disputes,

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

because of Public Counsel's erroneous assumptions that there were "secret" agreements that "violated state and federal law" when they were not filed.

3. There is No Mandatory Timeframe in Which to File Interconnection Agreements:[8]

Both Staff and Public Counsel admit that neither RCW 80.36.150 nor 47 U.S.C. § 252 contain any explicit timeframe delineating when an interconnection agreement must be filed for approval with the Commission. See, Staff's Response, at 12; Public Counsel's Response, at 7. Indeed, Staff has admitted that RCW 80.36.150 is inapplicable in this case. See, Staff's Response, at 13. However, Staff and Public Counsel argue that the Commission should still find some "implicit" timeframe under which an interconnection agreement must be filed in an effort to preserve a cause of action under either Section 252(a) or Section 252(e).

Even if the Commission has been delegated the legal authority to enforce a violation of 47 U.S.C. § 252,[9] the lack of an established timeframe in which an interconnection agreement must be filed is as fatal to the first and second causes of action (asserting violations of Section 252(a) and Section 252(e)), as it is to the fourth cause of action (asserting a violation of RCW 80.36.150). As FairPoint demonstrated in its Motion for Summary Disposition, the Commission's Policy Statements are not binding and cannot form the basis of a cause of action against FairPoint. It is only these Policy Statements that outline a specific timeframe in which an interconnection

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[8] This argument presupposes that the Settlement Agreement was an "interconnection agreement" that needed to be filed with the Commission. As demonstrated above, it was not an interconnection agreement and did not need to be filed with the Commission. Thus, this argument is made in the alternative to the other arguments presented above and in FairPoint's Motion for Summary Disposition.

[9] In FairPoint's Motion for Summary Disposition, FairPoint argued that the Commission does not have the legal authority to enforce a violation of 47 U.S.C. § 252 – assuming a violation exists in FairPoint's case (which it does not). See, FairPoint Motion for Summary Disposition, at 13-14. Even if this position is incorrect, the Commission is still unable to enforce a violation of 47 U.S.C. § 252 because of the lack of a specific timeframe delineating when an agreement must be filed.

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

agreement must be filed with the Commission.[10] Because the Policy Statements are not binding against FairPoint, RCW 80.36.150 cannot stand as a cause of action in this matter. There is no justifiable reason why Staff should concede that RCW 80.36.150 is inapplicable to this case, and not concede that 47 U.S.C. § 252 is inapplicable for the same reason.

The Commission could have adopted rules requiring interconnection agreements to be filed within a specific timeframe under 47 U.S.C. § 252.[11] The Commission could have made the Policy Statements into binding rules. It did not do so. The Commission cannot now manufacture an "implicit" timeframe and impose sanctions against FairPoint based on this "implicit" timeframe when the Commission has failed to carry out the necessary steps to impose such timelines. Although the Commission may attempt to remedy this deficiency by adopting specific rules related to the timeframe in which to file interconnection agreements for the future, it cannot penalize FairPoint for failing to follow rules that never existed.

4. The ILEC Bears the Sole Responsibility to File Interconnection Agreements:[12]

Staff, Public Counsel and Qwest all assert varying arguments that both CLECs and ILECs have an equal duty to file interconnection agreements under 47 U.S.C. § 252(a) and (e). As demonstrated in this Reply, and in FairPoint's Motion for Summary Disposition, the Commission need not even reach these arguments as they relate to FairPoint. However, should the Commission

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[10] See, In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996, Interpretive Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act, Docket No. UT-960269 (June 28, 1996); In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996, First Revised Interpretive and Policy Statement, Docket No. UT-990355 (April 12, 2000) (collectively the "Policy Statements").

[11] This is assuming Commission authority exists.

[12] Like the argument above concerning the lack of a specific timeframe in which to file an interconnection agreement under 47 U.S.C. § 252, this argument is made in the alternative because, as demonstrated, the Settlement Agreement was not an "interconnection agreement" that needed to be filed with the Commission.

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

feel the need to address this issue, the applicable law demonstrates that Qwest, and not FairPoint, had the responsibility to file the Settlement Agreement – assuming that it needed to be filed at all.

Public Counsel states without any authority that it simply "disagrees" with FairPoint that the ILEC, and not the CLEC, has the responsibility to file an interconnection agreement with the Commission. The Commission cannot rely on this type of an argument to defeat a Motion for Summary Disposition.[13] See, CR 56; WAC 480-09-426.

Staff asserts arguments that fail to make logical sense in an effort to rebut the claims of the Respondents that the ILEC bears the sole burden to file any interconnection agreement. For example, Staff claims that if CLECs are not obligated to file interconnection agreements, then the agreements will not be filed and other competing CLECs will not be able to opt into the provisions of the interconnection agreements because the competing CLECs will not know about the interconnection agreements. See, Staff's Response, at 4-5. This argument illogically assumes that the ILEC does not file the interconnection agreement. FairPoint has stated that if the Settlement Agreement can be considered an interconnection agreement, Qwest should have filed it. Thus, Staff's argument does not actually address whether FairPoint, as the CLEC, should have filed the Settlement Agreement, just that someone should have.

Qwest devotes its entire Response to the single issue of whether both ILECs and CLECs have the responsibility to file interconnection agreements. Qwest claims that requiring both parties to bear the responsibility for filing interconnection agreements is safer because it:

> creates a system of checks and balances that increases the likelihood that the interconnection agreements are filed. If one party fails to file an agreement, it would still be available to other CLECs because the other party to the agreement would be required to file it.

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[13] Indeed, the vast majority of Public Counsel's Response fails to meet the necessary level of specificity to make it of value to the Commission under the applicable legal standards. CR 56.

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

Qwest's Response, at 3. In reality, the opposite of Qwest's claim is true. When both parties share the obligation to file an interconnection agreement, there is a tendency to believe that the other party will handle the matter. Conversely, if both parties are overzealous, the Commission runs the risk that both parties will mistakenly assume the responsibility thus burdening the Commission with multiple filings of the same agreement. In other words, the likelihood of error is increased, not decreased, by having both the ILEC and the CLEC responsible for filing interconnection agreements.

Qwest's other arguments do not add up, either. For example, Qwest claims that placing the obligation to file an interconnection agreement on both parties will prevent the CLEC from later claiming that there was a "side" agreement that contradicts some term in the interconnection agreement. See, Qwest's Response, at 7. This argument does not make sense for several reasons. First, each interconnection agreement of which FairPoint is aware contains a robust "entire agreement" clause making any allegation of a "side" agreement that contradicts the interconnection agreement virtually impossible without evidence of actual fraud. Second, even if "side" agreements were possible, requiring both parties, instead of just the ILEC, to file the interconnection agreement would not make these side agreements any less likely.

In short, there is no rationale or legal basis to claim that the Commission or competing CLECs are any better off if both ILECs and CLECs have the responsibility to file interconnection agreements. To the contrary, from a practical standpoint, this is likely to lead to further confusion and additional errors. The better policy is to require the ILEC to bear the responsibility for filing an interconnection agreement. This will ensure that both parties are neither lax nor overzealous. Likewise, it will make it very clear which company the Commission should approach in the event that there are future failures to file an interconnection agreement.

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

CONCLUSION

Both the facts and the law relating to the Settlement Agreement demonstrate that FairPoint is entitled to summary disposition.

WHEREFORE, FairPoint prays that the Commission enter an Order granting FairPoint's Motion for Summary Disposition and dismissing FairPoint from obligations in this matter.

RESPECTFULLY SUBMITTED, this 6th day of January, 2004.

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RICHARD A. FINNIGAN, WSBA #6443
B. SETH BAILEY, WSBA #33853
Attorneys for Respondent, FairPoint Carrier Services, Inc.

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply in Support of FairPoint's Motion for Summary Disposition has been sent to the following parties by e-mail and U.S. mail, postage prepaid except where otherwise noted:

Shannon Smith
Asst. Attorney General
PO Box 40128
Olympia, WA 98504-0128
ssmith@wutc.wa.gov

Charles Watkins
Senior Counsel
Covad Communications Co.
1230 Peachtree Street, NE Fl 19
Atlanta, GA 30309
gwatkins@covad.com

Brooks Harlow
Miller Nash LLP
4400 Two Union
601 Union Street
Seattle, WA 98101
brooks.harlow@millernash.com

Charles L. Best
Electric Lightwave, Inc.
4400 NE 77th Avenue
Vancouver, WA 98662
charles_best@eli.net

Lon E. Blake
Dir. Of Regulatory Affairs
Advanced TelCom, Inc.
3723 Fairview Industrial Dr. SE
Salem, OR 97302
lblake@atgi.net

Lance Tade
Electric Lightwave, Inc.
4 Triad Center, Suite 200
Salt Lake City, UT 84180
VIA US MAIL

Daniel Waggoner
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Ave
Seattle, WA 98101-1688
danwaggoner@dwt.com

Judith A. Endejan
Graham & Dunn PC
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
jendejan@grahamdunn.com

Mark Trinchero
Davis Wright Tremaine LLP
First Interstate Tower, Suite 2300
1300 SW Fifth Avenue
Portland, OR 97201
marktrinchero@dwt.com

Arthur A. Butler
Ater Wynne LLP
601 Union St., Suite 5450
Seattle, WA 98101-2327
aab@aterwynne.com

Law Office of
Richard A. Finnigan
2405 Evergreen Park Dr. SW
Suite B-1
Olympia, WA 98502
(360) 956-7001

Teresa Reff
Senior Financial Analyst
Global Crossing Local Services, Inc.
Regulatory Affairs
1080 Pittsford Victor Road
Pittsford NY 14534
Teresa.reff@globalcrossing.com

Michel Singer Nelson
WorldCom, Inc.
707 17th St. Suite 4200
Denver, CO 80202
michel.singer_nelson@mci.com
VIA E-MAIL ONLY

David Conn
Deputy General Counsel
McLeodUSA, Inc.
PO Box 3177
Cedar Rapids, IA 52405-3177
dconn@mcleodusa.com

Greg Kopta
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
gregkopta@dwt.com

Lauraine Harding
Senior Manager
McLeodUSA Telecommunications
Services, Inc.
PO Box 3177
Cedar Rapids, IA 52405-3177
VIA US MAIL

Rex Knowles
XO Washington, Inc.
1111 East Broadway
Salt Lake City, UT 84111
VIA US MAIL

Lisa Anderl
Qwest Corporation
1600 7th Ave, Room 3206
Seattle, WA 98191
Lisa.Anderl@qwest.com

Robert Cromwell
Assistant Attorney General
Public Counsel Section
900 4th Avenue, Suite 2000
Seattle, WA 98164-1012
RobertC1@atg.wa.gov

DATED this 6th day of January, 2004.

____
Paige O. Lemcke