BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

COMMENTS OF QWEST CORPORATION

INTRODUCTION

__Qwest comments on the "supplemental" notice of proposed rulemaking issued by the Commission August 23, 2000 in the above docket, in which the Commission issued the CR-102 without specifying the statute that is being implemented by the proposed rule. Qwest submits that designation of the specific statute that is being implemented by the proposed rule is mandatory under the terms of RCW 34.05.320, and that the Commission's failure to comply with the requirements of law in this rulemaking as to the form of notice required may render its rule subject to legal challenge in this regard. Qwest continues to oppose the substance of the proposed rules in their current form.

~~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,~~

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~~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 proposed rules continue to address universal service issues without required legislative authority, as in the previous version.

Qwest previously commented on the fact that the earlier version of the rules was an attempt to adopt rules on the subject of universal service without proper legislative authority and in the face of a specific legislative prohibition. The current version of the

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proposed rules continues to display this characteristic. Although the current "supplemental" form CR-102 eschews use of the term "universal service," the conclusion that these rules address universal service is inescapable. The centerpiece of the proposed rules is the new proposed requirement in sub section 3 for companies that are subject to the requirement to extend service in sub section 2, to file tariffs with specific maximum charges, and the permission to file additional tariffs to recover a portion of the remaining cost through terminating access charges. As a matter of law, this is a rule that addresses universal service because WAC 480-120-540(1) provides:

> Except for any *universal service rate allowed pursuant to subsection (3)* of this section, the rates charged by a local exchange company for terminating access shall not exceed the lowest rate charged by the local exchange company for the comparable local interconnection service (in each exchange), such as end office switching or tandem switching.....[Emphasis added.]

> Sub section 3 of WAC 480-120-540 provides:

> If a local exchange company is authorized by the commission to recover any costs for support of universal access to basic telecommunications service through access charges, *it shall recover such costs as an additional, explicit universal service rate element applied to terminating access service.* [Emphasis added.]

Qwest filed pursuant to WAC 480-120-540, a terminating access tariff that bifurcated its rate into a portion that is equal to its interconnection rates and an "interim USF" portion pending a final determination by the Commission on the cost of universal service. Sub section (1) above of WAC 480-120-540 forbids that which the current proposal for amending WAC 480-120-071 would permit, of filing an increase to terminating access charges that would cause such charges to exceed rates charged for interconnection, unless the increase is to recover costs for support of universal service.

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However, as Qwest previously pointed out, three separate statutes forbid the Commission to adopt rules on this subject before the Legislature has approved the Commission's proposed universal service program. RCW 80.36.600, 80.36.610 and 80.36.620 are the statutes in question. The Legislature has not acted to approve the Commission's universal service program.

As noted above, the proposed rules address universal service issues as a matter of law because the only rate that the rules permit to be filed to recover a portion of the cost of line extension that is above the charges that the rule allows ILECs to assess to end users, is legally denominated a universal service rate. Qwest perceives that the rule addresses universal service issues. In addition, AT&T's comments during the June 16, 2000 public meeting establish that other participants perceive the issue as a universal service issue. AT&T commented that it would not oppose the rule, so long as the Commission treated the access charge payments as a "loan" to the universal service fund, to be repaid when the Legislature approved the Commission's universal service program.

It has been argued in the past that the Legislature did not intend to freeze universal service and that access charges have for many years provided support for universal service, and therefore the Commission may make rules that create new ways for access charges to support universal service despite the provisions of Chapter 337, Laws of 1998. Qwest submits that these arguments fail to give effect to the plain language of RCW 80.36.620, which requires that "*Any rules regarding universal service* adopted by the utilities and transportation commission *shall comply with the purpose,* as stated in RCW

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80.36.600, for establishing a program for the preservation and advancement of universal telecommunications service." [Emphasis added.] Of course, the establishment of the program described in RCW 80.36.620 is subject to the express requirement in RCW 80.36.600 that it "shall not take effect until the legislature approves the program."

2. The proposed rules continue to unlawfully and inexplicably single out ILECs to bear the burden of ~~inadequately compensated forced line extensions to serve~~ service to unprofitable customers.

Qwest previously commented on the fact that the proposed rules single 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 extension of service tariffs and to extend service consistent with such tariffs and the proposed rule. The current version continues this unfair and unlawful approach. It is also difficult to understand why the Commission would want to limit the universe of companies that would be required to extend service to provide service to premises that require it, to include only ILECs. Whether viewed as a universal service measure or a measure that is necessary for the protection of public safety and welfare, the ensuring of continued quality of telecommunications and safeguarding of rights of consumers, the rule violates 47 USC §253(b) because it is not competitively neutral. The rule, if adopted in its current form, will be subject to preemption by the FCC under §253(d) of the Act because of this.

Where the statute on which the Commission relies, RCW 80.36.090 clearly says that every telecommunications company shall provide facilities as demanded, it is beyond the Commission's statutory authority to impose that duty on only a subset of the class of

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all such companies. It is also a deprivation of the equal protection of the laws and a violation of §253(f) of the Act to exempt non incumbents from the duty to extend facilities.

Exclusion of CLECs from the ambit of the rule is also contrary to the WUTC Staff memo of May 1, 1998, which was distributed during the June 16, 2000 open public meeting and which is attached to these comments. Qwest generally finds the research in the memorandum to be correct and the analysis persuasive, although there are some areas in which Qwest disagrees with the inferences in the memo. In that memo, Staff opined that CLECs can be said to be public utilities and the extent of their obligation to serve depends on the facts describing their intention. These entities may, depending on the facts, have an obligation to serve under the common law that the Commission is powerless to abridge by adopting a rule.

The proposed rule is also contrary to Staff's memo which points out that the state's power to regulate depends on whether the service is affected with a public interest, and that in turn depends on monopoly circumstances. If there is no monopoly, then the service is not affected with a public interest and the state lacks power to compel its extension. The rule clearly would seek to compel extension by ILECs in areas where there is no actual monopoly. Of course there is no *de jure* monopoly anywhere in the state. *In re Electric Lightwave,* 123 Wn. 2d 530, 869 P. 2d 1045 (1994).

The rule appears to recognize that such competing providers including different modes of service are available, and it allows a company that is subject to mandatory line

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extensions to contract with one of these providers in order to satisfy the obligation imposed by the rule. But the rule does not acknowledge that it is unlawful and fundamentally unfair to impose this burden only on the ILEC when competing modes of service are available in the same area.

The CR-102 claims that by providing for ILECs to subcontract their imposed duties to extend facilities by hiring wireless providers, this somehow increases diversity of supply. This makes no sense because under the rule, the ILEC is the entity that is responsible to provide the service, and it is permitted to use the wireless provider as an instrumentality to satisfy that obligation.

Nowhere does the rule acknowledge and deal with the concerns expressed in comments on the earlier version of the rules by the director of the state enhanced 911 project. This agency stated that the use of wireless facilities as a substitute for wireline facilities raises grave concerns of practicability for the enhanced 911 system and cost for the ILECs who would adopt this approach. The state enhanced 911 system apparently would hold the ILEC responsible for the proper operation of the wireless connection to the customer insofar as the need to generate information on Automatic Line Identification and Automatic Number Identification are concerned. This does not indicate that this state agency views the situation as involving any increase in diversity of supply.

3. The proposed rules correctly recognize that the obligation of ILECs to extend service is fact based, but the rule continues to require extensions without regard to whether such extensions are reasonable.

The proposed rules continue to contain verbiage that recognizes that the

Commission retains the authority under RCW 80.36.090 to determine whether any applicant for service is not reasonably entitled to service and whether the local exchange company is not obligated to provide service to any applicant. Notwithstanding this recognition, the proposed rules purport to require extensions to any premises at which occupancy is not temporary. The current version clarifies that by "not temporary," the Commission intends that intermittently occupied locations such as luxury vacation cabins in remote locations, receive heavily subsidized line extensions at the expense of consumers of long distance service. Qwest believes that this clarification from the earlier version of the proposed rule, is counter to sound public policy.

Nothing in the criteria in section 7(a) on which the Commission can decide that an extension is not required, addresses the issues Staff stated in its May 1, 1998 memo were key to the determination of whether an extension of facilities could be legally compelled. The profession of service in an area by a utility is a question of fact, according to the Staff memo. The proponent of the extension should have to prove that the company has at a time in the past professed in fact an intent to serve the area through some overt act such as canvassing for customers or dedicating facilities. The rule should list such criteria as the company's prior profession of intent to serve the area in question. Filing of a map as part of a tariff is not sufficient to prescribe an exchange area under *Prescott Tel. & Tel. v. Wash. Util. & Transp. Comm.,* 30 Wn. App. 413, 634 P. 2d 897 (Div. 3 1981) unless the Commission issued an order approving the tariff. The tariff map is not clearly an exclusive franchise under *In re Electric Lightwave, supra*, 120 Wn. 2d at p. 540, 541

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(quoting legislative Joint Select Committee on Telecommunications report) and so the filing of a tariff map for an area should not be considered to be a per se profession to serve the entire area covered by the tariff map. While Mr. Shirley stated during the June 16, 2000 open public meeting that he no longer subscribed to the conclusions in his May 1, 1998 memo, he did not identify any Supreme Court cases which have been decided in these two years which would change the law he cited, nor did he identify Supreme Court cases which his earlier research had overlooked. Qwest has not located any material cases that have been decided since May 1998, nor any cases prior to that time that the Staff overlooked.

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

Qwest has previously commented that the proposed rules would prevent ILECs from charging their filed and effective line extension tariffed rates. Qwest has on file and in effect, a tariff for line extension that prescribes charges to end users that for all but the shortest extensions, would produce higher dollar charges to the end users than the maximum permissible charges under the formula in the proposed rule. No hearing into the justness and reasonableness of the existing rates has been held. The current version of the proposed rules continues to place ILECs in the dilemma that they cannot comply with both the proposed rule and their duty under RCW 80.36.130 and 80.36.150 to charge only tariffed or approved contract rates.

In General Order No. R-450, at p. 21, the Commission recognized its lack of authority to make rates by rule when it distinguished what it was requiring in WAC 480-

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120-540 from ratemaking:

> In this rulemaking proceeding, the Commission is not establishing rate levels, but is directing a form of rate design, with direction about the types of costs that may be included in which rates. However the rule does not, for example, mandate that a particular company's rate for terminating access charges be set at any specific rate level expressed in dollars and cents. Under our rule, each company may reasonably justify its own unique rate within the stated parameters.

In contrast, the proposed rules mandate a maximum charge to end users that can be calculated today, in dollars and cents. There is no possibility that any company can justify a higher rate for line extension than forty times the basic flat exchange rate, under the rule.

The proposed rule expressly requires ILECs to file tariffs that contain charges constrained by a specific formula setting maximum levels, even if the ILECs already have, as Qwest has, line extension tariffs that are in effect. This unlawfully reverses the burden of proof on what is effectively a mandated rate reduction because if the ILEC files the tariff, the ILEC bears the burden to demonstrate that the new rate is fair, just and reasonable, while under applicable case law the challenger of a filed and effective tariff must bear the burden. *State ex rel. Model Water & Light Co. v. Dept. of Pub. Service,* 199 Wash. 24, 90 P. 2d 243 (1939) Requiring the utilities to file new tariffs reducing rates that are already in filed and effective tariffs is the same relief to which the Commission would be entitled in a proceeding under RCW 80.36.140, after it had filed a complaint and carried its burden of proof.

5. The proposed rules continue to unfairly deny cost recovery for necessary reinforcement.

~~To the extent the WUTC would argue that 47 USC §254(b) preempts the Washington~~

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~~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 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.~~ Qwest has previously commented that ~~T~~the proposed rules specifically exclude any recovery for the cost of reinforcing cable facilities in existing routes where capacity no longer exists, in order to provide a working telecommunications circuit that runs from the extremities of the network back to the central office. Qwest submits that this facet of the proposed rule unfairly places the

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burden of cost for reinforcement nominally on the ILEC's ratepayers. One of the few non industry commenters to the previous version of the rules, Holly Ann O'Connell, protested as a ratepayer about having to bear the financial burden of line extensions provided to those who choose to live in remote areas.

In addition, the proposed rule has recently been revealed to be unjustly discriminatory in this regard. . The WUTC Staff, through Mr. Shirley, recently sent letters to industry members, asking them to consider voluntarily extending facilities to unserved areas that are outside the serving areas of any ILEC, and promising that the Staff would support recovery through terminating access charges of the costs of reinforcement. The letters stated that this was reasonable because these areas had not been within any carrier's exchange. This is an irrational and unjust discrimination. In Docket No. UT-960369, the Commission has approved for purposes of establishing the costs that underlie the rates ILECs may charge CLECs for the use of unbundled loops, modeling techniques that employ tapered outside plant designs. The locations to which the outside plant is modeled are based on some approximation of current customer locations. When growth occurs, whether inside an exchange boundary or outside that boundary, if it occurs where facilities do not exist, then some reinforcement back to a point at which available pairs exist, must happen in the real world, in order to provide service. It would be arbitrary and capricious to say, as is apparently the Commission's intent, that ILECs may charge CLECs only rates for loops that are based on efficient, tapered network design, but must inefficiently run untapered cables to the edges of the exchange boundary because ILECs

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cannot collect reinforcement charges from cost causers who demand line extensions in areas where growth was not anticipated.~~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~~

<u>6. The proposed rule does not meet the "rational decisionmaker" test in RCW 34.05.570(2)(c).</u>

In *Neah Bay Chamber of Commerce v. Dept. of Fisheries,* 119 Wn. 2d 464, 832 P. 2d 1310 (1992) the court addressed the issue of judicial review of agency rules under the standard in RCW 34.05.570(2)(c), which empowers the court to declare rules invalid if they "could not conceivably have been the product of a rational decision-maker." The court held that this provision of the revised APA required a broader judicial review of agency rules than was previously permitted, and required the court to decide on the reasonableness of the rule, as opposed to merely whether the rules are consistent with the statutes being implemented. 119 Wn. 2d at p. 470. The court held that this review required the court to examine the administrative record to determine if the result was reached through a process of reason. Id. at p. 474. The court remanded the regulations at issue in the case because there was no record of what actually "went into" the regulations and so there was no way to decide whether the regulations were rational or irrational. Id. at p. 475.

The administrative record here is devoid of support for the proposed rule. The CR-102 states that the rule is intended to maintain and advance the efficiency and availability of telecommunications service, ensure that customers pay only reasonable

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charges for such service and promote diversity in supply of such service in markets throughout the state. There is no evidence that the rule will promote efficiency. As noted above, the effect of the rule will actually be to decrease efficiency because tapered cables as in the current design, mean unrecovered reinforcement costs when extensions are mandated.

There is no evidence that the rule will actually maintain and advance the availability of service. There is no evidence in the administrative record of a large or even a small population of unserved end users who would qualify for subsidized line extensions if the rule were adopted, but who will have no other means to obtain service. There is no evidence on why it is reasonable to require subsidized line extensions for vacation cabins in remote locations, at the expense of consumers of long distance service.

The record is completely silent on the issue of the reasonableness of charges to end users that would be made under the rule. Reasonableness of charges depends on the cost of the service being provided, and can involve determining what the service is worth. *Puget Sound Elec. Ry. v. Railroad Comm. of Wash.,* 65 Wash. 75, 117 P. 739 (1911) These are factual questions. Qwest responded to the WUTC's SBEIS questionnaire that it would incur up to $6 million in cost to make extensions that are required under the proposed rule. The SBEIS inexplicably stated that the total cost to all large companies of making extensions in compliance with the rule was only $3,009,000.

Qwest stated in prior comments that it would be limited under the proposed rule to charging end users a maximum of $500 apiece for line extensions, and that this was

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less than Qwest's existing tariff would provide, for almost all extensions. No other evidence on the impact on actual charges of the proposed rule has been submitted by any party. No one has introduced evidence of what the service is worth.

There is no evidence on which a finding could be based that the maximum charge to end users under the rule is a reasonable charge. There is no evidence of the actual cost of an extension, or on the amount of that cost that would be excluded from recovery through terminating access charges under the category of reinforcement. There is no evidence on why it would be reasonable to exclude reinforcement costs from recovery under the rule, when the Commission, according to a recent letter by the WUTC Staff to industry members, allowed CenturyTel to recover such costs in its tariffs for the Libby Creek extension.

There is no evidence on the likely effect of the rule on diversity of supply. There is no information on the record that there are any radio carriers who charge end user rates that are no higher than those of the ILEC in any exchange and who provide the services listed in RCW 80.36.600, who would be eligible to serve as a contract provider. There is no evidence of what the ILEC would have to pay such a carrier in order to have such an arrangement as the rule contemplates.

The proposed rule conflicts with the requirements of RCW 80.04.130, without any explanation. The proposed rule requires tariffs to be filed for end user charges that are capped at a maximum of forty times the monthly rate for basic service, without regard to the cost of the service. For Qwest, for all extensions longer than two tenths of a mile, this

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would be a rate reduction compared to the rates in Qwest's filed and effective tariff. RCW 80.04.130 requires that rate reductions be rejected if they would produce rates below the long run incremental cost of service, and the filing company must demonstrate that the newly filed tariffs are above such costs. The proposed rule's exclusion of any method to recover necessary reinforcement costs means that the rates that Qwest would be required to file, would likely be below the long run incremental cost of making line extensions outside of municipal boundaries where facilities do not exist. The proposed rule does not explain this conflict.

In summary, the rule as proposed does not have sufficient record support to pass the "rational decisionmaker" test in the APA, and on review it must pass such a test. The rule should not be adopted in its current form.

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

Qwest has previously commented that the proposed rule is inconsistent with the requirements in RCW 80.36.130 and 80.36.150 that only rates that are contained in an effective tariff or approved contract, may be charged by a company that is required to file tariffs or contracts. The current version of the proposed rules continues to provide in subsection (7)(b) that the Commission may waive the portion of the rule that requires the filing of tariffed charges to end users based on forty times the basic monthly service rates under certain circumstances and allow the company involved to charge end users amounts that are not contained in any filed tariff, consisting of the "direct cost." If the Commission in response to a petition, waives for a particular end user its rule that

requires filed line extension tariffs that contain specific charges, that waiver will not affect the tariff that will be in effect and which will state the only lawful rates for the service. The Commission has no statutory power, whether it adopts this rule or not, to waive the provisions of a filed and effective tariff. The relief that this section promises is completely illusory.

8. The proposed definition of drop wire should be applied only prospectively.

Qwest is concerned that proposed subsection (1) which defines "drop wire" appears to be regulatory in tone, as opposed to being strictly a definition, and that the impact of this rule may not be what the Commission intended. The rule prescribes a specific configuration for drop wire of a minimum of three individual voice grade access lines, and Qwest appreciates that the current draft addresses access lines rather than the previous draft's use of specific copper pair technology. The Commission has not previously sought to regulate the ways that ILECs built their facilities in such detail, and because the network has been constructed over a century in Washington, there are many drop wires that contain fewer than three voice grade access lines. Qwest routinely deploys drop wire with three individual voice grade equivalents in new construction, but it has many older drops with fewer than three voice grade equivalents. It would be tremendously costly to require that all existing drop wires be modified where necessary to consist of at least three voice grade equivalents. The rule could, if the Commission determines to keep some constraint of this type in the rule, be amended to provide that it applies to drop wires placed after the effective date of the rule.

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9. The proposed rule contains a hurdle for recovery of cost in the form of a public interest test for the terminating access tariff, that is unexplained and could make cost recovery illusory.

Proposed paragraph (4)(c) provides that the Commission will review the cost justification for the terminating access tariffs that are authorized by the subsection and will approve them if they are consistent with the section of the rule and "in the public interest." Qwest is confused by this requirement, because in previous discussions the cost recovery through terminating access was advanced as meeting the needs of carriers to avoid confiscation. The SBEIS states that all costs except reinforcement costs will be recovered under the rule. If there is to be a new "public interest" determination before any terminating access tariffs are to be approved, this casts great uncertainty on the effectiveness of this means to avoid confiscation. In the case of CenturyTel, there was no hearing or evidence on public interest issues before the terminating access tariffs were ordered into effect. The rule gives no indication of how this "public interest" determination will be made, nor what standards will be used.

The statutory standard for rates is "fair, just, reasonable and sufficient," RCW 80.36.080, and there is no "in the public interest" test included in that statute. No Washington case of which Qwest is aware has used "in the public interest" as a ratemaking standard.

10. There should be no difference in the reporting requirements of Class A and smaller companies which collect terminating access charges under tariffs based on estimates.

Proposed paragraph (4)(b) and subparagraph (4)(b)(i) establish a dual standard for reporting of construction expenditures and collections for Class A companies and

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companies that serve fewer than two percent of the access lines. This dual standard serves no proper purpose and the rule should be modified to make the reporting uniform. The proposed rule requires Class A companies to report quarterly, without qualification. The objective of the Commission under its proposed rule should be to ensure that long distance carriers pay only terminating access "USF" charges that are based on actual line extension costs. There is no way to be certain that such is the effect of actual charges, without reports. The clear implication in proposed paragraph (4)(b) is that a small company may, at the open public meeting in which the Commission approves the tariff, successfully argue against any reporting requirements. This implication is reinforced by the wording of proposed subparagraph (4)(b)(i), which only requires smaller companies to report every six months if the Commission so orders. This dual standard does not serve the Commission's objective under the proposed rule and it should be eliminated.

11. The proposed rule does not follow the Legislative mandate to make sources of support of universal service explicit.

Qwest remains concerned that the proposed rule appears to move counter to the directive of the Legislature in RCW 80.36.600 to provide for methods of universal service support that are specific, sufficient and minimize implicit sources of support. The terminating access charge, while explicit to interexchange carriers, continues to be implicit as a source of support as far as the consumer is concerned because there is no indication on the bill for long distance services, that a portion of the cost paid by the long distance carrier was a terminating access charge for universal service support. In General Order No. R-450 at p. 8, the Commission acknowledged that supporting universal service

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through access charges was an implicit form of support, and was inherently discriminatory. This rule is a step backward from the step the Commission announced with the adoption of WAC 480-120-540, in that it increases an implicit form of support of universal service. The Commission maintained that its goal in adopting WAC 480-120-540 was to reduce implicit forms of support, as soon as the cost of providing universal service had been determined.

12. The proposed rule's treatment of cross boundary extensions is unconstitutional.

Qwest is concerned that proposed subsection (5)(a) delegates the Commission's authority to determine just and reasonable rates for a company that is "willing to serve" by means of a cross boundary extension, to companies that are "obligated to serve a neighboring exchange." This places the authority for the "willing" company's use of the section (3) terminating access cost recovery mechanism, in the hands of a private party, namely the "obligated" company or companies.[1] This is unconstitutional. *State of Wash. ex rel. Seattle Trust Co. v. Roberge,* 278 U.S. 116, 121, 122, 73 L. Ed. 210, 49 S. Ct. 50, 51, 52 (1928). As Qwest previously commented, the consent of the "obligated" companies is not necessary for the "willing" company to be allowed to extend service across the exchange boundary. The purpose of the rule should not be to allow the subsidization through terminating access charges of duplicative extensions by competing companies. Also, whether the cost of a cross boundary exchange extension is less than that of an in exchange extension is something the Commission can determine.

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[1] There is also no definition of what it means to be "obligated to serve," the neighboring exchange.

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Qwest is also concerned that the proposed paragraph (5)(c) which provides that the exchange boundaries in a cross boundary extension will remain unchanged, is too restrictive. There may be occasions when the companies involved determine that the boundaries should be changed, and there is no good reason for the rule to prohibit such a change. The word "will" should be changed to "may."

Conclusion

Qwest continues to believe that no new rule is required, and the available tools are ample to address individual cases in which tariffed line extension rates cause problems. Notwithstanding this general belief, the above comments generally address specific problems with the proposed rules and Qwest recommends that the proposed rules be modified to address those concerns.

Respectfully submitted,

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