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USWEST

February 12, 1993

Mr. Paul Curl
Secretary
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive S.W.
P. O. Box 9022
Olympia, WA 98504

Re: Washington STS, Ltd. v. U S WEST Communications,
Inc.
Docket No. UT-921213

Dear Mr. Curl:

Enclosed for filing please find an original and nineteen
copies of the Brief of U S WEST Communications, Inc. in the
above-referenced matter.

Very truly yours,

Molly K. Hastings
for EDWARD T. SHAW

ETS00434

Enclosure

cc: E. Canfield, ALJ - w/encl.
All Parties of Record - w/encl.

STATE OF WASH.
OFFICE AND TRASP.
COMMISSION

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON STS, LTD.,)	
)	Docket No. UT-921213
Complainant,)	
)	BRIEF OF U S WEST
v.)	COMMUNICATIONS, INC.
)	
U S WEST COMMUNICATIONS, INC.,)	
)	
Respondent.)	

A. INTRODUCTION

U S WEST Communications, Inc. ("USWC") submits this Brief in support of its position on counterclaim that Washington STS, Ltd. ("STS") uses assigned USWC telephone service lines in violation of USWC's tariffs. USWC further seeks a determination that STS's complaint be dismissed for failure to state a claim and the failure to present or provide any evidence sufficient to substantiate the allegations set forth in its complaint. USWC respectfully requests findings that (1) STS's complaint be dismissed with prejudice; (2) that the Washington Utilities and Transportation Commission ("WUTC" or "Commission") order that STS must and should have been purchasing out of USWC's access tariff for the provision of services to its end-users; and (3) that USWC is entitled to past access charges due to STS's failure to purchase under the appropriate tariffs.

1 B. STATEMENT OF FACTS

2 STS ordered complex business line service which USWC
3 installed in July, 1992. TR. pp. 26-29 and Exhibit 1. Shortly
4 thereafter, USWC became aware of the possibility that STS was
5 using USWC's service to provide toll services in violation of its
6 tariff. USWC attempted on several occasions to secure
7 clarification from STS regarding its intended use of the business
8 lines. (Such clarification was contained in correspondence
9 between the parties which Mr. Leppaluoto filed as Exhibits 1
10 through 5 at the hearing held on January 7, 1993.) TR. pp. 26-29
11 and Exhibits 1 through 5. After several weeks, USWC notified STS
12 of its intent to terminate service because of STS's use of the
13 services in violation of the tariff. TR. p. 29, Exhibit 5.

14 STS responded to USWC's notice to terminate by filing an
15 informal complaint with the WUTC. Upon investigation, WUTC staff
16 members also concluded that STS was using USWC's local exchange
17 access service in a manner violative of the tariff. The WUTC
18 advised STS that USWC would terminate STS's service.

19 TR. pp. 37-38.

20 On October 20, 1992, STS filed a formal complaint with the
21 WUTC alleging, among other things, that USWC engaged in anti-
22 competitive conduct toward STS, that USWC violated WUTC rules,
23 that USWC discriminated in the rates it charges to STS, and that
24 USWC failed to provide service on demand in violation of
25 RCW 80.36.090.

26 USWC answered and counterclaimed on November 12, 1992. On
27 December 11, 1992, USWC filed a motion to waive WAC 480-120-081
28 and permit immediate disconnection of STS's service, and asked

1 that the motion be heard at the hearing on the complaint,
2 scheduled for January 7, 1993. STS filed a reply to the motion on
3 December 29, 1992. After argument, USWC's motion was granted on
4 January 7, 1993. The hearing on the complaint commenced and
5 concluded the same day.

6 At the hearing, Mary Owen, USWC's Director of Product
7 Implementation, testified extensively on both the shared tenant
8 services and EAS bridging aspects of STS's operation in the Westin
9 Building. At p. 11 of the Transcript, Mary testifies:

10 And in analyzing the STS arrangement and their
11 service records none of these normal shared
12 tenant service provider functions appear to be
13 occurring. First, Mr. Leppaluoto has
14 purchased 48 two-way trunks from U S WEST.
15 And it is my belief that these trunks do not
16 terminate on any customer premise in the
17 Westin Building, and I base that on several
18 test calls made of which I was present at one.
19 I also, making sure that there wasn't a
20 termination in the Westin Building, asked Mr.
21 John Reilly (sic) in our legal department to
22 make at least one call to each of those 48
23 numbers incoming calls to the Westin Building.
24 Mr. Reilly did and provided me with a summary
of the results of those calls, and it was
interesting that not one of the calls was
completed to a customer in the Westin
Building, and I think that's critical that we
understand that. The calls either were not
answered, they were busy or in many, many
cases we intercepted calls from customers
calling from Issaquah, calling from Vancouver,
calling from Halls Lake, who were calling
other exchanges, that if they had made a
direct call would have in fact been toll
calls. And this is not a shared
tenant/provider arrangement. That simply does
not happen in shared tenant service.

25 TR. p. 11.

26 In support of its counterclaim, USWC entered into the record
27 an Affidavit in which John Riley, a USWC Paralegal, noted the
28 actual results he received when he called all forty-eight (48) STS

1 numbers. TR. p. 81 and Exhibit 7. Mr. Riley's Affidavit showed
2 the following results in forty-eight (48) test calls:

3 Twenty-six (26) of the calls resulted in no
4 answer after a series of rings. Five (5) of
5 the calls resulted in a busy signal.
6 Seventeen (17) of the calls resulted in Mr.
7 Riley being connected with persons who were in
8 the process of placing telephone calls. I
9 asked those persons where they were calling to
10 and from, and the name of their local long
11 distance carrier.

12 A log of the calls was attached to the Affidavit entered on the
13 record.

14 In concluding her testimony, Ms. Owen stated the following:

15 Q. Ms. Owen, based on your company
16 research and your company knowledge
17 and the information contained in Mr.
18 Riley's affidavit which you've
19 reviewed and which has been entered
20 as an exhibit in this hearing, and
21 also based on the testimony that Mr.
22 Leppaluoto provided this morning,
23 what conclusions do you have about
24 Washington STS, Limited and the
25 manner in which they use the 48
26 complex business lines they ordered
27 from U S WEST?

28 A. Based on the evidence we've heard
today, based on my own test call
that I made, Mr. Riley's 48 test
calls, and the test call made by Ms.
Mary Taylor of the WTC (sic) staff
and one other factor, the factor
that the only customer that STS has
(sic) is SVV Sales which is an
interexchange carrier, it is my
belief that the service that STS is
providing is interexchange service
bridging toll exchanges together via
EAS arbitrage, and as such
Washington STS, Limited should be
required to pay from the access
tariff all appropriate charges.

TR. pp. 87-88.

Except to ask Mr. Riley what the Affidavit should mean to him

1 (TR. pp. 84-85), Mr. Leppaluoto of STS provided nothing to rebut
2 the testimony of Ms. Owen and the Affidavit of Mr. Riley. In
3 fact, testimony by Mr. Leppaluoto in the hearing disclosed that
4 the basic exchange service USWC provided to STS terminated at an
5 STS switch, making it impossible for STS customers to have access
6 to the local exchange company as set forth in the definition of
7 private shared telecommunications system in RCW 80.04.010.

8 Q. Can you tell me how you connect your
9 customer to your service?

10 A. They would have to connect that.
11 All I do, I have the 48 lines from
12 U S WEST as we've mentioned before,
13 and U S WEST brought them into the
14 Westin Building, hooked them to our
15 switch, and that's the end of our
16 involvement with those lines. Now,
17 if we were to sell those lines to
18 other customers within the Westin
19 Building then we would have to have
20 PIN codes to identify those lines
21 and they could pick and choose.

17 TR. pp. 51-52.

18 Later at p. 56:

19 STS doesn't connect anywhere other than the
20 switch, so SVV would be the one you would have
21 to ask how they do it and I don't know how
22 they do it, but the access line, I think, is
23 what you're getting at.

22 TR. p. 56.

24 C. ARGUMENT

25 1. STS is Providing an EAS Bridging Service Contrary to
26 Commission Orders and Tariff Restrictions.

27 The question of whether companies providing EAS bridging
28 services are interexchange telecommunications companies required

1 to purchase out of USWC's access tariff was first brought to the
2 WUTC's attention in December, 1987. At that time, U S Metrolink
3 Corp. ("Metrolink") petitioned the WUTC to determine whether it
4 had jurisdiction to require Metrolink's registration as a
5 telecommunications company under RCW 80.36.350. In January, 1988,
6 GTE Northwest, Inc. filed its complaint against USWC alleging that
7 Metrolink was an interexchange carrier providing toll
8 telecommunications services, and that USWC was therefore required
9 to apply its switched access tariff. Motions were then made in
10 the declaratory ruling case to change the proceeding into a
11 classification proceeding. The new proceeding was to determine
12 whether Metrolink was a "telecommunications company" under
13 RCW 80.04.010, and thus required to register under RCW 80.36.350
14 and pursuant to Chapter 480-121 WAC.

15 In her First Supplemental Order, Administrative Law Judge
16 Rosemary Foster set forth the following Finding of Fact describing
17 Metrolink's services:

18 Metrolink manufactures, sells and leases a
19 device known as a Telexpand. The Telexpand
20 receives, translates, controls and directs
21 transmission of signals to and through the
22 central office switching equipment of the
23 local exchange company to create a call
24 conferencing or call forwarding function.
25 Metrolink markets a service which allows
26 subscribers to bridge overlapping EAS areas,
27 thereby avoiding toll charges. The subscriber
28 places a call to the Telexpand number. When
the Telexpand answers, the subscriber enters a
personal identification number which is
checked for authorization and recorded for
billing purposes. The Telexpand forwards the
number to the U. S. West central office, which
treats the request as an original local call
and dials the requested number. The Telexpand
then drops off the line. The net result is
that toll charges are avoided by the caller.

1 Judge Foster thus concluded that Metrolink, standing alone or in
2 conjunction with its user associations, was a "telecommunications
3 company" under RCW 80.04.010, and must register with the WUTC
4 under RCW 80.36.350. Attached hereto as Appendix A (First
5 Supplemental Order - February 7, 1989, at pp. 21-22).

6 Metrolink filed numerous exceptions to Judge Foster's Order
7 setting forth its activities incrementally, and arguing that these
8 activities did not constitute the provision of telecommunications
9 services. Reviewing Metrolink's arguments, the WUTC found:

10 These arguments have one thing in common:
11 each attempts to focus upon a particular
12 provision of law or regulation, then attempts
13 to characterize the MetroLink service in such
14 a way as to fall within the identified
15 "exemption". To the extent that any of the
16 factual, legal, or policy theories have any
17 superficial appeal, that appeal fades quickly
18 when the totality of the MetroLink operation
is examined in the context of the Washington
telecommunications infrastructure. In its
brief, MetroLink cites a quotation from an
early decision of the Washington Supreme
Court, Inland Empire Rural Electrification,
Inc., v. Department of Public Service, 199
Wash 527, p. 538, 92 Pac 258 (1939), where the
court said the following:

19 The question of the character of a
20 corporation is one of fact to be
21 determined by the evidence disclosed
22 by the record. A corporation which
23 is actually engaged as a public
24 utility cannot escape regulation by
25 the state merely because its charter
26 or its contract characterizes it as
a private corporation. On the other
hand, a private corporation cannot
be converted into a public service
corporation by mere legislative
fiat. What it does is the important
thing, not what it, or the state
says it is.

27 Unfortunately for MetroLink, the
28 Administrative Law Judge, upon a careful
review of this entire record, found that what

1 MetroLink actually does is essentially
2 identical to the operations of numerous
3 regulated toll providers in the state of
4 Washington. Simply stated, MetroLink holds
5 itself out to the public to interconnect
6 access lines provided by local exchange
7 companies and thereby provide interexchange
8 service commonly known as toll. The various
9 organizational structures and arrangements
10 utilized by Metrolink to maintain the
11 appearance of something other than what it is
12 demonstrate only the ingenuity of those who
13 seek to avoid regulation. The laws of the
14 state of Washington and particularly the
15 Regulatory Flexibility Act of 1985 enunciate a
16 clear state policy which favors flexible
17 regulation of competitive telecommunications
18 services.

11 Attached hereto as Appendix B (Second Supplemental Order - May 1,
12 1989, at p. 3).

13 Pursuant to the WUTC's Order, USWC revised its access tariff
14 provisions to make it crystal clear that companies providing EAS
15 bridging services must purchase from that tariff, like any other
16 exchange carrier.

17 Interexchange Carriers, who provide service
18 between Local Calling Areas, must purchase
19 services from this tariff for their use in
20 furnishing their authorized intrastate
21 telecommunications services to end-user
22 customers, and for operational purposes
23 directly related to the furnishing of such
24 services;...

22 WN-U-25, Original Sheet 1-1, 1.2(A).

23 2. STS is Not a Shared Telecommunications Service Provider
24 that is Exempt from Access Charges.

25 The definition for private shared telecommunications services
26 under RCW 80.04.010 states:

27 ...the provision of telecommunications and
28 information management services and equipment
within a user group located in discrete

1 private premises in building complexes,
2 campuses, or high-rise buildings, by a
3 commercial shared services provider or by a
4 user association, through privately owned
5 customer premises equipment and associated
6 data processing and information management
7 services and includes the provision of
8 connections to the facilities of a local
9 exchange and to interexchange
10 telecommunications companies.

11 The evidence overwhelmingly demonstrates that STS is
12 providing interexchange service as an interexchange carrier. Mr.
13 Leppaluoto testified that STS had but a single customer in the
14 Westin Building and was unable to demonstrate how STS provided
15 service to that customer. TR. pp. 50-56.

16 3. USWC Must Provide Services in Accordance With Its
17 Tariffs and in a Fair and Nondiscriminatory Manner.

18 Both Washington state and federal law prohibit a public
19 utility from charging or accepting rates contrary to published
20 tariffs. RCW 80.36.130 provides in part:

21 ...no telecommunications company shall charge,
22 demand, collect or receive different
23 compensation for any service rendered or to be
24 rendered than the charge applicable to such
25 service as specified in its schedule on file
26 and in effect at that time, nor shall any
27 telecommunications company refund or remit,
28 directly or indirectly, any portion of the
29 rate or charge so specified, nor extend to any
30 person or corporation any form of contract or
31 agreement or any rule or regulation or any
32 privilege or facility except such as are
33 specified in its schedule filed and in effect
34 at the time, and regularly and uniformly
35 extended to all persons and corporations under
36 like circumstances for like or substantially
37 similar service.

38 RCW 80.36.130.

39 Likewise, the Federal Communications Act provides, in part,
40 that:

1 It shall be unlawful for any common carrier to
2 make any unjust or unreasonably discrimination
3 in charges, practices, classifications,
4 regulations, facilities, or services for or in
5 connection with like communication service,
6 directly or indirectly, by any means or
7 device, or to make or give any undue or
8 unreasonable preference or advantage to any
9 particular person, class of persons, or
10 locality or to subject any particular person,
11 class of persons or locality to any undue or
12 unreasonable prejudice or disadvantage.

13 47 U.S.C. § 202(a).

14 The courts of the state of Washington have uniformly
15 recognized that the amount fixed in a lawful tariff must be
16 charged and paid. Robinson v. Wolverton Auto Bus Co., 163 Wash.
17 160, 163, 300 P. 533 (1931). Mr. Leppaluoto did not provide any
18 information on the record to suggest that USWC was or is providing
19 services to other companies at rates different than its charges to
20 STS. Given the plethora of data on the calling details of STS's
21 lines, it is clear that USWC could be found to violate its own
22 tariffs if, given the overall data, it continued to knowingly
23 provide local exchange service to this EAS bridging company.

24 4. STS Has the Burden of Proof in this Action and Has
25 Failed to Prove Any of the Allegations of the Complaint.

26 It is well recognized in the state of Washington that in a
27 complaint proceeding brought relating to an effective tariff, the
28 burden of proof is upon the party alleging that the application of
the tariff is illegal. The Washington Supreme Court stated in the
case of North Coast Power Company v. Kuykendall, 117 Wn. 563, 201
P. 780 (1921) that:

. . . it was determined that where a tariff
has been filed by a public service
corporation, and where, under § 8626-82, Rem.
Code (P. C. § 5609), complaint is made before

1 the effective date of the tariff, the burden
2 of proof is upon the public service
3 corporation to show that the proposed rates
4 are just, fair, reasonable and sufficient, but
5 that, where complaint is not made until after
6 the new tariff had become effective, the
7 burden of proof was shifted and the
8 complainant is compelled to show that the
9 tariff rates are unreasonable.

10 117 Wash. at 565 (emphasis added). See also, State Ex Rel. Model
11 Water & Light Company v. The Department of Public Service, 199
12 Wash. 24, 35, 90 P.2d 243 (1939).

13 STS has failed to provide or present any evidence to
14 substantiate the allegation in its complaint that USWC
15 discriminated in the rates it charges to STS.

16 E. CONCLUSION

17 Pursuant to the foregoing, this Commission should find that
18 STS has failed to establish any facts upon which to prove its
19 complaint, and the complaint should be dismissed in its entirety
20 with prejudice. In addition, this Commission should find that STS
21 uses local exchange access services in violation of USWC's tariff.
22 The Commission should find that STS failed to pay the correct
23 charges and that USWC is entitled to past access charges.

24 DATED this 12th day of February, 1993.

25 Molly K. Hastings

26 EDWARD T. SHAW
27 MOLLY K. HASTINGS, of Attorneys
28 for U S WEST Communications, Inc.

APPENDIX A

80.36.350 and pursuant to Chapter 480-121 WAC. (See Order and Notice of Scheduling and Hearing, Cause No. U-88-2370-J)

Hearings were held in this matter from October 31 through November 3, 1988, in Olympia.

Opening briefs were submitted by the parties on December 5, 1988. Reply briefs were filed December 12, 1988. Because U. S. West inadvertently did not submit a copy of its opening brief to Metrolink, Metrolink was granted an extension to reply to PNB's opening brief to December 27, 1988.

B. Factual Basis for Order

Metrolink is a Bellevue-based business corporation organized under the laws of the State of Washington in October, 1986. Metrolink manufactures, sells and leases a device known as the "Telexpand". The Telexpand receives, translates, controls and directs transmission of signals to and through the central office switching equipment of the local exchange company (in this case U. S. West) to create a call conferencing or call forwarding function. Under certain circumstances, use of the Telexpand allows callers to bridge overlapping Extended Area Service (EAS) areas without paying toll charges. It is this feature which is the subject of the present proceeding.

The Seattle Metropolitan area has several EAS areas. For example, a Seattle caller can place a call to a Bellevue exchange toll free, and vice versa. A Seattle caller can also call Federal Way toll free and vice versa. A Seattle caller can also call Federal Way toll free and vice versa. However, a Bellevue caller must pay a toll charge for a call placed to Federal Way and vice versa because the two areas do not have EAS with each other. A Telexpand located in an area where two EAS calling areas overlap, such as Seattle in the example given, allows Telexpand subscribers to place toll free calls to exchanges which do not have EAS with each other by routing the call through the overlapping EAS area. For example, a Federal Way caller can place a toll free call to a Telexpand located in Seattle which forwards the call toll free to a Bellevue number.

The Telexpand functions in the following manner. A customer calls the number of Telexpand. When the Telexpand answers, the customer enters a personal identification number which is checked for authorization and recorded for billing purposes. The customer then enters the number which he wishes to call. The Telexpand forwards the requested number to the U. S. West central office which dials the number. The

Telexpand drops off the line and is free to receive another incoming call. In the example used above, a Federal Way caller would place a call to a Telexpand located in Seattle, which is a toll free call. The customer would provide a personal identification number which would be checked for authorization and recorded for billing purposes. The customer would then provide the Bellevue number being called. The Telexpand would then forward the call to the Seattle central office of U. S. West, which would treat the Telexpand request as an original call. U. S. West would then place the call toll-free to Bellevue. The net result is that there is no toll charge for the call from Federal Way to Bellevue.

Metrolink has placed Telexpands at two locations in downtown Seattle which are within U. S. West's Seattle exchange. In addition, Telexpands have been placed in Federal Way, within Tacoma EAS areas.

At the time of the hearing, there were approximately 3000 Metrolink customers in the Seattle-Tacoma metropolitan areas. Almost all of these customers are members of either the Wethersfield Business Association or the Northend Business Association. These "user associations" are non-profit corporations which were created by Metrolink in 1987. Metrolink subscribers usually become members of one or the other association at the time they purchase Metrolink's services. Metrolink customers pay a fee directly to Metrolink for access to the Telexpand, based on usage. Metrolink customers also pay monthly association dues which are collected by Metrolink and forwarded to the user associations. Proceeds from association dues are primarily utilized by the user associations to pay for centraflex lines running from the Telexpand locations to the U. S. West central office. This arrangement allows Metrolink customers to distribute the costs associated with leasing centraflex lines among Metrolink customers. Most of Metrolink's customers are relatively small users for whom it would not be economically feasible to pay the full monthly cost for a centraflex line.

Both associations were originally organized by Metrolink personnel. The membership is composed exclusively of Metrolink customers. The initiation fee and dues schedule for each organization were established by Metrolink and are correlated with Metrolink's service prices. Neither association conducts any business not directly associated with Metrolink. Neither association has employees, an office, or a business telephone. The administrator for both associations is an independent contractor who works three or four hours per month for each association. His primary duties are to deposit the checks forwarded from Metrolink for

dues and to write checks to pay U. S. West for the centraflex lines. He has never visited the premises where the Telexpand machines are located. The Telexpand locations are leased by Metrolink, and Metrolink employees monitor and maintain the equipment. The user association applications contain an agreement which provides for a sublease of an undivided interest in the Telexpand premises, but there is no evidence that any association member has ever visited those premises. Metrolink bills association members for dues and forwards the funds to the association to be used by the association to pay for costs, primarily for centraflex lines. Metrolink has advanced funds in the form of interest-free "loans" to the association when membership dues do not cover the centraflex lines and other ancillary costs. The associations do not solicit membership. That function is carried out by Metrolink sales people. Metrolink periodically provides the associations with membership lists. Metrolink also provides the associations with engineering services. In short, all necessary services of the association are provided by Metrolink.

II. WITNESS SUMMARIES

Nine witnesses appeared on behalf of the parties in this matter.

Daniel Kranzler, president, U. S. Metrolink Corp., Bellevue, Washington, testified concerning Metrolink's operation concerning Metrolink as well as the operation and use of the Telexpand. Mr. Kranzler also offered rebuttal testimony responding to Commission staff and intervenor witnesses.

Keith B. Leffler, Department of Economics, University of Washington, Seattle, Washington, addresses the efficiency and competitive issues surrounding the regulation of Metrolink by the Commission.

Robert Craig Miller, administrator of the Wethersfield and North End Business Associations, Bellevue, Washington, testified concerning the purpose and functions of the associations.

Sharon L. Macklin, sole proprietor, Macklin and Associates, a communications consulting firm located in Bothell, Washington, testified concerning customer usage of Metrolink's equipment to bridge EAS calling areas. This witness also addressed other services available to consumers to avoid toll charges.

Thomas L. Wilson, Jr., utility rate research specialist for the Commission, Olympia, testified concerning factors which the Commission should consider in determining whether Metrolink is a telecommunications company subject to Commission jurisdiction.

Wallace L. Budsberg, utility engineer for the Commission staff, Olympia, explained from an engineering standpoint how the Telexand functions and how these functions result in the transmission of information.

Samuel M. Jones, industry affairs manager, GTE Northwest, Inc., Everett, testified concerning Metrolink's operations and why GTE believes Metrolink should be subject to Commission regulation.

Kenneth G. Millner, senior staff specialist-network development, GTE Northwest, Inc., Everett, testified concerning why, from an engineering standpoint, Metrolink's operations facilitate the provision of telecommunications for hire, sale or resale to the general public in Washington.

Michael P. Nilson, northern area quality assurance manager, GTE Northwest, Inc., Everett, and secretary-treasurer of the treasurer and co-owner of the Nordic Dinghy Company, a Washington corporation, testified concerning his contacts with Metrolink in an effort to obtain Metrolink's services for the Nordic Dinghy Company.

III. ISSUES

1. Whether the Washington Utilities and Transportation Commission has jurisdiction to require registration of Metrolink as a "telecommunications company" under RCW 80.36.350.

2. Whether the Commission has jurisdiction over Metrolink in light of existing federal and state regulations.

IV. POSITIONS OF THE PARTIES

A. U. S. Metrolink

Metrolink advances the following five arguments in support of its claim that it is not subject to Commission regulation.

1. Metrolink asserts that it is exempt from Commission regulation because it merely sells and leases customer premises equipment (CPE).^{1/}

2. Metrolink claims that it is not a public utility subject to Commission regulation because its customers do not have a legal right to purchase its services as they would if it were a local telephone company, water system or railroad. Metrolink asserts that in order to be considered a "telecommunications company", Metrolink would have to own, operate or manage facilities used to transmit information by wire for hire, sale or resale to the general public. Metrolink claims that it does not own, operate or manage such facilities and that the Telexand device is not a "telecommunications facility" because it does not transmit information. Finally, Metrolink asserts that it does not own, operate or manage telephone lines. According to Metrolink, it is the user associations as distinct and separate entities which actually provide EAS bridging services to association customers.

3. Metrolink further maintains that its operations are not within the statutory requirement for Commission jurisdiction because its regulation is not in the public interest. According to Metrolink, regulation would tend to inhibit the development of competitive alternatives to existing monopoly services. Metrolink further claims that regulation would be contrary to the Legislature's declared policy to "promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state." 1985 Laws of Washington, Ch. 45 Section 1. Furthermore, Metrolink asserts that sale and lease of Telexand devices benefits the public by allowing small businesses to utilize PBX services which have traditionally been available only to larger businesses which could afford to invest in their own PBX.

4. Metrolink argues that the FCC has preempted state regulation of customer premises equipment (CPE) which is used in the interstate telecommunications network.

^{1/}Metrolink also asserts that it is exempt because it is a "private share telecommunications service" under RCW 80.36.370(5). Metrolink asserts that it is within the definition of such a service because it provides "telecommunications and information management . . . equipment" (Telexand) to a "user group" (the associations) located in discrete private premises (the location of the Telexands).

According to Metrolink, because the Telexpand is customer premises equipment that is connected to and used as part of the interstate network, the Washington Utilities and Transportation Commission can not exercise jurisdiction over Metrolink.

5. Finally, Metrolink contends that the exercise by the Commission of jurisdiction over it would constitute unlawful and arbitrary and capricious discrimination in violation of Metrolink's constitutional right to equal protection. Metrolink asserts that the Telexpand is but one of many devices available for purchase or lease which allow users to bridge Extended Area Service (EAS) zones. It is this bridging activity, according to Metrolink, that serves as basis for Commission assertion of jurisdiction over Metrolink. Metrolink goes on to emphasize that there are other providers of bridging services including telephone answering services, shared PBX's and other customer premises equipment over which the Commission has not exercised jurisdiction. Therefore, singling out Metrolink under these circumstances would be arbitrary and capricious and would violate Metrolink's right to equal protection under the law.

In its reply, Metrolink argues that the other parties have failed to meet their burden of proof to establish that Metrolink should be subject to the Commission's jurisdiction. Metrolink maintains that it is merely a telecommunications equipment provider exempt from regulation. Metrolink challenges the image portrayed by the other parties that Metrolink and the associations represent an inseparable unit. Metrolink maintains that the real problem in this case is the current anachronistic EAS system which creates pricing anomalies.

Metrolink goes on to reiterate a number of its legal arguments against regulation in its reply brief. With respect to Commission staff's argument that a valid lease requires delivery of the property and control over it by the lessee as well as return of the property at a specified time, Metrolink maintains that neither of these conditions are required for a valid lease to exist. (See Metrolink Reply, pages 6-7). Metrolink goes on to point out that the Telexpand equipment does not "transmit". According to Metrolink, the actual transmission facilities in this case are U. S. West lines.

In addition to the legal arguments advanced by Metrolink, a number of policy concerns regarding the propriety of regulation were raised. Metrolink asserts that regulation of new entrants in the telecommunications market, as a matter of policy, is contrary to the public interest as

these entrants seek to correct inefficiencies generated by local telephone service monopolies such as U. S. West and GTE. Metrolink further argues that its regulation will send a "chilling" message to potential entrants that will discourage technological and service innovations in the telecommunications market.

With regard to its equal protection claim, Metrolink asserts that if the Commission chooses to regulate Metrolink, it should also regulate other EAS bridging devices such as telephone answering machines. Metrolink maintains that the Commission is required to treat similar entities in a similar manner in order to avoid contravention of the equal protection clause.

Because Metrolink did not receive a copy of the U. S. West's opening brief, Metrolink was granted an extension to December 27, 1988, to specifically respond to U. S. West's arguments. As was the case in its response to other intervenors, Metrolink attacks U. S. West's argument that Metrolink and the user associations are indistinguishable. In response to U. S. West's argument that the Telexpand is a "facility", Metrolink asserts that as it does not transmit and it does not convey information, Metrolink can not be considered a telecommunications company. Although U. S. West moves for assessment of access charges against Metrolink in this proceeding, Metrolink argues that such a motion is beyond the scope of the instant case.

B. Commission Staff

Commission staff maintains that the nature of Metrolink's service is as a provider of an alternative to short-haul toll services. According to Commission staff, this is demonstrated by the fact that Metrolink holds itself out as the provider of a toll alternative. Commission staff maintains that offering of access to Telexpands on a per use basis constitutes a "telecommunications service" within the meaning of applicable statutes. This contention is premised on the existence of three elements which would place Metrolink operations within the definition of the statute:

1. A corporation which owns, operates or manages any facilities;
2. Which facilities are used to provide telecommunications; and
3. Provision of such telecommunications is done for hire, sale

or resale to the general public within the state.

According to Commission staff, the record in this matter establishes that these statutory criteria are met by the service offered by Metrolink. According to Commission staff, Telexponds fall within the broad statutory definition of "facilities". Commission staff goes on to suggest that Metrolink meets the statutory definition of "telecommunications", i.e. "the act of sending knowledge or intelligence in any form to another place by wire or some other similar medium." (Commission Staff Brief, page 13). According to Commission staff, the Telexpond transmits information by signaling the central office via the "switch hook flash", regenerating the number dialed by the Metrolink customer and sending those digits to the central office. Commission staff claims this transmission of information places the Telexpond within the definition of telecommunications found in RCW 80.04.010. According to Commission staff, a company does not have to own the pathway over which transmission is provided for it to be within the definition of providing telecommunications under the statute. The company only would have to send information in any form over that pathway. (Commission Staff Brief, page 15). Consequently, according to Commission staff, the fact that the user associations lease the centraflex lines between the Telexpond and the central office does not preclude a finding that telecommunications services are being provided under the statute.

Commission staff addresses Metrolink's arguments against assertion of regulatory authority by the Commission. With regard to Metrolink's argument that it is exempt from regulation under the lease of customer premise equipment exemption found in RCW 80.36.370(4), Commission staff goes on to set forth the requirements for a lease of personal property and then argues that Metrolink's relationship with its customers does not constitute a lease of CPE. In addition, Commission staff maintains that even if this arrangement is a lease, it is not the lease of CPE but lease of a service or function performed by the Telexpond. (Commission Staff Brief, page 17).

Commission staff maintains that other technologies capable of bridging EAS areas are not comparable to Metrolink's service.

Commission staff acknowledges that even if subscribing to business lines constitutes an element in the definition of a telecommunications company, in this case Metrolink's close association with the business associations