September 14, 2000

Carole Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive SW
PO Box 47250
Olympia, WA 98504-7250

Re: Docket No. UT-991737 – In the Matter of Rulemaking Concerning Line Extension Tariffs - Comments of the Washington Independent Telephone Association

Dear Ms. Washburn:

This letter will constitute the comments of the Washington Independent Telephone Association ("WITA") concerning the proposed rulemaking in this docket. As requested in the Opportunity to Submit Written Comments on Proposed Rule, I am enclosing ten copies of these written comments. A separate set of comments has been provided by e-mail.

WITA has previously submitted comments in this docket on December 10, 1999, March 14, 2000, and May 25, 2000. WITA incorporates those prior comments by reference in these comments. In summary, WITA has previously advocated in writing or at workshops to the Commission that:

The Commission lacks the authority to compel regulated telecommunications companies to make changes to their lawfully filed tariffs and the rates in those lawfully filed tariffs by a rulemaking. To this extent, portions of the proposed rule exceed the Commission's authority.

The Commission is imposing the obligation to provide line extensions pursuant to Commission's rule only on fully regulated companies. It

is not imposing that requirement on competitive local exchange companies. All local exchange companies, whether they are an incumbent local exchange company or a competitive local exchange company, have the same obligation to serve under statute. The Commission has chosen to discriminate without a reasonable basis and in doing so it imposes additional costs and burdens on only regulated companies.

The Commission's rule creates the proverbial procrustean bed by imposing a single form of line extension policy on all companies. Line extensions by their very nature present issues that are individual to the company, the exchange served by that company and the customer's circumstances. A uniform policy established by rule removes flexibility.

This is an area where a Commission statement of policy, coupled with a carrot in the form of allowing certainty in cost recovery, would be better than regulatory fiat and the compulsion of rulemaking.

WITA recognizes that the Commission has chosen to ignore WITA's position on the Commission's legal authority. WITA also recognizes that the Commission is not going to adopt WITA's suggestion that the Commission pursue this issue through a policy statement rather than rulemaking. Given the Commission's position, WITA will offer comments on problems presented by the language in the proposed rule.

Additional Legal Issue.

Before turning to the language of the proposed rule, there is one more issue. In reviewing the proposed rule, there is another issue in which the Commission's legal authority is called into question. Under proposed WAC 480-120-071(4)(b), the Commission's proposed language states:

> In the case of companies that serve fewer than two percent of the access lines in the state, placement of the tariff on the agenda of a Commission open meeting constitutes notice of an opportunity to be heard on the need for any reporting requirements related to a tariff based on estimated costs.

This is an end run around the legislative restriction that the Commission can impose additional reporting requirements on a small company only after notice and an opportunity to be heard. A Commission open meeting does not constitute notice and an opportunity to be heard in the context required by statute for a hearing. The statutory requirement is that a full adjudicatory hearing

be held before the Commission may impose additional reporting requirements. This shortcut violates the intent of the legislature and the due process rights of the small companies.

Comments on Rule Language.

WITA appreciates the Commission and its Staff's willingness to work on language within the rule. In reviewing the most recent draft of the proposed rule, it became apparent that the draft's language presents many problems.

1. The use of the term "drop wire".

For example, there are a number of problems related to the rule's use of the term "drop wire." Proposed WAC 480-120-071(1) defines drop wire, in part, as "company-supplied wire and pedestals…." In draft WAC 480-120-071(2)(a) each regulated company is directed to "…provide drop wire for customer use." Since the definition of drop wire includes the pedestal, this regulatory direction means that the pedestal is provided for the customer use. Under the Commission's rule the customer could direct the use of pedestal (and the drop wire) for service from a competing company. That is a confiscation of the company's property. The pedestal is part of the company's network configuration and may include connections for several customers. The Commission may not direct that use of the pedestal (or even the drop itself) is the customer's to control.

Another problem raised by the definition of "drop wire" is the statement that drop wire is "company-supplied wire and pedestals to be placed between a premise and the company distribution plant at the applicant's property line." Many times the distribution plant is not placed at the applicant's property line. In a substantial number of occasions, the applicant is residing on a land-locked parcel and the company must use an easement to get to the applicant's property. The pedestal is placed in the right-of-way or at another company designated location which is not the applicant's property line. The definition,

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as written, ignores this common occurrence of the pedestal being placed on a location other than the applicant's property line.

Still another problem raised by the definition of "drop wire" is the requirement that "At a minimum, a drop wire must be sufficient in capacity to allow the provisioning of three individual basic exchange voice-grade access lines." By adding this sentence to the definition, the Commission has now established a standard of service for drop wire. Does that mean that drop wires which have been installed, but which only provide for two individual basic exchange voice-grade access lines are now in violation of Commission rule and must be replaced? At the very minimum, this rule

should be rewritten to provide that after the effective date of the rule the standard for drop wire will change. That can be easily done by changing the last sentence of the definition to read as follows:

> For drop wire installed after the effective date of this rule, at a minimum, the drop wire must be sufficient in capacity to allow the provisioning of three individual basic exchange voice-grade access lines.

2. Lack of a savings clause.

There are a number of interpretive problems raised by the way in which the rule includes and excludes certain developments and charges. For example, under draft rule WAC 480-120-071(3)(b) it states that "Customers are
responsible for providing or paying the cost of trenching, conduit, or other structures …." Is it the Commission's intent that this rule define the entire extent of the applicant's obligation?[1] Many companies have Service Order charges and Central Office charges which apply when an applicant signs up for service. These are charges related to the initiation of service that involve functions above and beyond providing for the line extension. However, by providing a broad statement delimiting what customers are responsible for paying, the negative implication is that they do not need to pay other charges related to the initiation of service.

A similar interpretive problem relates to how the charges are assessed to developments that are outside of the proposed rule; specifically, for those developments identified in section (6) of the proposed rule. If the company files a tariff amendment to conform its tariff to cover the developments that are included in the scope of the proposed rule, but maintains a time and materials charge, for example, in its tariff language for those developments that are outside of the proposed rule (as defined in the proposed rule), are those tariffs still lawful? Given the structure of the proposed rule, it is critical that the proposed rule include a general savings clause. WITA suggests the following:

> Nothing in this rule shall be construed to prohibit companies governed by this rule from recovering costs assessed to applicants for services contained in tariffs or similar lawful arrangements, or for charges to developments for line extensions that are outside of the scope of this rule contained in tariffs or other lawful arrangements.

[1] A related, but less important, issue is this section's use of language. Portions of the section refer to "applicant." Other portions refer to "customer." The terms should not be used interchangeably, but they are within the proposed rule.

3. The tariff recovery limitations are unclear.

There is another serious interpretive problem raised by the proposed rule's reference to federal Universal Service funds and other similar funds or grants contained in proposed WAC 480-120-071(4)(a). Under this proposed language, the Commission is stating a limitation on what may be recovered in a tariff charge for line extension service.[2] The limitation is that the tariff may not recover costs covered by, in part, "federal universal service funds, or any similar funds or grants from other sources."

It is not clear how this provision will be applied. Certain portions of the federal Universal Service program are meant to assist a company serving high-cost areas reduce the charges that would be assessed to customers and make the service affordable. Certainly, a portion of a company's expenditures to provide service are related to the extension of an outside plant, including line extensions. Does this mean that under this language it is the Commission's intent that a company not recover anything under a state tariff if it is receiving federal Universal Service funds? On the other hand, Universal Service funds

are always on a two-year lag under the current system. Under this view, federal Universal Service funds would not contribute to the recovery of a line extension at the time that the tariff is filed. Is that the proper interpretation? How does a company identify which portion of the line extension has been contributed to by federal Universal Service funds (there is no direct recovery of "line extensions")? In addition, what are "any similar funds or grants from any other sources", as that term is used within the draft rule?

4. Section (6) is ambiguous, at best.

From start to finish section (6) is at best ambiguous. At worst, it is unenforceable.

To begin, the lead-in language in subsection (6) states "Accordingly, this section does not apply to extensions to serve the following…." The use of the word "section" is confusing. Does that mean section (6)? Or does it mean the entire rule?[3] WITA suggests that the language be modified to read: "Accordingly, this rule does not apply to extensions to serve the following…."

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[2] Although not stated, the implication from the language is that the tariff charge being discussed here is the Universal Service element assessed on terminating access. If that is the Commission's intent, perhaps it should be stated more clearly.

[3] Not the least of the ambiguities is the fact that the concluding sentence of the section states that companies may not recover under subsection (4) for the "service" (line?) extensions excluded from the rule by section (6). What about recovery under section (3)? Why is this sentence even needed when the lead-in sentence says "…this section [rule] does not apply to extensions [excluded by the rule]"?

There is a further, major problem in section (6). In section (6) of the proposed rule, the Commission is proposing a very complicated and convoluted series of descriptions which developments are covered by the rule and which are not. In the list of the items that are covered and not covered by the rule, there is the potential for a great deal of confusion about how to apply the rule. It appears in most cases that the triggering event is a "filing." For example in subsection (a) it reads "developments filed after the effective date of this rule…." When does the filing occur? Is it the filing of the development? Is it the filing (provision) of the public offering statement?

In subsection (b), is it the "filing" of the application or the "filing" of the approved plat which is the triggering event?

Under subsections (e), (f), (g) and (h) the company will have to make an investigation to determine whether all lots were under "common ownership and control." How does one establish proof of "common ownership and control"? Is a statement by the developer sufficient? Does the company have to do an independent investigation? How does the company recover these costs (a title report may be necessary)?

Under (i) the rule would apply to mobile home parks, mobile home park cooperatives, and mobile home park subdivisions "created" after the effective date of this rule. What constitutes "creation"? Is it county approval? Is it the
filing of a land use application of some sort? Is it a wild cat developer running a bulldozer across lands to mark out proposed private roads?[4]

WITA suggests a simplification of the rule would remove many of these ambiguities. WITA suggests that section (6) be written to read as follows:

> The cost of extensions to developments, other than the short platting of a single lot, should be born by those who gain economic advantage from development and not by rate payers in general. This policy will promote the placement of telecommunications infrastructure at the same time as other infrastructures constructed as part of a development. Accordingly, this rule does not apply to extensions to serve developments, other than the short plat of a single lot.

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[4] Please keep in mind that this has occurred on more than one occasion. A fairly recent dispute near Asotin's exchange boundary is an example.

Conclusion.[5]

Based on all of these concerns, WITA respectfully requests that this rule not be adopted.

Thank you for your consideration of these comments.

Sincerely,

TERRY VANN

TV/nr
Enclosures
Cc: WITA Board of Trustees
Bob Shirley
Docket Commentors

line.ext.comments

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[5] The foregoing is by no means a complete delineation of problems with the draft rule. Other examples abound. For example, proposed WAC 480-120-071(4)(b)(i) tries to differentiate between Class A companies and those with less than two percent of the state's access lines. Yet, the definition of Class A companies as those with more than two percent of the access lines has not yet been adopted -- where does Ellensburg Telephone Company fall?