BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET NO. UT-970010
Complainant,	)	SECOND SUPPLEMENTAL
v.	)	ORDER REJECTING
	)	INTERCONNECTION COST
U S WEST COMMUNICATIONS, INC.,	)	ADJUSTMENT MECHANISM
	)	TARIFF, ADVICE 2821T
Respondent.	)	
. . . . .	)	

MEMORANDUM

I. Procedural History. On January 3, 1997, U S WEST Communications, Inc. (AUSWC@), filed tariff revisions with the Washington Utilities and Transportation Commission (ACommission@) under Advice No. 2821T, proposing changes to USWC=s Exchange and Network Services and Access Service tariffs (AICAM Tariff@). The filing introduced the AInterconnection Cost Adjustment Mechanism@ (AICAM@), which is intended to recover start-up costs which are incurred pursuant to the federal Telecommunications Act of 1996, and carried an effective date of February 3, 1997. The Commission suspended the filing on
January 29, 1997.

A prehearing conference was conducted before Lawrence J. Berg, Administrative Law Judge, on July 2, 1997. At the prehearing conference all requesting parties were allowed to intervene. Several parties requested leave to file motions to reject or dismiss the ICAM Tariff without further hearing. Furthermore, USWC requested that discovery be delayed until the threshold legal issues were resolved. The First Supplemental Order On Prehearing Conference (APrehearing Conference Order@) dated July 8, 1997, established a schedule for the briefing of threshold legal issues and ordered that discovery be delayed.

Motions to reject or dismiss were filed by Public Counsel, Commission Staff, and by a coalition of parties consisting of AT&T of the Pacific Northwest, Inc. (AAT&T@), Electric Lightwave, Inc. (AELI@), MCI Telecommunications, Corp./MCImetro Access Transmission Corp. (AMCI@), Metronet Services, Inc. (AMetronet@), NEXTLINK Washington L.L.C. (ANEXTLINK@), Sprint Communications Company L.P. (ASprint@), and TCG Seatlle (ATCG@) (collectively, AJoint Parties@). Responses in opposition to the motions to reject or

dismiss were filed by USWC and the Washington Independent Telephone Association (AWITA@). The moving parties filed reply briefs.

II. The ICAM Tariff. USWC is proposing to recover start-up costs that it claims it will incur to implement the mandates of the federal Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, *codified at* 47 U.S.C. ' 151 et seq. (1996) (Athe Act@). USWC claims the costs included in the ICAM are not recovered through any other mechanism already authorized under the Act or in Commission approved tariffs. In essence, the ICAM is a surcharge on rates paid by telecommunications carriers for interconnection, unbundled network elements, and resale to pay for past, present, and future expenditures associated with rearranging USWC=s network.

The ICAM is intended to recover costs incurred for the following network rearrangements: financing or paying for unplanned network upgrades; acceleration of planned network upgrades in compliance with state or federal requirements; and extension and modification of network facilities or operational support systems, including databases and electronic interfaces.

USWC claims that the network rearrangements are necessary to provide competitive local exchange carriers (ACLECs@) with interconnection, access to unbundled network elements, and the ability to resell retail services pursuant to the Act. USWC has identified the following cost categories: previously incurred systems costs for software changes to allow for service assurance, capacity provisioning, and billing and service delivery for CLECs; costs currently incurred for network modifications for anticipated traffic demands arising from the CLECs; and costs currently incurred to establish service centers to process CLEC service orders.[1]

USWC states that, through the third quarter of 1996, it incurred more than $16 million for network rearrangements in its 14-state region. The total costs USWC seeks to recover during the three-year term of the ICAM are estimated at $88.1 million for total Washington, of which $62.9 million is for intrastate service.[2] These costs are also divided among three service areas: local interconnection service (ALIS@), unbundled network elements (AUNEs@), and resale.

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[1] Advice 2821T, Attachment B at 2.

[2] USWC ICAM Cost Estimate Study, Summary of Costs, 1.

USWC proposes two options to recover the costs incurred for interconnection services. USWC=s preferred revenue source is the CLECs which request LIS and UNEs, or to resell services. USWC would recover the costs from the CLECs based upon the manner in which the CLEC operates. Monthly fees would be assessed to CLECs requesting service on a prorated basis over the three-year period.[3] USWC proposes a true-up mechanism. The cost recovery surcharge would be based on a rolling average for a 36-month period, with quarterly amounts added to the surcharge over the total 36-month period.[4] At the end of the three-year ICAM period, USWC proposes to conduct a second true-up and implement a surcharge to recover all network rearrangement costs previously incurred, but not fully recovered.[5]

USWC is uncertain what network rearrangements will ultimately be required. As such, USWC reserves the right to add other cost categories to the ICAM. If USWC is able to recover the network rearrangement costs from other revenue sources, USWC will credit the ICAM. USWC=s second option would be to recover the ICAM costs by way of a monthly surcharge on all of its access lines in Washington.[6]

III. Issues to Be Resolved. Public Counsel, Commission Staff, and the Joint Parties raised numerous grounds for rejecting the ICAM Tariff without further hearing. The parties focused their arguments on the issue of whether the ICAM constitutes impermissible retroactive rate making. They also argue that the ICAM Tariff is inconsistent with the interconnection cost recovery mechanism provided for in section 252(d) of the Act and that the recovery of interconnection costs is already at issue in the Commission=s generic cost docket.[7]

USWC and WITA also raised the issue whether the Commission has authority to reject the ICAM Tariff without conducting further hearings.

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[3] Advice No. 2821T, Appendix 1, Proposed WN U-36, Section 16.1, Original Sheet 1.

[4] Advice No. 2821T, Attachment B, at 6-7.

[5] Id., at 7.

[6] Advice No. 2821T, Appendix 1, Proposed WN U-31, Section 2.6.B, Original Sheet 66.1.

[7] Order Instituting Investigations, Order of Consolidation, and Notice of Prehearing Conference; In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale, et al., Docket Nos. UT-960369, UT-960370, and UT-960371 (November 21, 1996).

ISSUES, DISCUSSION AND DECISIONS

A. Does the Commission Have Authority to Reject the ICAM Tariff Without Conducting Further Hearings?

1. Positions of the Parties

USWC states that the issues raised in opposition to the ICAM Tariff are all issues upon which a hearing must be held in order to make a decision. USWC declares that it has a right to file this tariff and present its proposals to the Commission for decision on a fully developed factual record. USWC argues that it must be allowed an evidentiary hearing to address the allegation that the ICAM costs should be included in the determination of TELRIC prices in the generic cost docket.

WITA states that the issue to be resolved is simply whether the Commission can and should reject the ICAM filing without a hearing. WITA argues that the Commission is an agency created by statute and that, as such, its powers must be expressly provided in statute or necessarily implied therefrom. WITA cites RCW 80.04.130 in support of its contention that the Commission is required to conduct a full hearing before making an order in reference to a suspended filing of a public service company. WITA argues that there is no express authority to reject a tariff filing on its face.

Commission Staff argues that the motion to reject the ICAM is based on a legal issue which, if accepted by the Commission, will make an evidentiary hearing unnecessary. Commission Staff also argues that the Commission=s authority to reject a filing after a hearing implies that the Commission is authorized to reject a filing without a hearing if that filing is legally flawed.

Public Counsel states that the determination of a legitimate issue relating to the fundamental legality of a filing is part of the Commission=s authority to make final determinations. Public Counsel argues that it would not make sense to require the Commission to conduct a full evidentiary hearing on all issues prior to addressing a dispositive legal issue.

The Joint Parties argue that pursuant to RCW 80.01.040, the Commission has the authority to regulate in the public interest the rates, services, facilities and practices of telecommunications facilities. The Joint Parties also argue that if the Commission

lacked the authority to reject tariff filings, it would lack the ability to regulate in the public interest.

2. Commission Discussion and Decision

As reflected in the Prehearing Conference Order, the parties discussed the propriety of the submission of threshold legal issues to the Commission for summary adjudication. The presiding judge determined that these legal issues must be addressed in the course of this proceeding and that, in the best interest of all parties, they should be resolved prior to evidentiary presentations by the parties. A thorough exploration of this issue has been conducted. The presiding judge was persuaded that it would be unfair and burdensome to require USWC to submit to discovery while dispositive motions were pending, and ordered that all discovery activities be suspended until such time as the threshold legal issues are resolved. The parties were properly noticed of their right to object to any provisions of the Prehearing Conference Order pursuant to WAC 480-09-460(2), and no objections were timely filed.

USWC and WITA suggest that either dispositive legal issues do not exist in the context of tariff filings or that RCW 80.04.130 constitutes a prohibition against raising dispositive legal issues prior to an evidentiary hearing. Adjudicative proceedings consist of both legal and factual issues. Where material issues of fact are not in dispute, summary adjudication based upon dispositive legal issues is just and proper.

The Commission agrees with Public Counsel that it would not make sense to require the Commission to conduct a full evidentiary hearing on all issues prior to addressing a dispositive legal issue. Not only is the Commission=s authority to reject tariff filings indispensible to its duty to regulate in the public interest, its authority to reject filings based upon fundamental legal issues is also in the public interest. Evidentiary hearings consume a great deal of time and public resources. If a dispositive legal issue exists, it should be addressed prior to the commencement of an evidentiary hearing.

B. Is the ICAM Tariff Inconsistent With the Act and Is the Recovery of Interconnection Costs Sufficiently At Issue In the Commission=s Generic Cost Docket?

1. Positions of the Parties

Public Counsel states that the Act does not permit the type of cost recovery which USWC proposes. Public Counsel argues that the proper charges for the costs of interconnection and unbundling are to be agreed upon in negotiated contracts, or

submitted to the Commission for the determination of rates which are just and reasonable pursuant to section 252(d) of the Act.[8] Public Counsel states that any and all valid charges for LIS and UNEs should be recovered through the mechanism set out in sections 251 and 252 of the Act, and should be determined in the context of the Commission=s pending generic cost docket. According to Public Counsel, Congress had the opportunity to create a special mechanism to recover the alleged Astart-up@ costs addressed by the ICAM and did not do so.

Commission Staff agrees with Public Counsel that the Act expressly provides a mechanism by which to determine the costs which USWC is entitled to recover from CLECs in the form of revenues from LIS, UNEs, and resold services. Commission Staff also agrees that the absence of an ICAM-type cost recovery mechanism in the Act is evidence that Congress did not intend any other mechanism be employed. Commission

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[8] Section 252(d) of the Act states:

(1) **Interconnection and network element charges**: Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of section (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

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(3) **Wholesale prices for telecommunications services**: For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

Staff believes that the costs of interconnection, unbundling, and resale should be recovered through properly set prices. In Staff=s opinion, once the appropriate prices are established in the generic case, there is no need for further cost recovery relating to interconnection. Commission Staff points out that it has recently concluded that USWC=s general rate increase and overall revenue request in Docket No. UT-970766 is reasonable, and it cautions that the additional revenues from the ICAM could result in USWC achieving a higher than authorized rate of return.

The Joint Parties state that the Act defines the process through which USWC may seek to recover costs incurred in providing LIS, UNEs, and services for resale to CLECs, and sets forth the pricing standards to be used. The Joint Parties argue that the Commission=s November 21, 1996 Order in the generic cost case provided that recovery of ICAM-type costs would be addressed in that docket. The Joint Parties conclude that USWC is not entitled to two opportunities to recover the same costs.

USWC argues that the costs which the ICAM will identify and recover are not included in TELRIC cost studies, and must be recovered somehow in order to comply with the mandate of the Act that local exchange companies recover their costs for LIS and UNEs. USWC seeks to place the burden on the moving parties to establish that the Act or the FCC rules provide a mechanism for this type of recovery. USWC concludes that opposition in the generic cost docket to the recovery of Acompetition onset costs@ will deprive USWC of any legitimate opportunity for recovery.

USWC states that it previously offered to consolidate this filing with the generic proceeding to ensure that costs included in a TELRIC analysis or otherwise recovered will not be part of the costs recovered by the ICAM. USWC has presently offered to waive the suspension date for this tariff in order to allow the Commission to complete the cost and pricing proceeding. USWC contends that this extension of time will enable the Commission to verify that the ICAM identifies legitimate, recoverable costs which are not included in the generic proceeding. According to USWC, these interconnection costs will benefit new entrants and their subscribers, not USWC or USWC ratepayers.

WITA argues that if a company chooses to file a tariff that recovers part of its costs in one proceeding and the rest of its costs through another rate element determined in a separate proceeding, it does not constitute a basis for rejecting the tariff filing. WITA argues that the Commission can subsequently combine the authorized level of recovery into a single rate design, after considering all public policy considerations in a hearing regarding the appropriate rate design.

2. Commission Discussion and Decision

The underlying premise of the ICAM is that neither Congress nor the FCC

foresaw that incumbent local exchange carriers (AILECs@) would incur start-up costs in compliance with newly-mandated obligations, and that the absence of any appropriate mechanism for cost recovery necessitates an independent proceeding. The Commission considers this to be a fundamental flaw with the ICAM and it constitutes a legal basis upon which to reject the ICAM Tariff. The Eighth Circuit Court=s opinion dated July 18, 1997, discusses the capability of Congress to make informed decisions regarding the rights and duties of relevant parties, and while in a slightly different context is nonetheless instructive.[9] The Court comments on the FCC=s reference to the Cable Act in support of its proposed system of parallel federal and state jurisdiction over industry rates. The Court states:

> In sharp contrast to the Telecommunications Act, several provisions of the Cable Act explicitly grant the Commission the authority to regulate the rates of cable companies and explicitly require state authorities to follow the Commission=s rate making rules. [Citation omitted.] The Cable Act simply and forcefully demonstrates that the Congress is capable of clearly expressing its desire to grant the FCC authority over local rates when it wishes to do so. The Telecommunications Act contains no such articulation with respect to the local competition provisions.

Similarly, the Act contains no express provision that ILECs should recover their Astart-up@ costs as proposed in the ICAM. However, section 252(d) of the Act does provide that State commissions shall determine just and reasonable rates for LIS and UNEs based on the cost of providing the interconnection or network element. The Commission finds that Abased on the cost@ means based on *all* costs of providing the interconnection or network element. Section 252(d) of the Act simply and forcefully demonstrates that Congress is capable of clearly expressing the mechanism by which a State commission shall determine rates when it is appropriate to do so.

This Commission initiated a generic cost proceeding by order and notice dated November 21, 1996, for the express purpose of complying with the Commission=s obligations under the Act to establish just and reasonable rates for interconnection, unbundled network elements, and resale pursuant to section 252(d). Docket No. UT-960370 was expressly consolidated in that proceeding in order to determine the costs that USWC will incur when providing LIS, UNEs, and resale of services. The Commission stated that it anticipated that the determinations made in that proceeding would apply to

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[9] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997).

any relevant tariffs required to be filed pursuant to Commission Orders in the consolidated interconnection proceedings, Docket No. UT-941464, et al., and the USWC rate case proceeding, Docket No. UT-950200. In spite of the purposes and ultimate issues which were expressly stated in the generic cost proceeding notice, USWC proceeded to file the ICAM Tariff just over a month later. While USWC may have offered to consolidate the ICAM Tariff with the generic cost proceeding at the time it was filed, consolidation is inappropriate insofar as the generic case fully addresses the cost recovery mechanism established by the Act.

USWC states that the ICAM-related costs to be incurred are for the benefit of all CLECs requesting LIS, UNEs, or services for resale, and not for USWC ratepayers. USWC characterizes these start-up costs as costs that are common to requesting CLECs. In a discussion of forward-looking common costs, the FCC acknowledged that certain common costs are incurred in the provision of network elements.[10] The Commission agrees with the FCC conclusion that to the extent that costs cannot be directly allocated to elements and services, forward-looking common costs should be allocated among elements and services in a reasonable manner, consistent with the pro-competitive goals of the Act.[11] The Commission will consider whether forward-looking common costs should include start-up costs for the provision of LIS, UNEs, and resale of services in the generic cost case.

The WITA argument that the Commission is obligated to conduct multiple proceedings to consider a tariff that recovers part of the costs in one proceeding and the rest of the costs through another rate element determined in a separate proceeding is specifically rejected when both proceedings require that the same issues be resolved.

The Commission takes some exception with the USWC claim that its ratepayers do not benefit from costs that are incurred in response to the pro-competitive goals of the Act. USWC ratepayers are also consumers. The intent of the Act was to generate a benefit for all consumers by promoting competition and consumer choice. When the Commission exercises its authority to regulate in the public interest, the subject Apublic@ is comprised of consumers as well as competitors. If there are costs incurred by ILECs in the provision of LIS, UNEs, and resale which are not properly included in the determination of just and reasonable rates for LIS and UNEs, then those costs may be subject to recovery in a general rate case. There are well-established generally accepted accounting principles which apply to the proper treatment of start-up costs incurred by a regulated company. Usually when a company anticipates the need to incur costs and the

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[10] In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, paragraph 694 (August 8, 1996).

[11] Id., at paragraph 696.

need to recover those costs through rates, it would petition the Commission for an accounting order allowing the company to place the costs in a deferred account for prospective recovery through a rate case proceeding.

There are other considerations which lead the Commission to conclude that all relevant costs will be considered and included in the determination of prices in the generic docket. Pursuant to the Eighth Circuit Court decision, which was issued after the ICAM Tariff was filed and suspended, operational support systems (AOSS@) qualify as a network element. The treatment of OSS as a network element is a major component of the ICAM. Furthermore, USWC states that if the Commission establishes the proper wholesale discount in the generic cost case, the reseller-related portion of the ICAM will be addressed. The fact that there is opposition in the generic case to the recovery of Acompetition onset costs@ confirms that this issue will be fully addressed in that proceeding.

Finally, in a recent Notice of Proposed Rulemaking the FCC states that ILECs providing interconnection and access to unbundled network elements will not generate new types of costs beyond those already being incurred in normal operations.[12] The FCC concludes that although additional amounts may be incurred, these amounts may be recorded within existing accounts. Accordingly, this Commission is confident that all relevant costs will be reviewed in the determination of just and reasonable rates in the generic case.

C. Does the ICAM Tariff Constitute Retroactive Ratemaking?

The parties in this proceeding thoroughly briefed the issue whether the ICAM constituted retroactive rate making. In the Sixth Supplemental Order in Docket No. U-81-41, the Commission stated:

> [Retroactive rate making involves] surcharges or ordered refunds applied to rates which had previously been paid, constituting an additional charge applied after the service was provided or consumed. The evil in retroactive rate making as thus understood is that the consumer has no opportunity prior to receiving or consuming the service to learn what the rate is or to participate in a proceeding by which the rate is set. The Commission agrees that retroactive rate making, as thus understood, is extremely poor public policy and is illegal under the statutes of Washington State as a rate applied to a service without prior notice and review.[13]

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[12] Notice of Proposed Rulemaking, In the Matter of Amendments to Uniform System of Accounts for Interconnection, FCC CC Docket No. 97-212, paragraph 14 (October 7, 1997).

[13] Sixth Supplemental Order, Washington Utilities and Transportation Commission v. Puget Sound Power and Light Company, Docket No. U-81-41, at pages 17-18 (December 19, 1988).

The moving parties based their main argument on the proposed recovery of costs previously incurred through a true-up mechanism. The Sixth Supplemental Order also discusses the recovery of past expenses:

> The test for such treatment is not whether it constitutes retroactive rate making -- it does not -- but whether there are sound policy and evidentiary reasons for exercising the Commission=s judgment to do so.[14]

[14] Id., at page 19.

Accordingly, the Commission finds that any final determination regarding the proposed recovery of costs previously incurred would require an evidentiary hearing. The Commission also finds that a finding of retroactive rate making on the other grounds raised by the parties would require an evidentiary hearing.[15]

FINDINGS OF FACT

1. The Commission initiated a generic cost proceeding by order and notice dated November 21, 1996, for the express purpose of complying with the Commission=s obligations under the Act to establish just and reasonable rates for interconnection, unbundled network elements, and resale pursuant to section 252(d).

2. Docket No. UT-960370 was expressly consolidated in that proceeding in order to determine the costs that USWC will incur when providing for LIS, UNEs, and resale of services.

3. Operation support systems qualify as a network element.

4. Wholesale costs are incurred when providing wholesale services.

5. The ICAM proposes to recover common costs incurred by USWC in the provision of LIS, UNEs, and resale of services.

6. The generic cost proceeding and the ICAM proceeding both require that the same issues be resolved.

7. The intent of the Act was to generate a benefit for all consumers by promoting competition.

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[15] Other grounds raised by the parties include: the ICAM constitutes inadequate prior customer notice of rates and charges for service and insufficient opportunity for public participation in a rate setting proceeding; the ICAM constitutes a barrier to entry; the ICAM violates the state policy to promote competition; the ICAM is discriminatory; the ICAM cost support is insufficient; and the ICAM deprives ratepayers of property without due process of law.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and the parties.

2. The Washington Utilities and Transportation Commission has the authority to reject suspended tariff filings on a summary basis if there are no disputed material issues of fact and if there is a dispositive legal issue.

3. The assessment of whether the Act expressly provides for the recovery of interconnection costs, whether the Act provides for the ICAM, and whether the ICAM is consistent with the Act does not involve any disputed issues of material fact.

4. Section 252(d) of the federal Telecommunications Act of 1996 provides that the Commission shall determine just and reasonable rates for interconnection, unbundled network elements, and resale of services based upon all of the costs incurred in providing the interconnection or network element.

5. Language in the Act which provide for just and reasonable rates Abased on the cost@ means based on *all* of the costs of providing the interconnection or network element.

6. The Act does not contain an express provision for the recovery of Astart-up@ costs as proposed in the ICAM.

7. The ICAM is inconsistent with the cost recovery provisions stated in section 252(d) of the Act.

8. The Commission=s generic cost proceeding was initiated for the express purpose of complying with the Commission=s obligations under the Act to determine all of the costs and to establish just and reasonable rates for interconnection, unbundled network elements, and resale of services pursuant to section 252(d) of the Act.

9. The generic cost proceeding was initiated prior to the ICAM proceeding, and it fully addresses the cost recovery mechanism established by the Act.

10. The Commission should consider whether forward-looking common costs should include start-up costs for the provision of LIS, UNEs, and resale of services in the generic cost case.

11. The generic cost proceeding and the ICAM proceeding both require that the same issues be resolved; thus, the ICAM proceeding is superfluous.

12. All consumers benefit from the pro-competitive goals of the Act, including USWC ratepayers.

O R D E R

THE COMMISSION ORDERS that the motions to reject USWC=s ICAM Tariff are granted, and the revisions to USWC=s currently effective Tariff WN U-31 and 36, filed under its Advice No. 2821T, are hereby rejected.

DATED at Olympia, Washington, and effective this day of November 1997.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANNE LEVINSON, Chair

WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-09-820(1).