August 11, 1999

VIA ELECTRONIC MAIL
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Carole Washburn, Secretary
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Re: Telecommunications Act Fee Rulemaking, Docket No. UT-990873

Dear Ms. Washburn:

Pursuant to the Commission's Notice of Opportunity to File Written Comments (August 11, 1999) ("Notice") in the above-referenced docket, NEXTLINK Washington, Inc. ("NEXTLINK"), Electric Lightwave, Inc. ("ELI"), Advanced TelCom Group, Inc. ("ATG"), and NorthPoint Communications, Inc. ("NorthPoint"), provide the following comments. The comments are organized by the questions the Commission has posed in the Notice.

Should the Commission adopt fees under the statute? What factors should the Commission consider in deciding whether to adopt fees?

The Commission should not adopt fees pursuant to RCW 80.36.601. Every telecommunications carrier that is registered with the Commission to provide local and long distance services in Washington pays an annual fee to the Commission to recover the reasonable costs the Commission incurs to regulate and supervise those companies. RCW 80.24.020. Such regulation and supervision, moreover, is pursuant both to state law and to "any other law," RCW 80.01.040, and includes participation in federal proceedings. RCW 80.01.075. Accordingly, the mechanism for recovering regulatory costs -- including the cost of implementing the Telecommunications Act of 1996 ("Act") -- already exists, rendering unnecessary an additional fee structure. The Commission should consider adopting additional fees only if that existing

mechanism cannot generate adequate cost recovery, *i.e.*, if the Commission is experiencing a demonstrable and significant shortfall in operating funds that is directly attributable to the Commission's performance of its obligations under the Act.

What activities should be subject to fees, if fees are adopted?

If the Commission adopts fees, those fees should not be assessed on a "per activity" basis. Attempting to allocate fees on a "per activity" basis would undermine the development of effective competition by unduly burdening companies' ability to vindicate their rights under the Act, potentially in violation of 47 U.S.C. § 253(a). Competing local exchange carriers ("CLECs") will predominantly be the parties bringing actions to arbitrate or enforce interconnection agreements or statutory obligations under the Act. If the CLECs must pay the Commission's costs as well as their own, fewer CLECs will be able to afford to bring those actions or to provide service under the terms and conditions offered by the incumbent local exchange carriers ("ILECs").

Imposing "per activity" fees is also inherently discriminatory. If such fees are uniform for all carriers, regardless of the type of Commission action or proceeding, carriers involved in routine proceedings (such as opting into another carrier's negotiated interconnection agreement) would be compelled to reimburse the Commission far in excess of the costs the Commission incurs to undertake that proceeding. If the fees are established to reflect the actual costs incurred, carriers that engage in more costly proceedings, such as an arbitration or enforcement proceeding, effectively would subsidize later carriers that simply opt into the arbitrated agreement or incorporate the results of the enforcement proceeding. For example, figures provided by the Commission indicate that almost $52,000 in staff time was devoted to the MFS/USWC arbitration, but only $1,100 was devoted to GST's adoption of the agreement arbitrated between MFS and USWC. Attempts to tailor the fees to account for these disparities would only result in needless complexity and likely would fail to remedy the inherent discrimination.

If the Commission does adopt fees, how should they be structured? The law permits charging persons seeking action and to parties. Should fees be apportioned among participants? What standards are appropriate to use in apportioning fees? What process is appropriate to use in apportionment?

If the Commission adopts additional fees, those fees should be structured in the same manner as the existing fees, *i.e.*, as a percentage of reported intrastate gross revenues. All telecommunications carriers must interconnect their networks and thus, at a minimum, all carriers must rely on the Commission to establish appropriate pricing and other requirements pursuant to the Act, as well as to process requests for approval of interconnection agreements. Most, if not all carriers, moreover, will also benefit directly or indirectly from arbitrations and enforcement proceedings initiated by other carriers. Accordingly, all telecommunications carriers and their customers should contribute to the Commission's costs in proportion to the revenues they generate and report in Washington if the Commission adopts additional fees.

What is the relationship between the existing regulatory fee structure and any fees established in this rulemaking? How does that relationship affect setting or apportioning fees? Should the status of a person or party as one who pays existing regulatory fees affect the assessment or the level of fee under this potential rule?

The existing regulatory fee structure requires contributions from all regulated utilities without any attempt to tailor those fees to the costs the Commission incurs to regulate each industry. RCW 80.24.010. The Commission should not consider imposing additional fees on the telecommunications industry until the Commission has determined that the fees those companies already pay do not recover the costs attributable to regulating the telecommunications industry. Such a determination would require that the Commission study the relative costs generated, and fees paid, by the companies in each regulated industry to ensure that those companies are contributing their proportionate share of the costs the Commission incurs to regulate that industry. Any such study would also have to account for temporal variations in cost and contributions on an industry-specific basis, *i.e.*, the extent to which an industry generates significantly different costs or pays significantly different fees in different years.

Even were the Commission to undertake such a study, the Commission would have to be prepared to reevaluate the fees paid by *all* utilities to ensure that each industry pays for its own costs. The telecommunications industry should not be the only industry that must match fees to Commission expenses, and any attempt to impose higher regulatory fees solely on telecommunications companies would raise substantial issues of constitutional due process and equal protection. Until the Commission undertakes an appropriate study and requires all regulated utilities to contribute to their industry's regulatory costs, therefore, the Commission should not impose any additional fees on telecommunications companies.

What level of fees should be established? Should fees cover all costs or only a portion? Should fees be set on the basis of average resource costs or should they be billed individually in each proceeding based on exact costs? Should different structures and levels be adopted for different activities under the Act?

One of the problems with establishing separate fees for proceedings under the Act is the difficulty in determining the costs that would be recovered -- or, indeed, whether any costs are attributable solely to implementation of the Act. In 1994, two years prior to passage of the Act, the Washington Supreme Court determined that no monopoly franchise exists for the provision of local telecommunications service in Washington. *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 869 P.2d 1045 (1994). That same year, the Commission initiated proceedings to establish rates, terms, and conditions for interconnection of competing carriers' local exchange networks, which is mandated by state law. *WUTC v. USWC*, Docket No. UT-941464, *et al*.; RCW 80.36.200 & 220. The Act federalized this process, but the Commission likely would have incurred most of the same costs of implementing the Act as it would have incurred under state law. In other words, the advent of local exchange competition in fact, rather than the legal framework of the Act itself, is responsible for most, if not all, of the Commission's costs to implement the Act.

Even if some costs could be attributed solely to the Commission's implementation of the Act, the Commission should be careful to identify and quantify those costs accurately. Such an effort, however, like any other cost proceeding, likely would require expenditure of significant Commission and party resources, and would be unlikely to result in benefits to the Commission, regulated telecommunications carriers, or the end-users they serve. As discussed above, moreover, those costs often cannot be attributed solely to the parties in a particular proceeding and thus should not be billed individually in each proceeding based either on exact or averaged costs.

The Commission, therefore, should not adopt additional regulatory fees for implementing the Act. Existing regulatory fees should be sufficient to recover the Commission's regulatory costs, and the emergence of local exchange competition -- which began in Washington well before passage of the Act -- is responsible for any increase in the Commission's regulatory costs. If the Commission nevertheless decides to impose additional fees, those fees should be structured and calculated in the same manner as existing regulatory fees to avoid discrimination, as well as to minimize the Commission and company resources expended to calculate and assess costs and fees on an individual activity and/or party basis.

NEXTLINK, ELI, ATG, and NorthPoint appreciate the opportunity to provide comments to the Commission on these issues. Please contact me if you have any questions about these comments.

Sincerely yours,

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