November 12, 1999

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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: Interpretive and Policy Statement on 252(i), Docket No. UT-990355

Dear Ms. Washburn:

Pursuant to the Commission's Notice of Opportunity to File Supplemental Comments (November 10, 1999) ("Comment Notice") in the above-referenced docket, NEXTLINK Washington, Inc., Electric Lightwave, Inc., Advanced TelCom Group, Inc., Frontier Local Services, Inc., Frontier Telemanagement, Inc., NorthPoint Communications, Inc., Focal Communications Corporation, GST Telecom Washington, Inc., and Teligent, Inc. (collectively "Joint Commenters"), provide the following comments.

Joint Commenters -- particularly those who are also Petitioners in this docket -- appreciate the Commission's efforts to address the policy and procedural issues raised in the implementation of 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809. The Draft Interpretive and Policy Statement ("Draft Statement") largely resolves the issues it addresses consistent with the Telecommunications Act of 1996 ("Act"), the FCC's *Local Competition Order*, and Washington law, and establishes appropriate procedures for resolving disputes, as Petitioners requested. A few aspects of the Draft Statement, however, should be modified or clarified as discussed below.

The Draft Statement should be modified to delete Principle 7, which conflicts with Principle 6, the Act, and FCC decisions. Under the proposed Principle 7, "The 'reasonable period of time' during which a new [interconnection] arrangement must be made available to carriers with existing agreements is nine (9) months after the Commission approves the agreement." Draft Statement ¶ 19. On its face, this principle is inconsistent with Principle 6, which provides that the period of time in which a requesting carrier may exercise its right to pick and choose from an existing agreement "extends until the expiration date of that agreement." *Id*. ¶ 18. Principle 6 properly reflects the applicable legal requirements and should apply to all arrangements.

Principle 7 is also inconsistent with federal law. Neither Congress nor the FCC made any distinction between "new" interconnection arrangements and other arrangements, or between requesting carriers with and without an existing agreement. Rather, the Act and FCC Rule require incumbent local exchange companies ("ILECs") to "make available *any* interconnection, service, or network element . . . to *any* other requesting telecommunications carrier . . . ." 47 U.S.C. § 252(i) (emphasis added); *accord* 47 C.F.R. § 51.809(a). The Commission should not condition carriers' rights under federal law without Congressional and FCC authorization. The limitation in Principle 7 is particularly problematic because the Draft Statement provides no definition of a "new" interconnection arrangement or any explanation of why such arrangements are treated differently than other arrangements. Instead of assisting in the resolution of future disputes, this principle would generate disputes over whether a particular arrangement is "new" and thus available only for a limited time, as well as whether such a restriction is lawful.[1]

In addition to deletion of Principle 7, Principle 10 should be clarified by revising the second sentence to state, "An ILEC may impose additional terms and conditions from the Commission-approved agreement as part of an arrangement only if the ILEC proves to the Commission that those additional terms ~~the interconnection, services or elements comprising the arrangement~~ are ~~either~~ technically or financially inseparable from the requested interconnection, service, or element arrangement ~~or are related in a way that separation will cause an increase in~~

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[1] As a practical matter, moreover, a nine month window imposes an undue burden on carriers to obtain and review every interconnection agreement within nine months of its approval by the Commission to ensure that no "new" provisions have been negotiated or arbitrated. In particular, Smaller carriers with limited resources cannot reasonably undertake such extensive review, yet those carriers are precisely the carriers most likely to need to use Section 252(i) to obtain provisions that larger carriers with greater bargaining power have been able to negotiate or arbitrate with the ILECs.

~~underlying costs~~." This clarification is necessary to minimize ILECs' efforts to require that requesting carriers agree to terms and conditions that are not part of the Commission-approved agreement.

For example, both U S WEST and GTE have required or have attempted to require that carriers opting into an agreement sign a separate "opt-in" agreement or countersign an "opt-in" letter that alters the terms and conditions of the Commission-approved agreement. The latest version of GTE's "opt-in" letter states that the requesting carrier cannot seek reciprocal compensation for Internet Service Provider ("ISP") bound traffic under the requested agreement because a requirement that GTE pay such compensation to the requesting carrier allegedly would increase GTE's costs. The Commission should not permit such a practice. Rather, the Commission should make clear that the ILECs may not modify a Commission-approved agreement as a condition of allowing other carriers to adopt it. Any new terms introduced by the ILEC in addition to those the carrier has specifically requested, therefore, must be both from the Commission-approved agreement and inseparable from the requested provisions.

The Draft Statement should also be clarified by deleting the fourth sentence in Principle 6, *i.e.*, the sentence, "Such an extension would be unreasonable and unduly burdensome to ILECs because it could require an ILEC's continuing performance of obligations that were based on outdated assumptions." Draft Statement ¶ 18. While that statement hypothetically may be accurate in some limited circumstances, the more likely possibility is that the ILEC's continuing performance of those obligations is required by applicable law and based on current and viable assumptions. Requesting carriers are unlikely to seek negotiated provisions that have become obsolete, while ILECs are much more inclined to refuse to allow a carrier to obtain provisions from an expired agreement when the Commission required those provisions in an arbitration. The Commission should not base Principle 6 on a theoretical assumption that has little, if any, practical applicability, and thus should delete the fourth sentence in paragraph 18.

This clarification to Principle 6 raises an issue that the Draft Statement does not address -- the continuing viability, and availability to nonparties, of the Commission's resolution of legal issues in arbitrations. Three of the four complaint or enforcement proceedings and at least one arbitration brought before the Commission since the passage of the Act have involved ILECs' refusals to honor or to provide to other carriers terms and conditions the Commission had previously ordered in an arbitration. *See ATG v. U S WEST*, Docket No. UT-993003 (U S WEST refusal to provide arbitrated reciprocal compensation provisions from MFS Agreement); *NEXTLINK v. U S WEST*, Docket No. UT-990340 (same); *MFS v. GTE*, Docket No. UT-980338 (GTE refusal to provide reciprocal compensation for ISP traffic); *In re ELI/GTE Arbitration*,

Docket No. UT-980370 (same). As these proceedings and the ILEC opt-in practices discussed above amply demonstrate, ILECs will continue to refuse to provide arbitrated terms and conditions to other carriers as long as the Commission provides them any opportunity even to attempt to do so.

Parties and the Commission should not repeatedly be forced to relitigate issues the Commission has already resolved as a matter of law.[2] Accordingly, the Draft Statement should be amended to insert a new principle after what is now Principle 8 as a new Principle 8 (the current Principle 8 becoming Principle 7 if the current Principle 7 is deleted as discussed above) as follows:

> Principle 8. Notwithstanding the "reasonable period of time" and limitations established in Principles 6 and 7, a requesting carrier may seek to adopt an arbitrated provision in a Commission-approved agreement, even after that agreement has expired, if the Commission required that the provision be included in the agreement as a matter of law. The ILEC may refuse to permit the requesting carrier to adopt such a provision from an expired agreement only if the ILEC demonstrates to the Commission that an intervening change in the law has rendered that provision unlawful or no longer consistent with the Commission's current resolution of the underlying legal issue.

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[2] Such issues would include, but not be limited to, the Commission's determinations that ISP traffic is included in local traffic for reciprocal compensation purposes, *e.g., id.*; competitors' switches are treated like ILEC tandem switches for reciprocal compensation purposes if they serve a comparable geographic area, *e.g., In re ELI/GTE Arbitration*, Docket No. UT-980370; and ILECs may not charge up-front construction charges for unbundled network elements or services for resale, *e.g., In re TCG-U S WEST Arbitration*, Docket No. UT-960326.

The Joint Commenters 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,

DAVIS WRIGHT TREMAINE LLP

Gregory J. Kopta
Attorney for NEXTLINK Washington, Inc., Electric Lightwave, Inc., Advanced TelCom Group, Inc., Frontier Local Services, Inc., Frontier Telemanagement, Inc., NorthPoint Communications, Inc., Focal Communications Corporation, and GST Telecom Washington, Inc.

cc: Kaylene Anderson
Jackie Follis
Kath Thomas
Gena Doyscher
Christine Mailloux
Matt Berns
Gary Yaquinto
Angela Wu