

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

In re the Matter of the Petition of	)	
	)	DOCKET NO. UT-013073
	)	
ELECTRIC LIGHTWAVE, INC.,	)	
FOX COMMUNICATIONS, INC.,	)	DECLARATORY ORDER ON
INTERNATIONAL TELCOM LTD,	)	RECIPROCAL COMPENSATION
and XO WASHINGTON, INC.	)	RATES
	)	
For Declaratory Order on Reciprocal	)	
Compensation Rates	)	
.....	)	

1     **SYNOPSIS:** *The Commission declares that it did not in Docket No. UT-960369 establish permanent reciprocal compensation rates to replace interim rates in Commission-approved interconnection agreements.*

2     **PROCEEDINGS:** On August 13, 2001, Electric Lightwave, Inc., Fox Communications, Inc., International Telcom Ltd., and XO Washington, Inc. (“Joint Petitioners”) filed with the Commission<sup>1</sup> a petition for declaratory order in this matter pursuant to RCW 34.05.240 and WAC 480-09-230. The Joint Petitioners seek an order of the Commission clarifying that supplemental orders entered in Docket No. UT-960369, *et al.* (“UT-960369”),<sup>2</sup> did not establish per-minute of use (“MOU”) rates for reciprocal compensation. The Joint Petitioners also request that the Commission declare that as a result, interim reciprocal compensation rates in interconnection agreements approved by the Commission remain in effect until the Commission specifically establishes different per-MOU rates for reciprocal compensation in some other proceeding.

3     Notice of receipt of the petition, including a schedule for parties to file a statement of fact and law, was broadly served to telecommunications carriers on August 27, 2001. A prehearing conference was convened on September 24, 2001, and a schedule was

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<sup>1</sup> In this Order, the Washington Utilities and Transportation Commission is referred to as the “Commission” and the Federal Communications Commission is referred to as the “FCC.”  
<sup>2</sup> See *In the Matter of the Pricing Proceeding For Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket Nos. UT-960369 (general), UT-960370 (U S WEST), and UT-960371(GTE), Order Instituting Investigations (November 20, 1996). U S WEST Communications, Inc., subsequently merged and was renamed Qwest Corporation. GTE Corporation also merged and was renamed “Verizon Communications, Incorporated.” GTE Northwest Incorporated was renamed “Verizon Northwest, Incorporated.” In this Order, U S WEST and Qwest are referred to as the same incumbent local exchange carrier; GTE and Verizon also are referred to as the same carrier.

established for parties to file additional briefs. All written arguments were received by the Commission by October 16, 2001.

4 **PARTIES:** The following parties appeared and filed written statements: Electric Lightwave, Inc., Fox Communications, Inc., International Telcom Ltd, and XO Washington, Inc., by Gregory Kopta, attorney, Seattle; Qwest Corporation (“Qwest”) by Lisa A. Anderl, attorney, Seattle; Verizon Northwest Inc. (“Verizon”), by Judy Endejan, attorney, Seattle; Level 3 Communications, LLC (“Level 3”), by Rogelio Pena, attorney, Boulder, CO, and Commission Staff (“Staff”), by Gregory Trautman, Assistant Attorney General, Olympia.

5 **COMMISSION:** Commission orders do not state whether switching costs for unbundled network elements (“UNEs”) should also be used to determine termination rates for purposes of reciprocal compensation. Nor do our orders establish a per minute-of-use rate structure. Furthermore, permanent rates established in Commission orders must be submitted in tariff compliance filings, and then must be approved by the Commission, before becoming effective. Neither Qwest nor Verizon included a rate for reciprocal compensation in its compliance filings. Therefore, interim rates approved in interconnection agreements remain in effect. Our clarification does not foreclose the possibility that interim reciprocal compensation rates in existing agreements may be amended based on other terms and conditions in those agreements.

## I. MEMORANDUM

### Procedural Background

6 In June or July 2001, Qwest notified several of the Joint Petitioners that generally applicable local and tandem switching and transport UNE rates approved by the Commission in UT-960369 were applicable to reciprocal compensation. Qwest applied those rates to compensation due for the exchange of traffic as of December 2, 2000, the date that Qwest’s interconnection tariff became effective. According to Qwest, it overpaid invoices from CLECs based on the difference between the interim reciprocal compensation rate specified in the parties’ interconnection agreements and the payments that Qwest should have made based on the new rates.

7 The need for a declaratory order arises because the parties claim that they are unable to ascertain the cumulative significance of several Commission orders in UT-960369. The Commission approved rates for transport and termination (reciprocal compensation) in interconnection agreements on an interim basis and stated that permanent rates for transport and termination (reciprocal compensation) would be established in UT-960369. The Commission subsequently decided that it would

adopt rate structures proposed by parties on a case-by-case basis.<sup>3</sup> The parties disagree whether the Commission also adopted permanent rates for “interim” rate structures that were previously approved.

8 Every interconnection agreement that has been approved by the Commission provides for reciprocal compensation that is based on either a bill-and-keep or per-MOU rate structure.<sup>4</sup> In numerous cases the parties disagreed and the Commission was required to decide which rate structure to be given effect.<sup>5</sup> The Commission did not establish a preference for one rate structure over the other. However, in those instances where bill-and-keep was approved, the Commission also required that that the rate structure be converted to a per-MOU mechanism if a LEC demonstrated that the exchange of traffic was imbalanced by more than 10%.

9 In arbitration proceedings where the Commission adopted a per-MOU rate structure, the parties were directed to implement the Commission’s decision into their interconnection agreement consistent with language proposed by the prevailing party. Although the Commission was occasionally required to resolve disputes over the applicability of a particular element rate (such as local vs. tandem switching rates), the Commission did not define a per-MOU rate structure with specificity. Furthermore, the Commission’s Interpretive and Policy Statement implementing certain provisions of the Telecommunications Act of 1996 (the “Act” or the “Telecom Act”)<sup>6</sup> states that “[a]rbitration decisions are binding only upon the parties to the arbitration.”<sup>7</sup> Thus, except where a carrier has adopted a reciprocal compensation arrangement from some other interconnection agreement pursuant to Section 271 of the Act, the Commission cannot be certain whether per-MOU rate structures in existing agreements are identical.

### Statement of Facts

10 Although the parties disagree over the interpretation of Commission orders, there is no dispute presented regarding the core facts. Reciprocal compensation is based on

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<sup>3</sup> See UT-960369, 17<sup>th</sup> Supplemental Order (August 30, 1999), at para. 408-424.

<sup>4</sup> “Bill-and-keep” describes a rate structure where parties mutually exchange traffic without charge to each other. While LECs that initially favored bill-and-keep subsequently favored per-MOU, and vice versa, no LEC has negotiated or arbitrated a different recovery mechanism in any interconnection agreement.

<sup>5</sup> In numerous other cases the parties disagreed whether internet service provider (“ISP”)-bound traffic was subject to reciprocal compensation obligations. The Commission has uniformly held that ISP-bound traffic that originates and is delivered to a terminating carrier in the same exchange should be subject to reciprocal compensation obligations as if it were local traffic.

<sup>6</sup> Pub. L. No. 104-104, 101 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.* (1996).

<sup>7</sup> *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960269, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 (June 27, 1996) (“Interpretive and Policy Statement”), p. 4, para. II.C.2.

costs incurred to transport and terminate telecommunications traffic. The Commission initiated a generic proceeding to adopt a final cost methodology and prices for interconnection, unbundling, transport and termination, and resale, and stated that rates determined in individual proceedings are by definition interim rates.<sup>8</sup> The Commission approved interim reciprocal compensation rate structures and rates in interconnection agreements that were based on either bill-and-keep or per-MOU.

11 The Commission established costs and unbundled network element rates for switching and transport in UT-960369. Commission orders did not, however, explicitly establish new reciprocal compensation rates.

12 Qwest's and Verizon's tariffs containing wholesale rates for unbundled network elements became effective on December 2, 2000, and December 15, 2000, respectively.

### **Positions of the Parties**

13 The Joint Petitioners argue that the Commission's orders in UT-960369 do not expressly establish per-MOU rates for reciprocal compensation. They further argue that the Commission did not even establish a permanent rate structure for reciprocal compensation.<sup>9</sup> Thus, if no final rate structure has been established, then no permanent rate could be established either. The Joint Petitioners also argue that Qwest's compliance tariff filings in UT-960369 do not include a reciprocal compensation rate.<sup>10</sup>

14 According to the Joint Petitioners, Qwest's proposed permanent per-MOU rate structure is different from the interim rate structures that were approved in interconnection agreements. Level 3 concurs with arguments presented by the Joint Petitioners.

15 Qwest responds that Commission orders made clear from the outset that approved rates in interconnection agreements were interim, that permanent rates would be approved in the generic proceeding, and that parties would reform their agreements to adopt the Commission-approved rates.<sup>11</sup> Qwest argues that Commission orders address transport and termination using the same language as used when discussing transport and switching unbundled network elements ("UNEs"). Therefore, Commission decisions regarding unbundled rates for end-office and tandem switching also address termination costs in the reciprocal compensation equation.

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<sup>8</sup> Docket Nos. UT-960307, UT-960309, UT-960310, UT-960323, UT-960326, and UT-960332, Order on Sprint's Petition to Intervene and to Establish Generic Pricing Proceeding (October 23, 1996), p. 5.

<sup>9</sup> See the Petition filed by Joint Petitioners (August 13, 2001), at para. 4.

<sup>10</sup> See the Petition, para. 8.

<sup>11</sup> See UT-960369, Order Instituting Investigations (November 21, 1996), p. 3.

- 16 According to Qwest, switching as a UNE and switching to transport and terminate a call are functionally the same; in both instances, the call is processed through a carrier's end-office or tandem switch. Commission Staff agrees with Qwest. However, Staff elucidates that while it may be reasonable for the costs (and by extension, rates) determined for switching UNEs to apply to reciprocal compensation rates, the Commission did not expressly state an intent to do so.<sup>12</sup>
- 17 Qwest acknowledges that there is no explicit language in any Commission order either establishing or declining to establish permanent per-MOU reciprocal compensation rates.<sup>13</sup> However, Qwest points out that if such language existed, there would be no need for a declaratory proceeding because the parties would simply be able to refer to that language and resolve their dispute.
- 18 Qwest argues that FCC decisions contemplate that local and tandem switching rates are applicable to reciprocal compensation and that its proposed reciprocal compensation rate is consistent with the FCC's Local Competition Order.<sup>14</sup> Qwest further points to the Local Competition Order, at Paragraph 1060, where the FCC based its default rates for end-office termination on the same proxies that apply to local switching as an unbundled network element. Qwest argues that the Commission's policy that like services should be priced in a like manner compels the conclusion that local and tandem switching rates should also comprise termination rates. Qwest also argues that the Commission's subsequent consideration of alternative reciprocal compensation rate structures in Docket No. UT-003013 is not inconsistent with the determination of rate elements for the per-MOU mechanism in UT-960369.
- 19 Verizon argues that interim per-MOU reciprocal compensation rates were based on interim UNE rates. Whereas interim UNE rates have been replaced by permanent UNE rates, Verizon concludes that the interim reciprocal compensation rates also must be replaced. According to Verizon, competing carriers should not be allowed to benefit from lower permanent UNE rates without accepting the lower reciprocal compensation rates based on those same UNEs.<sup>15</sup>
- 20 Commission Staff states that it is unable to clearly determine that the Commission established permanent reciprocal compensation rates to replace the interim rates contained in interconnection agreements. Thus, Staff concludes that the Commission did not intend to set reciprocal compensation rates in UT-960369.

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<sup>12</sup> See Commission Staff Statement of Fact and Law (October 8, 2001), at p. 4.

<sup>13</sup> See Qwest's Response to the Comments of Other Parties (October 16, 2001), at p. 1.

<sup>14</sup> See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, No. 96-98, 11 FCC Rcd 15499, 16023-16026, 1996 FCC LEXIS 4312 (rel. Aug. 8, 1996) ("Local Competition Order")

<sup>15</sup> See Verizon's Reply to Commission Staff Statement of Fact and Law (October 17, 2001), at p. 2.

Staff reaches this conclusion reluctantly, as Staff has consistently advocated that the “interim” rates in many interconnection agreements should be adjusted because they substantially overstate costs. *Commission Staff Statement of Fact and Law, at p. 2.*

- 21 Staff argues that while the 8<sup>th</sup> Supplemental Order generally establishes costs, the section specifically addressing “Interconnection/Transport and Termination” does not appear to address termination costs. Further, in response to requests for clarification, the 9<sup>th</sup> Supplemental Order discussed transport costs and established a cost for the tandem switching element, but there was no further discussion of termination costs or reciprocal compensation.
- 22 According to Staff, the Commission’s 17<sup>th</sup> Supplemental Order is not clear whether rates approved in interconnection agreements will continue to be effective, or whether new per-MOU rates are to be implemented.
- 23 Qwest maintains that the Commission’s intent to establish permanent per-MOU reciprocal compensation rates can be ascertained even though there is no express language in its orders. Qwest argues that Staff’s conclusion negates the stated purpose of the generic proceeding and contradicts the Commission’s express intent that it would replace interim rates from the arbitrations with permanent rates.<sup>16</sup>
- 24 Verizon adds that no further explicit statement regarding permanent reciprocal compensation rates was necessary in Commission orders, because the Commission had previously determined that costs and prices resulting from UT-960369 were to replace all interim rates. Verizon argues, thus, there was no need to explicitly state the obvious.

### **Discussion and Decision**

- 25 Reciprocal compensation is often referred to as a single rate; however it is actually made up of two components. Section 251(b)(5) of the Telecom Act states that local exchange carriers must establish reciprocal compensation arrangements for the transport and termination of telecommunications. The FCC addresses this duty in its Local Competition Order at Paragraphs 1027 through 1118 and in its rules – 47 C.F.R. § 51.701-51.717. Transport and termination are treated as two distinct functions.<sup>17</sup>
- 26 For purposes of reciprocal compensation, FCC Rule 51.701(c) defines “transport” as “the transmission and any necessary tandem switching of local telecommunications traffic subject to Section 251(b)(5) of the Act from the interconnection point between

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<sup>16</sup> See Qwest’s Response to the Comments of Other Parties (October 16, 2001), at p. 3.

<sup>17</sup> Local Competition Order, at Para. 1039.

the two carriers to the terminating carrier's end office switch that directly serves the called party." Rule 51.701(d) defines "termination" as "the switching of local telecommunications traffic at the terminating carrier's end office switch . . . and delivery of such traffic to the called party's premises." Both the transport and termination rates that comprise reciprocal compensation may also be an aggregate of several rate elements. Thus, before a permanent reciprocal compensation rate can be determined, it is necessary to establish a rate structure.

27 The Commission established general methodology and costs in the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 14<sup>th</sup> Supplemental Orders in UT-960369. These orders include references to transport and termination costs. In the 8<sup>th</sup> Supplemental Order we rejected the use of the Hatfield Model to identify the cost of transport.<sup>18</sup> The Commission ordered that GTE and U S WEST's transport cost models should be used to determine rates if the Commission adopted a rate structure other than bill-and-keep.<sup>19</sup>

28 The 8<sup>th</sup> Supplemental Order rejected the various UNE switching costs proposed by parties, and we developed usage-sensitive switching costs based on several sources of data.<sup>20</sup> Qwest argues that the FCC established that the per-minute rate for local switching should also be used to determine the cost of call-termination in reciprocal compensation,<sup>21</sup> and that the company used that pricing structure in calculating its proposed rate. However, the 8<sup>th</sup> Supplemental Order neither adopts relevant findings made by the FCC nor states whether UNE switching costs should also be used to determine termination rates for purposes of reciprocal compensation.

29 The Commission's 9<sup>th</sup> Supplemental Order addressed requests for clarification. Several CLECs (Nextlink, TCG, and AT&T) jointly sought clarification of the 8<sup>th</sup> Supplemental Order (the "Nextlink Petition") on several points, including the "costs of interconnection and local call termination and transport." The parties stated in their petition:

The Commission's discussion of the costs of ... transport and termination of local traffic [in the 8<sup>th</sup> Supplemental Order] does not address ... call termination but is restricted to interoffice transport, for which the Commission establishes no cost. *Nextlink Petition for Clarification, at para.3.*

30 The Commission refuted the contention that no transport costs were established, and we repeated our findings regarding the use of GTE and U S WEST's transport cost models. But the 9<sup>th</sup> Supplemental Order is silent regarding termination costs. The Commission further stated:

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<sup>18</sup> 8<sup>th</sup> Supplemental Order, at para. 440; 9<sup>th</sup> Supplemental Order, at para. 32.

<sup>19</sup> A per-MOU rate structure is one such alternative reciprocal compensation method.

<sup>20</sup> The 8<sup>th</sup> Supplemental Order, at paragraph 320, states the per-MOU cost of an end-office switch for both U S WEST and GTE.

<sup>21</sup> Local Competition Order, at para. 1057.

We do not understand NEXTLINK, TCG, and AT&T's statement that they need additional information on how these costs should be calculated. *9<sup>th</sup> Supplemental Order, at para. 32.*

- 31 Staff comments that the Nextlink Petition raised the question, at least implicitly, of whether the cost standard for termination rates is the same cost standard for switching as an unbundled network element. If Staff's comment is accurate, then it was incumbent on any party that had an interest in such an outcome to make additional inquiry at the time of the Commission's pronouncement.
- 32 The Commission developed rates for each of the UNEs that comprise Qwest's proposed per-MOU rate structure, and these rates are not in dispute as separate elements. However, the Joint Petitioners disagree that the Commission established a permanent per-MOU reciprocal compensation rate structure based on these elements, or that these elements in the aggregate should replace interim reciprocal compensation rates approved in interconnection agreements. While the interpretation of terms and rates relevant to reciprocal compensation arrangements approved in interconnection agreements are not presently before the Commission, we agree with the Joint Petitioners that the Commission did not establish a permanent per-MOU rate structure in UT-960369.
- 33 The Commission's 17<sup>th</sup> Supplemental Order in that proceeding did not adopt a particular rate structure for transport and termination prices. Rather the Commission decided that it would continue to arbitrate disputes and, where feasible, adopt a rate structure that is proposed by one of the parties.<sup>22</sup> This outcome did not preclude the Commission from establishing a permanent per-MOU rate structure to replace interim rates that had already been approved, but no such proposal, discussion, or decision ensued.
- 34 Unlike the interim rates that became effective upon approval of rate schedules attached to interconnection agreements, permanent rates established in generic proceedings must be submitted in compliance filings, and then must be approved by the Commission, before becoming effective. We note that neither Qwest nor Verizon included reciprocal compensation rates in their compliance filings.<sup>23</sup> Qwest's and Verizon's omissions are inconsistent with the claim that permanent reciprocal compensation rates were established. At a minimum, the failure of Qwest and Verizon to file reciprocal compensation rates in tariffs would prevent any authorized rate from becoming effective.

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<sup>22</sup> We noted that where the public interest or prevailing law requires, the Commission may also adopt a rate structure that is not sponsored by either party.

<sup>23</sup> We also note that Qwest initially sought to apply carrier Switched Access charges as termination charges in its tariff, but the Commission rejected that filing. *See* Qwest's June 9, 2000, compliance filing. *See also* the Commission's 26<sup>th</sup> Supplemental Order, para. 78.



- 35 This conclusion should not be read as any indication as to how the Commission would resolve substantive disputes regarding a permanent per-MOU rate structure if squarely presented in the course of ongoing generic proceedings.<sup>24</sup> The Commission in this Declaratory Order merely clarifies that a permanent per-MOU reciprocal compensation rate structure was not established in UT-960369. Whatever unjustness may be perceived in the Commission's conclusion cannot be corrected in the manner suggested by Qwest and Verizon.
- 36 Our clarification does not foreclose the possibility that interim reciprocal compensation rates in existing agreements may be amended on some other basis. Consistent with the Commission's decision in the 17<sup>th</sup> Supplemental Order that it will adopt a rate structure that is proposed by one of the parties whenever they are unable to jointly reach agreement, the interpretation and enforcement of terms in existing agreements must be made on a case-by-case basis, and cannot be made in a declaratory order.
- 37 In summary, the Commission has not established a permanent per-MOU rate structure or rates to replace interim rates. Nor has the Commission approved permanent per-MOU rates in any tariff. Parties with existing agreements may further petition the Commission to establish a permanent rate in the generic cost proceeding. Alternatively, if a party believes that it is entitled to amend interim reciprocal compensation rates based on other terms and conditions in its interconnection agreement, it may petition for enforcement under Commission rules. Finally, parties may negotiate and arbitrate reciprocal compensation rates as agreements expire.

## II. FINDINGS OF FACT

- 38 Having discussed above all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include undisputed facts and other findings pertaining to the ultimate decisions of the Commission are incorporated by this reference.
- 39 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including electric companies.

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<sup>24</sup> We note that the authority of State commissions to establish reciprocal compensation rates may be presently restricted by the FCC. See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-98, Order on Remand and Report and Order (April 27, 2001).

- 40 (2) The pleadings filed in this proceeding, together with the evidentiary support provided by the parties, show that there is no genuine issue as to any material fact.
- 41 (3) The Commission approved interim reciprocal compensation rate structures and rates in interconnection agreements that were based on either bill-and-keep or per minute-of-use (“MOU”).
- 42 (4) The Commission initiated a generic proceeding to adopt a final cost methodology and prices for interconnection, unbundling, transport and termination, and resale, including permanent rates to replace interim rates in interconnection agreements.
- 43 (5) The Commission established costs and unbundled network element rates for switching and transport in Docket No. UT-960369, *et al.* Commission orders also established transport rates for reciprocal compensation.
- 44 (6) Commission orders did not established termination rates for reciprocal compensation. Nor did the Commission establish a permanent per-MOU rate structure.
- 45 (7) Qwest’s and Verizon’s tariffs containing wholesale rates for unbundled network elements became effective on December 2, 2000, and December 15, 2000, respectively.
- 46 (8) Tariffs filed by Qwest and Verizon in Docket No. UT-960369, *et al.*, do not state rates for reciprocal compensation.

### III. CONCLUSIONS OF LAW

47 Having discussed above in detail all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

- 48 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and all parties to, these proceedings.
- 49 (2) Commission Orders entered in UT-960369, *et al.*, did not establish a permanent per-MOU reciprocal compensation rate structure and rates to replace interim rates previously approved in interconnection agreements.

- 50 (3) The Commission has not approved permanent per-MOU reciprocal  
compensation rates in any tariff.
- 51 (4) Interim reciprocal compensation rates previously approved in interconnection  
agreements should remain in effect subject to further order of the  
Commission.

#### IV. ORDER

THE COMMISSION ORDERS That:

- 52 (1) Interim reciprocal compensation rates previously approved in interconnection  
agreements remain in effect subject to further order of the Commission.

DATED at Olympia, Washington, and effective this 31st day of January, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, 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 or RCW 81.04.200 and WAC 480-09-820(1).**