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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PRICING PROCEEDING FOR INTERCONNECTION, UNBUNDLED ELEMENTS, TRANSPORT AND TERMINATION, AND RESALE		
..... IN THE MATTER OF THE PRICING PROCEEDING FOR INTERCONNECTION, UNBUNDLED ELEMENTS, TRANSPORT AND TERMINATION, AND RESALE FOR U S WEST COMMUNICATIONS, INC.		Docket Nos. UT-960369 UT-960370 UT-960371
IN THE MATTER OF THE PRICING PROCEEDING FOR INTERCONNECTION, UNBUNDLED ELEMENTS, TRANSPORT AND TERMINATION, AND RESALE FOR GTE NORTHWEST INCORPORATED		
IN THE MATTER OF THE CONTINUED COSTING AND PRICING OF UNBUNDLED NETWORK ELEMENTS, TRANSPORT, TERMINATION, AND RESALE		Docket No. UT-003013

**JOINT COMMENTS TO COMMISSION'S SEPTEMBER 25, 2000
NOTICE OF OPPORTUNITY TO COMMENT**

**Qwest Communications Inc.; Covad Communications Company; MPower;
Verizon Northwest Inc.; Rhythms Links, Inc.; Advanced TelCom Group, Inc.; AT&T**

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Communications of the Pacific Northwest, Inc., McLeodUSA Telecommunications Services, Inc.; Electric Lightwave, Inc.; XO Communications (formerly NextLink); WorldCom, Inc.; New Edge Network, Inc.; MetroNet Services Corporation; ICG Communications, Inc.; and TRACER (collectively “the Parties”) jointly file this response to the Commission’s September 25, 2000 Notice of Opportunity to Comment regarding Dr. David Gabel’s involvement in Connecticut proceedings on the pricing of the high frequency portion of the loop. ("Notice").

SUMMARY

The fact and the appearance of fairness in a decision making body are the most important elements of any adjudicative proceeding. In addition, it is critical that the adjudicator refrain from needlessly introducing error into the process that could undo all the parties' time and effort on appeal. Both the fact and the appearance of fairness vanish when the decision-makers or their advisors take public positions on any matter pending before them. For that reason, the Parties must oppose any involvement by Dr. Gabel as a consultant to or witness for the Connecticut Office of the Public Counsel regarding the price of the high frequency portion of the loop or any other matter pending before this Commission in Docket No. UT-003013. The Parties also request further information regarding the extent of Dr. Gabel’s involvement, if any, in the Connecticut proceeding to date and recommend that the Commission adopt a formal policy against its advisors participating as witnesses in other states on issues pending before this Commission.

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A. FAIRNESS REQUIRES DEMONSTRABLE IMPARTIALITY.

The Commission can readily analyze the situation it has presented the parties in its Notice by referring to the Canons of the Washington Code of Judicial Conduct. Indeed, the Canons should apply to Dr. Gabel in this situation.

Dr. Gabel is performing judicial functions in this docket, advising the Commission and the Administrative Law Judge on both procedural and substantive matters, including the final price that the Commission should set for the high frequency portion of the loop. The fact that Dr. Gabel is not a lawyer or a Commissioner does not make a difference in this regard. As the Code states, “Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code.” Washington Code of Judicial Conduct, Application. Alternatively, Dr. Gabel comes within the Canon as "court personnel; subject to the judge's direction and control."

Canon 3 of the Code requires that “Judges shall perform the duties of their office impartially and diligently.” Subsection (A)(7) of Canon 3 elaborates that “ Judges shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control.”

The price/cost of the high frequency portion of the loop is an issue that is

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squarely before this Commission in this docket, and no decision has been rendered on that issue yet. In fact, opening round briefs on the topic are not even due until October 9. Obviously, it would be both inappropriate and unfair for the Commission or Dr. Gable to reach a decision on this matter before all of the legal arguments have been presented to them. Under these circumstances, Dr. Gabel's participation in the Connecticut proceeding as a consultant or witness for a party in any state addressing the cost of the high frequency portion of the loop would violate the requirement that the Commission's proceedings be fair in both fact and appearance.

B. VIOLATION OF THE DOCTRINE OF FAIRNESS CREATES APPEALABLE ERROR.

Under Washington law, a party may appeal an adjudicatory action on the grounds that the decision maker violated the fairness doctrine. It is self-evident that Dr. Gabel cannot be both an advocate in Connecticut and an impartial adjudicator/advisor in Washington on the same issue. Advocacy necessarily implies a lack of impartiality. It follows that the Commission is vulnerable to charges of unfairness by relying on advice from Dr. Gabel. The effect of Dr. Gabel's involvement in Connecticut would be to taint the judicial process in UT-003013 and create an appealable issue for any party that feels aggrieved by Dr. Gabel's advocacy in Connecticut. *See, e.g., Alger v. Mukilteo*, 107 541, 547, 730 P.2d 1333 (1987).

Given the significant time and effort expended in this proceeding to date, the Parties desire to avoid this unnecessary risk.

C. THE BEST REMEDY IS FOR DR. GABEL TO DECLINE THE CONNECTICUT ASSIGNMENT.

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The most appropriate remedy for this situation is for Dr. Gabel to decline to participate in the Connecticut proceedings as a party consultant or a witness. The Parties are not familiar with the terms of his contract with the Commission. However, if the Commission cannot require Dr. Gabel to decline the Connecticut assignment, then, at a minimum, he must be removed from his role as an advisor to the Commission in UT-003013 on the line sharing issue and any other related issue. If that happens, other remedies (i.e. striking testimony adduced by Dr. Gabel) may be appropriate and the Commission would have to provide the Parties a further opportunity to address such remedies.

Whether or not Dr. Gabel goes forward to act as a witness for the Office of Public Counsel in Connecticut, the Commission should require Dr. Gabel to fully disclose the extent of his involvement, if any, thus far as a consultant to that office on issues pending before this Commission. Because the full nature of Dr. Gabel's involvement to date in the Connecticut proceeding are not yet known, the Parties each reserve the right to request further remedies in UT-003013 once the level of Dr. Gabel's involvement is known.

D. THE COMMISSION SHOULD TAKE ACTION TO PREVENT SUCH CONFLICTS IN THE FUTURE.

The Parties appreciate the Commission bringing this situation to light and providing them this opportunity to state their positions. It indicates the Commission's appropriate concern for the integrity of its proceedings. The Parties are concerned, however, about the delicate position that the Commission's Notice put each of them in and jointly recommend that the Commission undertake to set formal policies or rules addressing this issue for

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Commission advisors in the future. Such policies or rules would assist the Commission in minimizing future appearance of fairness concerns.

CONCLUSION

For the reasons stated above, the Parties jointly object to Dr. Gabel concurrently playing the role of judicial advisor to the Commission in Washington and a consultant to or advocate for the Office of Public Counsel in Connecticut on issues regarding the high frequency portion of the loop or any other matter pending in UT-003013. If Dr. Gable does act as a consultant and/or witness on this issue in Connecticut, then the Commission must remove him as an advisor on that subject in this proceeding. In any event, the Commission should require Dr. Gabel to disclose the nature of his involvement, if any, in Connecticut to date so that the Parties can evaluate whether further remedies are required. Finally, the Parties urge the Commission to set a formal policy preventing its advisors from serving as position witnesses or consultants in other states on issues pending before this Commission.

Respectfully submitted this 2nd day of October, 2000.

<p>QWEST CORPORATION</p> <hr/> <p>Lisa Anderl Attorney for Qwest Corporation</p>	<p>COVAD COMMUNICATIONS CO.</p> <p><i>/s/ via telephone authorization</i> _____ Laura Izon Attorney for Covad Communications Co.</p>
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<p>ATER WYNNE</p> <p><u>/s/ via telephone authorization</u></p> <p>Arthur Butler Lisa Rackner Attorneys for: TRACER</p>	<p>DAVIS WRIGHT TREMAINE</p> <p><u>/s/ via e-mail authorization</u></p> <p>Gregory J. Kopta Attorney for: XO Communications (f/k/a NEXTLINK Washington, Inc.) New Edge Network, Inc. Advanced TelCom Group, Inc. AT&T Communications of the Pacific Northwest, Inc. Electric Lightwave, Inc. McLeodUSA Telecommunications Services, Inc.</p>
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<p>WORLDCOM, INC.</p> <p><u>/s/ via e-mail authorization</u></p> <p>Ann Hopfenbeck Attorney for WorldCom, Inc.</p>	<p>HUNTON AND WILLIAMS</p> <p><u>/s/ via e-mail authorization</u></p> <p>Jennifer McClellan Attorney for Verizon Northwest Inc.</p>
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