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

Re: Terminating Access Charges Rulemaking, Docket No. UT-990146

Dear Ms. Washburn:

Pursuant to the Notice of Opportunity to File Written Comments and to Propose Alternative Rule Language (April 30, 2001) ("Notice") in the above-referenced docket, Advanced TelCom Group, Inc., AT&T Communications of the Pacific Northwest, Inc., Electric Lightwave, Inc., Focal Communications Corporation of Washington, Pac-West Telecomm, Inc, TCG Seattle, TCG Oregon, XO Washington, Inc., and WorldCom, Inc. (collectively "Joint CLECs"), provide the following comments. Commission staff has proposed two alternatives to revising the current Commission rule governing terminating switched access: (1) amend WAC 480-120-540 to incorporate the waiver the Commission has previously granted to CLECs that petitioned for such a waiver; or (2) revoke those waivers and substitute a new rule provision for "Universal service cost recovery authorization." Joint CLECs strongly urge the Commission to adopt the former alternative in its current form and to reject the latter alternative in any form.

Comments

Commission enactment of WAC 480-120-540 in 1998 generated substantial controversy among virtually all telecommunications interest groups. The Commission sufficiently addressed the concerns of competing local exchange companies ("CLECs") by authorizing them, over staff's objection, to mirror the entire terminating access rates charged by the incumbent local exchange companies ("ILECs") in the same exchange. The proposed new section (7) to WAC

480-120-540 accurately reflects the Commission's decision and, to the extent any revision is needed to the rule, should be adopted as currently proposed.

Staff's alternative proposal, on the other hand, raises several legal and practical issues. Requiring CLECs to charge cost-based rates while permitting ILECs to charge substantially higher rates – even if that difference is allegedly attributable to universal service cost recovery – fails to comply with state statutes and would be discriminatory and anticompetitive. Proposed WAC 480-120-AAA primarily conflicts with state statutes by effectively reforming universal service funding without legislative authority to do so. The proposal would establish benchmark costs for providing residential and business exchange services and would authorize LECs to set access charges at a rate that would recover all costs the LEC incurs above the benchmark to provide those services in each exchange. No statutory provision authorizes such universal service funding. Currently, ILECs generate sufficient revenues to enable them to earn their Commission-authorized rate of return through the rates they charge for all services, including switched access (including additional revenues from the WECA-administered universal service fund for those companies eligible to draw from the fund). A Commission rule specifying that subsidies for high cost service areas be funded solely from terminating switched access charges departs from the current structure and would require legislative authority that the Commission presently lacks.

Even if Washington statutes could somehow be interpreted to authorize the Commission to permit LECs to fund their universal service obligations solely through their terminating switched access charges, such funding would run afoul of federal law. The Telecommunications Act of 1996 requires, "Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State." 47 U.S.C. § 254(f). Requiring toll providers (and their customers) alone to contribute to Washington universal service funding through the payment of terminating intrastate switched access charges is neither equitable nor nondiscriminatory.

WAC 480-120-AAA also raises a host of practical problems, not the least of which is the lack of a factual basis for the benchmarks of $31 for residential and $51 for business services and whether any specific amount should be codified. Implementing this proposal would effectively require the Commission to undertake rate case-type proceedings to determine each ILEC's costs of service in each of its exchanges, as well as to establish a means of tracking costs and terminating access revenues to ensure that each ILEC does not overrecover its universal service subsidy. Absent any real competitive threat to the ILECs, moreover, the subsidies contemplated by this alternative proposal would accrue only to ILECs. Such subsidies effectively would not be available to any other carrier that could not generate sufficient funds through its own terminating access charges to fully subsidize its entry into high cost areas. The alternative proposal thus is not competitively neutral and would actually undermine the procompetitive and universal service policy goals in the Telecommunications Act and Washington statutes.

The Commission should expect proceedings to implement the Staff alternative proposal to be contentious, time-consuming, and expensive for parties and the Commission alike. Similar proceedings will likely be required if and when the legislature either establishes an appropriate mechanism for funding universal service or authorizes the Commission to do so. The Commission should undertake such an effort at that future date, not now in conjunction with an interim solution of questionable legality at best.

With respect to revoking the waivers the Commission has granted to CLECs and requiring CLECs alone to charge cost-based rates for terminating switched access, Staff would be reopening old wounds. The Joint CLECs explained when WAC 480-120-540 was enacted that rate regulation of CLECs is fundamentally inconsistent with the legislature's requirement that competitively classified companies be subject only to "minimal regulation." RCW 80.36.320(2). CLECs nevertheless have accepted the Commission's decision to require CLECs to charge no more than the ILECs charge for switched access. Staff's alternative proposal would reduce CLEC revenues without any reduction in the costs CLECs incur to serve customers in Washington, particularly the terminating switched access charges CLECs must pay to ILECs when providing toll service. This proposal thus would further undermine the economic viability of effective local exchange competition in Washington and conflict with legislative policy goals to foster the development of such competition.

Recommendation

Accordingly, the Joint CLECs recommend that new section (7) as proposed in the Notice be added to WAC 480-120-540 and that the Commission not adopt WAC 480-120-AAA in its present or any other form until authorized by the legislature to reform universal service funding.

The Joint CLECs appreciate the opportunity to comment on Commission Staff's proposals with respect to amending WAC 480-120-540 or creating a new section WAC 480-120-AAA. Please contact me if you have any questions about these comments.

Very truly yours,

Davis Wright Tremaine LLP

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