October 20, 1999

<u>VIA ELECTRONIC MAIL</u>
<u>ORIGINAL VIA FEDEX</u>

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 Comments (October 20, 1999) ("Comment Notice") in the above-referenced docket, NEXTLINK Washington, Inc., Electric Lightwave, Inc., Advanced TelCom Group, Inc., AT&T Communications of the Pacific Northwest, Inc., GST Telecom Washington, Inc., and Winstar Communications, Inc. (collectively "Joint Commenters"), provide the following comments. The comments are organized by the questions on which the Commission has requested comment in the Comment Notice and in the Notice of Additional Rulemaking Workshop ("Workshop Notice").

Should the Commission proceed with a rulemaking to adopt fees for Telecommunications Act activities?

The Joint Commenters continue to recommend that the Commission not impose fees for activities it undertakes pursuant to the Telecommunications Act of 1996 ("Act") for all of the reasons stated in their previous comments. In addition, Commission staff's calculations and analysis demonstrate that such a fee structure cannot eliminate or even significantly close the estimated gap between revenues collected from, and expenditures attributable to, the telecommunications industry. Continuation of this rulemaking thus not only would be extremely controversial, but would be doomed to failure as an effective means of addressing the Commission's funding objectives.

Commission staff estimates that for each of the last two years, the Commission has spent over $1 million more to regulate the telecommunications industry than the Commission has received in revenues from telecommunications companies. Staff further estimates that at the level of potential fees listed in the Workshop Notice, the Commission would generate approximately $212,000 in additional revenues on an annual basis. Accepting these figures at face value for discussion purposes, the anticipated revenues from additional fees represent less than 17% of the existing $1.3 million differential between telecommunications revenues and expenditures and less than 1.8% of the Commission's $12 million annual budget. If the Commission's goal is to remedy existing or potential budget shortfalls, therefore, assessing fees on telecommunications companies participating in proceedings under the Act will not accomplish or significantly advance that goal.

The Joint Commenters appreciate the Commission's dilemma and agree that the Commission should be able to generate sufficient funds from regulated companies and companies that use Commission services to meet Commission expenditures incurred in complying with its state and federal statutory responsibilities. The only reasonable solution, however, is to obtain legislative authority to adopt a funding mechanism that equitably distributes the Commission's operating expenses across all regulated industries and companies and/or consumers in a nondiscriminatory and competitively neutral manner. Imposing fees on telecommunications companies seeking Commission action under the Act, however, is not such a funding mechanism. The Commission, therefore, should not be precluded from seeking appropriate legislative authority or otherwise faulted because it studied and ultimately refused to undertake a rulemaking under RCW 80.36.610 that cannot raise the necessary revenue and would negatively impact the Commission's ability to oversee the development of effective local exchange competition in Washington.

Are the possible level of potential fees identified in the Workshop Notice appropriate, if the Commission pursues fees?

Commission staff obviously has devoted considerable effort to develop possible fee levels in an amount that staff believes would be fair to parties and would not represent a barrier to entry. Unfortunately, the resulting fee levels not only fail to remedy the Commission's fiscal concerns but would skew the negotiation process, act as a barrier to entry to smaller companies, and encourage parties to bypass the Commission to resolve disputed issues to the detriment of all concerned.

The most problematic fee levels are the $10,000 proposed fee for an arbitration or petition for enforcement of an interconnection agreement. The legal costs associated with an arbitration or complaint already discourage parties from seeking full vindication of all of their rights under federal and state law -- particularly parties, like the Joint Commenters, which do not have a captive customer base from whom they are virtually guaranteed recovery of such costs. A $10,000 fee would increase those legal costs by as much as 25% or more (depending on the number and complexity of issues involved), with a corresponding increase in incentive to accept less than the rates, terms, and conditions the law provides in order to avoid the expense of a Commission determination.

Such a disruption in the cost/benefit analysis of dispute resolution would have a broad impact. During interconnection contract negotiations, the party with the greatest financial resources would be able to extract additional concessions from the other party as the price of avoiding the now significantly more expensive alternative of arbitration. Similarly during the performance of the agreement, one party may be able to avoid full compliance with its contractual obligations because an enforcement action at the Commission would be too expensive for the other party to pursue. For small CLECs -- particularly those seeking to offer service through resale or extensive use of unbundled network elements -- or CLECs seeking to serve low-margin customers, adding $10,000 to the cost of resolving disputed issues with the incumbents would likely be prohibitively expensive, imposing an insurmountable barrier to entry into local exchange markets in Washington.

Companies that continue to offer service in this state, moreover, will likely seek to avoid the additional fees by circumventing the Commission altogether. The FCC has established a "rocket docket" for expeditiously resolving interconnection contract and other disputes among competing carriers under the Act, and some federal district courts have determined that they have jurisdiction to resolve such disputes. The Act also authorizes the FCC to preempt state commission jurisdiction over any proceeding under the Act -- including arbitrations -- if that "commission fails to carry out its responsibility" under the Act. 47 U.S.C. § 252(e)(5). A party thus may petition the FCC to divest the Commission of jurisdiction based on a determination that a $10,000 fee for conducting an arbitration (or expedited enforcement proceeding) represents a failure to carry out the Commission's federal statutory responsibilities. If the Commission were to adopt the proposed fees, therefore, it would likely be increasingly removed, in whole or in part, from the implementation of the Act in Washington, as well as embroiled in litigation over the scope and extent of its jurisdiction.

At a minimum, the Commission should expect to incur additional expenses to participate in challenges to the lawfulness of RCW 80.36.610 and any fees adopted pursuant to that statute. The statute itself raises serious equal protection concerns by authorizing the Commission to impose additional fees only on telecommunications companies, and fees in the amounts discussed in the Workshop Notice would be subject to preemption as barriers to entry pursuant to 47 U.S.C. § 253. The likelihood of such a challenge is virtually assured in light of the fact that the Joint Commenters are unaware of any other state commission that has even proposed to adopt fees for conducting activities required by the Act. Under these circumstances, interested parties are unlikely to leave Commission adoption of such fees unchallenged, if for no other reason than to discourage other state commissions from adopting similar fees.

Opening Washington's local telecommunications markets to competition raises more than enough issues for the Commission and interested parties to resolve. The Commission should not create an extraneous issue by imposing fees that will unnecessarily drain industry and Commission resources and directly or indirectly impair the Commission's jurisdiction over proceedings arising under the Act.

Is the list of activities in the Workshop Notice an exhaustive list of activities that should be subject to fees?

The Joint Commenters oppose per-activity fees as discussed in their prior comments and accordingly have no comments on this issue.

In addition, the Commission may have the ability to apportion the fee for a mediation, arbitration, or interconnection agreement enforcement proceeding. Should it apportion each equally, upon the applicant for action, or upon the loser as is done with court costs?

Apportioning the fees for arbitration or enforcement of an interconnection agreement, rather than imposing the entire fee on the petitioner, would address a fundamental fairness issue, *i.e.*, that a party vindicating its rights should not also have to pay a fee to the Commission for such vindication. Potential apportionment of the fees, however, would not remedy one party's ability to use the existence of such fees as an improper lever in contract negotiation and compliance. In addition, the need for a determination of which party should be responsible for paying the fee, and in what amount, and would only serve to increase the gamesmanship involved in negotiation and enforcement of interconnection agreements under the threat of paying significant fees to the Commission for dispute resolution.

Obviously, as discussed above, assessing the entire fee on the petitioning party would create a substantial disincentive to file a petition for arbitration or enforcement and would strengthen the bargaining position of the party that already has a significant advantage. Splitting the fee equally between the petitioning and responding parties reduces, but does not eliminate, that impact. One party may still find it considerably less painful to pay the fee than the other party and may use the other party's reluctance to incur such an expense as a negotiating tool.

The fundamental problem with apportioning the fee is the need for an individualized Commission determination of how the fee will be apportioned. Uncertainty generates risk, and in this case, a petitioning party risks having to pay all or a portion of a $10,000 fee if it does not prevail. Because a petitioning party must be prepared to pay the entire fee itself, therefore, the impact on its behavior during contract negotiations or compliance is likely to be the same as if it knew it would be required to pay the entire fee. In addition, the other party may seek to minimize the chances that it will be required to pay the entire fee by refusing to compromise on one or more issues on which it may be likely to prevail in order to raise that issue in the arbitration and avoid being found as the party "at fault." Apportionment thus may not significantly reduce, much less eliminate, the impact of paying Commission fees on the negotiation and compliance process and instead may increase party and Commission expenditures by artificially generating additional issues to be resolved by the Commission.

The Commission would also have to establish the criteria for determining how the fees would be apportioned. If the Commission adopted the judicial model, *i.e.*, apportioning fees based on which party is the "prevailing party," the difficulty would be to decide which party "prevailed." Such a decision would likely be difficult in many instances, particularly those in which multiple issues are presented for resolution and each party prevails on some, but not all, of those issues. The Commission, moreover, has been loathe in the past to ascribe fault and its attendant consequences to any party, even when circumstances indicate that such fault exists. *See, e.g., MCIMetro v. U S WEST*, Docket No. UT-971063 (finding violation of interconnection agreement but refusing to impose fines); *NEXTLINK v. U S WEST*, Docket No. UT-990340 (requiring U S WEST to honor Section 252(i) request but finding no bad faith). As a practical matter, therefore, the Commission would be likely to split the fee equally in the absence of extraordinary circumstances, thus undermining any conceptual fairness in an apportionment based on which party prevails. In any event, the apportionment of the fee would likely be contested in every proceeding, further increasing the cost and complexity of all such proceedings.

The Commission cannot impose fees on a per-activity basis at, or anywhere near, the levels proposed in the Workshop Notice without generating a substantial negative impact on interconnection contract negotiation and compliance, erecting a significant barrier to entry, and creating a very real risk of losing jurisdiction to determine how the Act will be implemented in Washington. Particularly in light of the fact that such fees will not even approach raising sufficient revenues to remedy any budget shortfall, the Commission should not adopt any fees pursuant to RCW 80.36.610. Rather, the Commission should request legislative relief that will enable it to adopt a funding mechanism that is sufficient, equitable, and competitively neutral.

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., AT&T Communications of the Pacific Northwest, Inc., and GST Telecom Washington, Inc.

cc: Kaylene Anderson
Jackie Follis
Kath Thomas
Ron Gayman
Gary Yaquinto
Larry Walke

38936\22\00215.CMT/10.20.99
Seattle