BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Continued Costing and Pricing of Unbundled Network Elements, Transport and Termination, and Resale,	DOCKET NO. UT 003013 RESPONSE BRIEF OF PUBLIC COUNSEL (PART A)

I. INTRODUCTION

1 Pursuant to the schedule adopted herein, Public Counsel files the following response to line sharing issues raised in the opening round of briefs. This brief follows the general outline of the opening brief.

II. LEGAL AND POLICY ISSUES

A. The Loop Is A Shared Cost.

2 As Public Counsel pointed out in its opening brief, any discussion of line sharing pricing must come to grips with the principle that the loop is a shared cost, common to all the services that use the loop. This is not only the most analytically sound approach; this Commission has affirmatively declared its adherence to this principle in Washington.[1] The opening briefs are almost entirely silent on the application of that ruling to this case. The Commission Staff does cite the Commissioner's Order establishing that principle to argue that a 50-percent-of-loop-cost basis for line sharing is inappropriate, since "many services are provided over the loop and contribute to the cost recovery of the loop." Opening Brief of Commission Staff, pp. 9-10**.** This point has broader application. This is precisely why a zero price is inappropriate for line sharing. It has now become one of the many services provided over the loop and, therefore, must make some reasonable contribution to loop costs. By its alternative recommendation for a positive

[1] *WUTC v. USWC*, UT 950200, Fifteenth Supplemental Order, April 11, 1996, pp. 83-84.

price, Staff is at least indirectly recognizing the applicability of this principle.

3 Last month's decision on line sharing by the California Public Utilities Commission, affirming a Final Arbitrator's Report on the issue, is interesting for its treatment and discussion of many of the issues raised in this proceeding. For example, the California Commission rejected the premise that because ILECs have not allocated any loop cost to DSL in their tariff filings, state regulators are bound to reach the same conclusion in line sharing dockets. The California Commission pointed out that the DSL tariff allocations are not necessarily the last word on this subject, concluding:

> Parties do not dispute that Pacific and GTE allocated no costs to their ADSL services for their interstate retail rates. We agree with the reasons stated in the FAR, however, that this does not result in the TELRIC for use of the high frequency portion of the loop being zero, or the reasonable rate being zero.[2]

The California Commission based its conclusion on several important points. First, the FCC line sharing order is permissive, not mandatory. Second, the ILEC allocations were for the purpose of setting price floors. Third, the cost and price principles of the Telecommunications Act of 1996 had to be applied, and costs allocated by ILECs for ADSL service were direct costs only. Fourth, total costs include not only direct costs but also joint and common costs.[3]

4 While the determination of what constitutes a reasonable contribution to joint and common costs is not an exact science, it is difficult to see how a contribution of zero is reasonable. The California Commission concluded, in fact, that it was "presumptively unreasonable" to set the price at zero:

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[2] *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish A Framework For Network Architecture Development of Dominant Carrier Networks (Rulemaking 93-04-003); Investigation on the Commission's Own Motion Into Open Access and Network Architecture Development of Dominant Carrier Networks (Investigation 93-04-002)("California Line Sharing Dockets")*, California Public Utilities Commission, Interim Opinion, September 22, 2000, p. 16 ("Cal. Interim Opinion").

[3] *Id*., pp. 16-17

> This Commission has considered and adopted allocations of joint and common costs, including forward-looking common costs, in many industries for decades. Based on our expertise and long experience in this area, we conclude that it is presumptively unreasonable to find a just, reasonable, and nondiscriminatory interim rate subject to later true-up adjustment for access to the high frequency portion of the loop to be zero, taking into account a reasonable allocation of joint and common costs in the interim, including forward-looking common costs.[4]

The California Commission also observed that a zero price was questionable in light of the development and deployment of advanced services over the loop:

> In fact, if transport of data is the future of telecommunications, it may be that xDSL services on the high frequency portion of the local loop cause all future loop costs, and voice services cause none. We agree with the result of the interim arbitration that we need not decide this now. At the same time, it would be unreasonable to find for purposes of the interim arbitration that zero cost is appropriate for, and no contribution is reasonable to, the local loop[.][5]

As Dr. Gabel suggested at the hearing, it is also a fair question to inquire why DLECs should not contribute to the cost of the loop (through a line sharing charge) if the ILECs are upgrading their networks to allow for provisioning of more advanced services. (Tr. 1129).

B. The Section 254(k) Issue Must Be Addressed In This Case

5 As Qwest notes in its opening brief, Section 254(k) is directly implicated by the line sharing issue. Qwest points out that:

> ***The state commissions, with regard to intrastate services, are charged with ensuring that services which are included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.
>
> The Commission can ensure consistency with this requirement by pricing the high frequency portion of the loop in such a way that it bears a reasonable share of the joint and common costs associated with the provision of that element. As discussed below, the entire loop is a joint cost of providing the two dedicated connections to allow line sharing. As such, failure to reasonably allocate a portion of that cost to the high frequency portion of the loop will result in other elements and services bearing a disproportionate share of those costs.[6]

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[4] *Id.*, p. 17
[5] *Id.*, p. 18
[6] Opening Brief of Qwest Corporation, ¶¶ 10-11.

6 Discussion of Section 254(k) is noticeably absent from other opening briefs. Neither TRACER, nor Staff, nor the Joint CLECs, to Public Counsel's knowledge, addressed the issue. Verizon mentions Section 254(k), but incompletely summarizes its provisions, mentioning only the subsidy prohibition and not the provisions requiring that basic services bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

7 Section 254(k) was cited as a basis for adopting a positive price in the recent California line sharing docket. There the Final Arbitrator's Report stated:

> [T]he Act requires states to ensure that carriers may not use services that are not competitive to subsidize services that are subject to competition. Further, the Act requires states to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services. (47 U.S.C. 254(k).) The CPUC has found the definition of universal service to include single party voice grade local exchange service. Therefore, the CPUC must ensure that basic exchange service bears no more than a reasonable share of the joint and common costs of the loop. The loop is required for both voice and xDSL when the line is shared [.] [7]

8 Whether or not the parties to this case choose to discuss or address Section 254(k), it is clearly and directly raised by the proposal for a zero charge for line sharing. The Commission must, therefore, be cognizant of the application of the statute in reaching its decision here. While some parties argue that a positive HUNE price should not be adopted because it will drive up the retail price for DSL, perhaps the more pertinent question is - does a zero price for the HUNE artificially inflate (by acting as a subsidy for DSL) the prices for voice grade services? The endeavor being pursued under the Telecommunications Act of 1996 is to set the UNE prices by moving prices closer to cost while at the same time fostering competition, making reasonable contributions to the common cost of the network, and preserving universal service. Singling out one service for special treatment – as a "free rider" – does not square with these principles.

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[7] *California Line Sharing Dockets*, Final Arbitrator's Report (FAR), May 26, 2000, pp 72-73. The FAR decision on line sharing was ultimately adopted by the CPUC, although the Interim Opinion did not expressly incorporate the quoted 254(k) discussion.

III. LINE SHARING

A. The Commission Should Adopt A Positive Rate For The High Frequency Portion of the Loop.

9 Public Counsel recommends that the Commission adopt a positive HUNE rate, as does Qwest, and the Commission Staff in its alternative recommendation. In our opening brief, Public Counsel recommended that the Commission adopt a rate in the range bounded by Staff's proposal at the low end and Qwest's at the high end. One approach available to the Commission might be to adopt any prices for line sharing already contained in existing interconnection agreements, so long as they fall in this range.

10 Some parties argue that a positive HUNE rate will have an adverse impact on competitive entry. The California Commission did not find this argument persuasive. After noting a lack of evidence regarding price elasticity of CLEC DSL customers, CLEC profit margins, or the effect of a positive price on CLECs, the Commission found:

> Other than COVAD's assertion, there is no evidence that CLC entry will be hindered or precluded by the interim rates established here. [footnote omitted]. On the other hand, the adopted interim rates are a substantial reduction from the cost of an unbundled loop. This is very likely to spur deployment of advanced services by all carriers. Interim Opinion, p. 22.

11 Public Counsel suggests that a similar conclusion is warranted in this case. It is true that the California Commission took some comfort in the fact that it was establishing an interim rate, subject to later true-up. The Washington Commission could adopt a similar approach on the issue in this state, allowing for further proceedings to make a final determination on the HUNE rate.

B. No Windfall To ILECs Should Be Permitted.

12 On this issue, Public Counsel agrees with the point made in COVAD's brief, that adoption of a positive price, without provision for an offset, is the least desirable outcome on this

issue.[8] Public Counsel believes that the Commission has sufficient mechanisms at its disposal to prevent double recovery of loop costs if a positive HUNE rate is adopted. Public Counsel's opening brief argued that neither the Qwest nor the Verizon merger settlement agreements precluded revenue-neutral rate adjustments to offset new HUNE revenues. The Commission Staff, one of the signatories to the Qwest and Verizon merger settlement agreements, concurs with Public Counsel's interpretation of those rate plans as permitting an offsetting adjustment to rates:

> If the ILECs are allowed to impose a charge for line sharing, the Commission should require them to make a corresponding reduction to the retail price of the UNE loop. As set forth in paragraph 49, the merger settlements with Verizon and Qwest do not preclude revenue-neutral rate rebalancing.[9]

13 Again, reference to the recent California ruling is instructive. The commission addressed both the "windfall" argument and the price squeeze issue:

> New Edge says ILECs will enjoy a windfall (since ILEC's costs are zero, not $5.85 and $3.00, according to New Edge), along with the opportunity to price squeeze their competitors out of the market. To the contrary, the [Final Arbitrator's Report] orders ILECs to maintain a memorandum account tracking revenues from the monthly recurring rates for access to the high frequency portion of the loop, as well as revenues from any rate which contribute to joint and common costs. If later found just and reasonable, the entire balance will be returned to voice customer ratepayers of the ILECs. This means ILECs will neither enjoy a windfall, nor any opportunity to price-squeeze their competitors.[10]

14 While there are differences between the California and Washington regulatory frameworks for telecommunications, the policy underlying the California decision is equally applicable here. The Washington Commission, as suggested in our opening brief, likewise has the tools, including imputation requirements, to prevent a windfall or "double recovery" of costs. The Commission should not be deterred from making the correct decision on pricing policy and

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[8] Part A Post Hearing Brief of COVAD Communications Company and Rhythms Links, Inc., n. 82

[9] Opening Brief of Commission Staff, ¶32, ¶49 (making the same point with regard to double recovery of OSS start up costs).

[10] Cal. Interim Opinion, p. 22.

methodology out of misplaced concern that it cannot prevent a windfall.

IV. OSS ISSUES

15 Public Counsel supports the position set forth in the Staff opening brief regarding recovery of OSS costs.

V. CONCLUSION

16 For the reasons set forth in our opening and responsive briefs, Public Counsel recommends that the Commission adopt a positive price for the high-frequency portion of the unbundled loop. This issue represents an important opportunity for the Commission to reaffirm a basic principle of telecommunications costing, that all services which rely upon the loop must make a reasonable contribution to the cost of that loop. Not only is this theoretically sound, but as we move further into an era when the loop is becoming an input for increasingly advanced services, it is simply inequitable to impose all loop costs on basic voice grade services.

DATED this 23rd day of October, 2000.

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