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SERVICE DATE

JAN 16 1998

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET NO. UT-961638
Complainant,	)	
v.	)	
U S WEST COMMUNICATIONS, INC.,	)	FOURTH SUPPLEMENTAL ORDER REJECTING TARIFF FILING
Respondent.	)	

SUMMARY

Proceedings: On December 19, 1996, U S WEST Communications, Inc., (U S WEST or Company) filed with the Commission its Advice No. 2820T, revising its tariff WN U-31, Exchange and Network Services, Section 2, Sheets 22, 23, and 27. The Commission entered a Complaint and Order Suspending Tariff Revisions on January 22, 1997. The Company has waived its right to entry of an initial order and authorized the entry of a final order by the Commission in this matter.

Hearings: The Commission convened a prehearing conference in this matter on Friday, September 19, 1997, at Olympia, Washington, before Administrative Law Judge Terrence Stapleton of the Washington Utilities and Transportation Commission (Commission). At the prehearing conference, parties agreed to present this matter to the Commission for resolution based upon the written testimony and summary memoranda of the parties, and a procedural schedule for this purpose was adopted. The Company offered to extend until January 16, 1998, the statutory suspension period for Commission action on its tariff filing.

Parties: U S WEST is represented by Lisa A. Anderl; Staff of the Washington Utilities and Transportation Commission (Commission Staff) by Gregory J. Trautman, Assistant Attorney General; Public Counsel Section - Office of the Attorney General (Public Counsel) by Simon J. ffitch, Assistant Attorney General; Telecommunications Ratepayers for Cost-based and Equitable Rates (TRACER) by Arthur A. Butler; GTE Northwest Incorporated (GTE) by Timothy J. O'Connell. In addition to these parties, petitions to intervene on behalf of MCIMETRO Access Transmission Services, Inc. (MCI) by Clyde H. MacIver; Washington Independent Telephone Association (WITA) by Richard A. Finnigan; and Sprint Communications Company L.L.P. (Sprint) by Carol Matchett were granted at the prehearing conference. MCI withdrew its intervention as a party to

this proceeding on November 14, 1997. WITA, on November 4, 1997, and Sprint, on October 30, 1997, notified the Commission and the parties that they would not be filing testimony or position statements, but requested continued service with any orders served in this proceeding.

MEMORANDUM

U S WEST's Tariff Advice No. 2820T proposes to revise its Exchange and Network Services Tariff WN U-31 by amending Section 2.2, Establishing and Furnishing Service, as follows:

> Amend Section 2.2.1, Application for Service, by adding new section 2.2.1.A.4., as follows:
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> The Company shall use reasonable efforts to make available services to a customer on or before a particular date, subject to the provisions of and compliance by the customer with the regulations in this Tariff. The Company does not guarantee availability by any such date and shall not be liable for any delays in commencing service to any customer.
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> Amend Section 2.2.2, Obligation to Furnish Service, by adding new sections 2.2.2.B. and 2.2.2.C., as follows:
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> The furnishing of service under this Tariff is subject to the availability on a continuing basis of all the necessary facilities and is limited to the capacity of the Company's existing or planned facilities as well as facilities the Company may obtain from other carriers, from time to time, to furnish service as required at the sole discretion of the Company.
>
> The Company reserves the right to limit or to allocate the use of existing facilities, or of additional facilities offered by the Company when necessary because of lack of facilities or due to some cause beyond the Company's control.

I. Direct Testimony

A. U S WEST

U S WEST filed the direct testimony of Ms. Jensen, Director of Regulatory Affairs - Washington since 1991, in support of the proposed tariff revisions, which clarify the Company's tariff to indicate the following;

> The Company, like other telecommunications companies, will utilize in part the facilities of other carriers to provide service in Washington.
>
> The Company will use reasonable efforts to make available services to a customer on or before a particular date, subject to the provisions of and compliance by the customer with the regulations contained in the Company's tariff.
>
> The Company does not guarantee availability by any specific date and shall not be liable for any delays in commencing service to any customer.

Ms. Jensen testifies the tariff revisions will not affect the provision of service as currently practiced by the Company where it "[h]as existing facilities and/or available capacity to easily add facilities" and where the customer satisfies all other provisions of the tariff. Where it has neither existing facilities nor available capacity to add facilities, U S WEST would provide service where "the Company has as an existing plan to add additional capacity in the near future or where it makes business sense to do so."

Ms. Jensen then describes the number and nature of filled and unfilled orders for U S WEST's facilities, its ability annually to meet all but 0.4% of orders due to lack of facilities, and the reasons for shortages of facilities -- "work-at-home, electronic messaging and Internet access [which] has created a strain on the original network architectural design and has limited the number of available facilities to provide service upon demand." Because its net access line growth is only 3-5%, nine out of ten orders are not new service but relocation of service. The Company claims that 97% of the orders "it cannot satisfy due to lack of facilities or planned facilities" are within the base rate area,[1] "which is generally the exchange boundary or the area of highest population density within an exchange."

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[1] The base rate area (BRA) is defined in U S WEST's Exchange and Network Services Tariff WN U-31: "The area of highest population density within an exchange. The exchange boundary and the BRA boundary may be the same. The BRA is set forth on the tariff map."

Ms. Jensen urges that "U S WEST alone cannot be liable to provide service on demand in every instance," regardless whether facilities don't exist in every instance and cannot economically be provided, and where requisite permits and rights-of-way cannot be obtained on a timely basis. According to Ms. Jensen, since the Commission has accepted the proposed U S WEST tariff language for all other carriers providing local exchange service in U S WEST's service territory, the requirement that only U S WEST be held to furnish facilities on demand in all cases cannot be reconciled with either state law or the federal Telecommunications Act of 1996 (the Act).[2]

Essentially, the entire latter-half of Ms. Jensen's direct testimony is a recitation of the tariff or price list terms and conditions regarding establishing and furnishing service by competitive local exchange companies (CLECs) registered to provide local exchange service in Washington. U S WEST contends these same terms and conditions are in some instances identical and in others substantially similar to the tariff revisions it posits here. This recitation is provided for the proposition that "U S WEST would be subjected to a competitive disadvantage [under the Telecommunications Act of 1996] if it alone is expected to build facilities on demand, especially where that investment would be uneconomic." Ms. Jensen concedes that universal service is an important public policy goal, but argues that no funding mechanism is in place or reasonably anticipated which would recompense U S WEST for uneconomic investment undertaken to provide service on demand.

B. Commission Staff

Commission Staff through the testimony of Mr. Spinks, telecommunications analyst since 1984, recommends the Commission:

1) Reject the proposed tariff revisions in Docket No. UT-961638; and

2) Initiate a rule making docket for the purpose of establishing appropriate conditions under which incumbent local exchange service companies furnish facilities for the provision of wholesale and retail services.

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[2] Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, codified at 47 U.S.C. § 151 et seq. (1996).

Commission Staff is concerned that proposed Section 2.2.1.A.4. where the Company "does not guarantee availability" of services and "shall not be liable for any delays in commencing service" is "inconsistent with recent Commission decisions regarding service quality." Mr. Spinks cites to U S WEST's prior rate case, Docket No. UT-950200, where the Commission imposed a customer service guarantee program on U S WEST for failure to timely provision service, evincing "an intention on the part of the Commission that the company guarantee availability of service and bear liability for service delays." In U S WEST's pending rate case, Docket No. UT-970766, Staff notes it is "recommending the customer service prescriptions ordered by the Commission in Docket No. UT-950200 be expanded and be made a permanent part of the tariff."

Commission Staff also is concerned that proposed Section 2.2.2.B. would permit the Company to evade any obligation to provide any service to any customer where "facilities do not already exist or are not already being planned. The decision would be made in the sole discretion of the company."

Further, Staff fears customers' needs for service would never be met whenever U S WEST, in its sole discretion, determined that providing requested service either was "uneconomic" for the Company or could not be provisioned within the bounds of reasonable efforts by the Company. Staff finds such discretion unreasonable "given the current lack of alternative providers for most U S WEST customers[,]" and proposes the Commission consider the obligation to serve issue posited by U S WEST's tariff filing in tandem with universal service funding, unbundling, and resale of service issues. Mr. Spinks also expresses concern over U S WEST's clarification that it "will utilize in part the facilities of other carriers to provide service in Washington" pursuant to the Act of 1996. He notes that Section 214(e)(1)(A) of the Act, relied upon by U S WEST for this proposition, "neither requires nor permits the company to use other carriers' facilities[,]" and argues that to the extent U S WEST believes it necessary to provide for the use of other companies' facilities in its tariffs, the appropriate forum is rule making, not a tariff filing.

Mr. Spinks cites additional problems with the U S WEST tariff revisions: (1) the Company's ability to refuse to connect a customer to the network because it would be uneconomic ignores the positive network externalities in basic local telecommunications service; (2) granting the Company sole discretion to refuse to provide service could have "unintended anti-competitive consequences -- even the threat of losing service as the result of experimenting with alternate service providers could stifle implementation of competition;" (3) U S WEST would disqualify itself from eligibility for universal service funding for failure to meet the criteria as an eligible telecommunications carrier under Section 214(e)(1)of the Act, requiring a company to provide service throughout its designated service area; (4)

the Commission may need to waive the application of various rules to U S WEST if the tariff becomes effective depending on Company interpretation and application of the tariff revisions, given the ambiguous language of the tariff; and (5) U S WEST's proposed tariff revisions cannot be separated from its rates -- lower costs of service must translate into lower revenue requirement.

Commission Staff finds nothing inconsistent with requiring U S WEST to provide service on demand in its tariffed exchanges, while permitting CLECs to serve a limited subset of customers in their start-up years. Staff contends that while the statute applies equally to all telecommunications companies, their obligations may vary if circumstances so warrant. In this circumstance, U S WEST has a ubiquitous network in place throughout its tariffed service area and customers within that service area are entitled to receive service from U S WEST. Staff finds "it is not reasonable today to expect a new entrant with facilities only in downtown Seattle, to provide, or be able to provide, service to a customer in Moses Lake, Washington."

Mr. Spinks agrees with the principle that all companies, similarly situated, should be treated equally, but sees little similarity between U S WEST and CLECs when assessing applicability of the obligation to serve statute. U S WEST has enjoyed a virtual monopoly in this state for 86 years, built an extensive network in its tariffed service area, all the while being afforded the opportunity to earn a return on and of its investment. By contrast, CLECs, as providers of local exchange service, did not even exist a decade ago, have few facilities at this point in time, few customers, no market power, and little or no access to the facilities of U S WEST and other incumbent providers. Mr. Spinks believes "U S WEST has an obligation to serve because it undertook that obligation. It is not the statewide carrier of last resort."

Commission Staff also explores the issue of who pays for construction charges when Company facilities are exhausted. Mr. Spinks notes three general instances where U S WEST may charge a customer directly for construction of facilities to provide service: (1) customers within the base rate area must furnish or pay U S WEST to furnish the trench or poles in connection with the placement of new service wires from a point on the customer property line to the premises to be served; customers without the base rate area must pay line extension charges according to the rates, terms, and conditions of U S WEST's tariff; (2) an exception to the normal line extension tariff is provided when a line extension "involves unusual or disproportionately large construction expenditures as compared with the usual type of plant facilities construction;" and (3) a tariff provision allows U S WEST to charge directly for temporary or speculative projects. Mr. Spinks notes there are 26 pending formal complaints before the Commission contesting construction charges for telecommunications facilities. If the instant tariff revisions are approved and facilities to serve a customer are exhausted, "then the customer would have to pay the Company directly to install the facilities in order to get service."

Finally, Mr. Spinks describes efforts by Commission Staff to obtain through discovery U S WEST documents analyzing and supporting effects of the proposed tariff revisions on capital expenditure, planning, and company operations. The Company responded to Staff Data Request No. 2 that "it was unable to estimate changes in capital spending." U S WEST indicated in response to Staff Data Request No. 15 that "it had no documents that explained, justified, supported, or described the decision to make the proposed tariff changes but relied solely on the company filed testimony and competitive classification orders of the Commission." In response to Staff Data Request No. 16, the Company stated that "it had no documents that explained, justified, analyzed, or supported the effect of the proposed tariff changes on company operations, planning, competitive position, or capital spending."

C. Public Counsel/TRACER

Public Counsel and TRACER jointly sponsor the testimony of Dr. Selwyn, president of Economics and Technology, Inc., who has appeared before the Commission on telecommunications issues regularly since 1978. Dr. Selwyn recommends the Commission reject U S WEST's proposed tariff revisions which are "adverse to consumers interests, would conflict with federal and state statutes, and would provide the Company with an excessively broad amount of discretion in the way it provides local exchange service -- an essential and monopoly offering." In evaluating U S WEST's proposal, "the Commission should address whether there are sufficient incentives for U S WEST to provide adequate outside plant and switching facilities so that end users (whether they be U S WEST's retail customers or the customers of competitors who purchase U S WEST's bundled wholesale services and unbundled network elements (UNEs)) are supplied with basic local exchange service of an acceptable quality." Dr. Selwyn urges the Commission to require U S WEST as a threshold matter, regardless whether it makes "business sense," to provide facilities sufficient to connect all customers to the public switched network.

Dr. Selwyn says that upon reviewing Section 2.2.2.B., it is unclear whether U S WEST intends the section to apply solely to "inward" orders, or whether the Company could actually disconnect an existing customer or service in order to provide service to another customer. Other than the Company's "business sense" criterion (which is not defined in the tariff), U S WEST "fails to specify whether it would rely solely upon the payback period, whether the payback period would be assessed based upon separated costs and the corresponding intrastate revenues, the basis of the assumed revenue stream, and the specific payback period requirement (i.e., the maximum 'tolerable' duration of a payback period)."

Dr. Selwyn asks whether U S WEST would be more likely to find the placement of new facilities makes "business sense" in high-income areas with the prospect for significant additional revenue as opposed to lower income areas with less revenue potential; whether placement makes "business sense" in an area confronted with a competitive threat as opposed to an area in which serious facilities-based competition is minimal. It is unclear whether a unique "business sense" standard would apply to all Company investment in facilities, but the Commission should require a compelling rationale for any purported differences in economic criteria relied upon by U S WEST in its decisions as to when and where to deploy facilities.

U S WEST, in response to Public Counsel/TRACER Data Request No. 02-040, indicates that any payback period longer that the mandated depreciation life of the plant would fail its "business sense" criterion (absent customer contributions or some high cost fund mechanism). Dr. Selwyn dismisses this criterion because depreciation lives "are by their very nature *averages* that are taken over a wide range of plant within each plant category; applying this criterion leads to three potential outcomes:

(a) By excluding all construction whose expected payback extends beyond the "average service life" for the plant category, that "average life" will likely decrease (because the Company will tend to invest more heavily in shorter-term projects as long as the project life exceeds the payback period), thereby requiring adjustments to depreciation lives and rates . . . and the process will devolve into a "death spiral" under which the Company might not be required to make any investments at all!

(b) By excluding only the less financially-attractive (i.e., long payback) projects but without revising its depreciation rates, the Company will accumulate a reserve deficiency that may ultimately require some sort of upward adjustment in revenue requirement, since the depreciation rates under which it will then be operating will have been set on the basis of a more diversified mix of investments[.]

(c) Finally, if there is no change in the average service life, but the average payback period is shortened, then U S WEST will realize a windfall increase in return on those projects that it does pursue.

Ironically, if depreciation rates are increased under scenario (a) above or if revenue requirement is increased under scenario (b), the remaining U S WEST customers could be subjected to *increased rates overall* despite the ostensible 'improvement' in the Company's financial condition that would result from the elimination of long-payback investments from its portfolio."

Dr. Selwyn finds the proposed tariff revisions contrary to the public interest for the unprecedented discretion it permits U S WEST (and any other incumbent local exchange company (ILEC) filing such tariff provisions) in the provision of basic local exchange service, for which he contends "there is simply no meaningful competition and for which competition is not likely to evolve rapidly in the near term." Further, for this essential public service, "this degree of discretion is entirely anticompetitive and adverse to consumers' interests." Likewise, he notes that even if U S WEST provides service as requested, the Company can affect the quality of service provided through decisions about where and when to deploy and/or upgrade facilities. This corollary discretion in the level of service quality to be provided is entirely inappropriate until and unless the market has become sufficiently competitive as to discipline U S WEST for inferior service and performance.

Dr. Selwyn argues that any economic burdens attending U S WEST's obligation to serve must be analyzed in concert "with the enormous *and unique* economic benefits that have been enjoyed by U S WEST and other ILECs for nearly a century." Among those benefits, he cites "virtual insulation from business risk, the ability to amass a ubiquitous distribution, switching, and intraLATA transport infrastructure unmatched and unmatchable by any known competitor, the ability to acquire a near-100% share of the local exchange market, and unparalleled incumbency advantages vis-a-vis actual and prospective entrants that assure the ILECs' ability to retain substantially all of their core market share[.]" He reiterates Commission Staff testimony that U S WEST is not able to quantify the change in capital spending over the past five years if the proposed tariff revisions had been in effect, and references U S WEST's citation of its $38.5 million expenditure to convert multi-party lines to single-party service in Washington state as a facilities investment that the Company would "probably not" have initiated. Any "economic burden" on U S WEST from its obligation to serve requirement is mitigated in several ways, including its opportunity under traditional rate of return regulation to seek recovery of prudent investment costs, and its ability to charge customers under its current tariff for unusual or extraordinary construction costs associated with providing service.

Dr. Selwyn readily acknowledges that "the ILECs need to adjust their construction planning to accommodate their expectations of the potential impact of competition upon the demands for facilities. Erosion of demand for *ILEC* facilities would arise only where *facilities-based* competition develops *and* where the fungibility of the impacted ILEC facilities is limited." He delineates as fungible plant, ILEC switching and interoffice capacity -- in that it serves total demand in the wire center and is not materially affected by individual customers discontinuing service or ordering new services from facilities-based competitors; feeder cable connecting wire centers to service area interfaces (SAI) -- in that it serves any subscriber "subtending the SAI" and can be used to meet projected demand and growth over a large number of customers; even distribution cable beyond the SAI, while relatively non-fungible within the distribution cable itself, is "likely to be the *least competitively impacted* even in presence of some facilities-based competition because CLECs are more likely to purchase loop facilities and unbundled network elements from an ILEC than construct their own."

In response to U S WEST's testimony on CLEC tariff/price list terms and conditions affecting their obligation to provide service on demand, Dr. Selwyn replies that new entrants have not experienced either the incumbents' advantages of a historic monopoly or the economic protection afforded by regulation under which ILECs "have been permitted to acquire their massive, ubiquitously deployed infrastructures." Whether for legal or policy reasons the CLEC tariffs should have been approved as filed is irrelevant to the Commission's inquiry into the U S WEST proposed tariff revisions. Since the CLECs do not enjoy the regulatory protections and insulation from financial and business risks conferred upon U S WEST, "it is both reasonable and appropriate that U S WEST be subject to different and more rigorous service obligation requirements than other, non-dominant carriers." Regardless of the language of CLEC tariffs/price lists, to qualify to receive universal service support as an eligible telecommunications company, they must offer the requisite services throughout the designated service area.

Taking pains not to "offer a legal opinion," Dr. Selwyn believes a clear reading of the Act does not support U S WEST's reliance on the federal law to justify the proposed tariff revisions. He finds provisions in the Act which impose *"additional* obligations for incumbent local exchange carriers -- obligations that do not apply to CLECs.[3]" And, in a May 1998 Order, the Federal Communications Commission (FCC) rejected proposals to impose upon CLECs additional obligations that do apply to ILECs, including carrier of last resort obligations, as a condition of being designated as an eligible telecommunications carrier, i.e., eligible to receive

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[3] See, 47 U.S.C. §251(a),(b), and (c), which set forth differing obligations for all carriers, local exchange carriers, and incumbent local exchange carriers, respectively.

universal service support.[4] These clear distinctions under the Act lend further support to the contention that CLEC tariff/price list terms and conditions are irrelevant to any claim by U S WEST that equity or parity require that the Company be relieved of its long-standing service obligations.

Dr. Selwyn opines that "Washington law unambiguously requires U S WEST to furnish service on demand[,]" citing RCW 80.36.090. He also references other examples of statutory language that would be "undermined" if the tariff revisions were approved, including RCW 80.36.080, especially as it relates to the furnishing of service; RCW 80.36.140, as it relates to the adequacy and sufficiency of telecommunications services; RCW 80.36.200, as it requires telecommunication companies to "receive, transmit, and deliver, without discrimination or delay, the messages of any other telecommunications company;" and RCW 80.36.220, as it relates to a telecommunications company's duties to transmit messages.

D. GTE

GTE offers the testimony of Lida Tong, Director - External Affairs for Washington, with 24 years experience in governmental and regulatory affairs, who testifies that U S WEST's proposed tariff revisions renders any obligation to serve imposed upon U S WEST "subject to a rule of reasonableness. * * * GTE does not believe that it is good public policy for this Commission to impose avowedly unreasonable obligations on any local exchange company."

Ms. Tong asserts that RCW 80.36.090 applies equally to all companies, and finds no basis in RCW 80.36.320,.330, addressing competitive classification of telecommunications' services and companies by the Commission, for different treatment of the obligation to provide service on demand. She maintains the Commission "must establish a separate, competitively neutral policy for awarding and compensating for universal service obligations." Otherwise, requiring U S WEST alone to provide service on demand, "even when it is unreasonable to do so, will guarantee that U S WEST will always have a higher cost structure than its competitors."

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[4] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, May 8, 1997, ¶142

II. U S WEST Rebuttal Testimony

Ms. Jensen offers rebuttal testimony to clarify the tariff's application when no facilities are available, to demonstrate it is consistent with tariffs of other telecommunications companies and with certain provisions currently in the Company's tariffs, and to show that applying the obligation to serve only to U S WEST regardless whether facilities are available forces it to provide "universal service without any assurance of compensation for such service."

U S WEST urges that the language of RCW 80.36.090 does not distinguish between competitive and incumbent telecommunications companies, and that its tariff does not require it to provide a level of service different than that provided by CLECs. Nonetheless, U S WEST believes "this obligation-to-serve parity should be classified and confirmed." Ms. Jensen notes that "U S WEST has tariffs on file which clearly limit U S WEST's obligation to serve consistent with the proposed tariff, [i]ncluding, but not limited to, private line, custom calling features such as call forwarding and caller ID, transparent LAN services, and frame relay services."

Ms. Jensen contests Commission Staff's position that RCW 80.36.090 applies equally to all companies but allows obligations thereunder to vary with individual circumstances by drawing a comparison to levels of rate regulation by the Commission. The Company acknowledges Commission authority under RCW 80.36.320,.330 to impose different rate regulations on companies, but finds no commensurate authority with respect to service obligations. She also contests Staff's different treatment based upon U S WEST's "ubiquitous network and its market power[,]" and questions Mr. Spinks' assertions regarding CLECs' access to U S WEST's facilities for interconnection because he lacks familiarity with the specifics of any interconnection agreements approved by the Commission pursuant to the Act. She likewise contests Dr. Selwyn's distinctions in service obligations based as they were upon insufficient competitive pressure and the nature of the service -- essential and monopoly basic local exchange service -- for his failure to investigate the "existence of competitive access providers, including facilities-based competitors[.]" She agrees however with his proposition that "to the extent that a facilities-based provider exists, providing loops in competition with U S WEST or any other incumbent LEC, it can serve both residential and business customers with those loops," where the facilities can reach both.

U S WEST answers the question whether it is "unwarranted" or "premature" for the Company to be treated like CLECs under 80.36.090. Ms. Jensen without discussion responds that "[t]he Act requires that no carrier be subjected to a competitive disadvantage by state rules designed to preserve and advance universal service." She next maintains that competition "has been on the

table" since the Washington State Supreme Court decision[5] in the Electric Lightwave, Inc., application to provide local exchange service in U S WEST's service territory, thereby eliminating legal barriers to entry into the local service market. She closes her answer by quoting the FCC's universal service report and order "that any support mechanism continued or created under new section 254 should be explicit, rather than implicit as many support mechanisms are today."

Regarding circumstances attending the provision of local exchange service, U S WEST asserts that 1) where more than one provider has a loop that can reach a customer, it is not true that only the ILEC can provide service; 2) where an interconnection to an ILEC is feasible, another carrier can interconnect to provide service and build only that portion of the facilities needed to serve the customer; and 3) where it is uneconomic to build new facilities, the carrier providing service should be compensated for providing universal service. Therefore, applying RCW 80.360.090 only to ILECs is unsupportable, and contrary to the Act's requirement that universal service subsidies are required where it is uneconomic to provide service.

The Company disputes any interpretation of its tariff to permit U S WEST to disconnect an existing customer to provide service to a new customer, contending the language at issue implies the initiation of new service only, and offers that any ambiguity could be remedied by an amendment to the tariff. She disputes the testimony of both Dr. Selwyn and Mr. Spinks regarding the potential for service quality degradation, by noting that "U S WEST agrees to use reasonable efforts to make available services to a customer by the date the customer requests." Ms. Jensen lists several specific service related Commission rules and makes a general reference to others, as well as the service guarantee provisions of Docket No. UT-950200, as being unaffected by the proposed tariff filing. She also denies the tariff would permit U S WEST to avoid interconnecting CLECs, citing the Company's obligation under the Act "to provide interconnection where technically feasible," but if no facilities are available to serve the end-use customer, and U S WEST has no plans to add such facilities, "the CLEC would have to install additional facilities to provide service to the customer."

Ms. Jensen says that Commission Staff and Dr. Selwyn would require U S WEST to provide service on demand, regardless of the resource availability, be it engineers, construction crews, technical support, and plans to build facilities in the short term, but argues "the relevant statutes do not make these distinctions." She states that because any CLEC can connect at any feasible point to the ILEC's network, extensions of or additions to U S WEST's network can be performed by

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[5] In Re Electric Lightwave, Inc., 123 Wn.2d 530, 869 P.2d 1045 (1994).

any carrier; she opines that CLECs "may be best able to provide" that function due to their inherent lower cost of capital and non-union workforce. She calls for the Commission to "define basic telecommunications service and provide an equitable way for all LECs to share in that burden as required by federal law."

Countering Commission Staff and Public Counsel/TRACER criticism on this point, Ms. Jensen asserts that U S WEST currently uses its "business sense" to make decisions about facilities investment, taking into account "demand forecasts, current number of customers, and available subsidies, among other things," as well as types of information any other company would consider "in a competitive telecommunications market." U S WEST also considers Commission rules and regulations, and regulatory principles governing cost and depreciation methodologies, and service quality and prudence standards. Challenging Dr. Selwyn's "death spiral" prediction for the Company, Ms. Jensen contends that U S WEST will continue to invest "as any rational business would, where it is economic to do so." If only U S WEST must comply with RCW 80.36.090, it will be disadvantaged because it will not have financial resources to invest where it makes business sense to do so, constraining its market behavior where no such restrictions apply to its competitors.

III. Commission Discussion and Decision

The Commission is troubled by the U S WEST tariff filing, because it implicates not just the interpretation and application of RCW 80.36.090[6], but the Legislature's policy declarations in RCW 80.36.300[7] and the Commission's

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[6] RCW 80.36.090 provides in relevant part:

> Every telecommunications company, upon reasonable notice, shall furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto suitable and proper facilities and connections for telephonic communication and furnish telephone services as demanded[.]

[7] The legislature declares it is the policy of the state to:

> (1) Preserve affordable universal telecommunications service;
> (2) Maintain and advance the efficiency and availability of telecommunications service;
> (3) Ensure that customers pay only reasonable charges for telecommunications service;
> (4) Ensure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of regulated telecommunications companies;
> (5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state; and

responsibilities under the Telecommunications Act of 1996. The Commission earlier in this proceeding expressed its frustration that U S WEST chose to raise such a significant public policy issue in the context of a tariff filing,[8] with its requisite procedural formalities, the attendant positional litigation strategies, and the constraints imposed by the strict time lines associated with the tariff mechanism. We reiterate here our strongly held belief that critical public policy issues of this magnitude, breadth, and impact are not appropriate for resolution in the context of a formal adjudication.

While the Commission believes its inquiry whether the proposed tariff revisions should be approved ultimately may be determined with reference to RCW 80.36.090 -- it is after all the interpretation and application of this specific statutory provision to U S WEST that has been called into question -- and RCW 80.04.130 -- U S WEST bears the burden of proof that the proposed tariff language is in the public interest -- the Commission by no means can begin and end its inquiry there. As we noted above, the ramifications of the Company's proposal could have detrimental consequences for all present and potential U S WEST customers, and could have potential adverse effects on the development of a competitive local exchange services' market in this state. We now turn to a discussion of the bases for our decision in this matter.

A. Tariff Advice No. 2820T

The Commission begins its discussion with the specific language of the proposed tariff revisions. We take each proposed new section of the tariff in turn. Section 2.2.1.A.4. provides in relevant part:

> The Company shall use reasonable efforts to make available services to a customer on or before a particular date [but] [t]he Company does not guarantee availability by any such date and shall not be liable for any delays in commencing service to any customer.

It is the potential effect of this provision on service quality standards which we find most troubling. The Company proposes to use reasonable efforts to provide service, but not only relieves itself of any responsibility or obligation to meet its own, or any other, agreed or required installation date, but relieves itself of any liability for failure to meet such date.

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(6) Permit flexible regulation of competitive telecommunications companies and services.

[8] Third Supplemental Order Denying Joint Motion To Strike Testimony, Docket No. UT-961638 (December 19, 1997).

WAC 480-120-051, Availability of service--Application for and installation or service, governs the Company's provision of service upon satisfactory completion of the application process and compliance with all tariff requirements. The rule permits reasonable efforts to agree on a specific date for providing service; permits the Company to change an agreed date when circumstances warrant upon prompt notification to the customer; and allows the Company to avoid committing to a specific date where unable to do so, but requires periodic notification of the status of an order. The rule also requires U S WEST to "complete applications for installation of primary exchange access lines" upon this schedule: on a calendar monthly basis 1) 90% shall be completed within five (5) business days following receipt (not covered are all instances where a later installation date is requested or where special equipment or service is indicated); and 2) 99% shall be completed within 90 days following receipt.

In the Company's past general rate increase proceeding, Docket No. UT-950200, the Commission established a customer service guarantee program at least in part as a direct result of U S WEST's failure to meet the service installation requirements. The program requires, among other things, that the Company provide: waiver of installation charges, credit of basic monthly rate, and free call forwarding for orders for service not completed within five business days; for service orders not completed within 30 calendar days, subsidized cellular service or a substitute service such as voice messaging, or call forwarding at the customer's option.

Yet, Ms. Jensen in her rebuttal testimony says that the tariff language "will not limit the applicability of WAC 480-120-051 . . . or limit U S WEST's ability to provide the service guarantee ultimately required by the Order in UT-950200." We note her testimony does not say that the tariff *will not limit U S WEST's obligation to comply with the WAC regulations or the Order.* It is just that compliance with the Commission's service quality rules which informed our decision to direct the Company to institute a customer service guarantee program, and to improve service installation and restoration levels to those no worse than the Company experienced prior to 1991.

We question how U S WEST's tariff simultaneously can relieve the Company from its own commitment to install service "on or before a particular date" and can insulate the Company from all liability for "any delays" in providing service, and not run afoul of Commission rule and Order. We believe the proposed language is in fact in conflict with U S WEST's service quality obligations contained in Commission rules, and inconsistent with the customer service guarantee program we required to be implemented in the prior rate case proceeding.

> Section 2.2.2.B. provides in relevant part:
>
> The furnishing of service . . . is subject to the availability on a continuing basis of all the necessary facilities and is limited to the capacity of the Company's existing or planned facilities . . . at the sole discretion of the Company.
>
> Section 2.2.2.C. provides:
>
> The Company reserves the right to limit or to allocate the use of existing facilities, or of additional facilities offered by the Company when necessary because of a lack of facilities or due to some cause beyond the Company's control.

It is the interpretation and application of these over broad provisions which we find most troubling. The Commission finds particularly disturbing the unfettered discretion in U S WEST to refuse service to a customer based solely upon an amorphous "business sense" standard. Dr. Selwyn cites U S WEST's data request response indicating that any payback period longer than the mandated depreciation life of the plant would fail its "business sense" criterion. We agree with his assessment that using depreciation lives without more is an insufficient standard because "[d]epreciation lives are by their very nature *averages* that are taken over a wide range of plant within each plant category." We also agree with Mr. Spinks that the tariff cannot be separated from rates, and that if U S WEST curtails service to customers who are more costly to serve or collects more of the cost to serve them directly from customers, its revenue level from remaining customers should be reduced. This point is reinforced in the above description by Dr. Selwyn of three outcomes that could result from the application of U S WEST's "business sense" standard, concluding that "the remaining U S WEST customers could be subjected to *increased rates overall* despite the ostensible 'improvement' in the Company's financial condition[.]"

The business sense standard is informed only by the Company's determination that providing service would be uneconomic: "factors such as available cash for investments, the Company's investment plan, and profitability of any particular request for service[,]" would be considered by U S WEST in ascertaining whether a particular request for service was economic according to Ms. Jensen's rebuttal testimony. She expands on this point claiming that "U S WEST will continue to invest, as any rational business would, *where it is economic to do so*." However, if U S WEST is the only company required to invest in facilities ubiquitously, "[it] will be disadvantaged in the sense that it will not have

those resources *to invest where it makes business sense to do so*[.]" (Emphasis added.) The Commission cannot help but recall its recent history with U S WEST in rate case and depreciation rate proceedings over the issue of investment in infrastructure in this state.

The Commission in recent years has expressed its frustration over annual levels of investment in plant and facilities in this state by U S WEST. In our Order[9] resolving the Company's 1997 general rate increase filing, we note that "[t]he Company stated pointedly that it expects the Commission to grant its rate increases before it will make investment in the State." The Company does not address how the application of its "business sense" criterion in determining where and when to invest in plant and facilities will address its lingering service quality problems in Washington. In our rate case Order, we state that "[s]ome of the Company's present service quality problems appear to stem from its failure to invest sufficient capital or human resources." The Company would seem now, through the terms and conditions of its proposed tariff, to be embarking upon a policy of restricted investment calculated only for its bottom line effect, and directed only by its own "business sense" criterion to invest where it is economic to do so, all in the guise of responding to a "competitive marketplace."

The Commission would be more sympathetic to U S WEST's 'plight' but for the reality of that *competitive marketplace*. Ms. Jensen asserts that "competition in local exchange service has been on the table since the Washington Supreme Court's decision in [the Electric Lightwave case] (citation omitted)[.]" We recall that our order was entered in April 1992, and the matter was not resolved by the Court until March 1994, a nearly two year delay which could have forestalled any meaningful investment by ELI (and Digital Direct of Seattle, predecessor of TCG Seattle in a companion case) pending judicial determination of their status as a local exchange company. We note also that the federal Telecommunications Act of 1996 is now itself nearly two years old, and that each and every Commission arbitrated agreement under the Act, establishing the terms and conditions for interconnection of CLEC facilities with U S WEST facilities, is on appeal to federal district court. This continuing uncertainty over the status of their approved agreements with U S WEST likely will affect both the timing and the placement of CLEC facilities as envisioned by the Act. We note that the FCC recently has initiated a proceeding[10] to address the speed with which complaints arising under approved interconnection agreements are being resolved:

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[9] Tenth Supplemental Order Rejecting Tariff Revisions; Requiring Refiling, Docket No. UT-970766 (January 16, 1998)

[10] Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, *Report & Order*, CC Docket No. 96-238, FCC 97-396 (rel. November 25, 1997) [Public Notice: Common Carrier Bureau Seeks Comment Regarding Accelerated Docket for Complaint Proceedings, (rel. December 12, 1997)]

> The development of robust competition for all telecommunications services requires that there be a means of swift and fair dispute resolution between competitors. This Public Notice is the second initiative undertaken at the Commission in the last month to emphasize the critical role enforcement plays in facilitating competition and to improve the Commission's enforcement processes.

The path toward the goal of a competitive telecommunications environment has been a lengthy and arduous process, one fraught with contentiousness and rancor, a formidable workload, litigation in state and federal courts, numerous legislative initiatives, the overlay of a federal legislative scheme for speeding up what was perceived to be a too slow process at the state level, and the beginning of the cycle all over again to implement the federal mandates. This is not to say that progress has not been made, but speed has not been a hallmark of that effort under either state, or now, federal law.

The Commission shares Dr. Selwyn's uncertainty over the interpretation of the actual tariff language. We too are concerned over the meaning of the provision that service "is subject to the availability on a continuing basis of all the necessary facilities," especially when read with the Company's "right to limit or allocate the use of existing facilities . . . when necessary because of a lack of facilities or due to some cause beyond the Company's control." Irrespective of whether the Company would interpret this language to allow it to disconnect an existing customer in order to provide service to a different customer due to facilities exhaust, these are the problems of interpretation and application which attend such a broad grant of discretion. We do not believe this is merely an ambiguity or semantic problem which, if engendering "confusion, can obviously be remedied by an amendment to the tariff language" as proposed in Ms. Jensen's rebuttal testimony.

The Commission apprehends serious public policy implications for customers, competitors, and the development of competition if this tariff were to go into effect. We agree with Public Counsel/TRACER that the proposed tariff revisions "would provide U S WEST with excessive discretion as to when and where to provide a basic, essential service." In this context, we think Commission Staff's concern that customers' needs for service would never be met is well taken. Dr. Selwyn testifies that "[s]ome households and businesses might end up never being connected to the public network . . . and . . . [c]ompetitors and the customers they serve could be harmed by the anticompetitive and selective provision of underlying network facilities upon which competitors rely in order to enter the market." While Ms. Jensen asserts that U S WEST "has an obligation

under the Act to provide interconnection where technically feasible," we nonetheless share Dr. Selwyn's concerns over the Company's ability to selectively provision underlying network facilities which may be essential to "technically feasible" interconnection. Commission Staff fears that customers leaving U S WEST for competitors might discover upon attempting to return to the Company's system "that it may be too costly to reconnect them, or that facilities may no longer be available[.]"

The record in this proceeding includes evidence of U S WEST's ongoing promotional and advertising activities to sell customers additional telephone lines, while the Company simultaneously complains here that customer demand for additional lines exhausts its facilities and complicates its ability to provide basic local exchange service to new customers, therefore requiring it to be relieved of its obligation to provide facilities and service, in its sole discretion. U S WEST recently filed with the Commission a tariff to offer incentives to customers who have left its system to return to the Company.[11] We are left to speculate why U S WEST is so aggressively marketing its existing local exchange facilities to the point where it anticipates exhaustion in some exchanges, but concurrently asks for the right to cease to continue providing new local exchange facilities to serve a growing demand for its services, in its sole discretion.

The Commission reminds U S WEST that it carries the burden of proving that the proposed tariff revisions are fair, just, reasonable, and in the public interest. The Company has been unable to offer any factual bases for its assertions that its obligation to serve imposes a severe and unique economic burden. U S WEST has responded to the parties that it conducted no specific study to quantify the effect of the proposed tariff revisions on its operations, competitive position, planning, and capital spending; that it could not estimate the number of requests for service in 1997 that would have not been fulfilled if operating under these tariff provisions; and, that it could not estimate the changes that would have occurred in its capital spending over the past five years under these tariff provisions.

Dr. Selwyn's discussion on the potential for erosion of demand for U S WEST's facilities is also instructive and persuasive, arguing that it would arise only where facilities-based competition develops and where the fungibility of the affected facilities is limited. We concur in his assessment of those facilities which would remain fungible in the face of such competition, including his opinion that distribution cable is "likely to be the *least competitively impacted* even in the presence of some facilities-based competition because CLECs are more likely to

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[11] Tariff Advice No. 2906T, Docket No. UT-971804 (filed December 17, 1997)

purchase loop facilities and unbundled network elements from an ILEC than construct their own." That assumes, of course, that U S WEST will not have exhausted its loop facilities through its efforts to sell additional lines to its customers. We find that U S WEST has not refuted this point with any factual evidence.

The Company acknowledges that its current tariff permits it to recover the costs of providing service where special or extraordinary construction is required. Mr. Spinks testifies to three general instances where U S WEST under its tariff may charge customers directly for construction of facilities to provide service: 1) customers within the Base Rate Area (BRA) must furnish or pay to have the Company furnish the trench or poles in connection with the placement of new service wires from a point on the customer property line to the premises to be served (WN U-31, 4.1.6), and customers outside the BRA must pay line extension charges according to the rates, terms, and conditions of WN U-31, 4.2; 2) an exception to the normal line extension tariff is provided when a lines extension involves unusual or disproportionately large construction expenditures as compared with the usual type of plant facilities construction; and 3) a tariff provision allows the Company to charge directly for temporary or speculative projects. Ms. Jensen testifies that 97% of the Company's annual orders for service are within the BRA.

We hold that U S WEST has failed to carry its burden of proof that its proposed tariff revisions are fair, just, reasonable, and in the public interest. In making this determination, we do not do so in a vacuum. The Commission is cognizant and mindful that continuing to impose an obligation to serve upon demand upon incumbent local exchange companies is a short-run proposition given technological innovation and federal and state regulatory policy. U S WEST also recognizes this situation, as represented in its instant filing. Commission Staff recommends "that the Commission initiate a rule making docket to establish appropriate conditions under which incumbent local exchange service companies furnish facilities for the provision of both retail and wholesale services." Public Counsel/TRACER recommend "that the Commission initiate a collaborative workshop process, rule making, or other proceeding which can include participation from the full range of industry participants and other interested parties." We agree with GTE's suggestion that "it is in other proceedings in which the obligation to provide service upon demand, and the costs generated by such an obligation, can be determined."

B. RCW 80.36.090

U S WEST argues that RCW 80.36.090 applies equally to all telecommunications companies. We agree, and U S WEST clearly recognizes and acknowledges that the Commission has held consistently that all local exchange

companies must comply with the statute. The relevant portion of the statute is quoted above. A disagreement arises in the interpretation and application of the statute. The Company contends that it is being held to a different standard under the law than CLECs which have tariff provisions identical or substantially similar to its proposed tariff revisions. We disagree as to that contention, and find that equal treatment is accorded both U S WEST and CLECs.

Commission Staff notes that U S WEST is not the statewide carrier of last resort, although it has readily embraced that role for the provision of intra-LATA (local access and transport area) long distance service. U S WEST however does have an obligation to serve customers in its tariffed service territory. Whether or not barriers to entry into the local exchange market have been eliminated in this state, U S WEST remains the *de facto* monopoly provider of local exchange service in its historical, and currently tariffed, service territory with a nearly-100% market share, and has provided on this record no factual dispute of that reality. U S WEST also remains, as to this essential and monopoly service, fully regulated by the Commission. That fact bestows substantial benefits and substantial responsibilities upon the Company.

Among those substantial benefits are the following noted by Public Counsel/TRACER:

- near-ubiquitous already deployed network infrastructure;
- established relationships with nearly 100% of existing residential and business customers;
- brand name recognition acquired through ratepayer-funded advertising and communications programs aimed at customers of monopoly services;
- positive network externalities due to broad coverage; and,
- protection against significant adverse financial results under rate of return regulation, and the opportunity, obtained both through its monopoly and ongoing regulatory protection, to fully recover its investment on all network resources.

Among the substantial responsibilities entailed by these substantial benefits is the obligation to serve customers in its tariffed service territory. This obligation is a balanced response to the enormity of the above benefits which U S WEST continues to enjoy. The Company, which bears the burden to demonstrate that its tariff revisions are in the public interest, has not attempted to quantify and contrast

either the benefits claimed by Commission Staff and Public Counsel/TRACER or the economic burden alleged by the Company which stem from its status as the incumbent local exchange company.

By comparison, Mr. Spinks notes that CLECs "are largely start-up companies that did not even exist a decade ago, have very few facilities at this point in time, few customers, no market power, and little or no access to the facilities of the incumbent providers. Ms. Jensen challenges Mr. Spinks only on his assertion that CLECs have "little or no access to the facilities of the incumbent providers" and for his lack of knowledge whether CLECs had interconnection agreements with U S WEST or specific provisions of those agreements. The Commission knows that we have approved six arbitrated interconnection agreements between U S WEST and CLECs. We also know that all six agreements are currently on appeal in federal district court. What we cannot know, as in the ELI appeal discussed above, is what that portends for the timing and placement of CLEC facilities to bring competitive service alternatives to customers in this state. The Commission's formal complaint adjudication docket of disputes arising out of these same arbitrated interconnection agreements indicates to us that interconnection, even in the face of approved agreements, is proceeding neither smoothly nor rapidly.

In his testimony, Dr. Selwyn asks the Commission, in evaluating U S WEST's proposal, to address whether sufficient incentives exist for the Company to provide end users (both retail customers and customers of competitors who purchase U S WEST's bundled wholesale services and unbundled network elements) with basic local exchange service of an acceptable quality. We believe that the Washington State Supreme Court, affirming the Order of the Commission in Docket No. UT-940641, denying in part and granting in part U S WEST's petition for an accounting order regarding its capital recovery [12], has addressed that issue for us:

> The evidence is that U S WEST has always achieved full capital recovery in this state. * * * The Commission concluded, based on the record, that the Company has achieved proper and adequate recovery. * * * U S WEST offered no evidence the Commission found to be credible that it will not recover its capital investment in the future. * * * This conclusion is supported by the testimony.

U S WEST has provided no evidence on this record to support its position that investing in facilities to provide basic local exchange service is uneconomic.

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[12] Fifth Supplemental Order, on Remand, Granting Petition in Part, Docket No. UT-940641, April 11, 1996

RCW 80.36.320 provides for the classification of telecommunications companies as "competitive telecommunications company" whenever the Commission finds that the company is subject to "effective competition." In making that determination, the Commission at a minimum must consider the factors prescribed in paragraphs (1)(a) through (d). Paragraph (2) provides that "[c]ompetitive telecommunications companies shall be subject to minimal regulation. * * * The Commission may also waive other regulatory requirements under this title[.]" We read this provision to apply to any provision in Title 80 RCW.

The Commission however explicitly did not waive RCW 80.36.090 when competitively classifying CLECs because it believed the statute applied to "every telecommunications company." And, the Commission knew that a rule of reason would have to be applied to requests for service from CLECs: Commission Staff has posed the question whether a CLEC, which has placed its first and only facilities in Washington in downtown Seattle in competition with U S WEST, should be required to serve a customer in U S WEST's Moses Lake exchange because the Company decides in its sole discretion that it will not provide service? The rule of reason would dictate that anywhere a CLEC has facilities in place and could reasonably use those facilities to serve an applicant, it must provide service as requested because the customer is **reasonably entitled thereto.** RCW 80.36.090. As noted above, U S WEST remains the *de facto* monopoly provider of basic local exchange service in its tariffed service territory with a ubiquitous network in place, and it must provide service as requested because the customer is **reasonably entitled thereto.** RCW 80.36.090. We see no unequal treatment here and we will require U S WEST to continue to fulfill its obligation to serve customers pursuant to statute.

Earlier in this Order we recognize that the Commission and the Company, in consultation with Commission Staff, Public Counsel, TRACER, and other interested persons, must undertake an exploration of the issues raised by relieving incumbent local exchange companies of their traditional obligation to serve and an examination of the impact of such a decision on customers, competitors, and the development of a competitive local exchange market. We believe that common sense dictates that this undertaking begin immediately, and will order here that the obligation to serve issue be explored in all its facets as part of the Commission's pending universal service rule making. It will of necessity include all CLECs holding out the provision of local exchange service, who share with U S WEST an obligation to serve under RCW 80.36.090.

C. Policy Considerations

U S WEST argues that requiring the Company to provide service on demand to all customers whether or not it has facilities to do so, and without requiring CLECs to do likewise, would violate the Act since it would not be competitively neutral and would be inconsistent with Section 254 of the Act. Public Counsel/TRACER respond that holding U S WEST to a carrier of last resort (COLR) obligation is not inconsistent with the universal service provisions of the Act, a fact recognized by the FCC[13]:

> Several ILECs assert that the Joint Board's recommendation not to impose additional criteria is in conflict with its recommended principle of competitive neutrality because some carriers, such as those subject to COLR obligations or service quality regulation, perform more burdensome and costly functions than other carriers that are eligible for the same amount of compensation. The statute itself, however, imposes obligations on ILECs that are greater than those imposed on other carriers (footnote omitted), yet section 254 does not limit eligible telecommunications carriers only to those carriers that assume the responsibilities of ILECs.

"The FCC clearly rejects the claim that the goal of 'competitive neutrality' requires the identical treatment of CLECs and incumbents[,]" observing in a footnote that the differing market situations of ILECs and CLECs warrants the differential treatment afforded them under the Act. Commission Staff notes that "[i]n addition to being able to recover its costs through rates, U S WEST will be able to draw from the universal service fund to recover costs of serving customers in high-cost areas if it is designated as an eligible telecommunications carrier pursuant to Section 214 of the federal Act."

U S WEST further argues that nothing in Section 253(b) of the Act authorizes state commissions to discriminate among telecommunications providers' obligation to contribute to universal service. Public Counsel/TRACER find this reference "unpersuasive." They contend that Section 253 preserves state regulatory authority:

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[13] See, *Universal Service*, supra at footnote 9, ¶142-144

> Nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure continued quality of telecommunications services, and safeguard the rights of customers.

Public Counsel/TRACER report that Congress made clear that state regulatory action to regulate monopoly behavior was not preempted:

> Existing State laws or regulations that condition telecommunications activities of a monopoly utility and are designed to protect captive ratepayers from the potential harms caused by such activities are not preempted.

Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 438, S. Rep. No. 230, 104th Cong., 2d Sess. (1996), p. 127.

The Commission finds no conflict with our decision in this proceeding and the Act, and, in fact, believe our decision to be fully in concert with the federal law. U S WEST, to the extent it complies with the provisions of Section 214 of the Act, will receive universal service funding as an eligible telecommunications carrier (ETC). Yet, the Company has chosen to apply for ETC status in only ten of its local exchanges in Washington -- Seattle, Tacoma, Bellevue, Des Moines, Federal Way, Renton, Olympia, Spokane, Yakima, and Vancouver. Public Counsel/TRACER accurately put voice to our own concerns over this decision by U S WEST:

> However, by combining its decision to apply selectively for ETC status with its attempt to modify its tariffs in the current proceeding, U S WEST is trying to shirk its broader duties as the incumbent carrier.

We reject any argument that the Act requires us to resolve the instant proceeding otherwise than as decided.

Having discussed above in detail the documentary evidence concerning all material matters, and having stated findings and conclusions, the Commission now makes the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings are incorporated by this reference.

FINDINGS OF FACT

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, accounts, securities, and transfers of public service companies, including telecommunications companies.

2. U S WEST Communications, Inc. is engaged in the business of furnishing telecommunications service to the public within the State of Washington.

3. The language of Section 2.2.1.A.4. of the proposed tariff would be inconsistent with WAC 480-120-051 and the customer service guarantee provisions of our Order in Docket No. UT-950200.

4. The language of Sections 2.2.2.B. and 2.2.2.C. of the proposed tariff is overly broad and vests unreasonable discretion in the Company.

5. U S WEST has not offered any factual bases for its assertions that its obligation to serve imposes an unreasonable economic burden on the Company.

6. All telecommunications companies offering to provide basic local exchange service are held to the same obligation to provide service,

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and the parties.

2. U S WEST has failed to carry its burden of proof that its proposed tariff revisions are fair, just , and reasonable, and in the public interest.

3. RCW 80.36.090 applies equally to all telecommunications companies offering to provide basic local exchange telecommunications service.

4. U S WEST's obligation to serve is not inconsistent with the federal Telecommunications Act of 1996.

5. The Commission should reject U S WEST's proposed tariff revisions in their entirety.

ORDER

THE COMMISSION ORDERS:

1. The proposed tariff revisions filed by U S WEST Communications, Inc., under Advice No. 2820T, are rejected in their entirety.

2. The Commission Staff should move expeditiously to expand the scope of the rule making proceeding in Docket No. UT-970325 to include the obligation to serve of all telecommunications companies offering to provide basic local exchange telecommunications service.

DATED at Olympia, Washington, and effective this 16th day of January 1998.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANNE LEVINSON, Chair

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, 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).