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April 24, 1998

24375.109

VIA FACSIMILE

Mr. Paul Curl  
Acting Secretary  
Washington Utilities & Transportation Commission  
1300 S. Evergreen Park Dr. S.W.  
Olympia, WA 98504

Re: Docket No. UT-970723

Dear Mr. Curl:

Enclosed please find an original and 19 copies of TCI's Proposed Rulemaking to Adopt a Methodology for Determination of Just and Reasonable Rates for Attachment to Transmission Facilities.

Yours truly,

WILLIAMS, KASTNER & GIBBS PLLC



Penny S. Blomgren  
Assistant to Judith A. Endejan

psb  
Enclosures  
cc: All interested parties (w/encl.)

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BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PROPOSED RULEMAKING TO ADOPT  
A METHODOLOGY FOR  
DETERMINATION OF JUST AND  
REASONABLE RATES FOR  
ATTACHMENT TO TRANSMISSION  
FACILITIES

Docket No. UT-970723

On March 31, 1998, the Washington Utilities and Transportation Commission ("WUTC") issued a Notice of Opportunity to File Comments in this docket ("Notice"). In essence, this Notice asked interested parties to comment on whether the WUTC should adopt the methodology proposed by the Federal Communications Commission ("FCC") in its Report and Order in CS Docket No. 97-151 entitled *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*. TCI Cablevision of Washington, Inc. ("TCI") supports adoption of the FCC's cable attachment methodology. However, TCI would not support the Commission's adoption of the revised FCC "telecommunications rate" rules on a "flash-cut" basis, which would be neither lawful nor appropriate for the following reasons:

1. RCW Ch. 80.54 Requires The Commission to Adopt a Methodology Consistent With The Current FCC Methodology for Cable Pole Attachments.

The purpose of this docket is to adopt rules, regulations and procedures which will implement RCW Ch. 80.54. The provisions of that chapter give this Commission the authority

to regulate pole attachment rates for both telecommunications and cable television attachments.<sup>1</sup>

This chapter also establishes the sole criteria for establishing a just and reasonable rate. RCW

80.54.040 provides:

A just and reasonable rate shall assure the utility the recovery of not less than all the additional cost of procuring and maintaining pole attachments, nor more than the actual capital and operating expenses, including just compensation, of the utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities, and uses which remain available to the owner or owners of the subject facilities. (emphasis added)

As stated in its initial petition which instituted this rulemaking, TCI explained how Chapter 80.54 parallels the 1978 Pole Attachment Act which led to the FCC's pro rata based methodology which still remains in effect at the federal level for all pole attachments used by a cable television system. Section 703 of the Telecommunications Act of 1996 ("1996 Act")<sup>2</sup> maintained the existing FCC pole attachment formula for cable television attachments. However, Section 703 also directed the FCC to develop regulations for pole attachment charges for telecommunications carriers which would be phased-in between 2001 and 2006. The primary difference between the formulas which will apply to cable television attachments and to pole attachments for telecommunications purposes after 2001 is the apportionment of the cost of unusable space on a pole. For cable television attachments, the apportionment will remain

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<sup>1</sup>The definition of attachment in RCW 80.54.010(1) states "attachment means any wire or cable for the transmission of intelligence by telecommunications or television, including cable television . . ."

<sup>2</sup>Pub.L. 104-104, 110 Stat.56 (1996).

unchanged under federal law. This apportionment allocates a pro rata share of the cost of unusable space based upon the attaching party's proportion of space actually used. In contrast, the formula for telecommunications attachments, which will be phased-in over a period of five years after 2001, apportions two-thirds of the cost of unusable space on a per capita or equal basis among all attaching entities.

However, under Washington law (80.54.040) any methodology this Commission would adopt for pole attachment rates would have to follow a proportionate or pro rata approach to cost allocation, like the current FCC formula for cable rates. TCI advocated in its initial petition, and in comments throughout this proceeding, that the Commission adopt the FCC methodology for cable attachments. This methodology is consistent with Washington law and with recent decisions from other jurisdictions which regulate pole attachment rates at the state level.<sup>3</sup>

Thus, the Commission does not have the legislative authority to adopt Appendix A to the Notice if it establishes a methodology which is inconsistent with RCW 80.54.040. That appears to be the case because Appendix A allocates costs for the unusable pole space on a per capita basis for communications attachments. The question of whether the Commission should flash-cut to the FCC communications attachment formula is immaterial, because such an approach is not lawful under RCW 80.50.040. Under that statute the cost of the unusable space (the

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<sup>3</sup>See e.g., In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095, Opinion No. 97-10, New York Public Service Commission (June 17, 1994); Cablevision of Boston Company, et al., D.P.U./D.T.E. 97-82 (April 15, 1998); Consumers Power Co., et al., Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 (Feb. 11, 1997), appeal pending, Detroit Edison Co., et al. v. Michigan Public Service Commission, et al., Nos. 203480 and 203421 (Mich. Ct. App. filed May 22, 1997); Michigan Telecommunications Act, 1995, PA 216 [Art 216], November 30, 1995.

required support and clearance space) can be allocated only "in proportion to the space used for the pole attachment."

Even if the Commission were to have the authority to establish different formulas for cable and telecommunications attachments, which it does not, the Commission should not flash-cut to the FCC's telecommunications rate methodology under any circumstances.<sup>4</sup>

2. A "Flash-Cut" to a "Telecommunications" Formula Would Undermine State and Federal Pro-Competitive Policies.

Congress deliberately phased-in a new rate for "telecommunications attachments" starting five years after the 1996 Act to promote telecommunications competition--the core purpose of the new federal Act. Congress recognized that facilities-based competition would be slow to develop, even if the 1996 Act requires monopoly pole owners to make their facilities, such as poles, available to competing local exchange carriers (CLEC's), as well as from cable operators. Because Congress wanted to minimize barriers to the development of facilities-based competition on a widespread basis, it adopted § 703's phased-in approach for communications pole attachments. Had pole attachments for new telecommunications providers been set immediately based upon the number of parties attached as of 1996 (or even 1998) the resulting rate, based on the division of per capita pole costs, would be significantly higher - if not double - than a

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<sup>4</sup>The Notice does not state that the Commission recognizes that the FCC methodology stated in Appendix A would not apply to cable television attachments. If the Commission continues to consider adoption of a "flash cut" telecommunications methodology in this docket, it should clarify that this methodology would not apply to cable attachments, consistent with the existing FCC cable pole attachment rate formula and Section 703 of the 1996 Act.

pole rate established using the pro rata based cable formula. As is shown on the attached graph (Attachment A), by following the phase-in, a gradual ramp up attracts and retains facilities-based competitors until the time that a sufficient number of parties exist on the poles so that a "per capita" allocation of pole costs does not create an undue burden on any of the attaching parties. As is also shown on the attached graph, if one "flash-cuts" to a rate in which most pole costs are divided per capita according to the number of parties on a pole, then the pole rate today will more than double, creating a potentially insurmountable barrier to the deployment of new facilities and an incentive for a cable operator not to diversify into telecommunications.

Instead, Congress decided to phase-in the telecommunications formula with the expectation that more facilities-based competitors would attach to poles over time so that a "per capita" allocation of pole cost would not create a burden. Theoretically, if more telecommunications providers are attached to a pole, each will pay a significantly less share of pole costs on the modified per capita basis established by the 1996 Act.

On the other hand, flash-cutting to the telecommunications formula ahead of Congress' intended schedule would create the very barrier to competition which the 1996 Act tried to remove. Furthermore, it would be contrary to this Commission's own policy of promoting facilities based competition. Most recently this Commission reiterated that "consumers benefit most when there is facility-based competition." *Eighth Supplemental Order Interim Order*

*Establishing Cost for Determining Prices in Phase II*, in Docket Nos. UT-960369 through 71 (paragraph 33).<sup>5</sup>

A phase-in approach is an endorsed practice in periods of significant regulatory transition, such as has been created by the 1996 Act. For instance, at the federal level, the Modified Final Judgment ("MFJ") which broke up the Bell System<sup>6</sup> adopted an 8-year phase-in regarding access rates. From January 1984 through September 1991, the per minute access charge for a given type of traffic in a given area was equal, irrespective of whether a long distance carrier connected to an end office or tandem switch. Because AT&T had a built in cost advantage it had more direct (less costly) connections to an end office than new competitors the MFJ equalized this cost disparity for a period of time sufficient to allow for the development of long distance competition. Had AT&T been permitted to charge more for tandem connections than for the end office connections (which AT&T dominated), AT&T otherwise would have benefitted from an insurmountable advantage.<sup>7</sup>

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<sup>5</sup>In addition, the legislature has declared it to be the policy of the State to promote competition, which clearly includes facilities-based competition. See RCW 80.36.300.

<sup>6</sup>See *U.S. v. American Telephone and Telegraph Co.* 552 F.Supp. 131, Appendix B (D.D.C. 1982).

<sup>7</sup>The AT&T divestiture decree called for the Bell Operating Companies to establish access charges under new "cost-based" standards required by the MFJ. However, due to AT&T's dominance of the long distance market and its historical integration with the Bell Operating Companies, AT&T was directly connected to essentially all end offices, while its new competitors had virtually no direct end office connections and could not possibly afford to establish them, based on their traffic levels. These smaller entities would obtain access service by means of tandem switches (at least one for each LATA) that would connect to each of the end offices in the LATA. Switching a call twice (at the end office and the tandem) and transporting it between the tandem and the end office could justify a higher "cost-based" rate than one for simply switching a call at the end office and transporting it to AT&T.

Competition in long distance markets flourished after divestiture, but it took time. The number of competing long distance carriers increased and the larger ones established a sufficient market presence to create more economical direct end office connections. The specific impact of the phase-in on the promotion of competition in the long distance market can be readily seen by examining the market share of AT&T at the time of divestiture and after the eight-year phase-in period. According to a recent report prepared by the Industry Analysis Division of the Common Carrier Bureau of the FCC ("IAD Report") (Attachment B), AT&T had a total toll revenue market share of 90.1% in 1984. See Trends in Telephone Service at 52 (Feb. 1998). Its market share dropped dramatically, by more than 25 points to 63.2% of total toll revenue, at the end of the phase-in period in 1991. Id. Once permitted to gain a foothold in the market, competing long distance carriers have continued to cut into AT&T's market share, which is reported as 47.9% as of 1996. Id. In addition, during this time period access charges themselves declined, so that any cost based differential between tandem switch access charges and end office switch access charges did not have such of an impact on smaller competitors. However, had the federal regulatory regime allowed for a "flash-cut" to pure cost based access rates, new entrants would have paid disproportionately higher rates and the same level of competition inevitably would not have flourished.

Similarly, the 1996 Act ushered in a period of transition between monopoly and competitive markets for local telecommunications carriers. The 1996 Act is intended to create a new market environment in which the number of competing facilities-based carriers will grow.



The new "telecommunications" pole rate would be higher than the current "pure cable" rate today, **when there are few, if any, additional competitors.** The IAD Report indicates that the Bell Companies and Other Incumbent Local Telephone Companies ("ILECs") represented approximately 99% of the national local service revenues in 1996. Id. at 32. Thus, CLECs currently face an even steeper hurdle to competing in the local telephone market today than did competing long distance providers at the time of divestiture.

As more competitors arise, however, spreading fixed pole costs among more firms can lead to **lower rates, even than today's "pure cable" rate.** Thus, just like the situation with access charges in the long distance market, the new federal pole rate rules create a more hospitable environment for the growth of competition **right now** - precisely when it is most needed. That growth in competition will mitigate, and perhaps completely offset, the theoretical rate "increase" represented by the "telecommunications" pole rate. Hopefully the number of competing facilities based carriers will increase so that the new "telecommunications pole rate," when finally phased-in, will be lower than the "cable rate," which was not impacted by the 1996 Act. That is because spreading fixed costs among a greater number of attaching parties will lead to lower rates. In sum, the federal pole attachment scheme in Section 703 should not be undermined at the state level by adopting a flash-cut approach for telecommunications attachment rates.

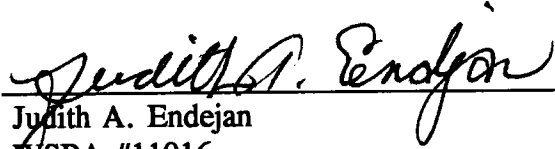
3. The Commission Should Follow The Existing FCC Cable Formula.

For now, the most prudent, pro-competitive approach for this Commission to take would be to adopt the cable pole attachment formula for all attachments covered by RCW 80.54. This approach has been taken in other jurisdictions, most recently in Massachusetts.<sup>8</sup> The FCC formula for cable pole attachment rates has been left intact by the 1996 Act, has withstood the test of time and will provide the most practical, least controversial methodology for all Washington pole attachment rates. Clearly, that result best promotes the public interest.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of April, 1998.

WILLIAMS, KASTNER & GIBBS PLLC

By

  
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WSBA #11016

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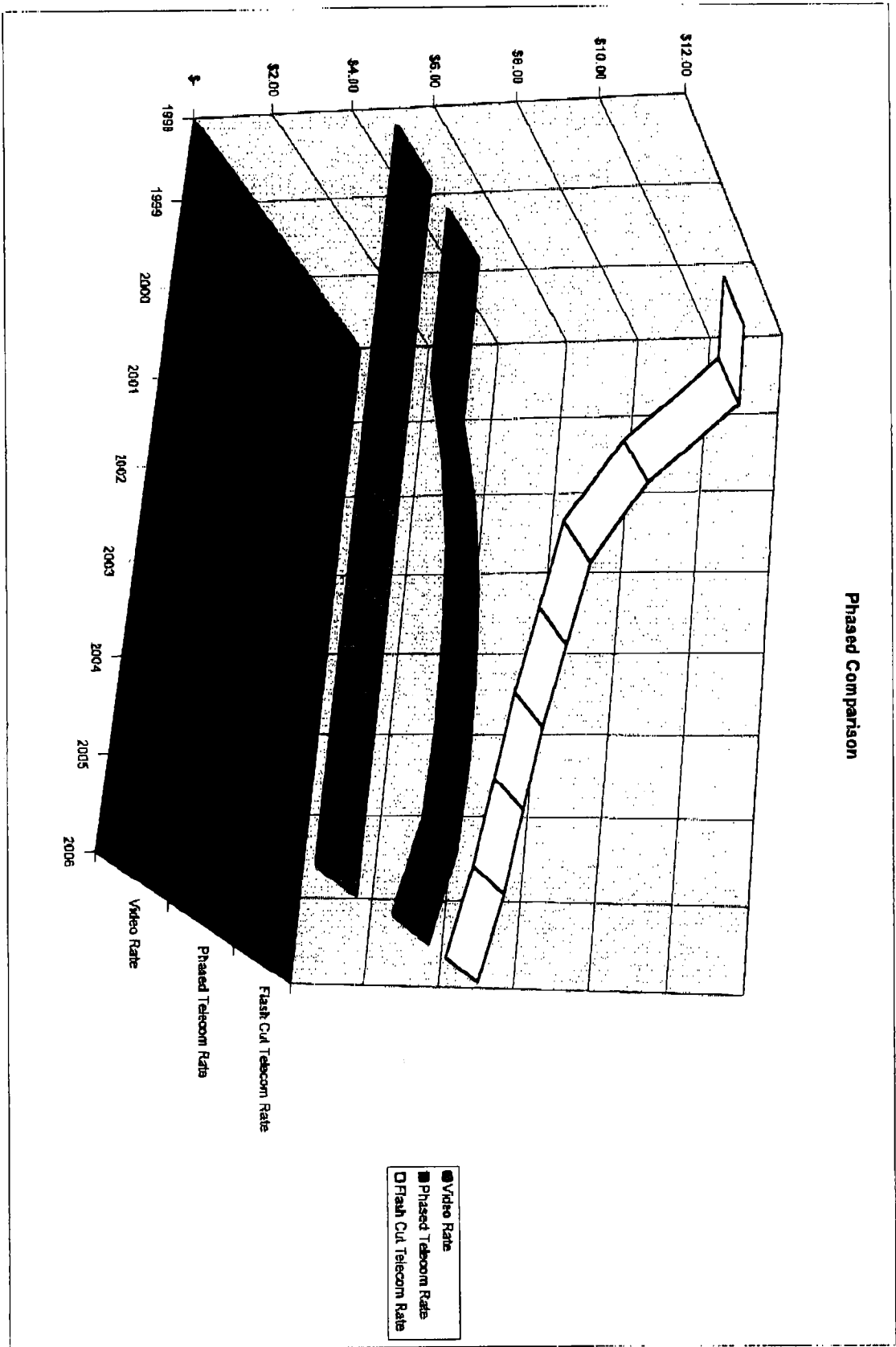
1919 Pennsylvania Ave. N.W.

Washington, D.C. 20006

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<sup>8</sup>See Footnote 3, supra.

Phased Comparison



# TRENDS IN TELEPHONE SERVICE

Industry Analysis Division  
Common Carrier Bureau  
Federal Communications Commission  
February 1998



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This report is available for reference in the Common Carrier Bureau's Public Reference Room, 2000 M Street, N.W., Room 575. Copies may be purchased by calling International Transcription Services, Inc. (ITS) at (202) 857-3800. The report can be downloaded [file name TREND198.ZIP] from the **FCC-State Link** internet site at <http://www.fcc.gov/ccb/stats> on the World Wide Web. The report can also be downloaded from the **FCC-State Link** computer bulletin board system at (202) 418-0241.

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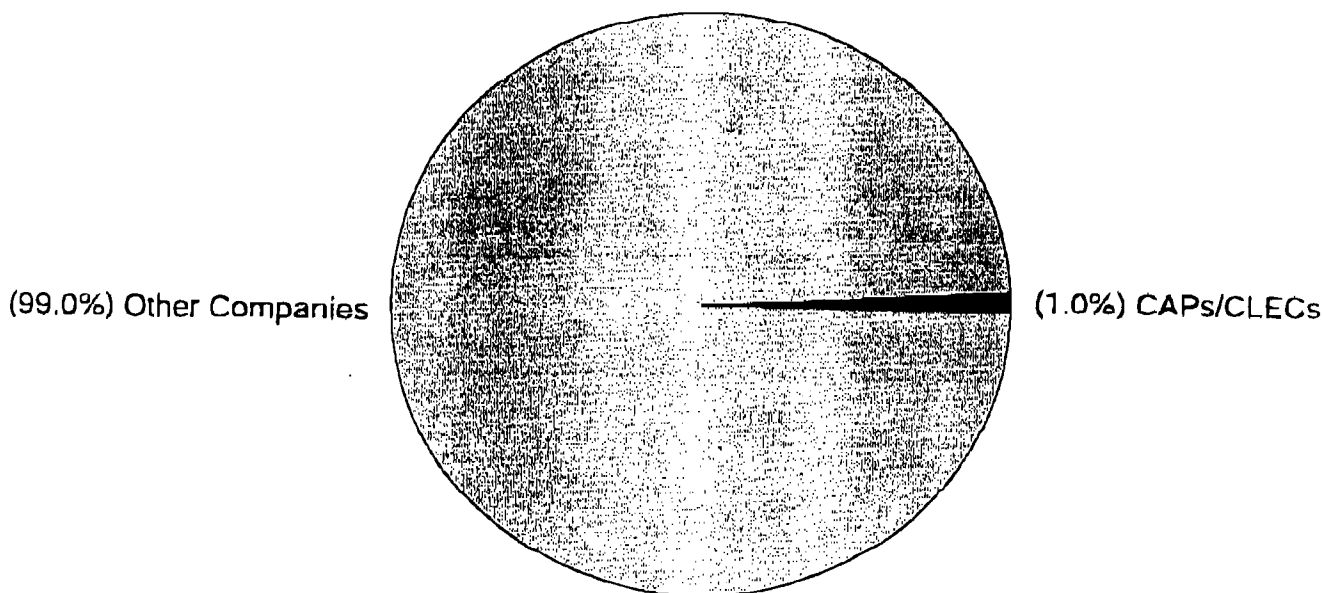
Attachment B

**TABLE 9.1**  
**NATIONWIDE LOCAL SERVICE REVENUES\* AND NEW COMPETITOR SHARE**  
 (Dollar Amounts Shown in Millions)

	1993	1994	1995	1996	Average Annual Growth 1993-1996**
1 Number of CAPs/CLECs***	20	30	57	109	76.0%
2 CAP/CLEC Local Service Revenues	\$178	\$281	\$595	\$949	74.7%
3 Bell Company# Local Service Revenues	\$58,838	\$61,415	\$65,485	\$70,290	6.1%
4 Local Service Revenues of Other Incumbent Local Telephone Companies	\$20,828	\$23,424	\$24,269	\$24,899	6.1%
5 All Other Local Service Revenues##	\$850	\$1,298	\$388	\$379	###
6 Nationwide Local Service Revenues (line 2 + line 3 + line 4 + line 5)	\$80,694	\$86,418	\$90,737	\$96,517	6.2%
7 CAP/CLEC Share of Nationwide Local Service Revenues (line 2 / line 6)	0.2%	0.3%	0.7%	1.0%	

Notes to Table 9.1 appear on the following page.

**Nationwide Local Service Revenue Shares - 1996**



### Notes for Table 9.1 - Nationwide Local Service Revenues and New Competitor Share

Source: Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data* (rel. Dec. 1994; Feb. 1996; Dec. 1996; and Nov. 1997):

Table 15 - local service revenues of CAPs/CLECs

Table 18 or Table 18B - local service revenues of the Bell companies

Table 19 - local service revenues of other incumbent local telephone companies

Table 5 and Table 20 - all other local service revenues

- \* Local service revenues are here considered to include revenues from local exchange, local private line, and other local services, as well as from interstate and intrastate access services, but not to include revenues from cellular or other mobile services or from toll (i.e., long distance) services.
- \*\* Calculated using the 1993 (beginning) and 1996 (end point) values.
- \*\*\* Legal entities identifying themselves in their annual TRS Fund Worksheet filings as competitive access providers (CAPs)/competitive local exchange carriers (CLECs). The number of legal entities reporting in this category in any particular year is influenced by ownership structure. For example, in 1996, American Communications Systems, Inc. reported as 20 separate legal entities (e.g., American Communications Services of Albuquerque, Inc.; American Communications Services of Maryland, Inc.), and Brooks Fiber Properties, Inc., which is being acquired by long distance carrier WorldCom, reported as 16 separate legal entities (e.g., Brooks Fiber Communications of Arkansas; Brooks Fiber Communications of Bakersfield, Inc.). A number of companies, including GST Telecom, Inc., ICG Communications, Inc., McLeodUSA Incorporated, and Teleport Communications Group, Inc., each reported as a single legal entity, however. A list of the legal entities that reported as CAPs/CLECs in 1996 appears in Industry Analysis Division, *Carrier Locator: Interstate Service Providers* (rel. Nov. 1997).
- # The Bell companies are Ameritech, Bell Atlantic (includes the former NYNEX), BellSouth, SBC (includes the former Pacific Telesis), and U S WEST.
- ## Local service revenues reported by legal entities that identified themselves in their annual TRS Fund Worksheet filings as being principally a long distance carrier (i.e., interexchange carriers, operator service providers, pay telephone providers, prepaid calling card providers, toll resellers, and other carriers) or a wireless carrier (i.e., cellular, personal communications service, paging, and other mobile carriers). Revenues of local service divisions of companies that are not themselves separate legal entities (e.g., MCImetro) are included here.
- ### Not meaningful; reporting of revenues among local and toll categories appears not to be consistent from year to year.

Chart A2.2 - Indicators of AT&T Market Share

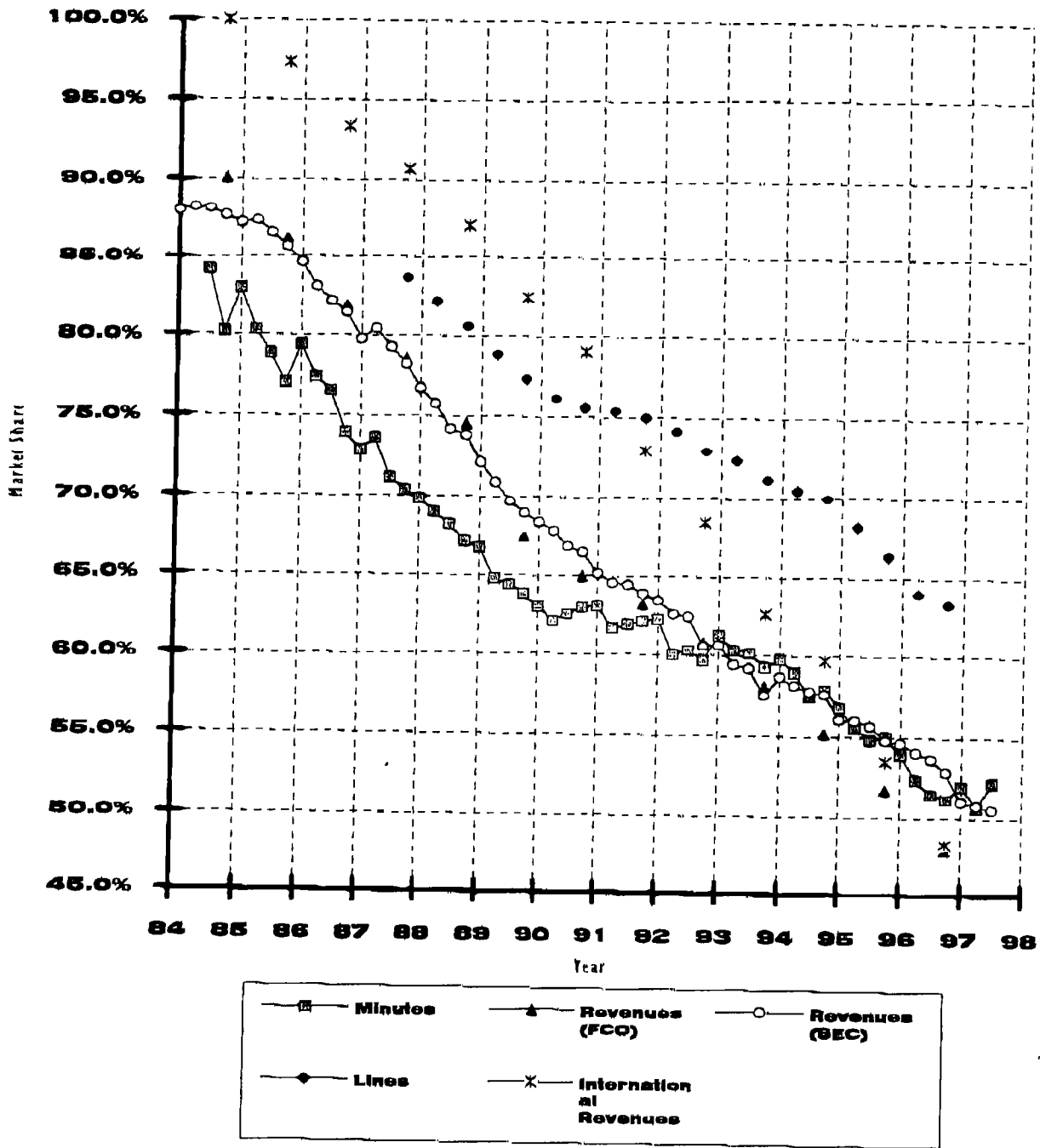


TABLE 11.7

**TOTAL TOLL SERVICE REVENUES - MARKET SHARE  
(BASED ON REVENUES OF LONG DISTANCE CARRIERS ONLY)**

YEAR	AT&T	MCI	SPRINT	WORLDCOM	ALL OTHER LONG DISTANCE CARRIERS
1984	90.1 %	4.5 %	2.7 %		2.6 %
1985	86.3	5.5	2.6		5.6
1986	81.9	7.6	4.3		6.3
1987	78.6	8.8	5.8		6.8
1988	74.6	10.3	7.2		8.0
1989	67.5	12.1	8.4	0.2 %	11.8
1990	65.0	14.2	9.7	0.2	10.0
1991	63.2	15.2	8.9	0.5	11.3
1992	60.8	16.7	9.7	1.4	11.5
1993	68.1	17.8	10.0	1.9	12.3
1994	55.2	17.4	10.1	3.3	14.0
1995	51.8	19.7	9.8	4.9	13.8
1996	47.9	20.0	9.7	5.5	17.0

TABLE 11.8

**TOTAL TOLL SERVICE REVENUES - MARKET SHARE  
(BASED ON REVENUES OF ALL LONG DISTANCE TOLL PROVIDERS)**

	AT&T	MCI	SPRINT	WORLDCOM	ALL OTHER LONG DISTANCE CARRIERS	BELL OPERATING COMPANIES	OTHER LOCAL TELEPHONE COMPANIES
1984	68.3 %	3.4 %	2.1 %		2.0 %	17.7 %	6.6 %
1985	67.1	4.3	2.0		4.4	16.5	5.8
1986	63.5	5.9	3.3		4.9	16.7	5.7
1987	60.2	6.7	4.4		5.2	17.5	5.9
1988	56.6	7.8	5.4		6.1	17.0	7.1
1989	52.3	9.3	6.5	0.2 %	9.1	16.0	6.5
1990	50.7	11.1	7.5	0.2	8.4	16.8	6.2
1991	50.2	12.1	7.8	0.4	9.0	14.7	5.9
1992	49.3	13.5	7.9	1.1	9.3	13.5	5.4
1993	47.5	14.5	8.2	1.5	10.1	13.1	5.2
1994	46.0	14.5	8.4	2.8	11.7	11.8	4.8
1995	44.9	17.1	8.5	4.3	12.0	9.6	3.7
1996	42.1	17.6	8.5	4.8	15.0	8.5	3.5

**Notes for Tables 11.6-11.8.**

Sources: Industry Analysis Division, *Long Distance Market Shares*.

Local exchange carrier information derived from USTA annual reports.

Long distance company information taken from reports filed pursuant to FCC Report and Order in CC Docket 83-1291.

1/ AT&T acquired Alascom August 7, 1995.

2/ MCI Telecommunications and Telecom USA merged during 1989. With the 1996 filing, MCI revised its 1995 revenues. MCI previously reported total operating revenues by SIC code. In its 1995 annual report to stockholders, MCI separated its core telecommunications services business from its business activities in ventures and developing markets. Its revenues for 1995 and 1996 now reflect core business information only.

3/ In July 1986, GTE Sprint and US Telecom merged into US Sprint. The information shown for GTE Sprint and US Telecom for 1986 is January 1 - June 30. The information shown for US Sprint for 1986 is for July 1-December 31. Effective February 28, 1992, the company's name became Sprint Communications Co.

4/ LDDS Communications, Inc. (which changed its name to WorldCom, Inc. in May 1995) and Advanced Telecommunications Corp. merged during 1992. In 1993, LDDS Communications, Inc. merged with Metromedia Communications Corp. and Comsystems Network Services. For 1993, only the revenues that were received after the merger are included in LDDS Communications' revenues. Those revenues up to the merger are listed individually for 1993. LDDS and Writel merged January 5, 1995. WorldCom acquired MFS Intelnet on December 31, 1996. WorldCom's market share does not include MFS Intelnet's revenues for 1996.

5/ Metromedia Communications Corp. and ITT Communications Corp. merged during 1988. Information for 1989 was reported separately.

6/ Frontier Corporation, the parent company of Frontier Communications Int'l. Inc., acquired ALC Communications, the parent company of Allnet on August 16, 1995. On May 18, 1995, Frontier Corporation acquired WCT Communications, the parent company of West Coast Telecommunications, which is now known as Frontier Communications of the West, Inc. In addition, on March 17, 1995, Frontier Corporation acquired American Sharecom, which is now known as Frontier Communications - North Central Region.

7/ Allnet and Lexitel merged at the end of 1985.

8/ Name changed from RCI Long Distance, Inc. in 1994.

9/ Company indicated it is strictly a reseller.

10/ Excludes \$261 million from marketing services in 1996 and \$143 million in 1995. Marketing revenues were included in the 1994 total.

11/ Name changed from U. S. Long Distance, Inc. in September 1997.

12/ Data for 1996 obtained from Annual Report to the Colorado Public Utilities Commission, which regulates telecommunications carriers pursuant to §40-15-301 C.R.S.

13/ Does not include \$10 million from non-communications operations in 1993, \$11 million in 1994, \$9 million in 1995 and \$13 million in 1996.

14/ Telesphere Network, Inc. and National Telephone Services, Inc. merged during 1989. In 1991, Telesphere Network, Inc. went into bankruptcy.

15/ Estimated by FCC staff.



**CERTIFICATE OF SERVICE**

**PENNY S. BLOMGREN**, under penalty of perjury of the laws of the State of Washington, declares that she did cause to be served Proposed Rulemaking to Adopt a Methodology for Determination of Just and Reasonable Rates for Attachment to Transmission Facilities by placing said document in the United States Mail, first class postage prepaid on the 24th day of April, 1998, to the following parties:

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SIGNED this 24th day of April, 1998, at Seattle, Washington.

  
PENNY S. BLOMGREN