**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| In the Matter of<br><br>Continued Costing and Pricing of Unbundled Network Elements, Transport and Termination. | DOCKET NO. UT 003013<br><br>PUBLIC COUNSEL PETITION FOR RECONSIDERATION OF THIRTEENTH SUPPLEMENTAL ORDER |

## I. INTRODUCTION

Pursuant to WAC 480-09-810, Public Counsel files this petition for reconsideration of the Thirteenth Supplemental Order in this case.

Public Counsel strongly supports the Commission's well-reasoned and principled conclusions establishing a non-zero recurring charge for the high-frequency portion of the loop (HUNE). On one significant point, however, Public Counsel has serious concerns about the decision and its impact. Specifically, Public Counsel requests that the Commission reconsider its treatment of the double recovery issue.

In its order, the Commission noted that the cost of the shared loop has traditionally been recovered from voice services and that if a non-zero price for the HUNE is adopted, an issue arises as to whether the ILECs will be permitted to "double recover a portion of the cost of the loop".[1] The Commission further observed that "we share the concern of some parties regarding possible windfall profits to incumbent LECs if a positive recurring price is adopted."[2] After reviewing the positions of the various parties on this issue, the Commission ultimately determined that "it is premature at this time to determine whether a non-zero price for the HUNE will lead to overearnings on a regular basis. The issue of over-earnings will instead be handled

[1] Order, ¶ 71.
[2] Id.

in the next docket that addresses Qwest's or Verizon's earnings."[3] Public Counsel believes this is an erroneous determination, and asks that it be reconsidered. For the reasons, set forth below, Public Counsel believes it is imperative that appropriate treatment of the double recovery issue be undertaken at the same time as the adoption of the positive HUNE rate in order for the Commission to achieve the outcome desired in the Thirteenth Supplemental Order.

## II. ARGUMENT

### A. The Commission Must Address The "Double Recovery" Issue In Tandem With Adoption Of The Positive Line Sharing Rate.

#### 1. The issue at stake is revenue neutrality not earnings.

Public Counsel would suggest that the order errs in focusing on this as an earnings issue. Instead, the question is more appropriately seen as one of implementing the newly adopted recurring charge in a revenue neutral manner. As the Commission correctly observed in its order, "[t]he cost of the shared loop has traditionally been recovered through the prices of voice services."[4] In this order, the Commission affirms that "the loop is a shared cost used by voice and advanced communications services"[5] and that a portion of the cost of the loop should be recovered from advanced services including DSL.[6] The Commission further concludes that:

> It is sensible to recover these [advanced services provisioning] costs from LECs provisioning advanced telecommunications services, *rather than relying on all users of voice services to compensate the ILEC for costs incurred providing services* that are used today by a small percentage of the population.[7]

Under the rates currently in effect, the ILECs are presumed to be recovering all their loop costs from existing services. By definition, therefore, the addition of a new revenue stream from the

[3] Order, ¶ 85.
[4] Order, ¶ 71
[5] Order, ¶ 56.
[6] Order, ¶ 57.
[7] Order, ¶ 63 (emphasis added).

HUNE charge creates an overrecovery of those costs. This is not revenue-neutral as to the ILECs.

Public Counsel does not argue that the overrecovery automatically allows the ILEC to earn in excess of its authorized rate or return. The concern rather is that, absent a mechanism to rebalance rates, loop recovery will not be properly shared, and Section 254(k) will be violated.

**2. Failure to address the double recovery issue at this time will permit ILECs to retain the benefits of double recovery.**

As noted above, the order appears to agree that double recovery and windfall profits are a concern. Delaying consideration of these issues until the next earnings proceeding for Qwest or Verizon, however, means at a minimum that the ILECs will retain the overrecovery revenues which they receive between the time the new HUNE charge is implemented, and the time of the earnings review. This is the case because any adjustment of rates that would occur at that time would be prospective only. This outcome is inconsistent with the Commission's determination in the Thirteenth Supplemental Order that the loop is a shared cost, not appropriately borne in its entirety by voice services. It continues to place the entire burden of loop recovery on voice services in this interim period.

An additional concern of Public Counsel is that there is no way to predict when, if ever, there will be a future earnings proceeding for Qwest or Verizon. Qwest, for example, has recently expressed interest in pursuing an "AFOR" under the amended alternative regulation statute.[8] If such an AFOR plan were filed and approved without an earnings review, it is quite conceivable that no review of Qwest earnings would occur for the foreseeable future. In that

[8] RCW 80.36.135; *see In re Application of U S WEST, Inc., and QWEST COMMUNICATIONS INTERNATIONAL, Inc., For An Order Disclaiming Jurisdiction, or in the Alternative, Approving the U S WEST Inc.- QWEST COMMUNICATIONS INTERNATIONAL, Inc., Merger,* WUTC Docket No. 991358, Ninth Supplemental Order ("Qwest Merger Order"), Appendix A (Merger Settlement Agreement), Sec. IV.D.

case, the overrecovery of loop costs would continue to accrue to the benefit of Qwest indefinitely, to the detriment of those customers paying for recovery of loop rates through their voice services.

Finally, to the extent that the Commission's adoption of the positive HUNE rate results in a change in any ILEC retail rate, a rebalancing of other rates may well be required under the terms of the Qwest and Verizon merger settlements. Section IV of the Qwest merger settlement, for example, precludes retail rate changes until January 1, 2004, but does permit rate rebalancing.[9]

**3. Continued double recover of loop costs until the next earnings proceeding would be a violation of Section 254(k).**

In the order, the Commission held:

> Because the loop is used to provide both basic exchange and advanced telecommunications service, *recovering the entire cost of the loop from voice services would violate Section 254(k) of the Act*.[10]

If the rebalancing of voice and advanced service contribution is postponed until some future unspecified date, and then only dealt with on a prospective basis, the ILECs loop cost recovery will violate the requirements of Section 254(k) for that entire intervening period. Having correctly found that Section 254(k) is applicable here, the Commission should require appropriate sharing of loop costs simultaneously with the implementation of a new HUNE rate.

**4. Allowing a positive HUNE charge without adjusting other rates is anticompetitive.**

An additional concern of Public Counsel is the potential anticompetitive effect of imposing a new HUNE charge on competitive providers. The purpose of the charge is to require

[9] Qwest Merger Order, App. A, Sec. IV.B.
[10] Order, ¶ 57 (emphasis added).

these providers to contribute to the shared cost of the loop.[11] If the ILEC is already fully recovering those costs from other services, then by definition, it obtains a competitive advantage over carriers who must pay the $4.00 HUNE rate to the ILEC. This violates principles of competitive neutrality in UNE pricing, 47 USC § 251(c)(3), 47 USC § 252(d)(1)(A)(ii),[12] and is inconsistent with the Washington's policy of fostering competition in telecommunications services**,** RCW 80.36.300(3)(promoting "diversity in the supply of telecommunications services and products").

Proceeding under the Thirteenth Supplemental Order without addressing the double recovery issue may also implicate the provisions of RCW 80.36.186, which states, in pertinent part:

> [N]o telecommunications company providing noncompetitive services shall, as to pricing of or access to noncompetitive services, make or grant any undue or unreasonable preference or advantage to itself or to any other person providing telecommunications service, nor subject any telecommunications company to any undue or unreasonable prejudice or competitive disadvantage [.]

Washington ILECs provide noncompetitive services, including voice services. If the pricing of those services already recovers the entire cost of the loop, then, by recovering those same costs again through a positive HUNE charge without adjusting other rates, it would appear the ILEC is granting an "undue … advantage to itself" and subjecting other telecommunications companies to a "competitive disadvantage."

## B. At A Minimum, The Commission Should Order ILECs Account For Additional HUNE Revenues In A Tracking Or Deferral Account.

[11] Id.

[12] *See also*, Joint Explanatory Statement of the Committee of Conference (Telecommunications Act of 1996 ), H.R. Conf. Report No. 104-458, 104th Cong., 2nd Session (January 31, 1996), p. 113 ("to provide for a competitive deregulatory national policy framework…by opening all telecommunications markets to competition[.]"

If the Commission feels that this is not an appropriate time to fully resolve issues around the rebalancing of loop cost recovery the Commission has an intermediate option available to it to address the double recovery issue. As Public Counsel recommended in its briefs, the Commission can require the ILECs to keep an appropriate account of all revenues received from line sharing, including those revenues which can be imputed from its own provision of the service. These revenues can be recognized as appropriate in a future proceeding, whether on earnings or on rate rebalancing.

The Commission should go further, however. Public Counsel recommends that the Commission, in addition to ordering a deferral or tracking account for these revenues, order further proceedings to determine how rates for voice services should be rebalanced to take into account the new line sharing revenues which contribute to loop cost recovery. This process should not wait until a future earnings review for Qwest or Verizon.

In the event the Commission does not wish to pursue either of these options, the Commission should, at a minimum, establish further proceedings to develop a mechanism to address the double recovery issue in tandem with the implementation of the positive HUNE rate.

## III. CONCLUSION

Public Counsel strongly supports the Commission's order requiring that advanced services using the HUNE contribute to loop cost recovery through a positive non-zero charge. Unless the "double recovery" issue is addressed in coordination with the new HUNE charge, however, consumers will be overcharged for voice services, competitors will be unfairly disadvantaged and the principles upon which the Thirteenth Supplemental Order are based will be undermined.

For these reasons, Public Counsel respectfully requests that the Commission reconsider its Thirteenth Supplemental Order.

DATED this 12th day of February, 2001.

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