NOTE: An important notice to parties about administrative review appears at the end of this order.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of:	)	
GTE NORTHWEST INCORPORATED and CONTEL OF THE NORTHWEST, INC.,	)	DOCKET NO. UT-910499
for an order approving contracts with affiliated interests for services and purchases.	)	FIFTH SUPPLEMENTAL ORDER FINDINGS OF FACT, CONCLUSIONS OF LAW AND INITIAL ORDER

This proceeding was initiated upon complaint of the Commission to determine whether the schedule of rates specified in GTE Northwest Incorporated's (GTE-NW) Advice No. 572 is reasonable and in compliance with the Commission's Second Supplemental Order in this docket, and if not, to determine whether penalties should be assessed, and to determine whether refunds are required.

Hearings were held on this matter on February 23 and April 27, 1993, in Olympia, Washington, before Administrative Law Judge Heather L. Ballash of the Office of Administrative Hearings. At the hearings, complainant the Washington Utilities and Transportation Commission was represented by Steven Smith, Assistant Attorney General, Olympia. Respondent GTE-NW was represented by Richard R. Potter, Attorney at Law, Everett. The public was represented by Charles Adams, Assistant Attorney General, Seattle.

MEMORANDUM

I. PROCEDURAL BACKGROUND

On September 24, 1992, the Commission issued in this docket its Second Supplemental Order Accepting Amended Settlement Agreement and Affiliated Interest Agreements. The Second Supplemental Order accepted an amended settlement agreement entered into among GTE-NW, Contel of the Northwest, Inc. (Contel-NW), the Commission Staff, Public Counsel, and U S WEST Communications. Paragraph Six of the amended agreement approved by the Commission provided as follows:

> The parties agree that GTE-NW and Contel-NW will implement rate restructuring and reductions (see Section 7) which will produce

The parties agree that GTE-NW and Contel-NW will implement rate restructuring and reductions (see Section 7) which will produce total revenue reductions of approximately $9,750,000 in 1993 - $7,750,000 for local services and, at least $2,000,000 for GTE-NW's access services.

On October 29, 1992, GTE-NW, in Docket No. UT-921240, filed with the Commission under its Advice No. 572, revisions to its currently effective Tariff WN U-11. The revisions include changes to Switched Access usage rates, increases to nonrecurring charges and the addition of Extended FGA Switched Transport and FGA Optional Toll Blocking. The annual revenue reduction for these access services is $2,000,103. In its filing, GTE-NW stated that the filing makes changes to its access service tariff as outlined in the Second Supplemental Order.

A disagreement exists between the Commission Staff and GTE-NW concerning the interpretation of Paragraph Six of the Amended Settlement Agreement. In particular, the disagreement is over whether the revenues for access services are to be reduced to cost.

In order to immediately pass through the benefits of the $2,000,013 reduction for access service, the Commission approved the filing in Docket No. UT-921240 and ordered this complaint to be initiated against GTE-NW to determine whether further access service revenue reductions are required by the Second Supplemental Order.

On January 26, 1993, the Commission entered its Third Supplemental Order Initiating Complaint and Notice of Hearing in this proceeding, ordering an investigation and public hearings for the following purposes:

1. To ascertain and determine whether the schedule of rates specified in GTE-NW's Advice No. 572 are reasonable and in compliance with the Commission's Second Supplemental Order.

2. To ascertain and determine whether the access service reductions required by the Commission's acceptance of the Settlement Agreement in this docket are to be based on costs.

3. To ascertain and determine whether the access service reductions required by the Commission's acceptance of the Settlement Agreement in this docket are limited in any way by GTE-NW's rate of return. In the event the access service reductions are limited by GTE-NW's rate or return, other hearing dates will be established by separate notice to determine GTE-NW's rate of return after restating and proforma adjustments.

4. To make and enter other such determinations and orders as may be just and reasonable, including directing GTE-NW to refund any amount of access service revenues found to be unreasonable and not in compliance with the Second Supplemental Order from the date of the service of the Commission's complaint, and to assess penalties for any violation of Commission orders that may be found by the Commission based on the record in this proceeding.

The parties agreed at a prehearing conference on February 23, 1993, to hold hearings in this matter in two phases. The first phase would address the issues presented in the Notice of Hearing on page 3 in paragraphs 2 and 3 set forth above. Based upon the Commission's resolution of those issues, the parties agreed there might be a need for a second phase of hearings to resolve the remaining issues.

II. ISSUE

The only issue in this phase of the case involves interpretation of Paragraph 6 of the Settlement Agreement. Does Paragraph 6 mean that GTE-NW is required to reduce its access charges to cost and, are such access reductions limited by GTE-NW's rate of return?

III. POSITIONS OF THE PARTIES

Each of the parties argued that there was a meeting of the minds regarding the intent of Paragraph Six. However, GTE-NW interprets the provision differently from Commission Staff and Public Counsel.

Commission Staff contended that the intent of Paragraph Six was clear based upon testimony submitted by Staff and uncontested by the company. Staff argued that the parties intended in Paragraph Six that access rates would be reduced to cost based upon cost studies to be done by the company.

Staff first referred to Mr. Twitchell's prefiled testimony (Exhibit T-5, pp. 8-9) where it states:

> GTE-NW will file studies to support the access charge filing. If these studies demonstrate that access charges should be reduced by more than two million dollars, they will make that filing. If the studies demonstrate that access charges should be reduced less than two million dollars, they will file for the two million dollar reduction.

Staff then pointed to Mr. Twitchell's testimony at the June 29, 1992, hearing when he stated:

> The access charge filing which the company has filed has a tariff sheet reducing access charges to traffic sensitive by $2 million. The company has agreed to reduce access charges by at least $2 million. They will provide cost studies for each of the access charge elements, and any of them that are not based on costs will be reduced. And if it's more than $2 million, then they will file tariffs accordingly.

Transcript, p. 46, lines 10-18.

Staff noted that the company had an opportunity to review Mr. Twitchell's prefiled testimony and made no objection to its admission. The company and its counsel were also present for Mr. Twitchell's testimony at hearing and did not cross-examine or object to his explanation of the access charge filing on the record.

In response to the company's claims regarding conversations about the settlement agreement between the parties off the record, Staff argued that testimony presented on the record before the Commission should control. Staff then submitted that GTE-NW is equitably estopped by its failure to contest on the record Mr. Twitchell's testimony from arguing that access service rates were not to be cost-based pursuant to Paragraph Six.

Finally, Staff contended that access charge reductions based upon cost should not be restricted by GTE-NW's rate of return. Staff stated that, if the company underearns because of the settlement agreement, it can file for a rate increase.

Public Counsel concurred with Commission Staff's position.

GTE-NW contended that it never intended to issue a "blank check" for access charge reductions. Reductions to be made were to be done based upon cost studies. GTE-NW maintained that it agreed to a minimum reduction of two million dollars. Any additional reduction based upon cost would be made at the company's discretion in conjunction with its authorized rate of return of 10.25 percent.

GTE-NW presented additional testimony at hearing in the complaint proceeding regarding conversations outside the record. The company claimed that these conversations indicate that GTE-NW never intended to reduce its access rates to cost, only that it

might file for rate reductions in excess of two million dollars when it determined it could afford to do so.

GTE-NW asserted that it never agreed to reduce its access charges to cost because it would have put the company's earnings at significant risk and would have impacted its creditworthiness. It would also have exposed customers to rate increase filings on the heels of rate reductions. GTE-NW stated that, if it had understood Staff's intentions to include such a commitment, the company would not have signed the settlement agreement.

If the Commission finds that Paragraph Six of the settlement agreement requires GTE-NW to reduce its access charges to cost, GTE-NW contended that the Commission must add an earnings level qualifier of 10.25%. It is the company's legal position that the access charge reductions should not reduce its overall earnings below 10.25%.

GTE-NW stated that the 10.25% rate of return is clearly a target in the settlement agreement when the agreement is read in its entirety. The agreement should therefore be construed in a manner consistent with the company's post-implementation earnings coming reasonably close to 10.25%.

IV. DISCUSSION

Settlement agreements are contracts, and their construction is governed by legal principles applicable to contracts. Baker v. Winger, 63 Wn. App. 819, 823, 822 P.2d 315 (1992). In construing a settlement agreement, the court must look first to the language of the agreement. Hadley v. Cowan, 60 Wn. App. 433, 438, 804 P.2d 1271 (1991).

Paragraph Six states:

> The parties agree that GTE-NW and Contel-NW will implement rate restructuring and reductions (see Section 7) which will produce total revenue reductions of approximately $9,750,000 in 1993 - $7,750,000 for local services and, at least $2,000,000 for GTE-NW's access services.

The wording of Paragraph Six is awkward and unclear. The provision was poorly drafted because the conditions under which the company would reduce access charges in excess of two million dollars were not clearly spelled out. If the Commission Staff expected GTE-NW to reduce access charges in excess of two million dollars, it needed to clearly state the basis for the reduction. No basis was stated in Paragraph Six.

If the intent of the parties cannot be found within the contract, then it may be found by applying the "context rule" adopted by the Washington Supreme Court. Under the rule, the intent of the parties to an agreement may be discovered by:

> [V]iewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations by the parties.

Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting from Stender v. Twin City Foods, Inc., 82 Wn.2d 250, 254, 510 P.2d 221 (1973)).

Staff attempted to clarify the intent of Paragraph Six through Mr. Twitchell's testimony at the June 29, 1992, hearing. The undersigned finds that Mr. Twitchell's explanation at page 46 of the transcript, as quoted above, more clearly states the intent of the parties. The key sentence is unambiguous, GTE-NW "will provide cost studies for each of the access charge elements, and any of them that are not based on costs will be reduced". This can only be construed to mean that access charges will be reduced to cost based upon the cost studies.

This statement was made by Commission Staff to explain Paragraph Six on the record before the Commissioners, GTE-NW employees and their counsel. GTE-NW did not object to nor cross examine Staff's witness regarding this testimony. The only reasonable conclusion that can be drawn from the conduct of the parties is that they agreed to do exactly what Mr. Twitchell explained to the Commission when the settlement agreement was jointly presented. The record is the best evidence of the intent of the parties because all were present at the time of Mr. Twitchell's testimony. Any conversations that may have occurred between the parties off the record can be accorded little weight in light of what has been stated on the record.

The undersigned agrees with Staff that GTE-NW is also equitably estopped from arguing that access service charge reductions were not to be reduced to costs. The three elements of equitable estoppel are: (1) an admission, statement, or act inconsistent with the claim afterward asserted; (2) action by the other party on the faith of the admission, statement, or act; and (3) injury to the other party resulting from allowing the first party to contradict or repudiate the admission, statement, or act. PUD of Lewis County v. WPPSS, 104 Wn.2d 353, 363, 705 P.2d 1195 (1985).

The first element requires a statement or act inconsistent with the claim otherwise asserted. The inconsistent statement or act may consist of "[s]ilence, when there is knowledge of the facts and when honesty and fair dealing demand that the party asserting a right speak." Board of Regents v. Seattle, 108 Wn. 2d 545, 554, 741 P.2d 11 (1987) (quoting 28 Am. Jur. 2d Estoppel and Waiver Section 53).

The GTE-NW employees and counsel were present and remained silent when Mr. Twitchell's prefiled testimony was admitted and when he further explained the settlement agreement on cross examination on June 29, 1992. This conduct is inconsistent with the company's later interpretation of Paragraph Six. If the company disagreed with Mr. Twitchell's interpretation, it had a duty to so state at the time of the hearing. The company also had another opportunity at a later hearing, after reviewing the transcript of the June 29 hearing, to state any disagreement with Staff's explanation. GTE-NW's failure to object to or correct Staff's explanation of Paragraph Six of the settlement agreement on the record prior to filing access charge rates constitutes an inconsistent act under the test for equitable estoppel.

Commission Staff relied on the company's apparent agreement with the explanation of Paragraph Six in going forward with implementation of the settlement agreement and approving the merger. There will be injury to Staff, Public Counsel and to the public if GTE-NW were now to say that it interpreted Paragraph Six differently. Staff and Public Counsel acquiesced to the implementation of the settlement agreement and the merger on the basis of Mr. Twitchell's interpretation of Paragraph Six stated in the record. It would do great injury to the public and the parties if the settlement agreement and ensuing merger were now rescinded or altered.

The company's request that access charge reductions be limited to a 10.25% rate of return should be denied. The settlement agreement provided for a range rate of return of 9.75% to 10.75%. If the access charge reduction were limited to a 10.25% rate of return, there would be no reason for a range rate of return with a low end of 9.75%. The inclusion of the 10.25% rate of return in the settlement agreement was solely for the purpose of pro forma calculations. The undersigned also agrees with Commission Staff that GTE-NW can file a rate case if the rate of return goes below 9.75%.

Further hearings in this matter may be required based upon the above findings and conclusions.

Based on the record and file in this proceeding, the undersigned administrative law judge makes the following findings of fact and conclusions of law.

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. GTE Northwest, Inc. (GTE-NW) is engaged in the business of furnishing telecommunications services within the State of Washington, and is a public service company subject to regulation by the Washington Utilities and Transportation Commission.

3. On September 24, 1992, the Commission issued in this docket its Second Supplemental Order Accepting Amended Settlement Agreement and Affiliated Interest Agreements. The Second Supplemental Order accepted an amended settlement agreement entered into among GTE-NW, Contel of the Northwest, Inc. (Contel-NW), the Commission Staff, Public Counsel, and U S WEST Communications. Paragraph Six of the amended agreement approved by the Commission provided as follows:

> The parties agree that GTE-NW and Contel-NW will implement rate restructuring and reductions (see Section 7) which will produce total revenue reductions of approximately $9,750,000 in 1993 - $7,750,000 for local services and, at least $2,000,000 for GTE-NW's access services.

4. On October 29, 1992, GTE-NW, in Docket No. UT-921240, filed with the Commission under its Advice No. 572, revisions to its currently effective Tariff WN U-11. The revisions include changes to Switched Access usage rates, increases to nonrecurring charges and the addition of Extended FGA Switched Transport and FGA Optional Toll Blocking. The annual revenue reduction for these access services is $2,000,103. In its filing, GTE-NW stated that the filing makes changes to its access service tariff as outlined in the Second Supplemental Order.

5. A disagreement exists between the Commission Staff and GTE-NW concerning the interpretation of Paragraph Six of the Amended Settlement Agreement. In particular, the disagreement is over whether the revenues for access services are to be reduced to cost.

6. In order to immediately pass through the benefits of the $2,000,013 reduction for access service, the Commission approved the filing in Docket No. UT-921240 and ordered this complaint to be initiated against GTE-NW to determine whether

further access service revenue reductions are required by the Second Supplemental Order.

7. In his prefiled testimony explaining the settlement agreement, Mr. Twitchell stated:

> GTE-NW will file studies to support the access charge filing. If these studies demonstrate that access charges should be reduced by more than two million dollars, they will make that filing. If the studies demonstrate that access charges should be reduced less than two million dollars, they will file for the two million dollar reduction.

(Exhibit T-5, pp. 8-9) GTE-NW had the opportunity to review this testimony prior to its admission at hearing on June 29, 1992. The company made no objection or correction to the prefiled testimony prior to admission at hearing.

8. At the June 29, 1992, hearing, Mr. Twitchell requested the opportunity to further clarify the settlement agreement and testified as follows:

> The access charge filing which the company has filed has a tariff sheet reducing access charges to traffic sensitive by $2 million. The company has agreed to reduce access charges by at least $2 million. They will provide cost studies for each of the access charge elements, and any of them that are not based on costs will be reduced. And if it's more than $2 million, then they will file tariffs accordingly.

Transcript, p. 46, lines 10-18. GTE-NW again made no objection and conducted no cross examination on this statement. GTE-NW presented no witnesses in response to the statement.

CONCLUSIONS OF LAW

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

2. Paragraph Six of the Settlement Agreement should be read to require GTE-NW to reduce its access charges to cost without limitation by its rate of return. The reduction should be at least two million dollars. GTE-NW is estopped from asserting any other interpretation of Paragraph Six based upon the statements of Mr. Twitchell in direct and cross examination testimony.

3. Access rate reductions should not be limited by GTE-NW's rate of return. If the company's rate of return falls below the target range low of 9.75%, the company may file for rate relief.

4. Further hearings may be held to:

(a) ascertain and determine whether the schedule of rates specified in GTE-NW's Advice No. 572 are reasonable and in compliance with the Commission's Second Supplemental Order, and

(b) make and enter other such determinations and orders as may be just and reasonable, including directing GTE-NW to refund any amount of access service revenues found to be unreasonable and not in compliance with the Second Supplemental Order from the date of the service of the Commission's complaint, and to assess penalties for any violation of Commission orders that may be found by the Commission based on the record in this proceeding.

ORDER

IT IS ORDERED That the complaint filed by the Staff of the Washington Utilities and Transportation Commission against GTE Northwest, Inc. is sustained; and

IT IS FURTHER ORDERED That GTE Northwest, Inc. is required to reduce its access charges to cost without limitation by its rate of return. The reduction should be at least two million dollars.

DATED at Olympia, Washington, and effective this 17th day of August, 1993.

OFFICE OF ADMINISTRATIVE HEARINGS

Heather L. Ballash

HEATHER L. BALLASH
Administrative Law Judge

NOTICE TO PARTIES:

This is an initial order only. The action proposed in this order is not effective until a final order of the Utilities and Transportation Commission is entered. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within a time limit as outlined below.

Any party to this proceeding has twenty (20) days after the service date of this initial order to file a Petition for Administrative Review, under WAC 480-09-780(2). Requirements of a Petition are contained in WAC 480-09-780(4). As provided in WAC 480-09-780(5), any party may file an Answer to a Petition for Administrative Review within ten (10) days after service of the Petition. A Petition for Reopening may be filed by any party after the close of the record and before entry of a final order, under WAC 480-09-820(2). One copy of any Petition or Answer must be served on each party of record and each party's attorney or other authorized representative, with proof of service as required by WAC 480-09-120(2).

In accordance with WAC 480-09-100, all documents to be filed must be addressed to: Office of the Secretary, Washington Utilities and Transportation Commission, 1300 South Evergreen Park Drive S.W., PO Box 47250, Olympia, Washington, 98504-7250. After reviewing the Petitions for Administrative Review, Answers, briefs, and oral arguments, if any, the Commission will by final order affirm, reverse, or modify this initial order.