WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE CONTINUED COSTING AND PRICING OF UNBUNDLED NETWORK ELEMENTS AND TRANSPORT AND TERMINATION	**DOCKET NO. UT-003013** PART A **RHYTHMS LINKS, INC.'S RESPONSE TO PUBLIC COUNSEL'S PETITION FOR RECONSIDERATION OF THIRTEENTH SUPPLEMENTAL ORDER**

Pursuant to the Commission's request for responses to Public Counsel's Petition for Reconsideration of the Thirteenth Supplemental Order in this case, Rhythms Links, Inc., ("Rhythms") respectfully submits the following comments.

While Rhythms continues to believe that the proper result in this case is to set the price for the high-frequency portion of the loop ("HUNE") at zero, it, like Public Counsel, has serious concerns about the Commission's decision to set a non-zero recurring charge for the HUNE but not order that there be an offsetting decrease in the price for the retail voice services sharing the line.

As noted by Public Counsel, the Commission acknowledged that the cost of the 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

ATER WYNNE LLP
LAWYERS
601 UNION STREET, SUITE 5450
SEATTLE, WASHINGTON 98101-2327
(206) 623-4711

portion of the cost of the loop."[1] However, the Commission 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 in the next docket that addresses Qwest's or Verizon's earnings."[2] Rhythms agrees with Public Counsel that this determination is erroneous and should be reconsidered.

Under Washington law, current rates are presumed to be fair, just, reasonable, and sufficient, unless and until the Commission determines otherwise.[3] Thus, as a matter of law, it must be presumed that all of the costs of the loop are being paid for 100% by current rates until the Commission affirmatively determines otherwise. Since the costs of the loop are already being paid for, any non-zero price, however determined, legally represents an over-recovery of the loop costs. The Commission need not, and should not, wait until a future earnings review to decide whether a non-zero price for the HUNE will lead to overearnings for the ILECs. Absent a reduction in the current prices for voice services, which prices have been found to be fair, just, reasonable and sufficient, any non-zero price for use of a portion of the loop that is already completely paid for necessarily represents an over-recovery. The only way that this would not be true is if the ILECs first were to demonstrate and the Commission to find that current prices are insufficient. For this reason alone, a non-zero price for the HUNE should not

[1] *See* Thirteenth Supplemental Order: Part A Order Determining Prices for Line Sharing, Operations Support Systems, and Collocation, WUTC Docket No. UT-003013, released January 31, 2001, ("Thirteenth Supplemental Order"), ¶71.

[2] Thirteenth Supplemental Order, ¶85.

ATER WYNNE LLP
LAWYERS
601 UNION STREET, SUITE 5450
SEATTLE, WASHINGTON 98101-2327
(206) 623-4711

be ordered unless it is accompanied by a requirement that there be a corresponding offset provided to the end-user on the price for his or her voice services.

As Rhythms pointed out in its previous briefing in this case, setting the HUNE charge at zero is the best result for consumers and for competition, and is fair to the ILECs, who already have their loop costs paid through the prices charged for voice services. As stated at Footnote 82, Page 23 of Rhythms and Covad's Post Hearing Brief in this case: "To be clear, a positive HUNE price with a voice rate offset is certainly better than a positive HUNE without an offset, but both results are inferior to a zero HUNE price." The reason is that there will be regulatory and transaction costs associated with giving an offset to consumers ordering xDSL services over a shared line. But, if a positive HUNE price is going to be required, there must be an offset to the DSL customer's voice service rates if double recovery and unfair dealing are to be avoided.

Rhythms also agrees with Public Counsel's argument that allowing a positive HUNE charge without requiring a corresponding reduction in other rates would be anticompetitive. Since the ILECs are already fully recovering the costs of the loop from other rates, allowing them to charge competitors $4.00 for the HUNE and not requiring a corresponding reduction in the other rates, necessarily gives them a competitive advantage over their competitors. The $4.00 HUNE charge becomes a direct cost to CLECs which will have to be recovered from

---

[3] RCW 80.36.080 (Rates, tolls, contracts and charges shall be fair, just, reasonable and sufficient); RCW 80.36.140 (Whenever the Commission shall find rates to be insufficient to yield reasonable compensation for the service rendered, it shall fix the same by order).

ATER WYNNE LLP
LAWYERS
601 UNION STREET, SUITE 5450
SEATTLE, WASHINGTON 98101-2327
(206) 623-4711

their customers in their xDSL rates. All of Qwest's loop costs, on the other hand, will continue to be recovered through its voice rates. This is discriminatory in violation of 47 U.S.C. § 252(d)(1) and would give Qwest an undue competitive advantage.

As noted above, the $4.00 HUNE charge to CLECs would also amount to a double recovery for either ILEC, Qwest or Verizon, with consumers paying twice for the single loop that serves their house or business. With respect to Qwest at least, this would insulate it from vigorous price competition from CLECs. Qwest would be able to maintain a margin on retail xDSL services at least equal to the HUNE charge or be free to undercut CLEC prices by the amount of the HUNE charge it does not pay.

Washington law clearly prohibits carriers providing noncompetitive services, such as the HUNE, from granting any undue preference or advantage to itself or subjecting any other telecommunications company to any undue prejudice or competitive disadvantage.[4] Allowing the ILECs to charge $4.00 for the HUNE without reducing the rates for other services contributing to the cost of the loop, when 100% of those loop costs are already covered by the other rates, clearly would put other providers at a significant competitive disadvantage and grant an undue advantage to the ILECs.

Rhythms does not agree with Public Counsel's suggestion that a tracking account be established. That would do nothing to address the current double recovery or the clear competitive advantage that the $4.00 HUNE gives to the ILECs. The double recovery affects

---

[4] RCW 80.36.186.

ATER WYNNE LLP
LAWYERS
601 UNION STREET, SUITE 5450
SEATTLE, WASHINGTON 98101-2327
(206) 623-4711

only those consumers who would be purchasing xDSL services over a shared line, not voice consumers generally. By setting up a tracking account for future earnings evaluation and losing the detail of which consumers are being required to overpay for their loops now, the proposal would accomplish nothing but benefit the ILECs and mask the harm to the CLECs and consumers. The better solution is to set the HUNE price at zero.

In conclusion, Rhythms agrees with Public Counsel that the Commission should reconsider its decision to delay consideration of the over-recovery issue until a future earnings review of the ILECs. As a matter of law, requiring dependent DSL competitors to pay $4.00 for using the HUNE on a shared line without requiring a corresponding reduction in the prices for the voice services provided by the ILEC over the same line creates a double-recovery that unfairly disadvantages the competitors, gives the ILEC an undue competitive advantage, and overcharges consumers buying DSL services from the competitors for the voice services they use. If, for some reason, the Commission believes it cannot order such offsetting reductions, it should not order a non-zero HUNE price. If the Commission still insists on charging the $4.00 HUNE price, it should give the ILECs the option of (1) charging the CLECs $4.00 and offering a corresponding $4.00 offset to consumers who purchase xDSL services from the CLECs, or (2) charging the CLECs a zero price for the HUNE and offering no offset, which would produce the same net result, put the CLECs in the same position as the ILEC, and avoid the regulatory and transaction costs associated with giving the offset.

ATER WYNNE LLP
LAWYERS
601 UNION STREET, SUITE 5450
SEATTLE, WASHINGTON 98101-2327
(206) 623-4711

For these reasons, Rhythms supports Public Counsel's request that the Commission reconsider its Thirteenth Supplemental Order.

RESPECTFULLY SUBMITTED THIS 28TH DAY OF FEBRUARY 2001.

ATER WYNNE LLP

By:___________________________________

Arthur A. Butler, WSBA #04678
601 Union Street, Suite 5450
Seattle. WA 98101-2327
(206) 623-4711

ATTORNEYS FOR RHYTHMS LINKS, INC.