

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of)
)
U S WEST COMMUNICATIONS, INC.,) Docket No. UT-990022
)
for Competitive Classification of) NEXTLINK, ELI & GST ADDITIONAL
Its High Capacity Circuits in) COMMENTS IN OPPOSITION TO U S
Selected Geographic Locations) WEST AMENDED PETITION
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NEXTLINK Washington, Inc. ("NEXTLINK"), Electric Lightwave, Inc. ("ELI"), and GST Telecom Washington, Inc. ("GST") (collectively "Joint Commenters") provide the following Additional Comments in Opposition to the Amended Petition of U S WEST Communications, Inc. ("U S WEST") for Competitive Classification of Its High Capacity Circuits in Selected Geographic Locations ("Amended Petition").

INTRODUCTION

Joint Commenters explained in their earlier comments that the evidence presented by U S WEST fails to demonstrate that its high capacity services are subject to "effective competition" as required by the legislature. Those comments are equally applicable to U S WEST's Amended Petition -- which relies on the same evidence U S WEST presented in ostensible support of its original petition -- and Joint Commenters will not repeat those comments here. Rather, these additional comments address three issues arising out of U S WEST's Amended Petition and

Commission Staff's support for that petition: (1) U S WEST's continued failure to demonstrate, and the lack of any evidentiary basis or support for Staff's belief in, the absence of a "significant captive customer base" in the six subject wire centers; (2) U S WEST's continued failure to prove that "reasonably available alternatives" to its high capacity services exist; and (3) the inapplicability of the recent access charge reform decision by the Federal Communications Commission ("FCC").

COMMENTS

A. U S WEST Maintains a "Significant Captive Customer Base" for High Capacity Services.

U S WEST bears the burden to prove that its high capacity services are subject to "effective competition," which the statute defines to mean that "customers of the service have reasonably available alternatives and that the service is not provided to a *significant captive customer base*." RCW 80.36.330 (emphasis added). The statute does not define "significant captive customer base," but both U S WEST and Commission staff -- also without attempting to define the term -- contend that U S WEST does not provide high capacity services to a significant captive customer base in the six U S WEST exchanges that define the geographic market in which U S WEST seeks competitive classification. The evidence produced in this proceeding does not support such a conclusion.

The plain meaning of "significant captive customer base" is that a meaningful number of end-users do not have a choice of service provider. The terms "significant" or "meaningful" are necessarily subject to some flexibility and interpretation, but even U S WEST characterizes 35%

as "significant," at least in terms of the amount of market share U S WEST allegedly has lost. U S WEST Reply Comments at 34-35. U S WEST's overall market share -- *i.e.*, the percentage of high capacity services provisioned over U S WEST facilities -- is 72% according to U S WEST's own data, *twice* the percentage U S WEST concedes is "significant." The record evidence thus demonstrates that a meaningful number of end-users of DS-1 and DS-3 services do not have a choice of service provider using facilities other than those provided by U S WEST.¹

U S WEST relies on the same flawed studies it originally submitted and the data collected by staff as support for its assertion that it maintains no significant captive customer base. The study and data support the opposite conclusion. Both U S WEST's studies and the collected data demonstrate that U S WEST provides approximately three quarters of the facilities used to provide high capacity services and that competitors have facilities in only a tiny fraction of the buildings in the six subject wire centers. If U S WEST's high capacity services were competitively classified, U S WEST could dramatically increase its retail market share simply by lowering its retail rate to its wholesale level (or vice versa),² thus eliminating competition that

¹ The record evidence concerns solely DS-1 and DS-3 services. To the extent that U S WEST seeks competitive classification of additional high capacity services, the record is devoid of any evidence whatsoever that these services are subject to effective competition.

² U S WEST contends that the Commission will establish unbundled network element rates, including four-wire unbundled loops that can be used to provide DS-1 services, and that U S WEST cannot change that rate. U S WEST Reply Comments at 16-17. U S WEST, however, identifies no UNE equivalent for DS-3 facilities, and competitive classification would enable U S WEST to lower its retail rates to create a price squeeze. As discussed more fully below, moreover, U S WEST can also impose provisioning delays and barriers other than recurring rates to undermine competitors' ability to use U S WEST facilities in the provisioning of high capacity services.

relies in whole or in part on U S WEST facilities, *i.e.*, all but 28% of the market. The evidence, therefore, demonstrates that U S WEST retains a significant captive customer base.

Staff does not cite any evidentiary basis for its belief that no significant captive customer base exists, but appears to base its view on nothing more than the existence of multiple competitors in the six wire center areas. Staff Reply Comments at 4. The existence of multiple competitors, however, is only one of the factors the Commission is required to consider and sheds no light on the extent to which U S WEST maintains a significant captive customer base. Maps of competitors' fiber network routes also do not indicate specific locations where competitors are able to offer service using their own facilities, as staff itself acknowledges. *See id.* at 1-2. Indeed, staff provides no explanation of why it no longer adheres to its initial analysis that U S WEST's competitors are largely dependent on U S WEST facilities to provide high capacity services. Staff Initial Comments at 3. Staff's sudden and unexplained belief in the absence of a significant captive customer base, therefore, has no demonstrable basis in fact and is contrary to the record evidence.

B. U S WEST Has Not Proven That High Capacity Service Customers Have "Reasonably Available" Alternatives.

U S WEST bears the burden to prove not only the absence of a significant captive customer base but that alternatives to U S WEST's high capacity services are "reasonably available." RCW 80.36.330. The record evidence indisputably demonstrates that competitors do not maintain sufficient facilities to customer locations to provide wholly facilities-based

alternatives to even a majority of end-users.³ U S WEST, however, maintains that competitors using U S WEST facilities also represent "effective competition," although U S WEST asks the Commission to ignore competitors' concerns over U S WEST's provisioning of those facilities in this proceeding. U S WEST Reply Comments at 29-30. Even assuming, without conceding, that service provided by competitors over U S WEST's facilities could be considered "effective competition," the record evidence submitted in support of its Amended Petition, like its original petition, fails to address, much less satisfy, U S WEST's burden of proof.

Competing service provided over U S WEST facilities cannot even arguably be considered "reasonably available" unless pricing and service quality standards, measurements, and remedies for nonperformance have been established to ensure that U S WEST and its competitors have access to those facilities on nondiscriminatory rates, terms, and conditions. U S WEST has not produced any evidence of such access. To the contrary, the Commission recently concluded that U S WEST's collocation charges are inflated, inconsistent with FCC requirements and U S WEST's own interstate tariff rates, and based on implausible assumptions. *In re Pricing Proceeding*, Docket Nos. UT-960369, *et al.*, Seventeenth Supp. Order ¶¶ 316-20 (Aug. 30, 1999). In addition, only one of the many requesting carriers has been able to obtain physical collocation in the Bellevue Glencourt central office -- one of the six central offices specified in U S WEST's Amended Petition -- and U S WEST expects further delays through the

³ U S WEST continues to contend that competitors *could* build their own networks, using both fiber and wireless technologies. As Joint Commenters discussed in their prior comments, U S WEST must prove "that the service *is* subject to effective competition," not that the service could be subject to effective competition in the future. RCW 80.36.330 (emphasis added).

end of this year, even though requests have been pending for over three years and U S WEST began to make space available for cageless physical collocation more than eight months ago. *See* Docket Nos. UT-960323, *et al.*, Letter from Lisa Anderl to Carole Washburn dated August 9, 1999. MCImetro and other companies continue to have problems with obtaining interconnection and other facilities from U S WEST, without which they cannot provide high capacity or any other services. *See MCImetro v. U S WEST*, Docket No. UT-971063. The Commission, moreover, has only just begun to investigate service quality and provisioning and remedies for collocation, unbundled loops and other facilities and services provided to competitors. Docket Nos. UT-990261 & UT-990582.

These other proceedings, in large measure, will determine the extent to which competitors will be able to provide an effective alternative to U S WEST's services, including the high capacity services at issue in this proceeding. Joint Commenters are not seeking to use this docket as a vehicle to resolve collocation and provisioning disputes, as U S WEST claims. The existence of other proceedings to address such disputes, however, does not relieve U S WEST of its responsibility to prove that the high capacity services it seeks to have classified as competitive are subject to effective competition, including proof that service alternatives are reasonably available. Service alternatives are not "reasonably available" if competitors must pay inflated prices for, and suffer unreasonable delays in obtaining, collocation and facilities needed to provide that service. If U S WEST seeks to rely on competitors' use of U S WEST facilities to provide "reasonably available" alternatives to U S WEST's high capacity services, U S WEST

must prove that it is not impeding, and cannot impede, competitors' nondiscriminatory access to, and use of, those facilities. U S WEST has failed even to offer any such evidence.

Commission Staff ignores this issue and dismisses related concerns over competitors' inability to "gain access to public rights of way, building entrances, or interconnection facilities" with the observation that "[t]he fact that a substantial number of circuits are being provided on competitors' networks demonstrates that barriers, while they undoubtedly remain, are not so high as to forestall entry entirely." Staff Reply Comments at 2-3.⁴ The statute does not authorize competitive classification if U S WEST can show that it has not completely prevented competitive entry. Rather, RCW 80.36.330 expressly demands proof of "*reasonably available alternatives*," and requires that the Commission consider "[t]he ability of alternate providers to make functionally equivalent or substitute services *readily available at competitive rates, terms, and conditions*," and "[o]ther indicators of market power, which may include . . . *ease of entry*." (Emphasis added). The legislature's use of "readily available" and "ease of entry" denotes an intent to authorize competitive classification when virtually *no* barriers to entry exist, not when existing barriers are not completely insurmountable. U S WEST has not made such a showing.

⁴ U S WEST relies on newspaper reports of wireless technology and the availability of U S WEST conduit to claim that building access is not a barrier to entry. U S WEST Reply Comments at 31-33. U S WEST, however, ignores the fact that companies must maintain equipment in buildings and must have access to riser space or cabling between floors of those buildings. U S WEST generally has exclusive access to the space dedicated for such purposes, without charge from the building owner, while competitors often must pay for space the building owner makes available for their equipment to the extent competitors are permitted access at all. Building owners' discriminatory treatment of telecommunications companies other than U S WEST thus represents a significant barrier to entry by providers seeking to provide service wholly over their own facilities.

C. The FCC's Fifth Access Reform Order Provides No Guidance on Whether U S WEST's Intrastate High Capacity Services Should Be Classified as Competitive Under Washington Law.

Staff has indicated that it views the FCC's recent decision in *In re Access Charge Reform*, CC Docket No. 96-262, *et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking (Aug. 27, 1999) ("*Fifth Access Reform Order*"), as effectively dispositive of U S WEST's petition for competitive classification. In that decision, the FCC granted U S WEST and other incumbent local exchange companies ("ILECs") that are already under price cap regulation the opportunity to obtain greater pricing flexibility in the provision of interstate access services by demonstrating the existence of sufficient "sunk" facility investment by competitors. More specifically, the FCC established two phases of pricing flexibility within a Metropolitan Service Area ("MSA"), each of which is triggered by a threshold percentage of collocation by competitors in the ILEC's central offices in that MSA. The *Fifth Access Reform Order* is not probative, much less dispositive, of U S WEST's Amended Petition.

The most significant distinction between the FCC's order and this proceeding is that Congress, unlike the Washington legislature, has not required a showing of effective competition or established any specific criteria an ILEC must satisfy prior to being eligible for regulatory flexibility. Indeed, the FCC refused even to consider market share data in its decision because it was "administratively burdensome," *Fifth Access Reform Order* ¶¶ 90-91, yet RCW 80.36.330 expressly requires that the Commission consider such indicators of market power. Similarly, the pricing flexibility the FCC offers for interstate services is far more restrictive than competitive classification. ILECs granted pricing flexibility by the FCC must continue to file tariffs, but may

offer term and volume discounts, contract tariffs, and increased tariffed rates (Phase I) and are exempt from FCC rate structure and price cap rules (Phase II), *id.* ¶¶ 122 & 153. U S WEST already may offer term and volume discounts and individual contracts, but competitive classification would remove any obligation to file tariffs and could provide U S WEST with regulatory freedom far beyond the flexibility the FCC has made available.⁵

The FCC's analysis in its *Fifth Access Reform Order* also does not aid this Commission in evaluating the extent to which intrastate high capacity services are subject to effective competition. The FCC adopted collocation as an administratively simple means of determining whether competitors had invested sufficient resources in their own facilities to establish a permanent competitive presence. While such investment demonstrates a commitment on the part of competitors to offer services in Washington, that commitment in no way is equivalent to the effective competition required by the legislature. As discussed above, the number of central offices in which competitors are collocated, like competitors' network maps, provides no indication of the extent to which competitors maintain facilities to customer premises. Even with respect to access to U S WEST facilities, as discussed above, collocation is meaningless if U S WEST does not provide nondiscriminatory access to central office space, unbundled loops, interconnection trunks, and other facilities on the same terms and conditions that U S WEST

⁵ Commission staff and other parties have referenced waiver of RCW 80.36.170 (unreasonable preference) and RCW 80.36.180 (rate discrimination). Although RCW 80.36.330 permits the Commission to waive the requirements of these statutory provisions as part of competitive classification, the Commission has not done so for companies classified as competitive and should not do so for U S WEST's high capacity services even if those services are classified as competitive.

provides those facilities to itself. The FCC's *Fifth Access Reform Order*, therefore, is inapplicable and irrelevant to the Commission's evaluation of U S WEST's Amended Petition.

CONCLUSION

For the reasons discussed above and in prior comments submitted by Joint Commenters, Public Counsel, and the intervenors in this proceeding, the Commission should deny U S WEST's Amended Petition.

RESPECTFULLY SUBMITTED this 10th day of September, 1999.

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