

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of)	
)	DOCKET NO. UT-990022
U S WEST COMMUNICATIONS, INC.)	
)	
for Competitive Classification of its)	EIGHTH SUPPLEMENTAL ORDER
High Capacity Circuits in Selected)	GRANTING AMENDED PETITION
Geographical Locations.)	FOR COMPETITIVE CLASSIFICATION
.....)	

SUMMARY

Petition for Competitive Classification: On January 8, 1999, U S WEST Communications, Inc. (U S WEST), filed a petition for competitive classification of its high-capacity circuits pursuant to RCW 80.36.330 and WAC 480-120-023. Specifically, U S WEST requested that the Commission classify as competitive its provisioning of DS-1, DS-3, and SONET [synchronous optical network] services within the Greater Seattle, Vancouver, and Spokane areas.

Commission Staff brought the matter before the Commission's regularly scheduled open public meeting of January 27, 1999, with a recommendation that the Commission set the matter for hearing and require U S WEST to notify its wholesale and retail customers of the filing of its petition and of a Commission order setting the petition for hearing. The Commission, on February 3, 1999, entered an *Order Setting the Petition for Hearing and Requiring Notice to Affected Customers; and Notice of Prehearing Conference*.

On February 11, 1999, a prehearing conference in this matter was convened before Administrative Law Judge Terrence Stapleton (ALJ). At the prehearing conference, the ALJ recommended to the parties that the petition be considered pursuant to RCW 80.36.145 and WAC 480-09-520, formal investigation and fact-finding, under which the Commission routinely considers petitions for competitive classification of companies and services. A schedule for the submission of written pleadings on the U S WEST petition was proposed.

U S WEST subsequently amended the petition on June 11, 1999, by deleting the Greater Vancouver market area from its petition. U S WEST further amended its petition by modifying the list of exchanges in the Greater Seattle market area to five metropolitan wire centers -- Seattle Elliott, Seattle Main, Seattle Campus, Seattle Duwamish, and Bellevue Glencourt -- as defined by filed maps, and a portion of the Spokane wire center -- as defined by boundary streets and the Spokane River and illustrated by a filed map.

At the request of Commission Staff and intervenors, the Commission's discovery rule, WAC 480-09-480, was invoked. U S WEST thereafter requested that the Commission enter a protective order, and the *Second Supplemental Order - Protective Order* was entered February 19, 1999. RCW 80.36.310 contemplates that the Commission may respond to a petition to be classified as a competitive telecommunications company (RCW 80.36.320) or to have services classified as competitive telecommunications services (RCW 80.36.330) by setting the matter for hearing under chapter 34.05 RCW or for a formal investigation and fact-finding under RCW 80.36.145. In the instant proceeding, no party objected to use of formal investigation and fact-finding.

Parties: Lisa A. Anderl appears for U S WEST Communications, Inc. (U S WEST); Shannon Smith, Assistant Attorney General, for Staff of the Washington Utilities and Transportation Commission (Commission Staff); Chip Holcomb, Assistant Attorney General, for Department of Information Systems (DIS); Simon ffitc, Assistant Attorney General, for Office of Public Counsel, Office of the Attorney General (Public Counsel); Mary B. Tribby for AT&T of the Pacific Northwest, Inc. (AT&T); Gregory J. Kopta for NEXTLINK Washington, Inc. (NEXTLINK), Electric Lightwave, Inc. (ELI), and AT&T Local Services (ALS); Clyde H. MacIver for MCIMETRO Access Transmission Services, Inc. (MCIMETRO); Brooks E. Harlow for MetroNet Services Corporation (MetroNet); Richard J. Busch for Washington Association of Internet Services Providers (WAISP); Barry Pineles for GST Telecom Washington, Inc. (GST); and Arthur A. Butler for Telecommunications Ratepayers for Cost-based and Equitable Rates (TRACER).

Commission: The Commission grants U S WEST's petition for competitive classification of its high-capacity circuits, as amended on June 11, 1999. Our Order is effective for six geographic market areas delineated in the amended petition: Seattle Elliott, Seattle Main, Seattle Campus, Seattle Duwamish, Bellevue Glencourt, and Spokane. We find competition for high-capacity circuits sufficiently robust in these areas to allow U S WEST to join the competition, to relieve U S WEST from price regulation of these services, and to let the competitive market work to determine prices.¹

BACKGROUND

U S WEST seeks competitive classification of high-speed data services (DS-1, DS-3, and SONET) in certain geographic markets in Washington. The DS-1

¹ U S WEST must, of course, observe the minimal statutory requirements under RCW 80.36.330 to post price lists and to price at least at cost, as well as comply with service quality standards, which remain in force.

services at issue are also called T-1 lines. A T-1 line is a dedicated circuit connecting two points. T-1 lines are capable of carrying the equivalent of 24 simultaneous voice conversations, or data, including video, at speeds of nearly 1.544 megabits per second,

taking into account that some of the capacity may be consumed by signaling information in overhead bit streams. The term T-1 line is synonymous with a DS-1 facility, and 28 DS-1s can be carried on a single DS-3 facility.

Business customers, including Internet service providers, use these high-capacity lines for local and interexchange applications. Medium and large customers also utilize these circuits for direct connections to an interexchange carrier's point of presence. Other telecommunications carriers, including competitors of U S WEST, are among U S WEST's biggest customers in the high-volume traffic centers in the state. The State of Washington is among the large customers of U S WEST for these services. For example, much of the K-20 Network includes numerous T-1 connections.

High-capacity services are provided over a variety of transmission media including traditional four-wire copper loops, with or without fiber optic applications for DS-1, and fiber optic and coaxial cable for DS-3. Electronics on each end of the dedicated circuit are adaptable to different applications, including greater user control of network maintenance, grooming, and facility management functions. Digital subscriber line (DSL) and integrated software defined network (ISDN) applications are sometimes cross-price elastic with DS-1 and DS-3 services. Various competitive wireless applications are also available as substitute services.²

MEMORANDUM

I. Applicable Statutes and Rules

The applicable statutes and rules, RCW 80.36.330 and 80.36.145 and WAC 480-120-022, 480-120-023, and 480-09-520, are set forth as Attachment A to this Order. The central statute at issue, however, is RCW 80.36.330.

RCW 80.36.330 authorizes the Commission to "classify a telecommunications service provided by a telecommunications company as a competitive telecommunications service" if it finds that the service is "subject to effective competition." The statute defines "effective competition" 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(1) enumerates four factors that the Commission "shall consider" in determining whether it will exercise

² Radio communications service companies are not regulated by the Commission pursuant to chapter 80.66 RCW. The Commission is precluded from regulating the radio communications services of a regulated telecommunications company except as provided by RCW 80.36.370.

its discretion to classify a telecommunications service as “competitive”:

- (a) The number and size of alternative providers of services;
- (b) The extent to which services are available from alternative providers in the relevant market;
- (c) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions; and
- (d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

RCW 80.36.330(1).

These four factors are not exclusive, and there may be other factors that bear on the Commission’s determination in individual cases. The Commission, however, may not be able to discover and develop fully in a given proceeding all data and information relevant to the four factors, or other relevant factors, without broad participation from the industry. In the ideal case, all participants in the industry that provide the same or similar services in relevant geographic markets would intervene and participate by producing credible factual data and information. That way, the Commission can understand fully how the enumerated factors, and other relevant factors, bear on the question of competition. In this case, not all telecommunications companies that provide the same or similar “high-capacity circuits” as U S WEST in the relevant geographic markets appeared to participate; most notably, Sprint Communications Company did not come forward.

The availability of data to support a claim that the subject services are subject to competition is limited in this proceeding because significant data is held by competitors who view the information as proprietary and sensitive. With the evidence available regarding the status of the market for the subject services, the Commission must consider whether the quantum of evidence presented by U S WEST satisfies the standard of substantial competent evidence necessary to carry the *prima facie* case. We also must weigh and consider any contrary evidence presented by other parties. In the final analysis, it is U S WEST’s burden to convince us that the record, considered as a whole, supports a determination that the services for which it seeks competitive classification are subject to “effective competition” -- *i.e.*, that “customers of the service have reasonably available alternatives and that the service is not provided to a significant captive customer base.” Then, according to RCW 80.36.330(1), “[t]he

Commission *may* classify a telecommunications service . . . as a competitive telecommunications service . . .”

The Commission has significant experience implementing RCW 80.36.330. However, this is the first petition for competitive classification of a telecommunications service *limited to specific geographic boundary constraints*. Prior petitions for competitive service classifications have been presented in a statewide context, without limitation to specific geographic markets. The language in RCW 80.36.330(1)(b), however, specifically contemplates consideration of “the relevant market,” which in our view may entail product, service, geographic, or perhaps even temporal aspects of definition.

II. Issues Summary and Positions of the Parties

In this section, the Commission provides a summary of the parties’ positions on the petition for competitive classification, beginning with petitioner U S WEST. The comments of the other participants in this proceeding sometimes overlap or are redundant. The fact that the same or substantially similar comments are not reproduced as to each party’s position does not mean that the Commission has overlooked or ignored those comments.

A. U S WEST

U S WEST characterizes the relevant end-user market as mid-sized to large businesses, carriers using high-capacity transport facilities, and resellers. Evidence points to U S WEST’s diminishing retail market share and the increasing ability of competitive providers to enter the market and make alternative service reasonably available to ratepayers. U S WEST argues that it does not possess a significant captive customer base within the boundaries of the geographic markets described in the amended petition. U S WEST notes that alternative providers have installed their own fiber networks and are actively soliciting customers in the relevant market areas. It has presented uncontested maps showing the location of competitive fiber-optic network facilities within the geographic markets described in the amended petition. U S WEST asserts that customers are not captive of U S WEST because they are able to choose more than one alternative provider.³

U S WEST argues that the availability of unbundled network elements (UNEs) at total element long-run incremental cost-based (TELRIC) prices, established by the Commission in Docket No. UT-960369, *et al.* and through numerous arbitrated and negotiated agreements, including provisions for collocation, means that

³ U S WEST Petition at 3,11.

competitors are able to provide service to customers, obviating concerns that it possesses monopoly market power over the "last mile." U S WEST has submitted tariffs and other evidence such as advertising material from as many as 13 CLECs, including several which are not parties to this proceeding.⁴ The advertising material includes references which are specific to both the Seattle and Spokane markets encompassed by the amended petition.⁵ However, not all of the 13 CLECs are in both Spokane and Seattle. The evidence also identifies non-regulated competitors such as wireless companies that are competing in the high-capacity private-line market.⁶

U S WEST also submitted information on revenues of certain competitors to show that some competitors are larger than U S WEST, on the basis of revenue. Operating revenues as of December 31, 1997, for AT&T/TCG and MCI/WorldCom exceeded \$60 billion compared to U S WEST's revenue of \$10 billion for the same period.⁷

U S WEST claims that the amount of capital necessary for competitive entry as a CLEC in Seattle or Spokane is obviously within reach of many competitors since they have built competitive networks. U S WEST claims alternative providers have sufficient network capacity to absorb U S WEST's existing business.⁸

U S WEST further claims major losses in the Seattle retail market for DS-1 and DS-3, and voice grade DS-0, services, asserting that it retains only a 21% market- share. (Note, however, that voice grade circuits are *not* under consideration in the instant petition.) In the wholesale market, it admits to a higher market share of approximately 72%.⁹

⁴ U S WEST Petition, Attachment 1 - Tariffs and Price Lists, includes U S WEST, AT&T Local Services (TCG), Covad, ELI, Fox, GST, GTE (tariff offers private line in U S WEST territory), MCI/WorldCom (two separate filings), NEXTLINK, Teligent, Winstar Wireless, WWP Fiber.

⁵ U S WEST Petition, Attachment 6.

⁶ U S WEST Reply Comments in Support of Amended Petition, Attachments D, "Wireless firms fly higher", and J, "Advanced Radio Telecom Posts 1998 Loss of \$2.06/share, Federal Filings Via Dow Jones."

⁷ U S WEST Petition at 5.

⁸ *Id.* at 2.

⁹ *Id.*, Attachment 2, at 11-12.

U S WEST contends that the distinction between retail and wholesale markets is unnecessary and largely irrelevant.¹⁰ U S WEST argues that retail/wholesale market segmentation is not possible in the analysis because of inadequate availability of data in the record. It notes that retail and wholesale circuits are sold out of a single tariff applicable for high-capacity circuits. U S WEST can neither size the markets nor ascertain precisely in which market each circuit it sells would be classified.¹¹ U S WEST also notes that high-capacity circuits can be partitioned by the customer, and U S WEST does not necessarily know whether the capacity is being used by a retail customer or by the carrier for other purposes such as switched-access services transport.¹²

U S WEST has filed maps that show the boundaries of each of the five Seattle wire centers and the Spokane wire center in the downtown portions of the exchanges.¹³ (See, Attachment B.) The maps show that competitors have installed hundreds of miles of fiber optic network and electronics.¹⁴

U S WEST provided copies of advertisements showing that competitors offer alternate route protection, SONET, and other network-management and grooming services which are functionally identical to the services U S WEST seeks to have classified as competitive.¹⁵

U S WEST also submitted information on collocation in the relevant geographic markets.¹⁶ This information shows a minimum of two and a maximum of six collocation requests for each of the five Seattle wire centers, and four collocation requests in the Spokane wire center. Together with the network maps of CLEC facilities in these areas, U S WEST argues that this information demonstrates the ability of alternative providers to compete with their facilities.

¹⁰ U S WEST Additional Comments in Support of Petition at 4.

¹¹ *Id.* at 17.

¹² *Id.* at 18.

¹³ U S WEST Motion to Amend Petition, Attached Maps.

¹⁴ U S WEST Petition at 6.

¹⁵ *Id.*, Attachment 6.

¹⁶ U S WEST Supplemental Reply Comments in Support of Amended Petition, September 24, 1999, Attachment A.

U S WEST submitted a December, 1998, marketing study of the Seattle high-capacity market by Quality Strategies which shows MCI/WorldCom, TCG, and ELI with 255-295 on-net buildings in the Seattle/Bellevue market, utilizing more than 600-620 route miles of fiber.¹⁷ The advertising material and press articles submitted make numerous general statements about quantities of fiber-route miles each competitor is installing, including affiliates of regulated utility companies (Avista Corporation) and cable companies (AT&T/TCI). U S WEST argues that where competitors want, they can get collocation and the UNEs necessary to complete the "last mile."

U S WEST submitted information on the cost of market entry through an engineering cost study compiled by an independent consultant.¹⁸ The study assumes that U S WEST is the incumbent with network in place and estimates various costs to displace U S WEST facilities in 2,517 buildings in Seattle, all within 9,000 feet of the nearest CLEC fiber route.¹⁹

U S WEST submitted uncontested data on prices showing that its prices are in the middle of a fairly wide range of prices. The rates for U S WEST's DS-1 and DS-3 services are currently tariffed at prices based upon cost studies reviewed by the Commission in a 1995 U S WEST general rate increase proceeding.²⁰ Recurring prices for the Channel Termination Rates of DS-1 service range from \$103.50 to \$550.00 and non-recurring prices range from \$200.00 to \$550.00. DS-1 transport mileage prices range from \$54.00 to \$79.20 for fixed recurring charges. For DS-3 services, Channel Termination Rate recurring prices range from \$1,080.00 to \$5,000.00 and non-recurring prices range from \$280.00 to \$5,000.00. DS-3 transport mileage prices range from \$279.00 to \$2,000.00 for fixed recurring charges. U S WEST's prices are competitive and fall in the middle of these ranges.²¹

B. AT&T and MCIMETRO

AT&T and MCIMETRO believe that customers have no reasonably available alternatives, and therefore that U S WEST has a significant captive customer

¹⁷ U S WEST Petition, Attachment 2, at 20.

¹⁸ U S WEST Additional Comments in Support of Petition, Attachment 7, Seattle Cost Study Model, Power Engineers, Inc.

¹⁹ *Id.*, *Executive Summary* at 1-3.

²⁰ Washington Utilities and Transportation Commission v. U S WEST Communications, Inc., Docket No. UT-950200

²¹ U S WEST Petition at 9.

base.²² AT&T and MCIMETRO further argue that data from Staff's Confidential Attachment B on location specific data show that U S WEST has a significant captive customer base.²³

AT&T, MCIMETRO, and others claim that U S WEST's long-term agreements, which have early-termination penalties, belie U S WEST's assertion that there is not a significant captive customer base.²⁴ They maintain that U S WEST can hold its wholesale customers captive. AT&T and MCIMETRO therefore conclude that the Commission should not grant regulatory flexibility until U S WEST is able to resolve issues about its "performance, access reform, interconnection, etc."²⁵ AT&T and MCIMETRO assert that U S WEST's "retail market" label is meaningless, and tends to make the competitive market look far more robust than it is in reality, since many competitors rely on U S WEST underlying facilities to provide service.²⁶

C. GST

GST filed comments in opposition to U S WEST's petition, alleging an array of policy considerations similar in nature to those of the other intervenors. GST's concerns include the dispute over analysis of market segmentation between wholesale and retail services, taking especially into account the concerns of Internet service providers (ISPs) and small CLECs.

D. TRACER

TRACER recommends denying the petition. Admitting that alternatives exist to U S WEST's high-capacity services in the geographic areas covered by the amended petition, TRACER nevertheless argues that data from Staff's Confidential Attachment B on location specific data show that U S WEST has a significant captive customer base.²⁷

²² AT&T Reply Comments at 7.

²³ AT&T Supplemental Comments at 4.

²⁴ AT&T and MCIMETRO Comments at 17.

²⁵ AT&T Comments at 5-6.

²⁶ AT&T Reply Comments at 10.

²⁷ TRACER Comments on U S WEST's Amended Petition at 11.

TRACER argues that looking at the retail market alone is misleading because it assumes that U S WEST circuits resold by competing CLECs constitute competition for U S WEST. In fact, the reseller and the reseller's customers are still dependent on U S WEST.²⁸

TRACER also raises questions as to whether U S WEST's Self-Healing Alternate Route Protection Services (SHARPS), Self-Healing Network Services (SHNS), and SONET services are to be classified as competitive.²⁹

TRACER argues that if U S WEST's petition is approved, it should be subject to a cap on prices current levels. TRACER recommends analysis of various measures of market power referenced in antitrust proceedings, such as the Lerner Index, measures of market price elasticity of demand, the elasticity of supply of the "competitive fringe," the firm price elasticity of demand, and the Hirfindahl-Hirschman Index. However, TRACER admits that while there is some information on market shares, reliable data on elasticity of supply, and elasticity of demand have not been provided.³⁰ TRACER recommends that prices for U S WEST high-capacity services should not be permitted to increase in the subject markets.³¹

TRACER maintains that because of building access difficulties, the market is not subject to effective competition. Comments were included concerning the Building Owners and Managers Association's (BOMA) position on building access. BOMA opposes mandatory building access. TRACER argues because U S WEST enjoys incumbent status in existing buildings, there is a relatively greater burden on competitive new entrants.³²

E. WAISP

WAISP complains that U S WEST's tariff for its DSL service requires ISPs to use U S WEST's high-capacity private-line services.³³ WAISP complains that this is a "tying requirement" related to U S WEST MegaCentral and MegaSubscriber

²⁸ TRACER Comments at 9.

²⁹ TRACER Comments on USWC's Amended Petition at 15.

³⁰ TRACER Comments at 7.

³¹ *Id.* at 20

³² TRACER's Comments at 16, and Exhibit 3.

³³ WAISP January 26, 1999 Letter at 1.

services.³⁴ WAISP also expresses concerns about appropriate pricing flexibility for “cross-territory” circuits -- those which have one end in a competitive area, the other end in a non-competitive area.³⁵ U S WEST subsequently filed revisions to its DSL tariff, permitting ISPs to use competitive private lines in conjunction with U S WEST DSL.³⁶ U S WEST clarified that each end of a circuit will be priced according to whether it is in the competitive or non-competitive area.³⁷

WAISP asks that the Commission clarify that only DS-1 and DS-3 services and SONET are included in the petition for competitive classification.³⁸

F. Public Counsel

Only one individual customer commented in this proceeding. He stated, “[t]here’s nobody to compete with [U S WEST].”³⁹

Public Counsel opposes the petition, arguing that U S WEST puts undue emphasis on the resale and retail side of the market.⁴⁰ Public Counsel argues that the resale of U S WEST’s service is not a good indicator of the existence of competition, because U S WEST retains unilateral price control. Access to customer premises and rights-of-way are significant barriers to competitive entry and these are of concern to Public Counsel.⁴¹

G. COMMISSION STAFF

Staff supports U S WEST’s amended petition.⁴² Staff urges the Commission to look at both retail and wholesale market shares, because resale of

³⁴ WAISP Comments at 2.

³⁵ WAISP Comments at 5.

³⁶ See, U S WEST Supplemental Reply Comments, Attachment C.

³⁷ U S WEST Additional Comments at 6.

³⁸ WAISP Supplemental Comments at 1.

³⁹ Clayton Chinn, an individual. Electronic comments, January 25, 1999.

⁴⁰ Public Counsel Comments at 2.

⁴¹ *Id.* at 3.

⁴² Supplemental Reply Comments of Staff at 1.

these services is an important aspect of the market and the distinctions in the data are blurred. Staff does not doubt that U S WEST market share is decreasing, but notes that circuit counts are increasing.⁴³

Staff comments that SHARPS and SHNS are a function of the fiber optic technology. The same fiber can be used to provide DS-1 and DS-3 services, and therefore should be classified as competitive.

In Staff's view, the fact that competitors have entrance facilities in numerous buildings speaks for the ability of competitors to offer an alternative at reasonably competitive rates.⁴⁴ Therefore, the benefits of price competition in Seattle may accrue to other U S WEST customers in non-competitive markets. Even with competitive service classification, U S WEST must still sell transport and termination to its competitors at established, cost-based, interconnection rates for UNEs.⁴⁵

Staff disagrees with TRACER's proposal to cap U S WEST's competitive DS-1 and DS-3 prices in Seattle and Spokane current levels, and points out that competitive classification implies regulatory flexibility and reform away from price regulation.⁴⁶

Staff argues that it is necessary to look beyond market-share numbers to the structure of the market itself and whether competitors are actually offering service in the relevant market.

Parties argue that U S WEST possesses market power due to the difficulty of market entry. Staff counters that the fact competitors are constructing competitive networks and collocating with U S WEST indicates competitive entry is occurring.

⁴³ Staff Comments at 3.

⁴⁴ Staff Supplemental Reply Comments at 2.

⁴⁵ *Id.*, 6.

⁴⁶ Reply Comments of Staff at 5.

III. Commission Discussion and Decision

The Commission, based on the entire record developed in this matter, finds that “effective competition” exists for the provision of DS-1 and DS-3 services in the six named metropolitan wire centers in Seattle and Spokane, as delineated by the boundary maps in U S WEST’s amended petition. We believe the record supports a finding that U S WEST does not have a significant captive customer base within the prescribed geographical areas because there are reasonably available alternatives to the services of U S WEST. Alternative providers can make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions. The amended petition of U S WEST for competitive classification of its high-capacity circuits should be approved. In addition, we hold that SONET services, including SHARPS and SHNS, are properly before the Commission in this proceeding and are likewise subject to effective competition in relevant geographic areas.

The Commission is generally persuaded by the presentations of Commission Staff and U S WEST that within the Seattle and Spokane competitive zones there is no significant captive customer base. Multiple providers operate in these business-oriented, downtown commercial centers, utilizing a combination of owned and leased facilities. With increased competition, all consumers of these services can reasonably expect to benefit with the availability of lower prices, as well as innovative and diverse service offerings.

TRACER and other parties argue that if we approve the petition, we should enforce a price cap on U S WEST’s high-capacity services. We do not accept that recommendation. The services are subject to effective competition, and the State’s policy goal to promote flexible regulation is not furthered by artificially capping prices for competitive services. U S WEST should be given the authority to quickly react to changing market conditions for the high-capacity services for which we grant competitive classification in the specified Seattle and Spokane metropolitan wire centers. U S WEST cannot name prices below the cost floors established for these services in Docket No. UT-950200. By permitting flexible pricing in these two geographic areas, the market will determine efficient prices, and principles of nondiscrimination will benefit consumers statewide. We find that because competitors have the ability to construct their own facilities or to lease unbundled network elements at cost-based rates or resell existing facilities pursuant to the Telecommunications Act of 1996, U S WEST lacks the ability to sustain prices substantially above cost in these two areas without losing market share.

Market share information shows that U S WEST’s market share varies from 33% - 88%. When the company asked for statewide competitive classification of private-line services over ten years ago, the Commission denied the petition because of lack of existing competition. Today, network maps in Seattle and Spokane virtually

follow the grid pattern of the streets in the downtown business core, and fiber rings trace major arteries throughout the wire centers in the petition. Data on collocation by CLECs show that competitive investment is taking place in these markets as well. Competitive prices range from below U S WEST's rates to well in excess of those rates, indicating that a variety of competitive market conditions are being met.

As to whether we should give greater weight to retail or wholesale market analyses, we find that it is appropriate to consider both. We rely on the Staff's analysis of circuit information provided under confidential seal, which shows that U S WEST's market share is diminishing over time, and is in fact quite low in some instances. These data on circuits yield a conservative picture, given that there are regulated and unregulated telecommunications carriers and service providers not party to this case, and data pertaining to their operations are therefore not in the record. If they were, we think that estimates of U S WEST's market share in the six metropolitan wire centers likely would be lower than that shown by the Staff. We note that the circuit data we have available do not differentiate between wholesale and retail markets in all cases.

Other measures of market power, such as ease of entry, are also favorable to U S WEST's petition. The data show that competitive investment is taking place, and, in Seattle alone, some 300 buildings have CLEC alternatives. The market for the services at issue here appears to be growing rapidly, and there is reason to believe that entry continues to occur. There is no indication that U S WEST has an unfair monopoly advantage over its competitors either in securing a larger share of this new business or in gaining access to new buildings or rights-of-way. In fact, undisputed evidence shows that competitors are gaining access to numerous buildings and to rights-of-way within the competitive zones delineated by U S WEST's amended petition.

It is a matter of significant concern to the Commission that numerous issues are raised concerning U S WEST's carrier-to-carrier service quality. We believe that, where appropriate, the establishment of competitive market conditions is one of the more effective steps which can be taken to improve carrier-to-carrier service quality. It is correct that prerequisites for competition such as OSS [operations support systems] parity, and the availability of efficient collocation are necessary. Also, as the bottleneck provider of services in markets throughout the state, U S WEST should be the focus of regulatory oversight. However, competitive classification will not relieve the company from compliance with Commission service quality standards. Rejecting this petition solely in response to those legitimate concerns would not cure those problems. Rather, related concerns are being addressed appropriately in various other Commission proceedings.

The Commission's rulemaking proceeding in Docket No. UT-990261 is exploring carrier-to-carrier service quality and the appropriate level of performance

guidelines. The Commission, in Docket No. UT-991294, is coordinating with the U S WEST Regional Oversight Committee (ROC) on regional OSS testing. The Commission is addressing with collocation issues in the rulemaking proceeding, in Docket No. UT-990582. The Commission has set forth nondiscriminatory conditions for provision of UNEs to CLECs for “last mile” purposes, including adjudicated prices based on cost factors derived in Docket No. UT-960369, *et al.*, and has approved more than 170 interconnection agreements containing such provisions.

In conclusion, relaxed regulatory and pricing authority, when conditions of effective competition can be demonstrated, are consistent with the State’s telecommunications policy goals.⁴⁷ Flexible regulation of competitive services is important, and the Commission will grant the amended petition. Regulatory oversight of U S WEST’s service quality in both wholesale and retail markets is not waived for either its fully regulated or competitively classified service provision of high-capacity circuits. Statutory prohibitions against undue preference, RCW 80.36.170, and rate discrimination, RCW 80.36.180, remain in effect statewide throughout all of U S WEST’s operating territory.

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. U S WEST Communications, Inc., is registered as a telecommunications company providing service within the state of Washington as a public service company.
3. On January 8, 1999, U S WEST filed a petition requesting competitive classification of its high-capacity services, pursuant to RCW 80.36.330 and WAC 480-120-022 and 480-120-023, within the Greater Seattle, Vancouver, and Spokane areas.
4. On June 11, 1999, U S WEST filed an amendment to its petition deleting the Greater Vancouver market area and modifying the list of exchanges in the

⁴⁷ **RCW 80.36.300 Policy declaration.**

(5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state.

(6) Permit flexible regulation of competitive telecommunications companies and services.

Greater Seattle market area to five metropolitan wire centers -- Seattle Elliott, Seattle Main, Seattle Campus, Seattle Duwamish, and Bellevue Glencourt -- defined by filed maps, and a portion of the Spokane wire center -- defined by boundary streets and the Spokane River and illustrated by a filed map.

5. The relevant product market is the provisioning of DS-1, DS-3, and SONET, including Self-Healing Alternate Route Protection Services (SHARPS) and Self-Healing Network Services (SHNS), within the six geographic market areas delineated by boundary maps in the amended petition.

6. There are reasonably available alternative providers of the telecommunications services to those U S WEST offers in the six geographic market areas.

7. There are no regulatory barriers to entry into the market for high-capacity services in the six geographic market areas, and entry presently is occurring.

8. The high-capacity services offered by U S WEST are subject to effective competition.

9. U S WEST 's prices for the relevant services are subject to the cost standard and other conditions described fully in the text of this Order until otherwise ordered by the Commission.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and all parties to, this proceeding. Title 80 RCW.

2. U S WEST's high-capacity services meet the requirements of RCW 80.36.330. The Commission should grant the petition, as amended, for competitive classification.

3. U S WEST should be permitted to offer its high-capacity services, DS-1, DS-3, and SONET services, including Self-Healing Alternate Route Protection Services (SHARPS) and Self-Healing Network Services (SHNS), under price list. RCW 80.36.330(2).

ORDER

THE COMMISSION ORDERS:

1. The amended petition of U S WEST Communications, Inc., for an order granting competitive classification of its high-capacity services is granted.

2. U S WEST Communications, Inc.'s prices for its high-capacity services are subject to the cost standard described fully in the text of this Order until otherwise ordered by the Commission.

3. U S WEST Communications, Inc., is authorized to offer its high-capacity services under price list, the format of which is subject to prior approval by the Commission, to be effective after ten days' notice to the Commission and to customers. In the event of a price reduction or a change in terms or conditions which do not have a rate impact, personal notice to customers is not required. Although the Commission does not have authority to waive this notice requirement, petitioner does have the option to publish notice of price reductions by a display advertisement in such newspaper or newspapers as are geographically situated so as to be circulated over the company's service area.

DATED at Olympia, Washington, and effective this day of
December, 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES: This is a final Order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this Order pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

Attachment A -- Applicable Statutes and Rules

RCW 80.36.330 Classification as competitive telecommunications, services—Effective competition defined—Prices and rates—Reclassification.

(1) The commission may classify a telecommunications service provided by a telecommunications company as a competitive telecommunications service if the service is subject to effective competition. Effective competition means that customers of the service have reasonably available alternatives and that the service is not provided to a significant captive customer base. In determining whether a service is competitive, factors the commission shall consider include but are not limited to:

(a) The number and size of alternative providers of services;

(b) The extent to which services are available from alternative providers in the relevant market;

(c) The ability of alternative providers to make functionally equivalent or substitute services readily available competitive rates, terms, and conditions; and

(d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

(2) When the commission finds that a telecommunications company has demonstrated that a telecommunications service is competitive, the commission may permit the service to be provided under a price list effective on ten days notice to the commission and customers. The commission shall prescribe the form of notice. The commission may adopt procedural rules necessary to implement this section.

(3) Prices or rates charged for competitive telecommunications services shall cover their cost. The commission shall determine proper cost standards to implement this section, provided that in making any assignment of costs or allocating any revenue requirement, the commission shall act to preserve affordable universal telecommunications service.

(4) The commission may investigate prices for competitive telecommunications services upon complaint. In any complaint proceeding initiated by the commission, the telecommunications company providing the service shall bear the burden of proving that the prices charged cover cost, and are fair, just, and reasonable.

(5) Telecommunications companies shall provide the commission with all data it deems necessary to implement this section.

(6) No losses incurred by a telecommunications company in the provision of competitive services may be recovered through rates for noncompetitive services. The commission may order refunds or credits to any class of subscribers to a noncompetitive telecommunications service which has paid excessive rates because of below cost pricing of competitive telecommunications services.

(7) The commission may reclassify any competitive telecommunications service if reclassification would protect the public interest.

(8) The commission may waive the requirements of RCW 80.36.170 and 80.36.180 in whole or in part for a service classified as competitive if it finds that competition will serve the same purpose and protect the public interest.

WAC 480-120-022 Classification proceedings.

(1) Rules of practice and procedure applicable. The rules of practice and procedure before the commission, chapter 480-09 WAC, shall apply generally to proceedings to classify a telecommunications company as a competitive telecommunications company or a service as a competitive telecommunications service.

(2) Initiation of classification proceedings. A telecommunications company shall initiate a classification proceeding by filing a petition with the commission. The commission may initiate a classification proceeding on its own motion by order instituting investigation.

(3) Notice to affected companies and public counsel. The commission shall serve a copy of the petition or its order upon all telecommunications companies which may be affected by the proceeding, and upon the public counsel section of the office of the attorney general. Service by the commission shall be made as provided in WAC 480-08-060(4). Alternatively, the commission may direct petitioner to serve a copy of the petition upon such parties as the commission directs. Service by petitioner shall be made in accordance with WAC 480-08-060(3).

(4) Notice to customers of classification proceeding. The commission may require a telecommunications company to give notice of the pendency of the classification proceeding. The commission shall determine the manner and distribution of notice.

(5) Appearances and intervention. Any person desiring to participate in a classification proceeding may petition to intervene as provided in WAC 480-08-070.

(6) Commission may require appearance. In any classification proceeding the commission may require all regulated telecommunications companies potentially affected by the proceeding to appear as parties to determine their classification.

(7) Burden of proof. In any classification proceeding, the telecommunications company shall have the burden of demonstrating that the company or services issue are subject to effective competition. Effective competition means that customers of the service have reasonably available alternatives and that the service is not provided to a significant captive customer base. In determining whether a service is competitive, factors the commission shall consider include but are not limited to:

(a) The number and size of alternative providers of services;

(b) The extent to which services are available from alternative providers in the relevant market;

(c) The ability of alternative providers to make functionally equivalent or substitute services readily available competitive rates, terms, and conditions; and

(d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

A telecommunications company will not be classified as competitive unless it demonstrates that the telecommunications services it offers are subject to effective competition.

WAC 480-120-023 Content of petition for classification of competitive telecommunications services and companies.

In addition to the requirements of WAC 480-08-050(13), a petition for classification of a competitive telecommunications service or a competitive telecommunications company shall, a minimum, be accompanied with the following:

- (1) Name and address of the petitioner;
- (2) A description of the services it offers;
- (3) Names and addresses of any entities which would be classified as "affiliated interests" of the petitioner pursuant to RCW 80.16.010;
- (4) A statement of the services the petitioner contends are subject to effective competition, and with respect to each such service the following information shall be provided:
 - (a) Descriptions of all services in the petitioner's definition of the relevant market for the service;
 - (b) Names and addresses of all providers of such services known or reasonably knowable to the petitioner;
 - (c) Prices, terms, and conditions under which such services are offered to the extent known or reasonably knowable to the petitioner;
 - (d) A geographical delineation of the relevant market;
 - (e) An estimate of petitioner's market share and any past or projected change in market share;
 - (f) A description of ease of entry into the market;
 - (g) A statement of whether petitioner has a significant captive customer base and the basis for any contention that it does not;

(h) A verifiable cost of service study supporting the contention that the price or rate charged for the service covers its cost. A petition which contends that all of a company's services are competitive and does not seek classification for some services if others are denied classification is exempted from this requirement;

(i) The manner by which notice of price list changes will be provided to customers and the commission.

RCW 80.36.145 Formal investigation and fact-finding—Alternatives to full adjudicative proceeding.

(1) The legislature declares that the availability of an alternative abbreviated formal procedure for use by the commission instead of a full adjudicative proceeding may in appropriate circumstances advance the public interest by reducing the time required by the commission for decision and the costs incurred by interested parties and ratepayers. Therefore, the commission is authorized to use formal investigation and fact-finding instead of an adjudicative proceeding under chapter 34.05 RCW when it determines that its use is in the public interest and that a full adjudicative hearing is not necessary to fully develop the facts relevant to the proceeding and the positions of the parties, including intervenors.

(2) The commission may use formal investigation and fact-finding instead of the hearing provided in the following circumstances:

(a) A complaint proceeding under RCW 80.04.110 with concurrence of the respondent when the commission is the complainant or with concurrence of the complainant and respondent when not the commission;

(b) A tariff suspension under RCW 80.04.130; or

(c) A competitive classification proceeding under RCW 80.36.320 and 80.36.330.

(3) In formal investigation and fact-finding the commission may limit the record to written submissions by the parties, including intervenors. The commission shall review the written submissions and, based thereon, shall enter appropriate findings of fact and conclusions of law and its order. When there is a reasonable expression of public interest in the issues under consideration, the commission shall hold at least one public hearing for the receipt of information from members of the public that are not formal intervenors in the proceeding and may elect to convert the proceeding to an adjudicative proceeding any stage. The assignment of an agency employee or administrative law judge to preside such public hearing shall not require the entry of an initial order.

(4) The commission shall adopt rules of practice and procedure including rules for discovery of information necessary for the use of formal investigation and fact-finding and for the filing of written submissions. The commission may provide by rule for a number of rounds of written comments: PROVIDED, That the party with the burden of proof shall always have the opportunity to file reply comments.

WAC 480-09-520 Formal investigation and fact-finding

(1) Pursuant to RCW 80.36.145, the commission finds that it is in the public interest to employ an abbreviated proceeding for certain petitions for competitive classification under RCW 80.36.320 and 80.36.330.

(2) The commission will institute an abbreviated proceeding on its own motion or the request of petitioner filing for competitive classification under RCW 80.36.320 or 80.36.330 where it is apparent on the face of the petition that no substantial issues of controversy are presented. The commission will invoke this rule by means of a notice of formal investigation and fact-finding. The notice will call for written requests to intervene, and advise all interested persons that no hearing is contemplated other than possible hearings for public testimony.

(3) Upon the filing of a request to intervene, the commission will take objections, if any, and determine whether the proceeding qualifies for an abbreviated proceeding. A proceeding in which an intervenor proposes to participate through written submissions and data exchanges will be presumed to fall outside the scope of this rule. any time, by written notice, the commission may convert an abbreviated proceeding into a formal adjudicative proceeding.

(4) The procedures set forth in WAC 480-09-480 will not apply in proceedings brought under this section. Informal exchange of data is the form of discovery that will apply to proceedings authorized by this rule. If such discovery is not sufficient to meet the needs of the parties, the proceeding will be converted to a formal adjudicative proceeding. The "protective order" process referenced in WAC 480-09-015 will not be available in an abbreviated proceeding. If a claim of "confidentiality" is made, the proceeding will be converted to a formal adjudicative proceeding.

(5) The formal record will be limited to written submissions by the parties. Confidential material will not be accepted. The commission will designate in the notice of investigation the number and method of rounds of written submissions necessary to develop the facts relevant to the proceeding. At a minimum, petitioners and respondents wishing to obtain classification will file one original and nineteen legible, double-sided copies of the completed petition form provided by the commission upon request, together with prefiled testimony and exhibits supporting the petition. The party with the burden of proof will always have the opportunity to file a written reply. Upon conclusion of the investigation the commission will enter an order, containing findings of fact and conclusions of law, disposing of the petition.

Attachment B -- Maps

[NOTE: The attached maps are available – in color – on the Commission’s web site: <<http://www.wutc.wa.gov>>; click on Telephone matters. Please contact Tom Wilson, Telecommunications Policy Staff, 360-664-1293, if you experience problems accessing these maps.]

