

Agenda Date: November 9, 2005

Item Number: A1

Docket: UT-051488

Company Name: Qwest Corporation

Staff: Deborah Reynolds, Telecommunications Regulatory Analyst
Glenn Blackmon, Director of Regulatory Services

Recommendation:

Grant Qwest Corporation's request for exemption in Docket No. UT-051488 for a period of one year, subject to the condition that the Company file cost support information.

Background:

On September 30, 2005, Qwest Corporation (Qwest or the Company) filed a petition requesting exemption from WAC 480-80-204(4) and treatment under WAC 480-80-204(3), resulting in an effective exemption from a portion of WAC 480-80-241(2).

On October 31, 2005, Integra Telecom and XO Communications filed joint comments requesting the Commission deny the petition. Public Counsel provided informal comments by e-mail on October 24, 2005.

WAC 480-80-204(4) requires telecommunications companies not classified as competitive offering a service classified as competitive under RCW 80.36.330 to state the rates, charges, or prices as either specific prices or maximum and minimum amounts. For example, Qwest's exchange and network access price list states that the current rate for its QWEST CHOICE Business Plus package is \$49.99, that the maximum rate is \$74.99, and that the minimum rate is \$26.86. The price list states that the service "may be offered on an individual case basis as determined by [Qwest] at rates that fall within the minimum and maximum rate band for these services."

WAC 480-80-204(3) allows competitively classified companies to file only maximum prices in their price lists. For example, XO Communications' price list

states, "All rates included in this price list are stated as maximum amounts pursuant to WAC 480-80-204(3). This provision applies to every rate stated in the price list, which is 333 pages long.

WAC 480-80-241(2) states that a telecommunications company is not required to file a contract with prices below the maximum prices in the price list, as provided for in WAC 480-80-204(3), or within the maximum and minimum prices in the price list, as provided for in WAC 480-80-204(4).

Discussion:

Qwest's Position

Qwest stated that establishing minimum prices in its price list is anti-competitive because it causes Qwest to disclose information to its competitors that it is not able to obtain about them. Qwest points out that there is no statutory requirement that mandates the Company file minimum prices in its price list. As such, Qwest argues that it makes sense to regulate competitively classified services in the same manner in which competitive companies are regulated, requiring only maximum prices be filed in the Company's price list.

In requesting this exemption, Qwest asks that it be treated as if its services were regulated under WAC 480-80-204(3) and that it be permitted to operate under the provisions of WAC 480-80-241(2) that states that a carrier is not required to file contracts for price listed services where the price in the contract is less than the maximum price stated in its price list.

Qwest has not requested an exemption from the requirement found in WAC 480-80-204(4) and 480-80-204(6), based on RCW 80.36.330(3), which states that prices or rates charged for competitive telecommunications services shall cover their cost.

Opposing Party Positions

In the joint comments filed on behalf of XO Communications and Integra Telecom, the protesting parties state that Qwest offers no means by which the Commission, customers, or competitors can determine whether Qwest is pricing such services above cost. The parties state that Qwest is the market leader for all regulated services it provides within its Washington territory. The parties contend that elimination of the price floor requirement would deprive the

Commission, affected consumers, and other service providers with the information they need to ensure that Qwest's pricing reflects competitive conditions. The parties also point out that none of Qwest's competitors have captive rate payers who can fund efforts to price services to other customers below cost.

In the informal comments from Public Counsel, Mr. ffitich expresses concern that Qwest is not a competitively classified company, that a number of its services remain fully regulated, and that it remains a dominant market participant with very large market shares in most areas. Public Counsel stresses that Qwest must not engage in "predatory pricing," by selling competitively classified services below cost, while recouping those costs elsewhere. Public Counsel does not accept Qwest's suggestion that there is no statutory requirement for this type of filing. Mr. ffitich points out the specific requirement that prices cover cost, and the Commission's authority to adopt rules to effectuate the provisions of Title 80. The condition requiring cost studies appears to be a less transparent way for the Commission, interested competitors or the public to determine whether the Company is complying with the statute.

Analysis

Staff reviewed the petition and believes that it is in the public interest. Staff is persuaded that the requirement to disclose a price floor puts Qwest at a disadvantage relative to its competitors. Staff acknowledges that RCW 80.36.330(3) requires Qwest to price its competitive services above cost. However, this statute does not require that the Commission use public disclosure through price lists to police the cost requirement. The statutes give the Commission other means of doing so that will result in more regulatory parity between Qwest and its competitors. These statutes are:

- RCW 80.36.330(4) gives the Commission authority to "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."
- In addition, RCW 80.36.330(6) states that "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.”
- Finally, RCW 80.36.360 provides that competitive services are subject to the state’s consumer protection act, Chapter 19.86 RCW. RCW 19.86.020 states that “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” Other statutes in Chapter 19.86 RCW provide remedies when unfair practices are discovered.

Staff believes that, when considered together, these three statutes show that the Commission’s primary concern with respect to below-cost pricing should not be the possibility of predation or other anti-competitive practices, because these are addressed in the consumer protection act. Rather, the Legislature intended that the Commission protect captive customers from having to pay more to make up for competitive losses of a regulated company. The Commission would enforce this provision in its review of regulated rates during general rate cases, and it does not need price floors stated in price lists to do so. Indeed, RCW 80.36.330(6) requires no prospective enforcement whatsoever; since the remedy stated there can be applied after below-cost pricing has already occurred.

The principal way that the Commission has enforced RCW 80.36.330(3) since its enactment in 1985 has been through the filing of cost studies when a company offers a competitive service. For example, when Qwest introduced the QWEST CHOICE Business service in 2003, it filed information demonstrating that the rates covered cost. (Docket UT-031856) Qwest was able to protect this information from disclosure to competitors by designating it as confidential pursuant to WAC 480-09-015. Staff recommends that, at least on an interim basis, the Commission make this practice mandatory for Qwest by including it as a condition of the rule exemption. Under this condition, Qwest would be required to file cost studies for all price-listed services filed under this exemption. Staff believes this is appropriate because having the cost study on file protects competitors and consumers by establishing the price floor as an actual number. Even though the competitors and consumers may not have access to it, if a complaint arises, the Commission should have the necessary information to make a determination about whether the Company was pricing below cost.

Staff also recommends that the Commission establish a one-year sunset date for this exemption. Doing so will provide a mechanism for the Commission to consider any problems or complaints that might be identified. It also would provide an opportunity for the Commission to consider whether the requirement to file cost support is still necessary. Staff believes a one-year term for the exemption would be appropriate.

Staff believes the requirement to file cost information addresses the concerns that led the Commission to require price floors in price lists. With this condition, granting the requested exemption will improve the level of regulatory parity between Qwest and its competitors by allowing them to operate under the same price list publication requirements. In addition, Staff believes the Commission can use the authority in RCW 80.04.070 "to inspect the accounts, books, papers and documents of any public service company" at any time, and therefore may request copies of all contracts executed under this exemption.

Conclusion:

Staff recommends the Commission grant Qwest Corporation's request for exemption in Docket No. UT-051488 for a period of one year, subject to the condition that the Company file cost support information.