

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of) DOCKET NO. UT-000883
)
U S WEST COMMUNICATIONS, INC.)
) **AT&T’S BRIEF**
for Competitive Classification of Business)
Services in Specified Wirecenters)
.....)

I. INTRODUCTION

AT&T Communications of the Pacific Northwest, Inc., TCG Seattle and TCG Oregon (“AT&T”) oppose Qwest Corporation’s (“Qwest”) petition pursuant to RCW 80.36.330 and WAC 480-120-023, for competitive classification of certain business services as set forth in Qwest’s Petition. The evidence proffered by Qwest and the other parties, along with AT&T’s experience in Washington as a direct competitor of Qwest, demonstrate that such classification is not warranted at this time under the criteria established by RCW 80.36.330.

AT&T recognizes that there were extremely active participants in this docket in opposition to Qwest’s petition for competitive classification. As such, for administrative efficiency, AT&T’s brief is intended to supplement those various briefs by focusing only on certain issues.

II. LEGAL FRAMEWORK/STATUTORY REQUIREMENTS

Qwest has petitioned the Washington Utilities and Transportation Commission (“WUTC”) pursuant to RCW 80.36.330 for competitive classification of business basic exchange telecommunication services in thirty-one (31) wire centers across Washington. The mandate of RCW 80.36.330 is clear: the WUTC “may classify a telecommunications

service provided by a telecommunications company as a competitive telecommunications service if the service is subject to effective competition.” RCW 80.36.330(1). “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.” *Id.*

In order to determine that a service is competitive, the WUTC “shall consider but is not limited to” the following factors:

- (a) The number and size of alternative providers of services;
- (b) The extent to which services are available from alternate 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 include market share, growth in market share, ease of entry, and the affiliation of providers of services.

RCW 80.36.330(1)(a)-(d).

The statute is unambiguous; the WUTC **must** find effective competition before granting competitive classification of these services to Qwest. *See Western Telepage, Inc. v. City of Tacoma*, 95 Wash.App. 140, 144-45 (1999) (“If a statute is plain and unambiguous, its meaning must be derived from the language of the statute itself.”) *See also Postema v. Pollution Control Hearings Board*, 2000 WL 1539089 (Oct. 19, 2000) (Even though an agency’s interpretation is accorded great weight when the statute is ambiguous, its views cannot conflict with an unambiguous statute.)

The WUTC should take these strict statutory standards into consideration in making its final determination and view with caution any “alternative” proposals by WUTC staff that may violate this legislative mandate.

III. EVALUATION OF QWEST PETITION/DEFINITION OF RELEVANT MARKET

The term “relevant market” must be viewed in terms of the strict statutory interpretation mandate articulated by the Washington courts. The statute states in part that the WUTC should view “the extent to which services are available from alternate providers in the **relevant market**.” RCW 80.36.330(1)(b) (emphasis added). In this matter, Qwest is clear in its petition that it seeks competitive classification of business basic exchange telecommunications services in thirty-one (31) wire centers across the state of Washington. *See* Exhibit 12-C at pp. 1, 4-5. Thus, on its face, the petition defines the relevant market as the geographic and product market for which Qwest requests relief.

In examination by Chairwoman Showalter, WUTC staff witness Dr. Glenn Blackmon acknowledged that a relevant market may be a specific geographic area (i.e., the thirty-one wire centers) and/or a specific service (i.e., business basic exchange telecommunications services.) *See* In the Matter of the Petition of U S WEST Communications, Inc. for Competitive Classification of Business Services in Specified Wire Centers Hearing (“Transcript”) at p.691, 1.9-11. Based on that premise, Dr. Blackmon acknowledges that there is “a market that...is undeniably mixed in terms of the degree to which customers have access to competitors. And [the WUTC] could decide...that the whole thing should remain as a regulated tariffed service.” *Id.* at p.69, 1.5-13. Based on strict statutory interpretation, the inquiry should end there and the Commission should not grant competitive classification of these services to Qwest.

However, unnecessarily complicating the definition of relevant market, and for the basis of his “alternative recommendation” of imposing various conditions upon

Qwest to possibly create effective competition, Dr. Blackmon states that the relevant market perhaps should be defined again, broken down further by the size of the customer. Transcript at p.691, l.14. Regardless of the fact that Qwest did not choose to petition for that particular market breakdown, Dr. Blackmon indicates that it may be impossible to define the market this way because “**there are somewhat inseparable pieces where competition is not yet fully effective.**” *Id.* at p.692, l.11-12 (emphasis added). Furthermore, Dr. Blackmon sees other innate problems distinguishing large businesses from small businesses and treating them as separate markets. *Id.* at p.694, l.11-15.

Thus, a further breakdown definition of relevant market has flaws acknowledged by its chief proponent. For the above stated reasons, views of geographic competition in the thirty-one (31) wire centers for business basic exchange telecommunications services should be the relevant test.

IV. RECOMMENDATIONS REGARDING DIFFERENT PROPOSALS

In viewing the relevant geographic market as the thirty-one (31) wire centers and the relevant product market as business basic exchange telecommunications services, substantial quantitative and anecdotal evidence has not established that Washington customers enjoy effective competition for these services. Because RCW 80.36.330 requires effective competition, Qwest’s petition should be denied.

A. Qwest Proposal

Recognizing the lack of substantive evidence, Qwest essentially retracted its request for competitive classification of these services in the geographic areas served by the thirty-one wire centers. *See* Transcript at p.214, l.12-25. Qwest also acknowledged

that it would accept Commission staff conditions regarding the four exchange areas, requesting relief from those conditions once Qwest's petition under § 271 of the Telecommunications Act of 1996 is recommended by the WUTC. *Id.*

As to obtaining unconditional relief once the WUTC recommends § 271 approval, the sole reason proffered by Qwest to not await Federal Communication Commission (FCC) § 271 approval is that "it may take several months before the FCC can get to the matter." *See* Transcript at p.213, ll.17-25. Because the FCC has merely ninety (90) days in which to act on a petition, FCC review would afford additional assurances of accuracy, and the WUTC's competitive classification of these Qwest services would not be in a position of having to be reversed. Awarding such premature relief is imprudent.

As Qwest acquiesced to WUTC staff recommendations, the parties are left with the WUTC staff recommendation to either classify services of DS-1 or higher as competitive in four identified areas: Seattle, Bellevue, Spokane and Vancouver, or impose conditions as to all business services in those same areas in an attempt to make those areas competitive. Based on Washington statutory requirements, neither approach is currently appropriate.

B. DS-1 or Higher Recommendation

In order to adopt the WUTC staff's recommendation to grant competitive classification of DS-1 or higher bandwidth, the WUTC would need to establish the following:

- 1) that a distinction can be made between effective competition for DS-1 or higher bandwidth markets versus smaller markets, and
- 2) that competition exists in the DS-1 or higher bandwidth market.

For reasons articulated in Section III A. above, based on Dr. Blackmon's own testimony, it is, at best, extremely difficult to separate the DS-1 or higher markets versus smaller markets for Qwest's petition.

Furthermore, Qwest has not established that there is effective competition in DS-1 or higher bandwidth market. When questioned by Chairwoman Showalter, Qwest's witness, Theresa A. Jenson, could not establish that such competition existed in any market, relying exclusively on anecdotal evidence and a Qwest document breaking out services possibly offered by CLECs at the relevant wire centers. *See* Transcript at pp.218, 1.9- 221, 1.13. *See also* Exhibit 12-C, Attachment H. Thus, Qwest has focused on the potential ability of certain CLECs including AT&T to provide alternative services, skirting the issue of whether the services are actually provided by those carriers, an essential element of the statutory definition of effective competition. *See* RCW 80.36.330(1).

In sum, the requisite business services are simply not available from alternative providers at this time. *See* Transcript at pp.223, 1.10- 224, 1.9, p.614, 1.6-11; *See also* testimony of various witnesses in the November 1, 2000 public hearing corresponding to this docket. Assuming that alternative carriers will provide competitive services once they are able and it is cost effective to do so, it would be prudent for the WUTC to wait to authorize the services as competitive, once evidence of competitors actually providing those services is present. Until that time, the Qwest services in question should not be afforded RCW 80.36.330 relief.

C. Instituting Various Conditions Suggested by Dr. Blackmon

After acknowledging that there is not effective competition for small business

customers (Transcript at p.693, l.18-19), Dr. Blackmon suggests that the WUTC could implement the following three conditions, which include:

- 1) Qwest's not revising the terms under which it offers service within wire centers in any way, including any reduction in its obligation to serve;
- 2) Qwest's continuing to offer all customers the customer service guarantees offered under the consumer bill of rights tariff; and
- 3) Qwest's not increasing prices or reducing availability, relative to the levels currently in its tariff, of any business local exchange service within those wire centers.

See Exhibit 201-TC at p.23, l.15-20.

There are fundamental problems with this approach. First, even Qwest acknowledges that it is contrary to the statutory authority to allow competitive classification by imposing certain conditions to create possible effective competition. *See* Transcript at p. 216, l.16-24. *See also* Section II above.

The second problem is that Dr. Blackmon cannot establish that the implementation of his suggested conditions would create effective competition using the definition mandated in RCW 80.36.330. Dr. Blackmon acknowledges that there would still be a captive customer base if the conditions were in place. Transcript at p.692, l. 23-693, l.6. Furthermore, even with the conditions in place, Dr. Blackmon concedes there still would not be effective competition for certain sectors of the market. *Id.* at p.694, l.3. Thus, the Commission should not find effective competition using Dr. Blackmon's conditioned approach.

VI. CONCLUSION

The Commission should deny Qwest's petition at this time, as there is no evidence of effective competition utilizing the relevant market articulated above. The plethora of evidence proffered by the various parties has established that the market has not matured enough to afford competitive services to the relevant market. Thus, regulatory control is still necessary until such time that effective competition can be established.

Respectfully submitted this 17th day of November, 2000.

AT&T COMMUNICATIONS OF THE
PACIFIC NORTHWEST, INC., TCG
SEATTLE AND TCG OREGON

Steven H. Weigler
Mary B. Tribby
1875 Lawrence St., Suite 1575
Denver, Colorado 80202
(303) 298-6508