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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of Qwest Corporation for Competitive Classification of Business Services in Specified Wire Centers	)	DOCKET NO. UT-000883
	)	RESPONSE OF QWEST CORPORATION
	)	
	)	
	)	

Comes now Qwest Corporation (“Qwest”) and responds to the Petition for Reconsideration filed by the Commission Staff (“Staff”) and the Request for Clarification and Reconsideration filed by the Office of Public Counsel (“Public Counsel”). The petition and request should be denied.

**I. ARGUMENT**

**A. Petition for Reconsideration by Staff**

Staff raises two issues in its petition. First, Staff claims that Qwest’s request for relief from RCW 80.36.170 and RCW 80.36.180 is untimely and the parties were surprised by this issue in Qwest’s Brief. Second, Staff argues that the Commission erred when it found in

¶¶78, 87 and 96 of the Seventh Supplemental Order that competition would serve the same purpose as RCW 80.36.170 and RCW 80.36.180. Neither argument has merit.

**1. The Commission Properly Waived RCW 80.36.170 and RCW 80.36.180**

Staff complains that Qwest did not include its request for relief from RCW 80.36.170 and RCW 80.36.180 in its petition. However, there is no authority that requires such inclusion. The requirements for a petition for competitive classification are contained in WAC 480-120-023, which does not require a listing of a request for waiver of RCW 80.36.170 or RCW 80.36.180.

WAC 480-120-024(2) requires a telecommunications company seeking competitive classification to include as part of its petition any requests for waivers of regulatory requirements. However, it is unclear whether this rule applies to petitions under RCW 80.36.330, or only to petitions under RCW 80.36.320. If the rule does apply in this case, there is a saving provision that states: “Requests for waiver not included in a classification petition shall be granted or denied in writing.” Thus the Commission, according to this rule may consider requests for waiver that were not included in a petition for classification, so long as it grants or denies the requests in writing. If WAC 480-120-024 does not apply to petitions under RCW 80.36.330, then the only requirements are in WAC 480-120-023, which Qwest’s petition clearly met.

Staff claims that the parties could not address the issue in testimony or briefs because Qwest did not include this request in its petition. This is incorrect. The parties did address the issue in both testimony and briefs. Public Counsel’s Request for Clarification and Reconsideration addresses the finding in the Seventh Supplemental Order that Public Counsel and TRACER did not offer argument in support of their position opposing relief for Qwest from these two statutes. Public Counsel refers to its brief and its testimony on the point. Public

1 Counsel/TRACER's brief at p. 3 clearly indicated those parties' understanding that Qwest sought  
2 relief from RCW 80.36.170 and RCW 80.36.180. Qwest witness Dr. Taylor addressed the issue  
3 in his direct testimony at Ex. 231T, p. 40, explaining that competition can actually involve  
4 economically healthy price discrimination. Also, Metronet/ATG witness Wood addressed the  
5 issue in testimony at Ex. 241TC, p. 5. Additionally, Staff invoked the issue of a partial waiver of  
6 RCW 80.36.170 and RCW 80.36.180 under the authority of RCW 80.36.330(8) in its testimony,  
7 citing that authority as a basis for its proposed conditions in its option for a "broader" grant of  
8 authority. Thus, it is clear that the issue was addressed by the parties.

9 **2. Staff's Challenge to A Grant of Relief Under RCW 80.36.330(8) is Flawed**

10 Staff cites Qwest's previous cases under RCW 80.36.330, the High Capacity circuits case  
11 and the intraLATA toll case, in which the Commission did not grant relief from RCW 80.36.170  
12 and RCW 80.36.180, and argues that because of those prior decisions the Commission should not  
13 have granted relief in the current case. However, Staff cites no facts to support its contention.  
14 Staff's argument says that because the Commission did not waive RCW 80.36.170 and RCW  
15 80.36.180 in prior cases, it need not even analyze the facts to decide whether it should grant relief  
16 for the local exchange services in this case. However, each case must be considered on its own  
17 merits regarding the waiver issue, and lack of waiver in one case is not determinative in another.

18 Staff next argues that the Commission must have been mistaken in viewing the Staff's  
19 position as supportive of waiving RCW 80.36.170 and RCW 80.36.180 in general, rather than  
20 only as a predicate for Staff's recommendation to impose conditions on the relief it proposed.  
21 However, nothing in the Seventh Supplemental Order indicates that the Commission relied on  
22 Staff's recommendation in finding that Qwest should receive relief under RCW 80.36.330(8).

1 Staff finally contends that by definition RCW 80.36.170 and RCW 80.36.180 serve to  
2 protect the public interest, and therefore it would never be possible for competition to meet the  
3 first prong of the test in RCW 80.36.330(8), of “serving the same purpose” as the former two  
4 statutes. This argument cannot be reconciled with the plain language of RCW 80.36.330(8).

5 Staff’s argument requires a conclusion that it is impossible under any circumstances of  
6 competition for a waiver of RCW 80.36.170 and RCW 80.36.180 to result in a condition where  
7 the public interest is protected. However, a basic canon of statutory construction states that the  
8 Legislature will not be presumed to have engaged in a useless act.<sup>1</sup> Under the Staff’s  
9 construction, it was useless for the Legislature to have provided for waiver of RCW 80.36.170  
10 and RCW 80.36.180 because the conditions necessary to allow such waiver could never be  
11 satisfied. The Staff’s construction reads RCW 80.36.330(8) completely out of existence and  
12 cannot be squared with the plain language of the statute. The Staff’s petition should be denied.

13 **B. Public Counsel’s Request for Clarification and Reconsideration**

14 **1. The Request for Clarification Raises No Issues and It Should be Denied**

15 Public Counsel asks the Commission to clarify “whether all business services purchased  
16 by customers who are served over DS-1 circuits *as a result of aggregation*, are classified as  
17 competitive under the terms of the Seventh Supplemental Order (emphasis added).” The  
18 Commission addressed this issue in its Order at paragraph 72. The order states “the record  
19 supports a conclusion that the customers served on DS-1 or larger circuits in the four exchanges  
20 have reasonably available alternatives and there is no significant captive customer base. While

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21 <sup>1</sup> In *Aviation West Corp. v. Wash. State Dept. of Labor and Industries*, 138 Wn. 2d 413, 421, 980 P. 2d 701 (1999),  
22 the court held that the 1994 amendments to the Administrative Procedure Act would not be interpreted as meaning  
23 that the new requirement for an agency in rulemaking to explain before adopting a final rule how it responded to  
comments or why it failed to do so was redundant to a requirement that already existed, because that would mean  
that the amendment was a useless legislative act.

1 both *small and large* business customers may be served by DS-1 or larger circuits, the volume of  
2 telecommunications service demanded by a customer is more critical to the determination of  
3 reasonably available alternatives than is the size of the business (emphasis added).”

4 The Commission also stated at paragraph 74 “The evidence in the record here  
5 demonstrates that competitors make their service offerings from DS-1 or larger circuits.” The  
6 Commission did not grant Qwest competitive classification based on the customer segment  
7 served. Rather, the Commission’s order, at paragraph 91, approved competitive classification for  
8 all business customers served on DS-1 or larger circuits. Public Counsel’s request for  
9 clarification is unnecessary. The Commission’s order speaks for itself.

10 **2. Public Counsel’s Request for Reconsideration Rehashes Arguments the**  
11 **Commission has Already Rejected and It Should be Denied**

12 Public Counsel’s Request for Reconsideration complains that the Commission erred in  
13 finding at ¶78 of the Seventh Supplemental Order that Public Counsel/TRACER offered no  
14 argument in support of their opposition to a grant of relief to Qwest under RCW 80.36.330(8).  
15 However, it is certainly not apparent that the language in ¶¶14 and 15 of Public  
16 Counsel/TRACER’s brief, which is the portion of the brief cited in the Request for  
17 Reconsideration, is argument directed at opposing relief under RCW 80.36.330(8). Nor does it  
18 appear that the Commission overlooked the argument, only that it found that Public Counsel  
19 offered no support for it. The only argument that specifically addresses the issue is in ¶150 of the  
20 Public Counsel/TRACER brief, which is a one sentence statement that if the Commission grants  
21 competitive classification, it should not waive RCW 80.36.170 and RCW 80.36.180. Public  
22 Counsel’s remaining arguments in its Request simply rehash the issue of whether the  
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1 Commission's finding of the existence of effective competition in the four exchanges is correct  
2 or not. This is not a valid basis for reconsideration.

3 **II. CONCLUSION**

4 For the reasons set forth herein, Staff's Petition for Reconsideration and Public Counsel's  
5 Request for Clarification and Reconsideration should be denied.

6 Respectfully submitted this 4th day of January, 2001.

7  
8 QWEST CORPORATION

9 LAW OFFICES OF DOUGLAS N. OWENS

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