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Theresa Jensen
Director – Washington Regulatory Affairs
Policy and Law

March 2, 2001

Ms. Carole Washburn
Executive Secretary
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive S. W.
P. O. Box 47250
Olympia, Washington 98504-7250

Re: Docket No. UT-991301 - Notice of Opportunity to File Written Comments Concerning Rules Relating to Price Lists – WAC 480-80-035

Attention: Glenn Blackmon

Dear Ms. Washburn:

I am writing in response to your February 9, 2001 letter inviting comment on the proposed rules relating to Price Lists – WAC 480-80-035. Enclosed are Qwest Corporation's ("Qwest") comments; an electronic copy was also filed in Word 97.

Qwest has significant concerns with the newly proposed rule language and its disparate treatment of telecommunications providers offering the same competitively classified services. The Commission previously issued proposed rules for Price Lists on January 2, 2001. Qwest had few comments on the January version of the proposed WAC 480-80-035 rule since it treated competitive services on a parity basis, with one exception, the filing interval required for contracts. The newly proposed rule, issued as part of this notice, significantly differs from the prior proposal without explanation. Qwest respectfully requests the Commission staff address the proposed changes and the rationale for such at the March 6, 2001 workshop. Qwest cannot support the proposed rule revision as currently drafted and urges the Commission to rewrite the rule so that it is competitively neutral.

If you have any further questions, I can be reached at 206-345-4726.

Very truly yours,

BEFORE THE
WASHINGTON UTILTITIES AND TRANSPORTATION COMMISSION

UT-991301	)	
Price Lists	)	**Comments of Qwest Corporation**
WAC 480-80-035	)	

I. Introduction

Qwest has significant concerns with the newly proposed rule language and its disparate treatment of telecommunications providers offering the same competitively classified services. The Commission previously issued proposed rules for Price Lists on January 2, 2001. Qwest had few comments on the January version of the proposed WAC 480-80-035 rule since it treated competitive services on a parity basis, with one exception, the filing interval required for contracts. The newly proposed rule, issued as part of this notice, significantly differs from the prior proposal without explanation. Qwest cannot support the proposed rule revision as currently drafted and urges the Commission to rewrite the rules so that they are competitively neutral.

II. Comments

WAC 480-80-035(1)(b):

The last sentence in WAC 480-80-035(1)(b) should be qualified to investigations in accordance with RCW 80.36.330(4).

WAC 480-80-035(1)(c):

The following language should be stricken:

> "Any dispute as to whether a customer had knowledge of a price list provision will be based on the form and content notice provided by the company as well as any other demonstration of the customer's actual knowledge."

In proposed WAC 480-80-035(1)(b), the Commission disavows itself of any regulatory action that would legitimatize a price list change. However, in WAC 480-80-035(1)(c) the Commission introduces itself as an authority on proper notification of price list and changes based on the customers "actual" knowledge of such a change and the form and content of such notice. If the Commission does not wish to view the price list as a document or filing with legal effect, then the Commission should refrain from involvement in rate disputes.

This proposed language might also suggest to consumers that a formal complaint is not required for price list rate disputes. This would be misleading since the Commission cannot resolve a formal customer dispute without a full hearing as provided

for in RCW 80.04.110. In addition, the Commission is not likely to limit its decision to only the two factors proposed above. All facts relevant to the complaint would be considered. This language should be stricken.

WAC 480-80-035(1)(d):

WAC 480-80-035(1)(d) should be stricken. It suggests the Commission will prejudge, without following proper adjudicative process, a conflict in favor of the customer based solely on a customer's claim of conflict or ambiguity.

WAC 480-80-035(1)(e):

WAC 480-80-035(1)(e) suggests that the commission may define the term of a contract to be one year unless otherwise specified by the contract or unless cancelled earlier by the customer. RCW 80.36.150 (3) requires contracts to state the time period of the contract. WAC 480-80-035(1)(e) conflicts with current statute requirements.

WAC 480-80-035(2):

WAC 480-80-035(2)(d)(ii) and (iii) and WAC 480-80-035(2)(e)(ii) impose different requirements on the price listing of competitively classified services depending upon whether the company offering the service is itself competitively classified. Under this proposal, services, which are competitively classified, such as intraLATA toll, are subject to different filing requirements, depending upon the status of the offering carrier. However, regardless of whether the Commission has granted competitive classification to a company or not, the factual analysis and legal conclusions that the Commission must reach in granting competitive classification, either for a company under RCW 80.36.320, or a service under RCW 80.36.330, are exactly the same. Thus, as will be discussed below, there is no basis for treating competitively classified services differently based on the identity of the carrier providing the service.

There are three factors to consider in evaluating the Price List Rule. First, the Commission cannot create a rule that exceeds its statutory authority. Second, the Commission cannot create a rule that is arbitrary and capricious. Third, the Commission cannot create a rule that affects telecommunications companies that is not competitively neutral.

The Commission's power to engage in rulemaking is derived from RCW 80.01.040. When the Commission engages in rulemaking it must do so within the confines of its statutory authority. In re Consolidated Cases, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994) (holding Commission lacked power to grant exclusive rights to telecommunications companies); Waste Mgt. of Seattle, Inc. v. WUTC, 123 Wn.2d 621, 869 P.2d 1034 (1994) (holding WUTC lacked statutory authority to examine financial records of affiliated waste management companies and wrongfully denied rate increase); WITA v. TRACER, 75 Wn. App. 356, 363, 880 P.2d 50 (1994) (holding Commission did not have statutory authority to adopt rule to establish Community Calling Fund). The Commission is authorized to regulate telecommunications companies, but it is not

authorized to do so in a manner that displaces competition. It must regulate telecommunications companies in a manner that is consistent with the public interest. Id.

Here, the proposed Price List Rule would exceed the Commission's statutory authority because it would displace competition. Such a result would be contrary to the public interest. The Price List Rule would create artificial distinctions for identical services that may be provided by two different carriers. It would subject a company attempting to engage in meaningful competition in a particular area to unfair and disparate treatment in circumstances where the Commission classified that particular service as competitive. Such a company would be placed at a disadvantage due to heightened reporting requirements that are not required of its competition. This disparate treatment is not in the public interest, because it displaces competition in the sense that it does not allow the market to control pricing and price listing requirements, but rather imposes those requirements on identical competitive services in a disparate manner.

Next, as currently written, the Price List Rule may be challenged as arbitrary and capricious. There is simply no rational basis for the Commission to distinguish between competitively classified services provided by incumbent versus competitive LECs. In adopting a rule, the Commission must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Neah Bay Chamber of Commerce v. Dept. of Fisheries, 119 Wn.2d 464, 471, 832 P.2d 1310 (1992) (record did not show whether agency properly considered appropriate facts or that agency exercised judgment fairly and properly) (citations omitted). In this case, there is no rational connection between the fact that two companies have the exact same service classified as competitive and the proposed requirement in the rule which would subject the companies to different filing requirements. There is no rational explanation why the utilities should be treated differently. Without a rational justification, as here, the rule would be arbitrary and capricious.

Finally, the Price List Rule is problematic because it is not competitively neutral. Under section 253(b) of the Telecommunications Act of 1996, a state cannot impose regulations unless the regulations are applied on a competitively neutral and non-discriminatory basis. 47 U.S.C. § 253(b). The competitively neutral requirement applies to the market as a whole, including the incumbent LEC. See, RT Communications, Inc. v. FCC, 201 F.3d 1264, 1268 (10th Cir. 2000) (Telecommunications Act trumped state law that did not apply to all telecommunications participants). Indeed, in Cablevision of Boston, Inc. v. Public Improvement Comm'n, 184 F.3d 88 (1st Cir. 1999) the court held: "If … a local authority decides to regulate for its own reasons . . ., § 253(c) would require it to do so in a way that avoids unnecessary competitive inequities among telecommunications providers." Id. at 105.

As discussed above, the Price List Rule creates unnecessary competitive inequities. It is not competitively neutral because it applies different standards for utilities providing identical service, despite the fact that a service has been classified as competitive.

For all of these reasons, the proposed Price List Rule should not be enacted as written. It does not level the playing field. And it unreasonably discriminates against a utility that engages in areas where the service it provides has been classified by the Commission as competitive.

WAC 480-80-035(4)(a):

The language excluding the requirement for competitive companies to file contracts priced below a stated maximum price should be stricken for the same reasons cited under WAC 480-80-035(2) above.

WAC 480-80-035(4)(d)(i):

WAC 480-80-035(4)(d)(i) conflicts with RCW 80.36.150(5), which states that a contract that covers competitive and noncompetitive services is permitted as long as the noncompetitive services are unbundled and priced separately from all other services, and facilities in the same contract. The proposed rule suggests that only noncompetitive services offered under an approved tariff or contract can be combined with a competitive service. This basically precludes a regulated company from offering a new service under contract combined with competitive services unless it first has an approved tariff in place. This is not required by statute and is anti competitive. This language should be stricken for the same reasons cited under WAC 480-80-035(2) above.

III. Conclusion

Qwest supports Commission efforts to minimize paper flow that the companies and the Commission must deal with. Qwest does not, however, support rules that treat competitors in a disparate manner and or rules that unreasonably discriminate against a utility that engages in areas where the service it provides has been classified by the Commission as competitive. The current price list rules should be retained until legislation is passed that enables the market to regulate prices of competitive services.

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