

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of U S West) DOCKET NO. UT-000883
Communications, Inc. for Competitive)
Classification of Business Services in) RESPONSE OF COMMISSION STAFF
Specified Wire Centers in Washington) FURTHER ADDRESSING ITS
) ARGUMENT THAT THE COMMISSION
) SHOULD DENY THE REQUEST OF
) QWEST FOR WAIVER OF RCW 80.36.170
.....) AND RCW 80.36.180

I. INTRODUCTION

This is submitted on behalf of Commission Staff in support of its petition for reconsideration of a portion of the Commission’s Seventh Supplemental Order Denying Petition and Accepting Staff’s Proposal in Docket UT-000883. On January 17, 2001, the Commission requested Staff to provide a response further addressing the merits of its argument for reconsideration. For the reasons set forth below and in Staff’s petition for reconsideration, the Commission should deny Qwest’s request for waiver of RCW 80.36.170 and RCW 80.36.180.

II. ARGUMENT

The Commission Should Deny Qwest’s Request for Waiver of The Statutory Prohibitions Against Undue Preference and Rate Discrimination

Commission Staff does not argue, as Qwest would have the Commission believe, that competition could never protect the public interest in the way that the discrimination and preference statutes do. RCW 80.36.330(8) is not a nullity; there may well be circumstances in which it would be appropriate to waive these statutes. Rather, Staff argues that, depending on the

circumstances, competition may (or might) not serve the same purpose. There simply is insufficient evidence from Qwest to meet its burden of demonstrating in this proceeding that a waiver of these two statutes is in the public interest. Since Qwest failed to make this request until the evidentiary hearings had concluded, there is little in the record either to support or to oppose the waiver of these statutes.

Simply put, Qwest has not explained why -- despite the fact that the Commission has not waived the discrimination and preference statutes for the 640-odd competitive telecommunications companies offering service in this state, or the local toll services of Qwest, Verizon, or Sprint, or the high-capacity private line services of Qwest -- it should have the freedom to grant undue preferences and to engage in undue discrimination in the offering through a price list of local exchange service to large business customers in Spokane, Vancouver, Bellevue, and Seattle.

Qwest characterizes Staff as complaining that the company did not include the waiver request in its petition and that such a request would have to be included in the petition. It is not Staff's position that a waiver request must be included in the competitive classification petition for it to be granted. Qwest is free to request such a waiver as part of a competitive classification petition or as a stand-alone request. It could even be incorporated into the Commission's administrative rules. What Qwest should not be permitted to do is what it seeks here: to make the request after the evidentiary record is closed and other parties' briefs are filed.

Qwest argues that it addressed the issue of waivers in its testimony, but the facts do not support this position. The only place in its own case -- other than its closing brief -- that Qwest cites as support is Dr. Taylor's testimony to the effect that competition can involve economically

healthy price discrimination. Qwest conveniently overlooks the fact that this was rebuttal testimony and not part of its direct case. Moreover, Dr. Taylor's testimony was at best a theoretical discussion of price discrimination and could hardly be interpreted as a petition for waiver of a statute. Indeed he cites as an example of beneficial discrimination the pricing that occurs in the long-distance market. Since the Commission has not waived these statutes for the companies that provide long-distance service, it is quite clear that Dr. Taylor was referring to a level of discrimination that can be accomplished without waiver of the statutes prohibiting undue discrimination and preference.

The paucity of evidence or argument from Qwest makes it difficult to say exactly what the effect of Qwest's request would be. Nonetheless, it should be noted that, by their own terms, these statutes do not apply to competitive service provided under contract. Thus, if the Commission were not to waive these statutes in this proceeding, the result would not be that Qwest was compelled to charge the same price to every customer. To the contrary, it could charge different prices to similarly situated customers, but it would have to do so through individual customer contracts. Pursuant to RCW 80.36.150 and WAC 480-120-027, those contracts would be filed with the Commission, and their essential terms and conditions would be public information.

What Qwest presumably is requesting, therefore, is permission to incorporate into its price list various prices, terms, and conditions that have the effect of granting undue preference to certain customers or customer classes or unduly discriminating against certain customers or customer classes. Qwest has not revealed its plans, but the discrimination and preference might

take the form of granting a lower price to customers who use its unregulated Internet or wireless services or establishing a higher priority in filling the orders of customers who agree not to intervene in proceedings before this Commission.

Perhaps competition would stop the company from engaging in undue discrimination and preference of the type suggested in these examples. The customer placed at the end of the queue or charged a higher price could be expected to switch to an alternative provider of local service, and the prospect of such losses might forestall the urge to discriminate. However, Qwest has not shown that to be the case, and until it does the waiver should not be granted.

Qwest also has not addressed the question of why its local exchange services should be exempt from the undue discrimination and preference statutes when its competitors' local exchange services are subject to those laws. Qwest is quick to object when its services are subject to stricter regulatory oversight than its competitors, and it is right to make this claim when its services face effective competition. By permitting Qwest to offer service under a price list, the Commission established the parity among competitors that Qwest purports to seek. Nothing in the record of this proceeding suggests that it would be in the public interest to go a step further and give Qwest more flexibility than its competitors.

In conclusion, Staff believes that the proper course is for the Commission to reject Qwest's request for waiver of RCW 80.36.170 and RCW 80.36.180 for failure to make the request in a timely fashion and for failure to provide sufficient evidence supporting the request. The company should then be free to make a separate petition for waiver of these statutes and to support that petition with evidence demonstrating that "competition will serve the same purpose and protect the public interest." RCW 80.36.330(8). Depending on the evidence supplied by

Qwest, Staff might well support such a petition, though it would almost certainly be concerned that other competitive local exchange providers be granted the same waiver. An alternative approach would be for Qwest to propose, in the current review of the price list rules, that these statutes be waived for all competitive providers of local exchange service. In either case, the Commission would then be afforded the opportunity to hear all sides of the issue in a way that it has been denied by Qwest's untimely and unsupported request in this proceeding.

III. CONCLUSION

For the reasons stated above, the Commission should grant Commission Staff's petition for reconsideration and deny Qwest's request for waiver of the statutory prohibitions against undue preference and rate discrimination.

Respectfully submitted this 19th day of January, 2001.

CHRISTINE O. GREGOIRE
Attorney General

SALLY G. JOHNSTON
Assistant Attorney General
Counsel for Commission Staff
1400 S. Evergreen Park Dr. SW
Olympia, WA 98504-0128
(360) 664-1193