

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In The Matter of the Petition of)	
)	DOCKET NO. UT-000883
QWEST CORPORATION)	
)	
)	
for Competitive Classification of Business)	EIGHTH SUPPLEMENTAL
Services in Specified Wire Centers)	ORDER GRANTING
)	RECONSIDERATION,
)	MODIFYING AND
)	CLARIFYING ORDER
.....)	

I. SYNOPSIS

1 The Commission modifies the Seventh Supplemental Order by denying waiver of the requirements of RCW 80.36.170 (unreasonable preference) and RCW 80.36.180 (prohibition on discrimination) at this time. The Commission reiterates that the competitive classification granted in this proceeding applies to all business services (in selected areas) over a DS-1 or larger circuit, whether purchased by one customer or by multiple customers aggregated on a DS-1 or larger circuit.

II. BACKGROUND

2 **Parties:** Lisa Anderl and Douglas N. Owens, attorneys, Seattle, Washington, represent Qwest. Sally G. Johnston, Assistant Attorney General, Olympia, Washington, represents Commission Staff. Simon J. ffitich, and Robert Cromwell, Assistant Attorneys General, Seattle, Washington, represent Public Counsel. Lisa F. Rackner, attorney, Ater Wynne, LLP, Portland, Oregon represents the Telecommunications Ratepayers Association for Cost-based and Equitable Rates (TRACER). Gregory J. Kopta, attorney, Davis, Wright, Tremaine, LLP, Seattle, Washington, represents X O Washington, Inc., f/k/a Nextlink Washington, Inc., Electric Lightwave, Inc., McLeodUSA Telecommunications Services, Inc., Focal Communications Corporation, Global Crossing Telemanagement, and Global Crossing Local Services, Inc. (Joint CLECs). Brooks Harlow, attorney, Miller Nash LLP, Seattle, Washington, represents MetroNet Services Corporation (MetroNet), and Advanced Telcom Group (ATG). Steven Weigler, attorney, Denver, Colorado, represents AT&T Communications of the Pacific Northwest, Inc. (AT&T), TCG Seattle, and TCG Oregon. Dennis Ahlers, attorney, Minneapolis, Minnesota, represents Eschelon Telecom of Washington.

3 **Procedural History:** On June 7, 2000, Qwest filed with the Commission a request for competitive classification of business services in thirty-one specified wire centers in Washington. The petition covers the geographical areas serviced by the following wire centers: Bellevue Glencourt, Bellevue Sherwood, Issaquah, Kent O'Brien, Auburn, Renton, Seattle Atwater, Seattle Campus, Seattle Cherry, Seattle Duwamish, Seattle East, Seattle Elliott, Seattle Emerson, Seattle Lakeview, Seattle Main, Seattle Sunset, Seattle West, Spokane Chestnut, Spokane Fairfax, Spokane Hudson, Spokane Keystone, Spokane Moran, Spokane Riverside, Spokane Walnut, Spokane Whitworth, Tacoma Fawcett, Tacoma Greenfield, Tacoma Juniper, Tacoma Waverley, Vancouver Orchards, and Vancouver Oxford. The services included in the petition include Basic Business Local Exchange Service, Centrex Services, Private Branch Exchange Trunks, and Basic Business Features.

4 The petition came before the Commission at its regularly scheduled open public meeting on July 12, 2000. The Commission, by Order entered July 14, 2000, set the petition for hearing. On July 21, 2000, and continuing on July 28, 2000, the Commission held a prehearing conference before Administrative Law Judge Karen M. Caillé.

5 On October 30, 2000, through November 2, 2000, the Commission held an evidentiary hearing before Chairwoman Marilyn Showalter, Commissioner Richard Hemstad, Commissioner William R. Gillis, and Administrative Law Judge Karen Caillé. Finally, public hearings were conducted on October 12, 2000, in Vancouver, and November 1, 2000, in Olympia, before the Commissioners and the presiding administrative law judge, to receive into the record comments from Qwest's business customers and other members of the public who expressed an interest in the outcome of this proceeding.

6 The Commission's final order¹ granted Qwest competitive classification in four of the nine exchanges² for which competitive classification was requested and further limited the services classified as competitive to those business customers served on DS-1 or larger capacity circuits. These exchanges are located in the Seattle, Bellevue, Spokane and Vancouver areas. Additionally, the Commission waived the requirements of RCW 80.36.170 and RCW 80.36.180, with respect to the services here classified as competitive.

¹ *In the Matter of the Petition of Qwest Corporation for Competitive Classification of Business Services in Specified Wire Centers*, Docket No. UT-000883, Seventh Supplemental Order (December 18, 2000) (hereinafter "the Order").

²This translates to 23 of the 31 requested wire centers.

7 Petitions for reconsideration or clarification of the Order were filed by Commission Staff and Public Counsel. The Commission requested Commission Staff to further address the merits of its argument for reconsideration, accepted Qwest's unsolicited response to the petitions as its answer, and provided the remaining parties with an opportunity to file answers to the petitions. Commission Staff, TRACER, and Joint CLECS filed pleadings in response to the Commission's request. Subsequently, the Commission requested responses from Commission Staff and Qwest addressing the clarification arguments contained in the Joint CLECs answer. Commission Staff and Qwest complied with the Commission request.

III. DISCUSSION AND DECISION

A. Issue Raised for Reconsideration

8 Public Counsel and Commission Staff ask the Commission to reconsider the portion of the Order waiving the requirements of RCW 80.36.170 (unreasonable preference) and RCW 80.36.180 (prohibition on discrimination). They request the Commission to deny waiver of these statutes. TRACER and Joint CLECs support the request for reconsideration. Qwest opposes it.

9 Public Counsel argues that the record reflects that Public Counsel and TRACER expressed serious concern for potential discriminatory conduct by Qwest. Without the statutory protections afforded by RCW 80.36.170 and 180, those customers who are less desirable to Qwest, and who have few or no alternatives, can be isolated and subjected to unreasonable discriminatory treatment. Public Counsel maintains that the level of competition in the market is inadequate to protect customers from undue discrimination so as to serve the same purpose as the statutory protections.

10 Commission Staff argues that Qwest's request for waiver of RCW 80.36.170 and RCW 80.36.180 is untimely. Qwest failed to make this request until the evidentiary hearings had concluded, and the parties did not have an opportunity to address the issue.³ Staff contends that there is insufficient evidence from Qwest to meet its burden of demonstrating in this proceeding that waiver of these two statutes is in the public interest. Further, Staff points out that no other competitive local exchange providers are exempt from these statutes, and cites prior competitive classification

³ Qwest post-hearing brief at p.46.

proceedings where the Commission did not waive these statutory prohibitions.⁴ Finally, Staff suggests that Qwest file for the waiver at another time, or approach the issue in our current review of price list rules. The latter alternative could present for consideration whether these statutes should be waived for all competitive providers of local exchange service.

11 Qwest responds that the parties did address the issue of discrimination in both testimony and briefs. Qwest references the testimony of witnesses for Public Counsel/TRACER, MetroNet/ATG, and Qwest.⁵ Qwest also references the brief of Public Counsel/TRACER at page 3. Staff rebuts Qwest's arguments by noting that Dr. Taylor's testimony was rebuttal testimony and not part of Qwest's direct case. Staff characterizes Dr. Taylor's testimony as "a theoretical discussion of price discrimination" that cannot be interpreted as a petition for waiver of the statutes. Qwest also challenges Staff's reliance on the High Capacity case⁶ and the IntraLATA Toll case,⁷ in which the Commission did not waive RCW 80.36.170 and 180. Qwest argues that each case must be considered on its own merits, and lack of waiver in one case is not determinative in another.

12 *Commission Discussion and Decision*

13 Our review of the record leads us to agree with Commission Staff that the record in this proceeding has not been sufficiently developed to determine on the merits whether to grant or deny waiver of RCW 80.36.170 and RCW 80.36.180. Qwest's request for waiver was untimely and contributed to the insufficiency of evidence on the issue. Moreover, Qwest has not met its burden of demonstrating that a waiver of these two statutes is in the public interest. Accordingly, the Seventh Supplemental Order is modified to deny Qwest's request for waiver of RCW 80.36.170 and RCW 80.36.180 at this time. Qwest may make a separate petition for waiver of these statutes in a future proceeding supported with evidence demonstrating that "competition will serve the same purpose and protect the public interest." RCW 80.36.330(8).

⁴ *In the Matter of the Petition of U S WEST Communications, Inc. for Competitive Classification of its High Capacity Circuits*, Docket No. UT-990022, *In the Matter of the Petition of U S WEST Communications, Inc. for Competitive Classification of its IntraLATA Toll Service*, Docket No. UT-990021.

⁵ Ex. 168T, p.33, ll.3-4 (Goodfriend); Ex.241TC, p. 5 (Wood); Ex.231T, p. 40 (Taylor).

⁶ *In the Matter of the Petition of U S WEST Communications, Inc. for Competitive Classification of its High Capacity Circuits*, Docket No. UT-990022.

⁷ *In the Matter of the Petition of U S WEST Communications, Inc. for Competitive Classification of its IntraLATA Toll Service*, Docket No. UT-990021.

B. Issue Raised for Clarification

14 Public Counsel asks the Commission to clarify whether all business services purchased by customers served over DS-1 circuits as a result of aggregation, are classified as competitive under the terms of the Seventh Supplemental Order. Joint CLECs support the request. Commission Staff and Qwest contend that clarification is unnecessary.

15 Public Counsel seeks clarification of paragraph 93 of the Order (Ordering Paragraph 1) which states:

Qwest's petition for competitive classification is granted only for the wire centers of the four exchanges of Bellevue, Seattle, Spokane, and Vancouver, and only for those business customers served on DS-1 or larger circuits.

16 Public Counsel observes that Public Counsel and TRACER noted in their brief that “[m]ultiple small customers may be aggregated on to a DS-1 or greater circuit, thereby blurring the distinction between large and small business customers that Dr. Blackmon appeared to be attempting to make...” *Public Counsel/TRACER br. at ¶141*. Based on this observation, Public Counsel requests clarification whether Paragraph 93 of the Order is meant to include customers who are aggregated on a DS-1 or larger circuit. Joint CLECs agree with Public Counsel that Paragraph 93 is ambiguous and could be interpreted to mean either that competitive classification applies to (1) each business customer whose telecommunications needs are of sufficient quantity to justify using a DS-1 or larger, or (2) any business customer whose service is provided using a DS-1 or larger circuit, even if that customer is only one of several customers served on that circuit. Joint CLECs suggest that the discussion in the Order suggests the former interpretation.

17 Qwest argues that clarification is unnecessary. Qwest contends that the Commission addressed this issue in the Order at paragraph 72. Paragraph 72 states that “the record supports a conclusion that the customers served on DS-1 or larger circuits in the four exchanges have reasonably available alternatives and there is no significant captive customer base. While both small and large business customers may be served by DS-1 or larger circuits, the volume of telecommunications service demanded by a customer is more critical to the determination of reasonably available alternatives that is the size of the business.” Qwest maintains that the Order speaks for itself.

18 Commission Staff also argues that clarification is unnecessary. Staff describes the procedure for filing a price list under the Order as written. Qwest will file a price list (1) offering local exchange service in the specific areas, and (2) stating the prices, terms, and conditions under which Qwest will offer service. The offering will be limited to “those business customers served on DS-1 or larger circuits.” *Order at ¶*

93. Qwest also will file a tariff revision to exclude from the tariff offering “those business customers served on DS-1 or larger circuits.” *Id.* Staff explains that until the price list and tariff offerings differ there is no dispute for the Commission to resolve. Staff recommends that the Commission await the event.

19 *Commission Discussion and Decision*

20 In view of some apparent uncertainty about what we meant by paragraph 93 of the Order, we reiterate that the competitive classification granted in this proceeding applies to all business services in Exhibit 12C, Att. A, purchased by anyone served over a DS-1 or larger circuit, whether one customer, or multiple customers aggregated on a DS-1 or larger circuit. Joint CLECS have misinterpreted paragraph 72 of the Order. We did not intend that the volume of service demanded by *each* customer justified the use of a DS-1 or larger circuit. Rather, we were rejecting the concept of a business size to define the relevant market in this proceeding.

IV. ORDER

21 The Commission grants the petitions for reconsideration and clarifies the Seventh Supplemental Order as fully described in the text of this Order.

DATED at Olympia, Washington, and effective this day of February, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner