

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of)
) DOCKET NO. UT-021120
)
QWEST CORPORATION) FIFTH SUPPLEMENTAL ORDER:
) DENYING MOTION TO STRIKE;
Regarding the Sale and Transfer of) DENYING ALTERNATIVE
Qwest Dex to Dex Holdings, LLC, a) MOTION FOR PERMISSION TO
non-affiliate) FILE SURREBUTTAL AND
.....) CONTINUE PROCEEDINGS

SUMMARY

1 PROCEEDINGS: Qwest Corporation ("Qwest") filed its "Application Regarding Transfer and Sale of Directory Business and Notice of Possible Affiliated Interest Transaction on September 3, 2002. The Commission established a procedural schedule in its Second Supplemental Order, which was entered following a prehearing conference. All scheduled prefiled testimony dates have passed. On April 24, 2003, Staff filed a motion to strike certain portions of Qwest and Dex Holding's prefiled rebuttal. Qwest and Dex Holding have answered and the matter is ready for decision.

2 PARTIES: Lisa A. Anderl, Senior Attorney, U S WEST, Inc. Seattle, Washington, represents Qwest Corporation. Brooks Harlow, Miller Nash LLP, Seattle, Washington, represents Dex Holdings, LLC. Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington represents XO Washington, Inc. Arthur A. Butler and Lisa Rackner, Ater Wynne LLP, Seattle, Washington and Portland, Oregon, represent WeBTEC, f/k/a TRACER. Stephen S. Melnikoff, Department of the Army, Judge Advocate General, represents the Department of Defense and Federal Executive Agencies. Ronald Roseman, attorney, Seattle, Washington, represents the AARP. Simon ffitich and Robert Cromwell, Assistant Attorneys General, Seattle, Washington, represents the Public Counsel Section, Office of Attorney General ("Public Counsel"). Greg Trautman, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff ("Commission Staff" or "Staff").

3 **MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO PERMIT SURREBUTTAL AND CONTINUE PROCEEDINGS:** On April 24, 2003, Commission Staff filed its Motion To Strike Portions of the Rebuttal Testimony of William E. Taylor and Joseph P. Kalt, or in the Alternative, To Permit the Filing of Surrebuttal Testimony and Reschedule Evidentiary Hearings. Public Counsel, AARP, and WeBTEC filed a letter on April 29, 2003, stating that they agree with Staff's Motion. Qwest filed its Answer opposing Staff's Motion on April 29, 2003. Dex Holding's filed its Answer opposing Staff's Motion on April 30, 2003. The Commission, for the reasons discussed below, concludes that Staff's Motion should be denied.

MEMORANDUM

4 Staff's Motion asks the Commission to strike portions of Dr. William E. Taylor's rebuttal filed on behalf of Qwest,¹ and portions of Dr. Joseph P. Kalt's rebuttal filed on behalf of Dex Holdings.² Staff argues that Dr. Taylor's testimony, and the "similar arguments" by Dr. Kalt, "allege that 'traditional imputation' is 'inconsistent with economics and public policy.'" *Motion at 2*. Staff contends that challenges to traditional imputation are not rebuttal and should have been made part of Qwest and Dex Holding's respective direct cases. Staff requests that the Commission strike the cited portions of these testimonies, or continue the proceedings for "at least one month" to permit Staff an opportunity to prepare and file surrebuttal. *Id. at 3*.

5 We do not read the challenged testimony as a collateral attack on traditional imputation or prior decisions on imputation by the Commission or the Supreme Court. As Dex Holdings states, there is no suggestion in Dr. Kalt's testimony that the Commission should address the validity of current or historic imputation. Quite to the contrary, Dr. Kalt testifies that: "Following the breakup of the Bell system, the WUTC's use of imputation (or the equivalent) was an understandable response to the restructuring of the industry and the transition to a more dynamic and competitive setting." Dex Holdings emphasizes the specific

¹ Specifically, the challenged testimony includes all of Section IV of Dr. Taylor's testimony, from page 36, line 1 through page 40, line 5 and page 4, lines 1 –14; page 5 line 19 – page 6, line 3; page 27, line 21 – page 28, line 7; and page 43, line 18 – page 44, line 5.

² Specifically, the challenged testimony includes page 2, line 17 – page 3, line 12; and page 11, line 14 – page 14, line 20.

context of Dr. Kalt's testimony by its suggestion that it could be admitted "for the limited purpose of arguing for an end to imputation *only in the context of consummating the sale of Qwest Dex.*"

6 Similarly, Qwest argues that Dr. Taylor's testimony is offered "in direct response to Staff's position that the Commission should disapprove the sale." Economic and policy arguments against continuing imputation are appropriate when the potential end of imputation is raised as a barrier to Commission approval of the sale, according to Qwest.

7 An essential thrust of Staff's case is that the Commission should not approve the Dex sale because it would be contrary to the public interest for imputation to end. Staff's alternative case in this regard is that if the sale is approved, it should be conditioned in a manner that preserves the effect of imputation into the indefinite future. Qwest and Dex Holdings have a right to respond to these proposals concerning the specific subject matter of whether we should approve the sale, or condition its approval as recommended, on policy, as well as legal and factual, grounds. As Qwest argues, Dr. Taylor's testimony that Staff seeks to strike addresses "economic and policy arguments why it is in the public interest to end imputation *upon approval of the sale of Dex.*" *Qwest Answer at 1 (emphasis supplied).* The context we emphasize is important. This is not the context of our prior consideration of imputation in various dockets, or of the Supreme Court's discussion and decision of this subject. Indeed, the Supreme Court expressly contemplated that the issue of ending imputation might be considered anew "if and when [Qwest] can show it has received fair value for the transfer of the asset."³

8 Staff also argues that the testimony presented by Dr. Taylor and Dr. Kalt concerning the purportedly harmful effect of imputation on competition has taken Staff by surprise and deprived Staff of an opportunity to respond. Staff implies that it has been "sand bagged." This is simply not the case. Ms. Teresa Jensen for Qwest, whose testimony now has been adopted by Mr. Mark Reynolds, offers several pages of testimony on this subject in her prefiled direct.⁴

³ *US West Communications, Inc., v. Utilities and Transp. Comm'n*, 134 Wn.2d 74, 102; 949 P.2d 1337, 1352 (1997).

⁴ Exhibit No. TAJ-1T, at 35:14-39:24.

9 Denying Staff's alternative request for surrebuttal, and a continuance of at least a month to accommodate its preparation, does not compromise Staff's ability to put on its case or our ability to obtain a full and complete record for decision. The challenged testimony is not factual. That is, neither Dr. Taylor nor Dr. Kalt presents some body of objective evidence to show asserted anticompetitive impacts from imputation. Dr. Taylor and Dr. Kalt's testimonies present only policy arguments and opinions. Their arguments and opinions can be explored via cross-examination and by questions from the Bench, if necessary. Staff's witnesses also may be questioned on these subjects and we are confident that their opinions and policy arguments will find expression during that process to the extent our record requires it. Finally, parties may make policy arguments, in addition to legal and factual arguments, in their post-hearing briefs.

ORDER

10 The Commission Denies Staff's Motion To Strike Portions of the Rebuttal Testimony of William E. Taylor and Joseph P. Kalt, or in the Alternative, To Permit the Filing of Surrebuttal Testimony and Reschedule Evidentiary Hearings.

DATED at Olympia, Washington, and effective this 2nd day of May 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner