

0019

1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION
3 WASHINGTON UTILITIES AND)Docket No. UT-011329
4 TRANSPORTATION COMMISSION,)Volume II
5 Complainant,)Pages 19-40
6 v.)
7)
8 QWEST CORPORATION,)
9 Respondent.)
10 _____)

11 A settlement hearing in the above
12 matter was held on March 5, 2002, at 9:35 a.m., at
13 1300 Evergreen Park Drive Southwest, Olympia,
14 Washington, before Administrative Law Judge KAREN
15 CAILLE, Chairwoman MARILYN SHOWALTER, Commissioner
16 RICHARD HEMSTAD, and Commissioner PATRICK OSHIE.

17 The parties were present as
18 follows:
19 QWEST CORPORATION, by Lisa Anderl,
20 Corporate Counsel, 1600 Seventh Avenue, Room 3206,
21 Seattle, Washington 98191.

22 PUBLIC COUNSEL, by Robert
23 Cromwell, Assistant Attorney General, 900 Fourth
24 Avenue, Suite 2000, Seattle, Washington 98164.

25 THE COMMISSION, by Shannon Smith,
26 Assistant Attorney General, 1400 Evergreen Park
27 Drive, S.W., P.O. Box 40128, Olympia, Washington
28 98504-0128.

29 Barbara L. Nelson, CSR
30 Court Reporter

0020

1

2

INDEX TO EXHIBITS

3

4

EXHIBIT:

MARKED:

5

Number 1

38

6

Number 1-C

38

7

Number 2

22

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

0021

1 JUDGE CAILLE: Let's go on the record.
2 Good morning. This is a settlement hearing in Docket
3 UT-011329, encaptioned Washington Utilities and
4 Transportation Commission versus Qwest Corporation,
5 and this matter concerns Qwest's -- it was a
6 complaint brought by the Commission concerning
7 Qwest's Centrex customer loyalty program.

8 May I have the appearances for the record,
9 please?

10 MS. ANDERL: Thank you, Your Honor. Lisa
11 Anderl, on behalf of Qwest Corporation. I've
12 previously appeared in this matter. Do you need the
13 address and phone number?

14 JUDGE CAILLE: No, I don't, just your name
15 and whom you represent.

16 MR. CROMWELL: Robert Cromwell, on behalf
17 of Public Counsel.

18 MS. SMITH: Shannon Smith, for Commission
19 Staff.

20 JUDGE CAILLE: Let the record reflect there
21 are no other appearances. I am going to now ask the
22 witnesses to stand. I will swear you both in at the
23 same time, since we're doing this as a panel.

24 Whereupon,

25 DR. GLENN BLACKMON and THERESA JENSEN,

0022

1 having been first duly sworn, were called as
2 witnesses herein and testified as follows:

3 JUDGE CAILLE: Thank you. All right. And
4 at this point I was going to excuse myself to go get
5 the Commissioners.

6 (Recess taken.)

7 JUDGE CAILLE: While we're waiting for the
8 other Commissioners to join us on the bench, I do
9 want to admit into the record the settlement
10 agreement, and that was filed, I believe, on January
11 the 25th. So let the record reflect that the
12 settlement agreement is marked and admitted as
13 Exhibit Number 2.

14 All right. I'd like to welcome the
15 Commissioners to the bench. Commissioners, this
16 morning we are here for a settlement hearing in the
17 WUTC versus Qwest complaint hearing, which involved
18 the customer -- Centrex customer loyalty program.
19 And we have two witnesses that are appearing today.
20 They have been previously sworn. And appearing for
21 Commission Staff is Dr. Glenn Blackmon and appearing
22 for Qwest is Theresa Jensen.

23 I think the order of business will be for
24 us to hear a statement from each of the witnesses and
25 then it will be open for questions.

0023

1 DR. BLACKMON: Thank you. Good morning.
2 This is a settlement of a complaint that the
3 Commission brought regarding Qwest's customer loyalty
4 program that it operated for very large Centrex
5 customers. It first came to the Commission's
6 attention during the course of the 271 case, and the
7 Commission directed Staff to investigate that and
8 made findings in that case that the use of an
9 unpublished rebate program was a violation of the
10 requirement that companies publish their prices.

11 So the complaint was filed last fall, Staff
12 investigated it, determined that it was actually
13 provided to one customer, the State Department of
14 Information Services.

15 We were able to reach this settlement with
16 Qwest, where they are admitting to various violations
17 and agreeing to pay \$100,000 in penalties now, with
18 an additional 50,000 potentially payable, depending,
19 over the next year, on whether or not the company is
20 able to certify that it has not made any other
21 violations and if the Staff has not alleged any other
22 violations.

23 And Staff recommends that this settlement
24 be approved by the Commission.

25 MS. JENSEN: Theresa Jensen, with Qwest

0024

1 Corporation. Qwest has looked into this matter and
2 is very concerned about the matter from the
3 standpoint that the statutes and rules were not
4 followed. I will share with you that this, we
5 believe, to be a singular incident. We have a very
6 tight process as it relates to the filing of
7 contracts in place. We actually have a contract
8 group that is part of our policy and law department,
9 and it is actually the responsibility of my
10 department to file the contracts with the Commission.

11 This is a case where there was an offer to
12 a customer that was not originally solidified as a
13 contract amendment, which would have been the case or
14 has since been the case in that Qwest has filed this
15 credit program as part of the contract with this
16 individual customer and the Commission has approved
17 that, which was back in June, June 6th of 2001.

18 The failure to file this provision and the
19 existence of this provision was unknown until this
20 document was actually produced in some discovery --
21 was unknown to the Policy and Law Department. As a
22 result, we have taken steps to ensure that our
23 employees understand the rules and obligations, as we
24 do on an annual basis. And the degree of coverage
25 with our employees varies, dependent on how close

0025

1 they are to these processes.

2 We cannot recreate how this occurred. The
3 decision was actually made by some officers in US
4 West prior to the merger. Those officers no longer
5 work for the company, and there is no record, other
6 than the documents in this docket itself, upon which
7 we can rely.

8 What we can do is ensure that it doesn't
9 happen again, and as part of the settlement agreement
10 before you this morning, we have agreed to additional
11 training beyond that that we already do on an annual
12 basis. And one is to cover each employee that would
13 actually be involved in this form of an offer to a
14 customer to make sure that it's very clear that in
15 the future this is a provision that needs to be
16 addressed, either in contract or tariff, and that it
17 cannot be offered until that occurs, and then, two,
18 to cover all employees on the incident specific to
19 this complaint so that they understand how serious
20 this is and that this is not in compliance with
21 existing company policies and procedures.

22 We have not done that yet because we felt
23 that there may be some additional elements after this
24 morning's discussion that you would like us to add.
25 But, again, this is in addition to the annual

0026

1 coverage that occurs with every employee each year.

2 Qwest does take the Commission's rules and
3 laws most seriously and that is why we have a Policy
4 and Law organization and a Contract Administration
5 group. And so I can share with you that, to the best
6 of my knowledge, we have never had this situation,
7 because we do have a very tightly-managed process,
8 and I wish I could share with you more specifics
9 about how it happened, but unfortunately I can't. I
10 can only assure you that it should not happen again
11 in the future. If it does, Qwest has agreed to take
12 the appropriate disciplinary actions necessary.

13 JUDGE CAILLE: Thank you. Commissioners.

14 CHAIRWOMAN SHOWALTER: Ms. Jensen, I think
15 you -- if you could turn to page three of the
16 settlement agreement. And I'm specifically looking
17 at the first bullet under Remedy, and this is an
18 admission that Qwest violated three RCWs and a WAC.
19 I believe you just gave a factual statement of what
20 constitutes the violation. We need a factual basis
21 to find a violation, not just the admission of it.
22 But I want to make sure, because the statement here
23 says that the violations of -- the second sentence,
24 the violations of RCW 80.36.170 and 80.36.180 are the
25 result of Qwest's failure to file the amendment to

0027

1 the contract, and there's no prior reference to the
2 amendment or the contract in this settlement
3 agreement. Is the contract a contract with DIS?

4 MS. JENSEN: Yes, it is.

5 CHAIRWOMAN SHOWALTER: And what is the
6 amendment?

7 MS. JENSEN: The amendment has subsequently
8 been filed. Once we became aware of this matter, a
9 determination was made that the contract should have
10 been amended to reflect the credit that was given to
11 this customer on a monthly basis. And as a result, a
12 contract amendment was filed on June 6th, 2001, to
13 correct this credit on a going forward basis. The
14 determination was made that this credit was actually
15 an amendment to the customer's existing contract, and
16 so that is the purpose of this statement.

17 CHAIRWOMAN SHOWALTER: I see. So what
18 violated the law was the amendment, and that
19 amendment was not filed; is that correct?

20 MS. JENSEN: Actually, what violated the
21 law, as I understand it, is difficult to recreate.
22 The determination was made that this offer should
23 have been an amendment to the contract, and it was
24 the failure to file that amendment that was in
25 violation of the statute.

0028

1 CHAIRWOMAN SHOWALTER: Okay. And then you
2 say that that is what constituted a violation of
3 80.36.170 and 80.36.180, but in the previous sentence
4 you are admitting to a violation of 80.36.150, and I
5 notice that 150 says contracts to be filed with the
6 Commission. So I would think that the failure to
7 file the amendment would also be a violation of 150.
8 Am I correct on that?

9 MS. ANDERL: Your Honor, may I jump in?

10 CHAIRWOMAN SHOWALTER: Sure.

11 MS. ANDERL: Thank you. Lisa Anderl, on
12 behalf of Qwest. Yes, you're right, but what we were
13 trying to clarify there -- and Ms. Smith can correct
14 me if I'm representing something that the parties
15 didn't agree to, but I don't think that I will -- is
16 that it was clear on its face that the failure to
17 file the amendment violated 80.36.150, because that's
18 what that statute requires.

19 80.36.170 and 180 are the statutes with
20 regard to discriminatory or preferential treatment,
21 and I believe the parties wanted to communicate by
22 way of this language that the provisions of the
23 program to the customer were not violative of the
24 discrimination or preferential treatment statutes,
25 because, in fact, the Commission approved those

0029

1 provisions subsequently when they were filed. It was
2 the failure to publicize them that constituted the
3 violation, and I think probably we were all very
4 close to it and chose this way as a shorthand way of
5 trying to communicate that.

6 I can see that somebody reading it who
7 wasn't that familiar with the case might have the
8 questions that you do.

9 CHAIRWOMAN SHOWALTER: All I'm trying to do
10 is get on the record the on-the-ground factual basis
11 for the violations of these three statutes, and I
12 think Ms. Jensen has now provided that basis.

13 COMMISSIONER HEMSTAD: I'm trying to
14 understand, from reading the materials and background
15 -- so apparently now the discount program is filed as
16 part of the contract?

17 MS. JENSEN: That's correct.

18 COMMISSIONER HEMSTAD: What was the -- your
19 understanding of the background here, was this an
20 oversight or was it intentionally not included for
21 competitive reasons?

22 MS. JENSEN: That is a difficulty,
23 Commissioner Hemstad, in that we don't know what the
24 basis of the decision was made. What we do know is
25 that there was a decision made that a contract or

0030

1 tariff modification wasn't necessary. What we don't
2 know is what went behind that decision or why that
3 decision was made or even what questions were asked.
4 But upon becoming aware that this customer was, in
5 fact, receiving a rate in the form of a credit, it --
6 once Policy and Law became aware of that, it's very
7 clear that that needs to be filed with the
8 Commission, so that step was taken.

9 This offer is only with one customer, and
10 that's why we amended the contract with that
11 customer, as opposed to filing a tariff.

12 COMMISSIONER HEMSTAD: Well --

13 DR. BLACKMON: Commissioner Hemstad, may I
14 speak on that? Staff obviously is even one step
15 further away from this than the Policy and Law
16 Department at Qwest, but the memorandums that were
17 produced through discovery, which I guess is the only
18 evidence that either of us has on this --

19 COMMISSIONER HEMSTAD: And I read those
20 memos.

21 DR. BLACKMON: Right. To Staff, they
22 suggest that this was deliberate. It may have been
23 done with, you know, perhaps less than a full
24 understanding of what the law required, but the memos
25 definitely suggest that this was to be done outside

0031

1 of the contract and billing systems, and we -- you
2 know, DIS received a letter, they didn't receive a
3 contract amendment, saying, Here, sign this, and
4 you'll start to get a lower rate. They just received
5 a letter that said we're going to give you a credit
6 that will be retroactive for the last ten months and
7 going forward as long as you maintain a certain
8 volume of service.

9 JUDGE CAILLE: Excuse me. Dr. Blackmon,
10 the memos you're referring to, that has been admitted
11 as Exhibit 1?

12 DR. BLACKMON: Yes, that's correct.

13 JUDGE CAILLE: Thank you.

14 COMMISSIONER HEMSTAD: Well, what I find
15 puzzling, it seems to me it's entirely appropriate
16 for the company to address its competitive needs and
17 to respond to them, whatever they may be. That
18 having been said, I don't know -- I guess I'm having
19 some difficulty understanding what the motivation
20 would be for keeping it secret when you could simply,
21 as apparently now is the case, file its
22 determination, or with that, that it is not unduly
23 discriminatory, is appropriate, then why the secrecy?

24 MS. JENSEN: Well, and that's exactly the
25 point, Commissioner Hemstad, is we don't know that it

0032

1 was an intentional secret. There's no evidence,
2 other than the exhibit that we all have before us, to
3 give us any facts as to how or what the basis of this
4 decision was made. And there is an inference by some
5 that this may be a secret or may have been by design
6 a secret, but we really don't know that.

7 You're absolutely correct. There is
8 nothing wrong with this offer to the customer, other
9 than, under your rules, it needs to be filed with the
10 Commission. And so that's why the distinction in the
11 first bullet point, but you have found, through
12 approval of this contract amendment, there is nothing
13 wrong with the program. It's the failure to file the
14 provision of the program that was the violation.

15 COMMISSIONER HEMSTAD: Well, what is a bit
16 curious about it is that the memo describes the
17 approval of the Legal and Regulatory teams and Vice
18 President for Regulatory Affairs, and I assume that
19 scheme is similar to our statutory regulatory
20 arrangements must be the case in other states, too,
21 where US West operates, so that Washington hardly is
22 unique in those filing requirements.

23 MS. JENSEN: Yes, and those individuals,
24 again, are no longer with Qwest Corporation. They
25 were US West employees. I can assure you that that

0033

1 review did not take place with the state regulatory
2 attorney or organization, because if it had, and we
3 in fact -- Ms. Anderl and I were in fact present at
4 that time, they would have been instructed to make a
5 filing and also advised that there was no issue with
6 this filing, to the best of our knowledge.

7 COMMISSIONER HEMSTAD: That's all I have.

8 CHAIRWOMAN SHOWALTER: Any more questions?

9 COMMISSIONER OSHIE: Yes. This is actually
10 a question for Mr. Blackmon, or Dr. Blackmon. The
11 complaint alleges violations of 80.36.100 and also
12 80.36.130, but the settlement, of course, does not
13 address either of those RCWs. And I'm just curious,
14 Mr. Blackmon, if there's a reason -- I'm realizing
15 this was a settlement, but why they were not
16 addressed in the settlement agreement?

17 DR. BLACKMON: I think it's purely a matter
18 of trying to reach a compromise. We felt that the
19 admissions that were here were sufficient for our
20 purposes, and so in the effort to compromise, we
21 agreed to leave those out.

22 COMMISSIONER OSHIE: Okay. Thank you.

23 JUDGE CAILLE: Anything further?

24 DR. BLACKMON: Could I just make one
25 correction, I think, to statements that have been

0034

1 made, and that has to do with the contract amendment.
2 I don't believe that it was approved by the
3 Commission. I think that it was filed here and
4 accepted, and I think it's -- it doesn't affect this
5 decision one way or the other, really, but it was not
6 approved and the filing of an amendment here to a
7 contract does not constitute approval of this
8 Commission.

9 CHAIRWOMAN SHOWALTER: Was it on our no
10 action portion of the agenda?

11 DR. BLACKMON: Yes, it was.

12 MS. JENSEN: Mr. Blackmon is correct. I'm
13 sorry, I mischaracterized that.

14 JUDGE CAILLE: All right. Thank you.
15 Anything further?

16 MR. CROMWELL: Yes.

17 JUDGE CAILLE: Yes, Mr. Cromwell.

18 MR. CROMWELL: Thank you. I just want to
19 make the record clear and share a few observations
20 with the Commissioners. First, we were not a party
21 to this settlement, nor were we included in the
22 settlement discussions. While we are glad that the
23 Commission Staff conducted an investigation of this
24 matter, we are not here to either support or oppose
25 the proposed settlement for you. We would hope that

0035

1 the Commission Staff is satisfied that this was an
2 isolated program problem and does not -- and that
3 they've assured themselves that there is not similar
4 anticompetitive conduct occurring in other divisions
5 of Qwest.

6 We would like to make a record of the
7 following observations. The penalty amount on a
8 per-violation basis is quite small. If Qwest indeed
9 files and this Commission approves mitigation, it
10 amounts to 11 cents per violation. As a party to the
11 271 proceeding, where this matter originated, we note
12 this as an example of the type of anticompetitive
13 conduct relevant to the Commission's public interest
14 inquiry in that docket. Lastly, we would note that
15 the settlement does not provide for public disclosure
16 of the memorandum we have discussed or the underlying
17 documents which, in our opinion, should be made
18 public. Thank you.

19 CHAIRWOMAN SHOWALTER: Well, Mr. Cromwell,
20 despite the statements you've just made, you do not
21 oppose this settlement?

22 MR. CROMWELL: We take no position on the
23 settlement.

24 CHAIRWOMAN SHOWALTER: Thank you.

25 COMMISSIONER HEMSTAD: Well, I want to

0036

1 pursue -- you're a party to the proceeding. I assume
2 you have to at least acquiesce. Otherwise, you have
3 the responsibility of either withdrawing or
4 proceeding with the litigation, I think.

5 MR. CROMWELL: I'm not certain that that's
6 required under law.

7 CHAIRWOMAN SHOWALTER: Well, isn't not
8 oppose the same as acquiesce, I would say.

9 MR. CROMWELL: I think the statement I
10 made, which is that we do not oppose the settlement,
11 but we neither support nor endorse it is the position
12 that we've taken in this litigation.

13 COMMISSIONER HEMSTAD: I think I
14 misunderstood.

15 MR. CROMWELL: Okay, sorry.

16 CHAIRWOMAN SHOWALTER: While we're on this
17 topic, do we have in the record that the other party
18 is not opposed to the settlement?

19 JUDGE CAILLE: We have on the record that
20 the other party is not taking a position on the --

21 CHAIRWOMAN SHOWALTER: But isn't that in
22 writing?

23 JUDGE CAILLE: Yes.

24 CHAIRWOMAN SHOWALTER: I've forgotten the
25 other --

0037

1 JUDGE CAILLE: Metronet.

2 CHAIRWOMAN SHOWALTER: If Metronet has in
3 writing that they are not taking a position, it seems
4 to me that that is the equivalent of not opposed and
5 the equivalent of acquiescing.

6 JUDGE CAILLE: I assume that if they were
7 going to oppose, they should have been here.

8 CHAIRWOMAN SHOWALTER: Okay. Thank you.

9 JUDGE CAILLE: Just as a housekeeping
10 matter, Ms. Smith and Ms. Anderl, could you just
11 clarify again for me what parts of the -- isn't there
12 just one part of Exhibit 1 that remains confidential,
13 and that's the amount on the first page of the
14 exhibit?

15 MS. SMITH: That's correct, Your Honor.

16 JUDGE CAILLE: We still have many yellow
17 pages here. That's why --

18 MS. SMITH: We have. If I could clarify,
19 Your Honor, we have two documents, and one of them is
20 on yellow paper, and that has all of the confidential
21 information appearing on that document. There is a
22 document that's in white paper and it has the
23 confidential information redacted, and the
24 confidential -- most of the confidential information
25 in that exhibit that's redacted are the names of

0038

1 customers in other states who may have been eligible
2 for this rebate in those states, and then the amount
3 on the front page of the record request from the 271
4 case.

5 And I know that Ms. Anderl and I had some
6 discussions about whether or not that number should
7 remain confidential, but then, as the settlement
8 progressed, we didn't conclude our discussions on
9 that.

10 MS. ANDERL: That's accurate, Your Honor.
11 So I guess really there would be an Exhibit 1 and an
12 Exhibit C-1 that would reflect the two separate
13 documents, because I believe that the confidential
14 information is a part of the record here, and
15 virtually all of the narrative has been released as
16 nonconfidential. And Ms. Smith accurately
17 characterized there are some numbers and customers
18 names that are redacted, and that's all.

19 JUDGE CAILLE: Okay. So I will -- the
20 yellow copy will be designated as 1-C, then, and the
21 public document will be 1, Exhibit 1.

22 COMMISSIONER HEMSTAD: Mr. Cromwell, in
23 view of your comment and the discussion now held, the
24 bulk of that material is now not confidential. Are
25 you satisfied with that?

0039

1 MR. CROMWELL: I think that would address
2 our concerns. I don't have a copy of it, so I
3 haven't had a chance to review that.

4 MS. SMITH: I will say that Mr. Cromwell
5 was provided a copy of the non-confidential version
6 by letter. Public Counsel should have a confidential
7 version from the 271 case, and I wasn't sure at the
8 time I sent the letter out whether Public Counsel had
9 signed the confidentiality agreement in this case, so
10 the confidential exhibit in this case was not sent
11 out.

12 MR. CROMWELL: I don't have it in my file.
13 I can't attest that our mail folks don't have it
14 somewhere, but I don't have it.

15 JUDGE CAILLE: All right.

16 MS. ANDERL: Well, if I could just make one
17 comment in response to something that Mr. Cromwell
18 said, and maybe it's so obvious that it doesn't bear
19 pointing out, but obviously, in reaching this
20 settlement, the parties compromised on a number of
21 issues. I believe, had it gone to litigation, we
22 certainly would have contested the number of
23 violations alleged. So the assumption that it
24 amounts to an 11-cent-per-violation penalty I think
25 is premised on accepting the theory that all of the

0040

1 violations would have been proved or accepted, and I
2 don't want the settlement amount inappropriately
3 characterized as de minimis, because we don't believe
4 that it is.

5 CHAIRWOMAN SHOWALTER: Well, actually, I
6 meant to flag off on that point. I think that's
7 quite correct. What's in front of us is -- I'm not
8 sure if it's a single violation or three violations,
9 but it's a single event that constitutes a violation,
10 and the penalty is a \$150,000, with 50,000 suspended,
11 so that's what's on the record.

12 COMMISSIONER HEMSTAD: I'm not sure we
13 would want to go through a hearing and hear the
14 evidence on each violation.

15 MS. ANDERL: One of the benefits of a
16 settlement, Your Honor.

17 JUDGE CAILLE: All right. Anything
18 further, Commissioners? Then the witnesses are
19 excused and we will take this matter under
20 advisement. Thank you.

21 MS. ANDERL: Thank you.

22 MR. CROMWELL: Thank you.

23 MS. SMITH: Thank you.

24 (Proceedings adjourned at 10:08 a.m.)

25