

**BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION
COMMISSION**

In the Matter of the Petition of:

QWEST CORPORATATION

For Competitive Classification of
Bundled Telecommunications Services.

DOCKET NO. UT-061634

In the Matter of the Petition of:

QWEST CORPORATION

To be Regulated Under an Alternative
Form of Regulation Pursuant to RCW
80.36.135.

DOCKET NO. UT-061625

PUBLIC COUNSEL'S MOTION TO
REJECT OR DISMISS PETITION; IN
THE ALTERNATIVE, REQUEST
FOR ADJUDICATION;
OPPOSITION TO WAIVER OF
PUBLIC NOTICE; MOTION TO
CONSOLIDATE

**I. MOTION TO REJECT OR DISMISS PETITION FOR COMPETITIVE
CLASSIFICATION (DOCKET NO. UT-061634)**

A. Motion

- I.* Pursuant to WAC 480-121-026, WAC 480-07-375(1), and WAC 480-07-380(1), Public Counsel respectfully moves the Commission for an order rejecting Qwest's petition¹ in Docket No. UT-061634 for substantial and material failure to comply with the Commission rules for petitions for competitive classification. In the alternative, the Commission should dismiss the petition for failure to state a claim for relief under RCW 80.36.330.

B. Argument

1. The filing should be rejected because it omits many required elements.

2. Chapter 480-121 of the Washington Administrative Code (WAC) contains the Commission rules which generally govern the filing of petitions for competitive classification of telecommunications services. “[P]etitions for competitive classification must be in the form prescribed by the Commission.” WAC 480-121-020. WAC 480-121-062 contains the requirements which a petition “must, at a minimum, include.”

3. Qwest’s short petition devotes approximately one page to an effort to establish the substantive elements required by the rule. The petition fails to include the following:

- The names and addresses of affiliated interest entities. WAC 480-121-062(4).
- A description of the service the petitioner proposes to classify as competitive and their functional or equivalent services in the relevant market. WAC 480-121-062(5), (5)(a).

4. The only description provided by Qwest is the statement that the subject services “may include various combinations of non-competitive, competitive, and deregulated services.”² An example of what a bundle “could include” is provided. This description of what services “may” be affected by the petition is far too vague and open-ended. There is literally no way for the Commission or the public to tell what services should be considered in the docket or would be affected by Commission action. The Company has the capacity and the information needed to list its affected service offerings but chose not to do so.

- The names and addresses of all providers of the service known or reasonably knowable to the petitioner. WAC 480-121-062(5)(a).

¹ Petition of Qwest For Competitive Classification of Bundled Telecommunications Services and Request for Waiver of Customer Notice Requirement Under WAC 480-121-065 (Qwest Petition).

² Qwest Petition, ¶ 4.

5. This requirement is meant to elicit information about the “number and size of alternative providers” who offer functionally equivalent or substitutable services, pursuant to RCW

80.36.330(1)(a). No information was provided to meet this requirement.

- The prices, terms, and conditions under which the services are offered by competitors. WAC 480-121-062(5)(c).

6. No information was provided on this point either for third-party providers, or for Qwest’s own services which allegedly provide the competition.

- An estimate of the petitioner’s market share. WAC 480-121-062(e).

7. No information was provided to meet this requirement.

- A description of ease of entry into the market. WAC 480- 121-062(f).

8. No information was provided to meet this requirement.

9. As WAC 480- 121-026 provides: “[t]he commission may reject any filing that does not comply with commission rules.” The rule is designed to ensure that petitions on the important issue of competitive classification at least meet a threshold level of addressing the basic statutory requirements. If a petitioner has not met that threshold, there is no reason for the Commission or intervenors to devote resources to the request. The Commission cannot consider the factors it is required to consider by statute if the petitioner fails to provide it the information to do so. Here, the petition on its face substantially and materially fails to include the required elements and it should be rejected.

2. The petition should be dismissed because it is based on a theory not consistent with the statute.

10. If the petition is not rejected under WAC 480-121-026, it should be dismissed on the grounds that it states a theory for competitive classification that has no basis in Title 80 and, in fact, violates the statutory provisions.
11. The Commission may grant a motion to dismiss on the basis “that the opposing party’s pleading fails to state a claim on which the commission may grant relief.”³ In considering such a motion, the Commission applies the standards applicable to a motion to dismiss pursuant to Washington Superior Court Civil Rules 12(b)(6) and 12(c) and considers the documents initiating the proceeding, including the utility’s prefiled evidence, if any.⁴ Here, the Company has filed no evidence beyond the petition so the Commission’s review is based upon the petition. Dismissing a case is appropriate under CR 12(b)(6) and 12(c) when “it appears beyond doubt that that the [non-moving party] can prove no set of facts that would justify recovery.”⁵ The Commission stated that the “fundamental question” in considering a motion to dismiss is, given the previous orders related to the utility, the relevant case law, and the Commission’s statutory and inherent authority, would the Commission grant the requested relief based on the allegations in the utility’s filing?⁶ The Commission has granted a motion to dismiss when the filing failed to satisfy just one of these factors.⁷
12. The reason for Qwest’s failure to meet the statutory requirements is its curious definition of competition. The core theory of Qwest’s petition is that competition exists because customers

³ WAC 480-07-380(1)(a).

⁴ *Id.*; *WUTC v. PSE*, WUTC Docket Nos. UE-011163, UE-011170, Sixth Supp. Order at ¶¶ 12-13 (Oct. 4, 2001).

⁵ *Gorman v. Garlock, Inc.*, 121 Wn. App. 530, 534 (2004).

⁶ WUTC Docket Nos. UE-011163, UE-011170, Sixth Supp. Order at ¶¶ 12-13.

⁷ WUTC Docket Nos. UE-011163, UE-011170, Sixth Supp. Order at ¶ 41.

“can purchase a bundle or they can purchase separately one or more components that are included in the bundle. This constitutes a ‘reasonably available alternative.’”⁸ Under this theory, Qwest need not provide any information about alternative providers or market share or meet any of the other statutory requirements that relate to the identification of true competitors in the residential mass market. Effective competition is shown solely because Qwest competes with itself.

13. Not only does this theory defy common sense and even rudimentary economics, RCW 80.36.330 is expressly based on the premise that competition is provided by telecommunications providers who are separate from and independent of the incumbent provider. The statute is explicit that in determining whether effective competition is present, the Commission is required to examine not only “the number and size of alternative providers,” but also whether and to what extent alternative providers offer service in the relevant market, including the ability to offer functionally equivalent services at competitive rates. RCW 80.36.330(1)(a)-(c). The statute also lists as a relevant inquiry that the Commission review the affiliations of these providers, presumably so that it can determine whether the alleged competition is merely a sham. RCW 80.36.330(d). The Commission’s WAC 480-121-062(4) has incorporated this affiliate information as a filing requirement.

14. The WAC filing rule also requires information on market share and ease of entry, neither of which has been addressed in the petition, as noted above. Ease of entry becomes irrelevant if Qwest is its own competitor. It already is in the market as the incumbent. As for market share, under Qwest’s theory, it would be possible for Qwest to have 100 percent of the market, in other

⁸ Qwest Petition, ¶ 5.
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words to be a monopoly, and still be “subject to effective competition.” This reads the market share requirement out of the statute. Under Qwest’s theory, the Commission could find “effective competition” even if there were no providers other than Qwest for any telecommunications service in the state of Washington.

15. RCW 80.36.330 sets forth the basis upon which a telecommunications service may be competitively classified. This is the only basis upon which the legislature has authorized the Commission to grant this regulatory relief. Qwest is not free to disregard the statutory criteria and create its own definition of effective competition, purport to meet that definition, and then request competitive classification on that basis. The petition should be dismissed as stating no basis for classification under the statute.

II. REQUEST FOR ADJUDICATION (DOCKET NO. UT-061634)

A. Motion in the Alternative

16. Public Counsel contests the Qwest petition. In the event that the Motion to Reject or Dismiss is denied, Public Counsel respectfully requests that the Qwest petition for competitive classification be suspended and set for hearing and adjudication pursuant to RCW Chapter 34.05 and 80.36.310.

B. Argument

17. RCW 80.36.310(1) expressly authorizes the Commission to set a petition for competitive classification for hearing as an alternative to allowing it to take effect. In addition, the APA provides that an agency may commence an adjudicative proceeding at any time for any matter over which it has jurisdiction. RCW 34.05.413(1); *see* WAC 480-07-305(1). There is no dispute in this case that the Commission has jurisdiction over the subject matter of the petition. As set

forth below, there are strong policy reasons why the Commission, absent rejection, should exercise its jurisdiction in the public interest to suspend this petition and set the matter for hearing.

18. Local telephone service is an essential service which consumers need to communicate for family, work, school, medical, emergency, and many other critical reasons. A significant reduction in the regulatory protection for that essential service should not occur unless the Commission has had the opportunity to review the petition on a full evidentiary record. The burden of proof is on the petitioning carrier to show that effective competition is present and that the other requirements of the statute are met. *Electric Lightwave, Inc., v. WUTC*, 123 Wn.2d 530, 547, 869 P.2d 1045 (1994)(while the case involved RCW 80.36.320, it is procedurally parallel under RCW 80.36.310). In *U.S. West Communications, Inc., v. WUTC*, 86 Wn. App. 719, 728, 937 P.2d 1326 (1997), the Court noted that the purpose of the statutory framework was the protection of monopoly ratepayers.⁹

19. The competitive classification requested here is a case of first impression with a broad impact on mass market residential customers. It is not clear from the filing whether a majority or a minority of residential customers subscribe to bundled services. There is no question, however, that the petition potentially impacts virtually all residential customers because of the carriers' marketing emphasis on bundles. This is the first case to come before the Commission which proposes *de facto* price deregulation for local basic residential telephone service in any form. Thus it presents to the Commission for the first time the need to resolve assertions that

⁹ The Court analyzed the definition of the term "significant captive customer base" in RCW 80.36.320. The term also appears in RCW 80.36.330.

aspects of the mass market for residential local service are effectively competitive. The Commission has not examined that issue for this company before.

20. A finding of effective competition in the residential market is certainly not a foregone conclusion. Only a year ago, for example, the Commission reviewed the state of competition for Verizon NW, Washington's second largest incumbent local exchange carrier (ILEC), whose territory covers many different urban and rural areas of the state.¹⁰ The Commission Staff presented evidence that Verizon NW's average market share for residential local exchange service was greater than 98%. The Commission noted that the evidence showed that "Verizon NW now exerts great market power with the existing level of competition" and that its market share was "extremely high."¹¹ In addition, in the Verizon- MCI Merger Order, the Commission found that intermodal, wireless, and VoIP competition were not yet mature enough to pose significant competitive challenges.¹² The Commission also noted that competitors face new challenges since the FCC no longer requires incumbent carriers to offer competitors the unbundled network element platform at total element long run incremental cost.¹³ The evidence about the telecommunications market in the Verizon –MCI case should raise warning flags about blanket claims in this petition regarding the level or strength of competition in the residential market in Washington.

21. For these reasons, the Commission should not grant this request for competitive classification at an open meeting. The issues are new, they significantly affect many customers statewide, the Commission lacks a record for review of the statutory criteria, there has been no

¹⁰ *In the Matter of the Joint Application of Verizon Communications Inc, and MCI, Inc., For Approval of Agreement and Plan of Merger*, UT-050814, Order No. 07, Accepting Settlement, On Condition; Approving Merger, On Condition (Merger Order).

¹¹ *Id.*, ¶¶ 72, 75.

¹² *Id.*, ¶¶ 68-71.

opportunity for intervention or formal discovery by interested parties, and there has been no notice to customers.

III. RESPONSE IN OPPOSITION TO MOTION FOR WAIVER OF NOTICE TO CUSTOMERS (DOCKET NO. UT-061534)

22. Public Counsel strongly opposes the request for waiver of the customer notice requirements of WAC 480-121-065. As we have argued above, this petition raises important questions which do affect or could potentially affect virtually all of Qwest's mass market residential customers in a significant way. The rule reflects a policy determination by this Commission that customers have right to know when their telecommunications carrier seeks a dramatic reduction in the level of regulatory protection they will receive from the Commission. The rule is intended to provide customers and opportunity to participate and express their opinions on the proposal if they wish.
23. Qwest justifies the request by saying that all of the components of a bundled service are available on a stand-alone basis. This point is neither persuasive nor relevant. The petition does not involve stand-alone services. For customers now purchasing local service through bundles, however, there would be a major change in regulatory protection if the petition were granted. For customers who do not purchase bundles, they might opt to purchase a bundle in the future without any knowledge that different levels of regulation apply. Qwest's argument that customers will get notice of future changes should be given no weight. Notice after the fact is too late. If Qwest's petition is granted, customers may get notice of changes to their service, but with competitive classification, will be able to do little or nothing to affect the changes. The

¹³ *Id.*, ¶ 74.
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purpose of the notice requirement in the rule is so that customers can tell the Commission and the Company what they think of the proposal before the decision is made.

24. Finally, it is worth noting that Qwest has chosen to file its petition without providing the required notice to its customers thirty days in advance of the effective date. Qwest could have sought the waiver before filing the petition. Instead, it seeks a waiver after the fact to cure its failure. The waiver should be denied. The absence of the required notice provides a separate ground for rejecting the petition.

IV. MOTION TO CONSOLIDATE WITH AFOR DOCKET (DOCKET NOS. UT-061634, UT-061625)

A. Motion In the Alternative

25. In the event that the Commission does not reject or dismiss, and sets the competitive classification case for hearing, Public Counsel moves the Commission for an order, pursuant to WAC 480-07-320 and WAC 480-07-375(1)(d), consolidating this Docket No. UT-061634 with the Qwest petition for an Alternative Form of Regulation (AFOR), Docket No. UT-061625.¹⁴

B. Argument

26. WAC 480-07-320 provides, in pertinent part, that “[p]arties may request consolidation...by motion to the commission” and that “[t]he commission, at its discretion, may consolidate two or more proceedings in which the facts or principles of law are related.” While they are brought under different statutes, the Qwest competitive classification petition and the AFOR petition are factually and legally related.

¹⁴ *In the Matter of Qwest’s Petition to be Regulated Under an Alternative Form of Regulation Pursuant to RCW 80.36.135*, Docket No. UT-061625 (Qwest AFOR Petition).

27. While the Qwest AFOR petition was filed under the AFOR statute, RCW 80.36.135, the petition is built around the request that Qwest be treated as if it were a competitively classified company. Qwest’s Modified Washington AFOR Proposal attached to the petition states that “Qwest will be subject to the same regulation as those companies who are competitively classified pursuant to RCW 80.36.320, subject to certain exceptions and certain transition period requirements.”¹⁵ The proposal document also states that “residential exchange service features and packages will be treated as competitively classified” under the AFOR.¹⁶
28. After filing the AFOR petition, Qwest then filed its petition seeking competitive classification under RCW 80.36.330 for all the bundled services that it offers statewide. This request clearly overlaps with the AFOR proposal, essentially asking for the same relief for the same general category of bundled services as the AFOR petition seeks.
29. Qwest’s petitions require the Commission to examine related statutory issues. RCW 80.36.135 (2)(c) requires the Commission to consider whether an AFOR will “[p]reserve or enhance the development of effective competition and protect against the exercise of market power.” RCW 80.36.330(1) requires a determination of whether effective competition exists, and requires a consideration of indicators of market power, including market share. RCW 80.36.330(1)(d). Both statutes also require the Commission to examine rates for the affected services to determine, in one case, if an AFOR will provide for fair, just, and reasonable rates, RCW 80.36.135(2)(e) and in the other, if services from competitors are available at competitive rates. RCW 80.36.330(1)(d). Both petitions request waiver of various regulatory requirements implicating RCW 80.36.135(5) and RCW 80.36.330(2).

¹⁵ Qwest AFOR Petition, Exhibit A, p. 1; *See also*, Qwest AFOR Petition, ¶ 3. (underlined in original).

¹⁶ *Id.*, Exhibit A, page 2.

30. Examination of all these overlapping issues will require the Commission to review related factual evidence about Qwest's competitive environment under related legal standards. Separate consideration of these matters in parallel proceedings would be inefficient and burdensome for the Commission and for interested parties. In the event the competitive classification docket is set for hearing, there is ample justification for its consolidation with the Qwest AFOR Petition docket under the standard set out in the applicable WAC.

31. Dated this 21st day of November, 2006.

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