

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Petition of	)	<u>DOCKET NO. 03-049-49</u>
QWEST CORPORATION for Pricing	)	
Flexibility for Residence Services in the	)	<u>REPORT AND ORDER</u>
Areas Served by 44 Central Offices	)	

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In the Matter of the Petition of	)	
QWEST CORPORATION for Pricing	)	<u>DOCKET NO. 03-049-50</u>
Flexibility for Business Services in the	)	
Areas Served by 19 Central Offices	)	<u>REPORT AND ORDER</u>

ISSUED: October 31, 2003

SHORT TITLE

**Qwest Pricing Flexibility - Residential and Business Services Dockets**

**SYNOPSIS**

The Public Service Commission of Utah grants pricing flexibility to Qwest Corporation for specified retail business services in the areas that are the subject of the Petition in Docket Number 03-049-50. Pricing flexibility for the residential services that are the subject of Docket Number 03-049-49 is also granted with the exception of basic service outside of Comcast's serving areas. For basic service within Comcast's serving areas the Commission retains the cap set in our previous order in this matter. For basic service outside of Comcast's serving areas the current tariff for basic service shall remain in effect.

**APPEARANCES**

**DOCKET NO. 03-049-49**

Gregory B. Monson	for	Qwest Corporation
David W. McGann		
Robert C. Brown		
Michael L. Ginsberg	"	Division of Public Utilities
Assistant Attorney General		
Reed Warnick	"	Committee of Consumer Services
Assistant Attorney General		
Richard S. Wolters	"	AT&T of the Mountain States, Inc. and TCG Utah

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Committee of Consumer Services

By The Commission:

### **PROCEDURAL HISTORY**

On July 1, 2003, Qwest Corporation (Qwest) filed a petition for pricing flexibility for residence services in the areas served by 44 central offices that was assigned Docket No. 03-049-49. On the same day, Qwest filed a petition for pricing flexibility for business services in the areas served by 19 central offices that was assigned Docket No. 03-049-50. Qwest filed testimony in support of its petition in each docket on the same day. Qwest also filed a notice of each petition certifying that the notice had been served on all competitive local exchange carriers certificated to provide public telecommunications services within the state of Utah, as required by Rule R746-351-4(B), on July 1, 2003.

Qwest filed a motion for entry of a protective order in each docket on July 2, 2003. The Commission issued a protective order in each docket on July 7, 2003. On July 10, 2003, the Division of Public Utilities (Division) filed a memorandum in each docket, stating that it was unable to respond to the petition within 10 days as contemplated by Rule R746-351-4(C) and recommending that the Commission schedule a hearing on the petition. AT&T Communications of the Mountain States, Inc. and TCG Utah (Jointly referred to as AT&T hereafter) filed a petition to intervene in Docket No. 03-049-49 dated July 14, 2003, indicating that it may wish to file evidence in the docket. The Committee of Consumer Services (Committee) filed a memorandum in both dockets dated July 16, 2003, concurring with the Division's recommendations. The Commission conducted an initial hearing to determine a timeline for decision and to set a schedule for the dockets. On August 4, 2003, the Commission issued its Procedural Orders for the two dockets setting hearing dates for October 23 and 28, 2003. On August 15, 2003 the Salt Lake Community Action Program, Crossroads Urban Center and Utah Legislative Watch filed a joint petition to intervene. On August 19, 2003 the Commission issued an Order approving the intervention of AT&T Communications of the Mountain States, Inc., the Salt Lake Community Action Program, Crossroads Urban Center and Utah Legislative Watch.

### **DISCUSSION**

#### **Pricing Flexibility**

Incumbent telephone corporations in Utah may obtain pricing flexibility for services that are the same or substitutable for those a Competitive Local Exchange Carrier (CLEC) is authorized to, and is, providing in the same designated geographic area (Utah Code Ann. § 54-8b-2.3(2)). Qwest's pricing flexibility becomes effective when four conditions are met: (1) the Commission has issued a certificate to at least one CLEC; (2) one or more CLECs have begun providing the same or substitutable services in the defined geographic area; (3) Qwest has allowed the CLEC to interconnect with its essential facilities and to purchase its essential services by written agreement, stipulation or pursuant to an order of the Commission; and (4) Qwest is in compliance with the rules and orders of the Commission adopted or issued under Section 54-8b-2.2. *Id.* 54-8b-2.3(2)(b)(iii). Pursuant to Section 54-8b-2.3(8), the Commission may determine if a price cap should accompany the grant of pricing flexibility in order to protect the public interest.

#### **Business Services - Docket 03-049-50**

At the hearing, the Division withdrew its opposition to the grant of pricing flexibility in the Huntsville, Roy, Santaquin and West Jordan central office areas. Prior to the hearing, only the second of the four threshold conditions was at issue, that is, whether one or more CLECs were offering the same or substitutable services. The Commission finds that the evidence presented establishes that the four threshold conditions for granting pricing flexibility have been met for the business services in Qwest's petition. In particular the Commission finds, based on the exhibits and testimony presented, that more than one CLECs is providing service in each central office area. Therefore, the Commission grants pricing flexibility to Qwest for the business services contained in its petition for the central office areas enumerated in the petition.

### Residential Services - Docket 03-049-49

The parties disagree whether the threshold conditions have been met for residential services. The dispute centers on whether CLECs offer services that are the same or substitutable for Qwest's residential offerings. The Division testified that pricing flexibility should be granted only in those areas served by Comcast Cable Communications, Inc. (Comcast). The Committee testified that Comcast does not provide a stand-alone basic service offering that is the same or substitutable for Qwest's basic service offering. As a result, the Committee recommended not only that no new pricing flexibility should be granted, but also that the grant previously made in Docket 01-2383-01 should be revoked. The primary issues were whether a customer could purchase stand-alone basic service, and if they could, at what price that service was sold.

Various witnesses addressed the issue of what basic service is available from Comcast. During public witness testimony, a customer provided anecdotal evidence that he and others were unable to obtain Comcast telephone service. The Division provided contradictory anecdotal evidence that they found a customer could order the service within the defined service areas. The Commission will rely on Comcast's interpretation of its own price list (on record in response to a formal data request in this docket), that basic stand-alone service is currently available at \$14.90. Section 5.2.6 of Comcast's price list allows the purchase of a "Primary Access Line" in a stand-alone configuration within its defined service areas. Therefore, the Commission finds that Qwest has a competitor for basic residential service in the Comcast serving areas. This is the same finding as in our previous Order. We make no changes to those findings with respect to basic residential service; i.e., we do not revoke the earlier granted residential pricing flexibility in the Comcast serving areas and neither do we lift the price cap previously imposed.

Qwest argued that in addition to Comcast, US Tel and McLeod among others also offered the same or substitutable basic service. The Division and Committee testified that none of the other CLECs provided any offerings that were the same or substitutable for Qwest's basic residential service. In Commission Rule R746-360-2 basic telecommunications service is defined in part as ". . . local flat-rated, unlimited usage, exclusive of extended area service . . ." This definition includes an unlimited local calling feature. US Tel's offering, with a 1,000 minute limit, does not meet the unlimited standard set out by Commission rule. McLeod offers a similar service to Qwest's basic service, but at a significantly higher price. All other CLEC offerings mentioned in testimony were priced higher than McLeod. The Commission finds that the residential service offerings of CLECs, other than Comcast, are not the same or substitutable for Qwest's basic residential service. Therefore, the Commission does not grant residential pricing flexibility for residential basic service in areas outside of Comcast's current serving areas. For these areas, Qwest's current tariff rates for basic service will remain in effect.

There remains the question of whether, for Qwest's other services in the residential pricing flexibility petition, CLECs are providing services that are the same or substitutable. The Commission finds that for these other services there are the same or substitutable services available from CLECs in the residential market. When basic service is excluded from the comparisons, it is clear that the four threshold conditions mentioned above are met. Therefore, the Commission grants pricing flexibility to Qwest for all of the residential services included in the petition with the exception of basic residential service.<sup>(1)</sup>

### Price Cap

The Commission has the authority under Section 54-8b-2.3(8) to establish price caps to protect the public interest. The basic test the Commission intends to apply in pricing flexibility dockets was stated in previous dockets 02-049-82 and 01-2383-01. In our earlier Order we explained the economic and public policy reasons for our test.

"All parties in this docket except Qwest advocated that the Commission set a price cap or maximum price if pricing flexibility is granted. The Division showed that Qwest's current business customers in Utah central offices where Qwest currently has pricing flexibility authority pay more for many services than do Qwest's Utah customers in central offices where pricing flexibility has not yet been granted. Qwest has testified in many dockets before this Commission that business services tend to be priced above costs. But when faced with a significant loss of market share Qwest did not lower prices. This suggests that even with the significant level of market penetration achieved by CLECs in Qwest's

flexibly priced Utah service territory the benefits of effective competition are not fully manifest.

Utah has limited experience with competitive activity and companies' behavior in areas with only one competitor and pricing flexibility. A price cap is an appropriate protection until sufficient experience accumulates to evaluate this condition. XO's testimony points out that the public interest danger is even greater if the sole competitor provides service only through resale offerings. This fact suggests an even greater need to provide a price cap in areas with only one competitor or only resale competitors.

In areas where there is only one competitor, or in areas where only resale competition exists the Commission believes protection of the public interest in this case requires the imposition of a price cap at the time pricing flexibility is granted. Therefore, in areas where either of these conditions exists the Commission may impose a price cap when granting pricing flexibility if the public interest requires it.

Either condition (one competitor, or only resale competitors) may be sufficient to require a price cap."<sup>(2)</sup>

The Division and the Committee urged the Commission to alter its decision regarding the price cap, both suggesting that a more granular analysis is needed. The Division urged the Commission to address the viability of competition in light of the changing regulatory and business landscape, and the Committee urged the Commission to adopt an effective competition standard. In response to direct questioning regarding what the Commission should use in establishing a price cap, the Division did not offer a specific measure or standard, but rather testified that the decision had to be made on a case-by-case basis. The Committee did offer the specific standard of using the Herfindahl-Hirschman Index (HHI) as a proxy for effective competition, but did not offer an opinion on what level ought to be the threshold point. The Commission is left in much the same position as the previous dockets, with testimony that identifies concerns about future behavior, but no specific recommended measures to implement into a new test.

The Commission therefore finds that the concerns raised in these dockets are essentially the same as those raised in the prior dockets related to pricing flexibility. The parties failed to provide clear and convincing evidence that the Commission should deviate from its established precedent. We note that there is nothing in the statute that prohibits the Commission from responding to behavior that is deemed to not be in the public interest by implementing a price cap at some future date if circumstances warrant it, or to change the level of the cap in a future proceeding as well. The Commission intends to closely monitor the markets, and the behavior of the participants in them, and act to promote the development of competition and to safeguard the public interest as needed. The Commission also notes that pricing flexibility, by its very nature, anticipates both upward and downward movement in various prices, creative packaging, and marketing of existing and new services. It is expected that consumers will have more choices both in terms of providers and, more importantly, in terms of services as these markets develop.

#### Business Services - Docket Number 03-049-50

The Division testified that certain factors should be considered when addressing the need for a price cap. It expressed concern that barriers to entry would be significant in the absence of Unbundled Network Element-Platform (UNE-P). The Division also asked the Commission to consider that the number of potential competitors was declining. Further, the Division and Committee suggested that HHI numbers show that effective competition is not present.

While the number of CLECs holding current certificates has declined recently, we note that the number of CLECs actually providing service has been increasing or holding steady in each year for which we have data. Further, the number of access lines served by CLECs has also increased year-to-year while Qwest's market share has decreased. The Division asserts that not all of Qwest's line losses are due to competition, and suggests the Commission carefully evaluate the significance of the number of lines Qwest claims it has lost to competition. The Commission recognizes that not all lines Qwest loses are due to customers switching to competitors, and the methods by which Qwest collects the data may skew the results. The fact remains that the CLEC market share in Utah is consistently growing in all areas of the market that CLECs have entered. Whether the process that Qwest has chosen to internally track that growth is accurate does not change that fact that the Commission's own data collection efforts over the past six years have documented that growth.<sup>(3)</sup>

Both the Division and Committee calculated the HHI for the Utah market to demonstrate the potential market power

that Qwest could exercise. This measure is used by the US Department of Justice and the Federal Trade Commission as part of their Horizontal Merger Guidelines when examining the impact of mergers on particular markets. Direct application of HHI numbers is difficult since we are not dealing with a merger but rather are reviewing the current status of an industry. As noted above, Qwest's market share has declined and market concentration as measured by the HHI has continued to decrease.

The Commission finds that the presence of UNE-P reduces the majority of the barriers to entry mentioned in the testimony of the Division and Committee witnesses. The Commission finds that there are at least two competitors in each of the central offices that are the subject of Qwest's business services pricing flexibility petition. Further the Commission finds that these competitors are not using resale as a method of providing service.<sup>(4)</sup> Therefore, the Commission declines to implement a price cap for the services and areas that are included in Qwest's business services pricing flexibility petition.

#### Residential Services - Docket Number 03-049-49

The Commission found that Qwest has no competitors offering a same or substitutable basic residential service outside of Comcast's serving areas; therefore, pricing flexibility was not granted in those areas. The Commission did find that Qwest has only one competitor for basic residential service within Comcast's service area. Based on the reasoning set forth in Dockets 02-049-82 and 01-2383-01, a price cap is placed on Qwest's basic residential service in Comcast's service areas. For Comcast service areas, the Commission sets the price cap for basic residential service at a price equal to the current tariff rate. There was no specific information presented that persuades us that the logic we used in the prior dockets to set the price cap at the current tariff rate is incorrect.

The Commission finds that with the exception of basic residential service, multiple CLECs are providing a variety of residential services that meet the same or substitutable standard for the services in Qwest's petition. Therefore, the Commission imposes no price cap for these residential services.

#### ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Qwest is granted pricing flexibility for the retail business services in the 19 central office areas that are the subject of Docket Number 03-049-50.
2. With the exception of basic residential service as defined in footnote 1, Qwest is granted pricing flexibility for the residential services in Qwest's central office areas that are the subject of Qwest's petition in Docket Number 03-049-49.
3. The status of Qwest's basic residential service in areas defined by Comcast's serving areas will remain unchanged. The current grant of pricing flexibility with a cap equal to the current tariff price is not altered.
4. Qwest's petition for pricing flexibility for basic residential service in areas outside of Comcast's service area is denied.
5. Pursuant to Utah Code 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah this 31<sup>st</sup> day of October, 2003.

/s/ Ric Campbell, Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard  
Commission Secretary

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<sup>1</sup> For the purposes of this Order we define "basic residential service" to consist of a "1FR" account or a "1MR" account, or any other similar service that allows a customer to obtain a basic dial tone and industry standard connectivity with no added features. A customer who chooses to order other features or packages from Qwest is no longer considered a basic residential service customer. We further clarify that intraLATA toll does not count as a feature for the terms of this definition. A customer can purchase basic residential service for either the tariffed price, or the capped price whether or not that customer opts to have Qwest provide intraLATA toll.

<sup>2</sup> Page 8-9, Report and Order in Dockets Numbers 02-049-82 and 01-2383-01.

<sup>3</sup> Since 1998 the Commission has collected data regarding the status of the telecommunications industry in Utah and published that data in an annual report as required by Utah Code Ann. § 54-8b-2.5.

<sup>4</sup> The term resale does not include UNE-P. We believe that CLECs which use UNE-P are a viable economic alternative to Qwest, and that they can act independently of Qwest's retail pricing decisions.