ORDER NO. 03-600

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UX 27

In the Matter of	)	
	)	
QWEST CORPORATION	)	ORDER
	)	
Petition to Exempt from Regulation Directory Assistance and Related Services.	)	

DISPOSITION: RECONSIDERATION DENIED

On June 13, 2003, the Commission entered Order No. 03-368 denying most of Qwest Corporation's (Qwest) petition to deregulate its Directory Assistance (DA) services. On August 15, 2003, Qwest filed an application for reconsideration of Order No. 03-368. Commission Staff filed a response in opposition to Qwest's application on August 29, 2003.

OAR 860-014-0095 governs applications for reconsideration. Under that rule, the Commission may grant an application for rehearing or reconsideration if the applicant shows that there is:

> (3)(a) New evidence which is essential to the decision and which was unavailable and not reasonably discoverable before issuance of the order;
>
> (b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision;
>
> (c) An error of law or fact in the order which is essential to the decision; or
>
> (d) Good cause for further examination of a matter essential to the decision.

Qwest's Position. Qwest argues that the Commission should reconsider its order in this docket for the following four reasons, all having to do with errors of fact or law:

1. Qwest contends that the Commission did not consider the entire record evidence in the proceeding. Specifically, Qwest alleges that the Commission failed to consider a wide enough definition of "relevant market." In earlier cases, in dockets UX 15 and UX 18, Qwest asserts that the Commission used a much wider definition of "relevant market." In those cases, which dealt with deregulating voice messaging services, the Commission considered a number of technologies in defining the relevant market. In Order No. 03-368, however, the Commission determined that the relevant market was limited to DA services delivered via the wireline handset, excluding other technologies for delivery of DA information. Qwest argues that the Commission should follow its own precedent and practice in defining the relevant market. Qwest notes that the Commission did not even mention these prior orders in Order No. 03-368.

2. Qwest argues that the Commission employed the wrong standard for judging price competition. The Commission (Order No. 03-368 at 17) spoke about "price constraining competition" while the statute (ORS 759.030) merely talks about "price competition."

Qwest concludes that "Qwest is unable to set its DA prices at a competitive market level simply because market prices are higher than Qwest's and thus are not 'constrained' by Qwest's lower (regulatory set) prices" (Qwest application at 16). Qwest asserts that the Commission erred in altering the terms of a legislative enactment. Further, the Commission erred because it speculated about what the Legislature intended. The Commission stated, at 17: "However, we do not believe that the Legislature intended to adopt a regulatory scheme that results in increasing prices to customers above what would be considered fair and reasonable under cost regulation."

Qwest argues that if there is price competition, prices will gravitate to the correct level, which may be up or down from the level of regulatory set prices.

3. Qwest next argues that the Commission should reconsider the entire record evidence in conjunction with its previous precedent in considering whether there is price competition. Specifically, Qwest cites to Order No. 94-1556 in UX 15, where the Commission found that alternative providers' services were "offered at comparable terms and conditions." There the prices ranged from $4.95 per month to $25 per month, and the Commission found that price competition existed.

4. Qwest argues that the Commission used the wrong standard regarding functional equivalency. One of the four factors the Commission must consider in determining whether to deregulate a service is whether the alternative providers' services are functionally equivalent or substitutable for Qwest's services. The Commission found that all the DA providers give "the same kinds of information." Order at 6. However, it

then ruled that only wireline carriers' DA services "are equivalent in convenience and accessibility." Order at 16. Qwest asserts that "equivalent in convenience and accessibility" is not the appropriate standard.

In addition, Qwest argues that the Commission should reconsider its determination not to consider whether there is service competition or whether DA services are subject to competition. The Commission did not consider these issues because it found that price competition did not exist. Therefore, under ORS 759.030(3), it was not compelled to deregulate DA services. Under ORS 759.030(2) the Commission has discretion to deregulate a service if price or service competition exists or if the service is subject to competition, but in this case chose not to. Qwest argues that if the Commission had applied previous precedent or even discussed such precedent, or applied the correct statutory standard, the Commission might have come to a different conclusion about the relevant market or about price competition. At a minimum, Qwest believes that had the Commission done so, it might have reached a different conclusion about not considering whether there is service competition for DA services in Oregon. Qwest asks the Commission to reconsider its decision not to consider the service competition and subject to competition factors under ORS 759.030(2).[1]

Staff's Position. Staff argues that the Commission did not unlawfully deviate from past precedent in determining the relevant market and price competition. UX 15 and UX 18 dealt with deregulation of voice messaging services and had nothing to do with DA services. UX 15 ended in a stipulated agreement to deregulate voice messaging, and UX 18 ended without controversy when Qwest accepted conditions not related to the issues in UX 27. UX 27, Staff notes, was a contested docket in which parties disagreed about the relevant market, whether barriers to entry exist, and whether price competition exists. One other difference between the voice messaging dockets and UX 27, according to Staff, is that the Commission specifically concluded in UX 15 (the precursor of UX 18) that Sprint had minimal market power. The issue of market power, which bears directly on the question of whether price competition exists, was an area of disagreement in UX 27.

Staff notes that voice messaging and DA are distinct services. Here, the Commission weighed evidence and determined that Qwest had not met its burden of proof demonstrating that price competition existed in the relevant market of DA service. The lack of conflicting evidence in UX 15 and UX 18 is in sharp contrast to the evidence in UX 27.

Staff also argues that the definition of relevant market is entwined with the price of alternatives in the relevant market as well as additional costs borne by customers. In the voice messaging dockets, the Commission found that answering machines were

[1] Qwest also mentions that the Commission issued its order in this docket well past the statutory deadline. It is not clear whether Qwest asserts this as a ground for reconsideration. At the prehearing conference in this matter, however, Qwest agreed to waive the statutory deadline for this order.

included in the definition of the relevant market and therefore the price of the answering machine was considered in weighing the evidence. In this case, if the relevant market was defined more broadly, one would have to consider other costs associated with more alternatives, such as the cost of owning a computer or cell phone.

Staff maintains that the arguments that distinguish the relevant market for voice messaging and DA services are also true for the Commission's conclusions on price competition. In the present DA docket, the record shows what Qwest's pricing behavior has been in other states where its DA services have been deregulated.

Staff contends that the UX 15 and UX 18 dockets are distinguished from UX 27 by the respective records on barriers to entry. In the case of voice messaging, the Commission found that there were minimal barriers to entry. The ILECs' voice messaging was a new service trying to break into the market for services such as answering machines and answering services. There were no barriers to entry facing competitors in the voice messaging market. In the case of DA, there are barriers to entry. Furthermore, Qwest is the incumbent provider of DA services and its pricing is above the long run incremental cost of providing the service. There are other providers trying to break into the market, but they are offering DA services at a substantially higher price than Qwest.

Discussion and Resolution.

We address Qwest's four points and final argument in turn.

1. We agree with Staff that prior precedent does not determine the relevant market for any given service. The grounds on which Staff distinguishes between voice messaging and DA services are salient and justify our decision not to discuss the voice messaging cases in our order. Qwest is mistaken in asserting that we did not consider the entire record evidence in selecting a definition of relevant market. We chose the definition in the order based on the entire record and consideration of the type of service in question.

2. As to Qwest's arguments about the term "price constraining competition," our order made clear that under competition, we expect prices to fall (as long as they are above marginal cost, as they are for DA services). As we said in Order No. 96-021, "Over the long term, if the conditions for effective competition are met, competition will drive prices closer to incremental cost." We note that we did use the correct statutory phrase "price competition" in our order. See page 17, several occurrences.

We also used the correct statutory standard. In applying the statute, we looked at the factual circumstances shown by the record evidence to determine whether price competition exists. We gave considerable weight to the fact that the alternative providers price their services higher than Qwest's, which are already above Qwest's incremental cost. We took this to indicate that competitors are unwilling to create

sufficient pressure to lower (that is, to constrain) prices. The fact that prices are not falling with alternative providers in the market is evidence that there is a lack of price competition in the market.

In the same passage to which Qwest refers on p. 17 of Order No. 03-368, in which we use the phrase "price constraining competition," we also considered the fact that Qwest had raised prices for its DA service in the states in which that service had been deregulated. We viewed this as further evidence that price competition did not exist because, as we apply the statute, prices should not go up immediately if there is price competition.

Qwest also faults us for speculating about what the Legislature intended with ORS 759.030. It is our job to interpret the laws that we are to apply.

3. Qwest asserts that we should reconsider the entire record evidence in conjunction with precedent in considering whether there is price competition. We have already addressed the differences between the UX 15 and UX 18 dockets and UX 27.

4. Qwest maintains that we used the wrong standard in judging whether other services were functionally equivalent or substitutable for Qwest's DA service. We discussed whether alternatives to Qwest's DA were equivalent in convenience and accessibility. We believe these factors are covered by the concept of substitutability, and find no error here.

Qwest asks us to consider whether there is service competition or whether DA services are subject to competition. Qwest has not convinced us that it is necessary to revisit this decision.

We conclude that Qwest's application for reconsideration does not meet the standards for reconsideration in OAR 860-014-0095 and should be denied.

ORDER

IT IS ORDERED that Qwest's application for reconsideration of Order No. 03-368 is denied.

Made, entered, and effective _____.

_____
Lee Beyer
Chairman

_____
John Savage
Commissioner

_____
Ray Baum
Commissioner

A party may appeal this order to a court pursuant to applicable law.