Office of the Secretary
Service Date
May 3, 2000

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF U S WEST COMMUNICATIONS, INC. FOR DEREGULATION OF BASIC LOCAL EXCHANGE RATES IN ITS BURLEY, IDAHO EXCHANGE.	))))))	**CASE NO. USW-T-99-15** **ORDER NO. 28369**

This case was initiated on July 23, 1999, when U S WEST Communications, Inc. (U S WEST) filed an Application pursuant to *Idaho Code* § 62-622(3) seeking deregulation of its basic local telephone rates in its Burley, Idaho exchange. Section 62-622(3) requires the Commission to cease regulating basic rates in a local exchange calling area upon a showing by an incumbent telephone corporation that effective competition exists for basic service throughout the local calling area. U S WEST premised its Application on an allegation that it "is experiencing 'effective competition' in the Burley exchange as defined within the terms of this statute." U S WEST Application p. 2. This is the first Application to be filed with the Commission by an incumbent telephone provider claiming its basic service rates should be deregulated by the terms of Section 62-622(3).

On July 30, 1999, the Commission issued a Notice of Application and Notice of Right to Intervene. Petitions to Intervene were filed by AT&T Communications of the Mountain States, Inc.; GST Telecom Idaho, Inc.; Electric Lightwave, Inc.; the Idaho Telephone Association; Century Telephone of the Gem State; Century Telephone of Idaho; Potlatch Telephone Company; Troy Telephone Company; and a group called Idahoans for a Competitive Edge in Telecommunications, Inc. The Commission granted each Petition to Intervene.

GST Telecom Idaho, Inc. and Electric Lightwave, Inc. (GST/ELI) filed a Motion to Dismiss U S WEST's Application on September 20, 1999. GST/ELI argued that the statutes require US WEST "to present <u>substantive</u> and <u>meaningful</u> evidence of effective competition," and that the proof of competition must show that it exists *throughout* a local exchange calling area, including expanded local calling areas served by adjacent incumbent companies. GST/ELI Motion p. 2. The Commission convened a prehearing conference on October 12, 1999, and heard arguments on GST/ELI's Motion to Dismiss. Following oral argument, the Commission

issued bench rulings denying the Motion, and also clarifying for the parties the local exchange calling area relevant to US WEST's Application. The Commission subsequently issued Order No. 28184 containing the bench rulings made by the Commission during the prehearing conference. The Commission denied GST/ELI's Motion on a determination that "the pleading filed by US WEST in this case is sufficient to entitle it to present its case in a hearing to the Commission." Order No. 28184 p. 2. Additionally, it became clear during the prehearing conference that US WEST intended to supplement its Application with additional information, and the Commission determined to provide that opportunity to U S WEST. Tr. pp. 21, 37, 39, 43. The Commission denied GST/ELI's Motion in order to allow US WEST an opportunity to present evidence on its Application.

On January 13, 2000, the Commission convened a hearing to receive US WEST's evidence. The Commission also provided an opportunity for parties to submit post-hearing briefs, which subsequently were filed by U S WEST, the Commission Staff and the Idaho Telephone Association. After fully reviewing the evidence presented in this case and the relevant statutes, the Commission issues this Order denying U S WEST's Application for deregulation of its basic service rates in its Burley, Idaho exchange.

STATUTORY FRAMEWORK FOR U S WEST'S APPLICATION

Idaho Code § 62-622(3) provides as follows:

> (3) The commission shall cease regulating basic local exchange rates in a local exchange calling area upon a showing by an incumbent telephone corporation that effective competition exists for basic local exchange service throughout the local exchange calling area. Effective competition exists throughout a local exchange calling area when either:
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> (a) Actual competition from a facilities-based competitor is present for both residential and small business basic local exchange customers; or
>
> (b) There are functionally equivalent, competitively priced local services reasonably available to both residential and small business customers from a telephone corporation unaffiliated with the incumbent telephone corporation.

The legislature specifically provided a statement of its intent regarding the effectiveness of competition when the Commission considers an Application under Section 62-622(3). *Idaho Code* § 62-602(2) provides as follows:

> (2) It is the intent of this legislature that effective competition throughout a local exchange calling area will involve a significant number of customers having both service provider and service option choices and that actual competition means more than the mere presence of a competitor. Instead, for there to be actual and effective competition there needs to be substantive and meaningful competition throughout the incumbent telephone corporation's local exchange calling area.

In these statutes, the legislature stated and reiterated that competition must be actual, effective, substantive and meaningful, and must be present throughout the local calling area before the Commission is required by law to cease regulating basic service rates.

In addition, Section 62-622(3) is an amendment to the Telecommunications Act of 1988, codified at Idaho Code Title 62, Chapter 6. The stated goal of the 1988 Act is to "protect and maintain high quality universal telecommunications at just and reasonable rates for all classes of customers and to encourage innovation within the industry by a balanced program of regulation and competition." *Idaho Code* § 62-602. Under provisions of the 1988 Act, a local telephone company may choose to be exempt from price regulation for all its services other than basic local exchange service. *See Idaho Code* §§ 62-604, -605. This election by a local telephone provider accordingly provides pricing flexibility on services other than basic local services. Following enactment of the 1988 Act, US WEST elected this pricing freedom in its southern Idaho telephone exchanges, including the Burley exchange. Tr. p. 256.

U S WEST'S POSITION

U S WEST in its Application asserted that "Project Mutual Telephone Cooperative Association, Inc. [PMT] has built facilities for the provision of telecommunications service within the geographic boundaries of Burley exchange and is providing service to both small business and residential customers of basic local exchange services using those facilities." U S WEST Application p. 2.[1] The evidence presented by US WEST regarding the level of

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[1] U S WEST also alleged that the presence of wireless service providers satisfies the "functionally equivalent" standard for basic local service set forth in paragraph (b) of Section 62-622(3). U S WEST subsequently abandoned that position and relied solely on the presence of PMT's facilities in the Burley exchange as the basis for its Application.

competition in the Burley exchange was largely undisputed. Taken in the light most favorable to U S WEST, the evidence shows that approximately 30% of its customers currently may have access to PMT as a local telephone provider in the Burley exchange. Tr. p. 139. U S WEST's evidence showed only approximately 4% of the customers actually receive service from PMT. Tr. p. 197. On this record, US WEST's witness testified that "there is no question that actual competition from a facilities-based competitor, is in fact, present for both residential and small business basic local exchange customers in Burley." Tr. p. 190. US WEST thus contends the Commission is required to cease regulating basic local exchange rates in the Burley exchange pursuant to Section 62-622(3)(a).

It became clear during the presentation of this case, including in the post-hearing briefs filed by the parties, that the fundamental question presented by US WEST's Application is a legal one; that is, whether the level of competition in the Burley exchange satisfies the requirements of *Idaho Code* § 62-622(3). More specifically, whether the presence of a facilities-based competitor that may extend to 30% of the local exchange customers meets the standard established by the legislature for mandatory deregulation by law. We conclude on the record in this case that it does not.

ANALYSIS

***Principles of Statutory Construction*.**

In construing and applying a statute, the Commission is guided by principles established by the Idaho Supreme Court. First, as U S WEST noted in its post-hearing brief, "the interpretation of a statute begins with an examination of its literal words." *State v. Watts*, 131 Idaho 782, 784, 963 P.2d 1219 (Ct. App. 1998). *See also Atkinson v. State*, 131 Idaho 222, 224, 953 P.2d 662 (Ct. App. 1998) (the interpretation of a statutory provision must begin with the literal words of the statute, giving the language its plain, obvious, and rational meaning). It is the Commission's duty when construing a statute to ascertain, from reading the whole act in which the statute is contained, the purpose of the legislature and to give affect to the legislative intent. *Greenwade v. Idaho State Tax Commission*, 119 Idaho 501, 505, 808 P.2d 420 (1991).

We thus first turn to the language of Section 62-622(3). The Commission must end regulation of basic local rates upon a showing that "effective competition exists throughout the local exchange calling area." Attention was focused at the hearing on the phrase "throughout the

local exchange calling area." Staff placed in the record the definition for the word "throughout," and argued in its post-hearing brief that "effective competition must be present in or to every part of the local exchange calling area" according to the plain, rational meaning of the words used in the statute. Staff Post-Hearing Brief p. 5.

The literal, rational meanings for the words selected by the legislature compel the conclusion that a competitor's presence must extend to most if not all parts of the local calling area in order for basic service rates to be deregulated. The definition of "throughout" supports no other conclusion. In addition, the statute requires there to be "effective" competition, which is defined as producing a decided, decisive or desired effect, ready for service or action, actual. Webster's New Collegiate Dictionary, 1976. Not only must the competition be in all parts of the calling area; it must be actual, decisive, ready for service.

The conclusion that competition must be pervasive in an exchange is supported by the specific legislative intent provided at *Idaho Code* § 62-602(2). There the legislature reiterated that effective competition throughout the local calling area "will involve a significant number of customers having both service provider and service option choices and that actual competition means more than the mere presence of a competitor." The legislature intends there to be "substantive and meaningful competition throughout the incumbent telephone corporation's local exchange calling area" before basic rates are deregulated. *Idaho Code* § 62-602(2).

U S WEST argues, however, that the Commission should disregard the legislature's expressly stated intent because "when applying a statute that is clear on its face, a reviewing body should not look elsewhere for the legislature's intent in using particular language." U S WEST Post-Hearing Brief p. 12, citing *State v. Berntsen*, 68 Idaho 539, 541, 200 P.2d 1007, 1011 (1948); *Cameron v. Minidoka County Highway District*, 125 Idaho 801, 803, 874 P.2d 1108, 1110 (1993). U S WEST contends "Idaho law does not allow for cross-statute modification of Section 62-622(3) because the statute is plain and unambiguous on its face." U S WEST Post-Hearing Brief p. 15, citing *Miller v. State*, 110 Idaho 298, 299, 715 P.2d 968, 969 (1986); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n. 29 (1978).

We believe U S WEST misapplies principles of statutory construction. The primary purpose in agency construction of a statute is to "determine legislative intent and give effect thereto." *George W. Watkins Family v. Messenger*, 118 Idaho 537, 540, 797 P.2d 1385 (1990). Clearly then an agency should be guided by the expressly stated intent of the legislature in order

to give effect to that intent. That is especially true where, as here, the language of the statute being construed is consistent with the legislature's intent.

The principle of statutory construction U S WEST argues actually is contrary to its position. When interpreting a statute, "the plain meaning of a statute will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results." *Id.*; *Atkinson v. State*, 131 Idaho 222, 224, 953 P.2d 662 (Ct. App. 1998). The clearly expressed legislative intent in Section 62-602(2) is consistent with, not contrary to, the literal language of Section 62-622(3). If the two were inconsistent, it is the expressly stated legislative intent that would prevail because that after all is the goal, to give effect to the legislative purpose and intent.

In addition, it is U S WEST's application of Section 62-622(3) that would lead to absurd results, not application of the actual words of the statute. By U S WEST's analysis, the only operative language in Section 62-622(3) is that contained in subparagraph (a). If U S WEST's interpretation were correct, the legislature would have accomplished its purpose by requiring price deregulation merely when "competition from a facilities-based competitor is present for both residential and small business local exchange customers." It would be enough under U S WEST's interpretation if a facilities-based competitor were available to one residential and one business customer. By that interpretation, the legislature's express requirement that competition be effective, actual, substantive, meaningful, involving a significant number of customers, and throughout the local calling area is all rendered meaningless. As U S WEST points out, "statutes must be read to give effect to every word, clause and sentence." U S WEST Post-Hearing Brief p. 15, citing *Wright v. Willer*, 111 Idaho 474, 476, 725 P.2d 179, 181 (1986).

Alternatively, U S WEST's construction has the legislature using language to create a certain standard and then reversing that standard by redefining the same words in a subparagraph. It is akin to the legislature stating that "competition must be available to most customers" and then defining "most customers" to mean significantly less than half. That would be an absurd result, and is contrary to what the legislature intended.

Finally, none of the cases relied upon by U S WEST support its argument that the Commission must disregard the legislature's intent expressed in Section 62-602(2). U S WEST cites *State v. Berntsen*, *Cameron v. Minidoka County Highway District*, *Miller v. State*, and *Tennessee Valley Authority v. Hill* for its argument that "a reviewing body should not look

elsewhere for the legislature's intent in using particular language." U S WEST Post-Hearing Brief p. 12. None of those cases involved application of an expressly stated legislative intent. The very goal in construing a statute is to "ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions." *Baker v. Sullivan*, 132 Idaho 746, 750, 979 P.2d 619 (1999), *quoting Corporation of the Presiding Bishops v. Ada County*, 123 Idaho 410, 515, 849 P.2d 83, 88 (1993). If ascertaining and giving purpose to the legislative intent is the goal, it would be anomalous to disregard the intent expressly stated in statute. U S WEST's cases at most can be cited for the proposition that it is not necessary to review the legislative history behind a statute when the statute is clear on its face. The Commission could find no authority for the contention that expressly stated legislative intent must be disregarded when it appears consistent with the plain language of the statute it elucidates.

There is established authority, however, for the principle that laws should be reviewed in the statutory context in which they are enacted. *State v. Burnight*, 132 Idaho 654, 978 P.2d 214 (1999) (a statute is to be construed as a whole without separating one provision from another); *Lawlis v. Davis*, 98 Idaho 175, 560 P.2d 497 (1997) (provisions introduced by an amendment must be read in unison with the provisions of the original act); *Matter of Adoption of Cheney*, 126 Idaho 554, 887 P.2d 1061 (1995) (statutes that relate to the same subject matter must be construed together); *Greenwade v. Idaho State Tax Commission*, 119 Idaho 501, 808 P.2d 420 (1991) (tax code statute reviewed in its context in the Idaho Income Tax Act). Statutes are construed "under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed." *State v. Burnight*, 132 Idaho at 659.

Section 62-622(3) is an amendment to the Telecommunications Act of 1988 which, among other things, permits a local telephone company to exempt its non-basic services from price regulation by the Commission. *Idaho Code* §§ 62-604, -605. The pricing flexibility granted U S WEST under the 1988 Act enables it to package products and adjust rates on non-basic services to compete with PMT's pricing flexibility. Tr. pp. 195-96. An example is a product U S WEST calls CustomChoice, which allows customers to select several calling features for a single, reduced price. Tr. p. 148. This is the "balanced program of regulation and competition" envisioned by the legislature "to protect and maintain high-quality universal service telecommunications at just and reasonable rates for all classes of customers and to

encourage innovation within the industry." *Idaho Code* § 62-602. It is the Commission's role in this balanced program to ensure that high-quality basic service remains available at just and reasonable rates for all classes of customers. In this context, it is entirely logical that the legislature required a high level of competition before all regulatory pricing control of basic service rates is removed.

***The Evidence of Competition in the Burley Exchange*.**

Being guided by the statutory directive to deregulate when "effective competition exists for local exchange service throughout the local exchange calling area," we review the evidence presented to determine whether it shows a level of competition that is effective, actual, substantive, meaningful, involving a significant number of customers, and is not just a mere presence.

The only allegation in U S WEST's Application regarding the level of competition is a bare assertion that its testimony will show that PMT "has built facilities for the provision of telecommunication service within the geographic boundaries of the Burley exchange and is providing service to both small business and residential customers of basic local exchange service using those facilities." Application p. 2. Likewise, the testimony and exhibits initially filed by U S WEST are minimal, prompting GST/ELI's Motion to Dismiss and its characterization of U S WEST's evidence as newspaper snippets, speculation and opinion. GTS/ELI's Motion to Dismiss p. 6. U S WEST did strengthen its evidence with its supplemental filing, and we turn next to the record for evidence of "effective competition throughout the local calling area."

U S WEST's evidence is contained in the testimony of a single witness and 13 exhibits. Most of the exhibits have little relevance to the existence of effective competition in the Burley exchange. Exhibit 1 is a list of interconnection agreements and certificates for public convenience and necessity approved by the Commission during the past four years. However, U S WEST's witness testified that no company other than PMT is providing local service in Burley as a result of the approved interconnection agreements or certificates. Tr. p. 195.

Exhibit 2 is a drawing showing the boundaries of the local exchanges of PMT, Albion Telephone Company, and U S WEST's Burley exchange. Exhibits 3, 5 and 6 are newspaper and business journal articles discussing PMT's expansion plans; Exhibit 4 is a copy of PMT's quarterly customer newsletter. Exhibit 3 discusses future plans of AT&T to provide local

telephone service over cable television lines in the Boise area. Exhibits 4, 5 and 6 do contain information regarding development by PMT of its facilities. Statements in Exhibit 4 are that "residential telephone service and cable telephone services are now being installed in east Heyburn." PMT's newsletter also asserts that "with the activation of service in Heyburn, Project Mutual became the first company to build its own facilities into an area served by an existing telephone company." Similarly, the newspaper and business journal articles report that PMT sometime in the next three years "will spend millions of dollars to create a network able to provide phone and cable television service to everyone in Burley," Exhibit 5, and that PMT "has installed 135 miles of fiber optic cable in the Rupert-Heyburn area over the past seven years." Exhibit 6. U S WEST provided exhibits that are photographs of PMT's central offices and facilities, Exhibit 7 and 7a, and a map U S WEST prepared showing the location of PMT's fiber cable. Exhibit 8 and 8a. Exhibit 13 is a graph showing US WEST's gain in customers from 1994 through 1999 in the Burley exchange. From 1994 through 1998, US WEST's customer count increased by at least 300 lines each year. In 1999, U S WEST gained only 28 new customer lines. Tr. p. 93. Based on this information, U S WEST estimated that approximately 30% of its Burley exchange customers may have access to PMT as a local service provider. Staff put its estimate at 20%. Tr. pp. 263, 274.

The record establishes that a facilities-based competitor at least has a presence in U S WEST's Burley exchange, but falls short of showing that competition presently is actual, effective, substantive and meaningful. The record proves that PMT is constructing facilities in the Burley exchange: the only statistical evidence of PMT's effectiveness is that as many as 4% of the Burley customers may be using PMT's local service and that the annual increase in U S WEST's customer line count slowed in 1999. There is no evidence showing that U S WEST's customer gain rate decreased because of the efforts of PMT rather than due to any number of other factors. Even evidence of PMT's facilities does not equate to competition. For example, although evidence showed that PMT had extended fiber optic cable to Declo, U S WEST testified that no resident of Declo can actually obtain service from PMT because "Project Mutual is not focusing on Declo right now." Tr. p. 250. In short, although evidence that PMT is constructing facilities is undisputed, there is scant evidence that PMT's activities present "effective competition throughout the local calling area."

U S WEST's presentation of evidence undoubtedly resulted from its belief that it need not demonstrate the existence of competition throughout the Burley exchange, but merely needed to show the presence of a facilities-based competitor. U S WEST at best provided an estimate that PMT's local service is available to 30% of the customers. We find that the evidence in this record does not satisfy the legislature's intent for the level of competition required to mandate deregulation of basic service rates.

***Public Interest*.**

The Commission is directed, when considering deregulation of incumbent telephone corporations, to "examine the impact such deregulation will have on the public interest." *Idaho Code* § 61-602(3). U S WEST argued that "the burden does not rest on U S WEST to convince this Commission that competition is desirable or beneficial" because "it has been the official policy of this state that full competition throughout the telecommunications industry is in the public interest." U S WEST Post-Hearing Brief p. 10. We can readily agree that full competition in telecommunications may be in the public interest, but the public interest directive is not a theoretical question about the benefits of full competition. It instead requires the Commission to consider the effect on the public interest if deregulation is instituted based on the record in this case.

Our concern regarding the public interest is the same as that which prompted the legislature to require substantive, meaningful competition throughout the local calling area before basic rates are deregulated. It is the concern "that U S WEST could cover its competitive losses by raising its rates for those customers within the local calling area who have no choice of service providers." Tr. p. 260. That amounts to more than 70% of the Burley exchange customers. The economic incentive to ignore those areas where no competition or regulation exists could also jeopardize the availability of high quality universal service at just and reasonable rates.

Nor are we convinced that deregulation of U S WEST's basic local rates will provide real benefits to the Burley customers. U S WEST already has pricing freedom for all but its basic local service rates, and can compete freely with PMT when establishing prices for advanced calling services, as demonstrated by CustomChoice. U S WEST's current residential rate in Burley is only 67 cents per month higher than that of PMT. Tr. p. 259. Given the current similarity in the basic service rates of PMT and U S WEST, "U S WEST's long-standing

position that its residential rate is already priced below its cost," Tr. p. 160, and the relatively few customers that can choose between different providers, it seems unlikely that deregulation of U S WEST's basic local rates will mean lower prices for customers.

Finally, if deregulation occurs here, where the evidence demonstrates little more than the mere presence of a competitor, Section 62-622(3) could be used inappropriately to deregulate virtually all areas in U S WEST's south Idaho service area. We find that the precedent deregulation in this case would establish is contrary to law and adverse to the public interest.

Future Section 62-622(3) Applications.

We conclude on the record in this case that U S WEST's Application for deregulation of its basic local exchange rates in its Burley, Idaho exchange must be denied. Although it may be difficult for U S WEST and other incumbent local telephone providers to obtain precise information of a competitor's activities, Section 62-622(3) nonetheless requires evidence showing more than the mere presence of a competitor. The parties debated whether an applicant must show a specific market penetration level by a competitor for the Commission to hear a Section 62-622(3) case. U S WEST asserts that "a market share test is not appropriate for determining when the requirements of Section 62-622(3) have been met." US WEST Post-Hearing Brief p. 5. Likewise, U S WEST correctly notes that Section 62-602(2) "does not speak in terms of market shares, percentage of customers or other numerical standards." US WEST Post-Hearing Brief p. 16. Staff also testifed that the deregulation standard of Section 62-622(3) is not precise and "contains a certain amount of subjectivity," Tr. p. 262, but that "effective competition should be available to a majority of customers in an exchange before the Commission should take a request for deregulation under consideration." Tr. p. 269. U S WEST disagreed with Staff's recommendation because service to a majority is not specifically required by the statute. Tr. p. 172. U S WEST also expressed concern that requiring a majority "allows the competition to choose which customers it will serve while limiting its availability to less than the majority of customers." Tr. p. 172. U S WEST referred to it as "cherry-picking" by the competitor while the incumbent has not been "freed to compete." Tr. p. 172.

Given the language of the statute, we conclude it would be inappropriate for the Commission to declare a specific penetration level or loss of a specific market share as a bright line test for application of Section 62-622(3). The concern raised by U S WEST is valid, and Section 62-622(3) itself does not provide a benchmark loss of market share for deregulation.

Nonetheless, given the expressed intent of the legislature, it is difficult to foresee circumstances where competition could be deemed effective and throughout the local exchange calling area where less than half the customers have a choice of provider.

Nor is the Commission convinced that the statute requires a competitor to actually construct facilities to all parts of the local calling area. A facilities-based competitor could provide a pervasive presence through a combination of facilities and interconnection agreements that enable it to provide service throughout the local calling area. *See e.g.*, 47 USC 271(c). In order to meet the statutory standard, the incumbent could provide evidence that a competitor is providing service through an interconnection agreement with the incumbent or that resale providers are available to customers and thus present effective competition for the incumbent.

Finally, the Commission is aware that incumbent providers may need to respond quickly in the presence of actual, effective competition in an exchange. "If technology allows a service to be deployed rapidly throughout an area, such as the development of more affordable wireless service, or introduction of local service over the existing cable TV system, this should be taken into consideration when assessing how soon an area should be deregulated." Tr. pp. 269-70. The Idaho Telephone Association (ITA) in its post-hearing brief criticized Section 62-622(3) as making "the transition from regulation to competition incredibly slow, cumbersome and expensive." ITA Post-Hearing Brief p. 2.

This case proceeded at a pace consistent with the requests and actions of the applicant. Several factors contributed to the time required for completion: it is a case of first impression that generated requests for intervention from other interested parties; U S WEST's initial filing prompted a motion to dismiss and U S WEST's subsequent request to supplement its filing; U S WEST requested an opportunity to file post-hearing briefs. U S WEST made no formal assertion or request for expedited treatment or for shortened discovery response times. Nonetheless, the Commission will expedite the process for future applications filed under Section 62-622(3). Assuming the application is complete upon filing and does not need to be supplemented with additional information, the Commission is committed to processing future Section 62-622(3) applications within 90 days of filing.

Although we conclude that U S WEST's Application must be denied on the record in this case, the Application has assisted in clarifying several issues for future applications filed under Section 62-622(3). The Commission determined that the local calling area at issue is the

geographic area served by the applicant company, and "not a calling area that may result from extended area service approved by the Commission and which may involve more than one incumbent local exchange provider." Order No. 28184, p. 2. U S WEST's evidence does demonstrate that open market incentives are having an effect in telecommunications, and that competition may one day exist to replace the need for the traditional regulatory pricing and service controls. To help ensure that the administrative process does not hinder the transition to competitive markets, the Commission will expedite future Section 62-622(3) cases.

CONCLUSION

The Commission concludes on the evidence presented that the Application of U S WEST for deregulation of its basic local rates in the Burley exchange must be denied. The legislature intended competition to be effective, substantive, meaningful, involving a significant number of customers and not just a mere presence by a competitor, and throughout a local exchange calling area for basic rates to be deregulated by law. The evidence shows the presence of a competitor in U S WEST's Burley exchange, but does not demonstrate the existence of effective competition required by the legislature in Section 62-622(3) for rates to be deregulated.

O R D E R

IT IS HEREBY ORDERED that the Application of U S WEST for deregulation of its basic local rates in the Burley exchange is denied.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this day of May 2000.

DENNIS S. HANSEN, PRESIDENT

Commissioner Smith's Dissent Attached
MARSHA H. SMITH, COMMISSIONER

PAUL KJELLANDER, COMMISSIONER

ATTEST:

Myrna J. Walters
Commission Secretary

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DISSENTING OPINION OF
COMMISSIONER SMITH

Case No. USW-T-99-15

I respectfully dissent from the opinion of my colleagues in this case. I find that the statutory requirements for price deregulation of the Burley exchange have been met by the evidence presented and the petition should be granted effective on the date that the nonrural universal service fund is implemented.

The statute provides in relevant part:

> The commission shall cease regulating basic local exchange rates in a local exchange calling area upon a showing by an incumbent telephone corporation that effective competition exists for basic local exchange service throughout the local exchange calling area. Effective competition exists throughout a local exchange calling area when either:
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> > (a) Actual competition from a facilities-based competitor is present for both residential and small business basic local exchange customers; or
> >
> > . . .

I.C. § 62-622(3)(a)

The statutory language and legislative history are clear. Rate setting by the Commission is to cease when effective competition exists throughout a local exchange area. The statute then provides two circumstances, either of which is sufficient to fulfill the requirement of effective competition throughout a local exchange area. The first is when "Actual competition from a facilities-based competitor is present for both residential and small business basic local exchange customers." The evidence presented demonstrates that is the situation in the Burley exchange at the present time.

The facts presented at the hearing were undisputed. Project Mutual Telephone Company (PMT) serves the surrounding areas of Rupert and Oakley, and built its own telephone facilities in U S WEST's Burley exchange and initiated local service there in 1998. In 1999 PMT opened a business office in downtown Burley and began soliciting both residential and business customers. Exhibit 8A outlined the placement and extent of PMT facilities in the Burley

exchange as of July 1999. It is also important to note that PMT can offer a complete package of toll services to customers, unlike U S WEST.

During legislative debate on this statutory provision, the requirement that specific market share percentages or penetration levels be the test of competitive entry was rejected. Instead, the presence of a facilities-based competitor was enacted as the standard. While acknowledging that a facilities-based competitor is present in the Burley exchange, the majority rests its decision on the point that "less than half the customers have a choice of provider." The majority concludes that "competition must be pervasive in an exchange" to meet the legislative intent language of *I.C. §* 62-602(2). In my opinion the precise language of *I.C. §* 62-622(3)(a) was enacted to give the Commission adequate guidance for decision making in these matters. The intent language discusses effective competition as involving "a significant number of customers having both service provider and service option choices." The term "significant" is vague and subjective. The discussion about whether PMT reaches more or less than 30% of Burley customers illustrates that "significant" is unworkable as a legislative standard for Commission decisions. Thirty percent is a significant number of customers, especially when you consider that no one expects that 100% of customers will have this option. I find based on this evidence that the extent of PMT's service in the Burley exchange is sufficient to meet the statutory requirement for price deregulation.

The precise language of *I.C. §* 62-622(3)(a) also avoids placing an impossible evidentiary burden on the applicant. As pointed out in the brief filed on behalf of the Idaho Telephone Association (ITA), information presented on the number of PMT customers in the Burley exchange was of necessity based on estimates. PMT has sole control of evidence about its business plan, number of customers and the implementation schedule. PMT has no obligation to share that information with the Commission and chose not to do so. It also has no obligation, nor would it make business sense for PMT to share that information with its competitor, U S WEST. U S WEST presented the evidence it was able to glean from its operations, the media and personal observation of the exchange and PMT's activities. The majority criticized the U S WEST evidence as minimal and seems to be waiting for evidence that can be presented only if the incumbent loses substantial numbers of customers. Does U S WEST have to wait until it has lost more than 50% of its Burley customers before it can refile with the Commission and attempt

once again to get pricing freedom there? This approach makes the legislature's statutory scheme work as an obstacle to competition, rather than the stepping stone that was intended.

While I find the evidence supports approval of this application, I would not make that approval effective immediately. The Commission should be careful to do all it can for customers who may not have choices in an exchange where price deregulation is anticipated. This concern was noted in the testimony of former Commissioner Perry Swisher, who admonished the Commission not to leave those people "high and dry." While *I.C.* § 62-622(3)(a) doesn't specifically address this concern, *I.C.* § 62-610F requires that we establish a universal service fund (USF) that will provide support for high cost geographic areas identified by the Commission. Proceedings to implement this nonrural USF are underway.

I would make approval of the U S WEST petition effective simultaneously with the implementation of this USF. Thus doing all within the statutory ability of the Commission to protect customers residing in high cost areas where competition may be slow to arrive. The passage of time as the fund is developed and implemented would allow for further expansion of PMT service in the Burley exchange so that fewer customers would be in this situation. There is no guarantee that the nonrural USF as implemented will help any customer in the Burley exchange, but because it may, I would not allow price deregulation until it is in place.

Former Commissioner Swisher's other concern that an incumbent if given pricing freedom would use it to underprice services and run off the competition is essentially an antitrust matter with remedies available other than Commission regulation or oversight.

It will soon be one year since U S WEST filed this application. In all likelihood, PMT's service has continued to expand and grow. It may now extend to at least half of the customers in the Burley exchange. This demonstrates once again the validity of arguments in the ITA Brief that the process as implemented by the Commission is cumbersome and impractical for an industry that is moving from monopoly to competition. I do not believe this is what the legislature contemplated, intended or enacted. It envisioned a speedier process, responsive to the needs of customers and the industry and designed to increase competition. That would be accomplished by recognizing that actual facilities-based competition does exist in the Burley exchange in the form of PMT service for both business and residential customers. By rejecting this application outright, the majority denies competitive forces an opportunity to operate in the Burley exchange. My proposed resolution of this case would give effect to the law as enacted

and provide to customers whatever level of relief results from the implementation of the non-rural USF.

For these reasons, I dissent from the opinion of the majority.

DATED at Boise, Idaho this day of May 2000.

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Marsha H. Smith, Commissioner

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