

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

IN THE MATTER OF THE SECOND APPLICATION OF U )  
S WEST COMMUNICATIONS, INC. FOR A FINDING )  
THAT ITS INTEREXCHANGE )  
TELECOMMUNICATIONS SERVICES ARE SUBJECT TO )  
COMPETITION )

Docket No. 70000-TA-98-442

(Record No. 4516)

APPEARANCES

For the Applicant, U S WEST Communications, Inc. (U S WEST):

PAUL J. HICKEY of Hickey, Mackey, Evans & Walker, Cheyenne, Wyoming.

For the Intervenor, AT&T Communications of the Mountain States, Inc. (AT&T):

MICHEL L. SINGER of AT&T Communications, Denver, Colorado.

For the Intervenor, McLeod Telecommunications Services (McLeod):

ELIZABETH ZERGA of Herschler, Freudenthal, Salzburg, Bonds & Zerga, Cheyenne, Wyoming.

For the Intervenor, Union Telephone Company (Union Telephone):

BRUCE S. ASAY of Associated Legal Group, Cheyenne, Wyoming.

For the Intervenor, MCI WORLDCOM (MCI):

MICHEL MURRAY of MCI WORLDCOM, Denver, Colorado.

HEARD BEFORE

Chairman Steve Ellenbecker

Deputy Chair Kristin H. Lee

Commissioner Steve Furtney

Chairman Ellenbecker, Presiding

ORDER

(Issued April 20, 1999)

This matter is before the Commission upon the renewed application of U S WEST for a finding by the Commission that its interexchange telecommunications services in Wyoming are subject to effective competition under W.S. § 37-15-202(a) of the Wyoming Telecommunications Act of 1995, and upon the interventions of AT&T, McLeod, Union Telephone and MCI in this matter. The Commission having reviewed the application, its files concerning U S WEST,

applicable Wyoming telecommunications law, the evidence presented at the public hearing in this matter and otherwise being fully advised in the premises, HEREBY FINDS and CONCLUDES:

#### Parties and Procedure

1. On July 6, 1998, the Commission issued its order in Docket No. 70000-TA-97-358 which denied a petition by U S WEST to have, inter alia, its interexchange telecommunications services in Wyoming found to be subject to competition under W.S. § 37-15-202(a) in the Wyoming Telecommunications Act of 1995.
2. On October 16, 1998, in the above-captioned matter, U S WEST filed a renewed petition for a finding by the Commission that its interexchange telecommunications services in Wyoming are subject to competition under the Wyoming Telecommunications Act of 1995.
3. On October 28, 1998, the Commission issued its Procedural Order Setting Hearing which scheduled a public hearing in this matter to be held on January 14, 1999, beginning at 9:00 a.m., in the Commission's hearing room in Cheyenne, Wyoming.
4. Notice of the public hearing was published, once per week for two consecutive weeks in the Casper Star Tribune and a public service announcement was broadcast five times per week for two consecutive weeks on KUWR-FM, (Wyoming Public Radio) in Laramie, Wyoming.
5. On November 12, 1998, AT&T filed a Petition to Intervene, which was granted by the Commission in open meeting on November 24, 1998, and confirmed by Commission order of the same date.
6. On November 18, 1998, McLeod filed a Petition for Leave to Intervene, which was granted by the Commission in open meeting on November 24, 1998, and confirmed by Commission order of the same date.
7. On November 20, 1998, Union Telephone filed its Request to Intervene, which was granted by the Commission in open meeting on November 24, 1998, and confirmed by Commission order of the same date.
8. On November 24, 1998, U S WEST filed its Motion for Confidentiality regarding the protection of any proprietary information which might be disclosed during the proceedings in this matter. On December 17, 1998, the Commission issued its Order Granting Motion for Confidentiality Agreement pursuant to open meeting action taken on December 15, 1998.
9. On November 30, 1998, MCI filed its Petition for Leave to Intervene, which was granted in open meeting on December 15, 1998, and confirmed by a Commission order issued that same day.
10. On January 6, 1999, AT&T filed the direct testimony of Warren R. Fischer. On that date, the Commission received McLeod's Notice of Intent to Adopt and Jointly Sponsor Testimony of AT&T Witness Warren Fischer and U S WEST's Responses to AT&T's First Set of Interrogatories.
11. On January 13, 1999, McLeod filed its Responses and Objections to U S WEST's Data Requests.
12. On January 14, 1999, U S WEST filed three separate Motions to Compel Discovery requesting the Commission direct AT&T, McLeod and MCI to respond fully to interrogatories propounded by U S WEST.
13. Pursuant to public notice, under the Wyoming Telecommunications Act of 1995 and in accordance with its Rules, the Commission conducted the public hearing in this matter on January 14, 1999, in the Commission's hearing room in Cheyenne, Wyoming. At the public hearing, the parties appeared in person and through counsel, and were given the opportunity to participate fully in the proceedings. U S WEST presented the testimony of David Teitzel and AT&T presented the testimony of Warren Fischer. Representatives of Union Telephone and MCI observed the proceedings but did not actively participate. No member of the public appeared for the purpose of offering comments.
14. At the conclusion of the public hearing, the Commission established a post-hearing schedule for the submission of late-filed exhibits and the filing thereafter of briefs. The Commission then took the matter under advisement and closed

the proceedings.

15. On January 25, 1999, MCI filed a Notice of Withdrawal from the proceedings.

16. On January 26, 1999, McLeod filed its Confidentiality Agreement regarding the protection of any proprietary information which might be disclosed during the proceedings.

17. On January 28, 1999, the Commission issued its Order Permitting Withdrawal of Party pursuant to open meeting action taken on that day granting the "Notice" of MCI. In its Order, the Commission noted, inter alia, that MCI was a party to the proceedings pursuant to a written order of the Commission and that, generally, parties may not unilaterally undo by notice what the Commission has done by order. Therefore, the Commission, in granting MCI's request, determined that it would treat the Notice as a Motion for Withdrawal.

18. On February 5, 1999, McLeod filed its Closing Brief. On February 8, 1999, AT&T filed its Post-Hearing Brief and U S WEST filed its Post-Hearing Brief and its Motion for Sanctions Against AT&T Communications of the Mountain States, Inc. On February 18, 1999, AT&T filed its Response to U S WEST's Motion for Sanctions Against AT&T.

19. On March 11, 1999, at its regular open meeting, the Commission considered legal arguments regarding U S WEST's Motion for Sanctions Against AT&T and denied the motion. Also, on March 11, 1999, the Commission conducted a public deliberation in this matter. It concluded, by majority vote, that U S WEST's intrastate interexchange telecommunications services in Wyoming are subject to effective competition and approved U S WEST's application. Deputy Chair Furtney dissented and filed a dissenting opinion. (See the attached dissent of Deputy Chair Furtney.)

#### U S WEST's Position

20. David L. Teitzel, U S WEST's Director of Product and Market Issues, testified in support of U S WEST's petition. He began with a clarification of the actual services for which U S WEST seeks pricing flexibility. He testified that:

". . . the range of services for which we are requesting that [subject to effective competition] classification could include our message telecommunications service, that's known colloquially as the 1+ direct dial service; our calling connection plans; our operator surcharges; our 800 service product; the 800 service line product; and outward WATS. So when I refer to our intraLATA long distance family, it would include those specific services." (Transcript of January 14, 1999, public hearing proceedings, hereinafter Tr., p. 47; and also see U S WEST Exhibit 1, pp. 2-3 for a complete description of the services involved in the application.)

21. Teitzel stated that, to have its intraLATA long distance services declared competitive, U S WEST must meet the three prong test found at W.S. § 37-15-202(a). Specifically, he stated that U S WEST must demonstrate (i) the extent to which equal or equivalent services are available from alternative providers in the relevant market, (ii) the extent to which the services of alternate providers are either functionally equivalent or can be substituted at comparable prices, terms and conditions, and (iii) that existing economic, regulatory or technological barriers to entry have been either removed or substantially reduced. (Tr., p. 48.)

22. With regard to the first statutory test regarding the availability of equal or equivalent services from other providers, Teitzel said that over 50 carriers were currently actively providing 1+ intraLATA long distance service in Wyoming which resulted in what he termed a dramatic decrease in U S WEST's share of switched access minutes, a statistic which, in his opinion, "clearly demonstrated" that effective competition exists within the state. He further stated that U S WEST had incurred significant reductions in its provision of 800 Service lines and WATS lines. (U S WEST Exhibit 1, pp. 4-5.) Teitzel testified that AT&T currently had a motion before the Federal Communications Commission (FCC) requesting that it be reclassified as a non-dominant carrier stating that its competitors "financial clout" made monopolistic pricing by AT&T unprofitable, that continued stringent regulation increased costs to its customers, that burdensome and unequal regulation placed it at a disadvantage and deprived its customers of price reductions and innovative service offerings. Teitzel stated that:

"AT&T could well have been describing the current situation U S WEST finds itself in within the Wyoming intraLATA market. The similarities are striking." (Id. at 6.)

23. Teitzel testified that 50 percent of the total intraLATA long distance minutes are being carried by alternative carriers in Wyoming which he termed a "clear indication" that Wyoming customers recognized their competitive long distance options and were taking advantage of those opportunities. (Tr., p. 49.)

24. Teitzel further stated that competitive local exchange companies had also impacted the long distance market in that those companies could offer consumers a complete package of services which was not available from U S WEST due to [federal] regulatory constraints, but which included both local and long distance services in direct competition with U S WEST. He cited two Wyoming-based companies, Tri Tel, Inc., and Silver Star Communications, which had publicly stated that they would provide such competitive services. (U S WEST Exhibit 1, p. 6.)

25. He testified that competitive long distance providers are well known to Wyoming customers, particularly since the implementation of 1+ intraLATA equal access and in part due to a formal informational notice sent in November 1997 by U S WEST to its customers indicating the availability of alternative intraLATA equal access providers. He stated that AT&T, Sprint and MCI, all highly visible and nationally known companies, had spent millions of dollars in advertising in U S WEST's service territories alone to attract new customers. He stated his opinion that the smaller new market entrants also posed a competitive risk. (Id. at 7.)

26. Teitzel testified that U S WEST's interexchange services also faced competition from wireless services, Internet Protocol telephony and "dial-around" services. He testified that wireless subscribership from 1996 to 1997 had increased nationally by 25.6% and the cost for that service had decreased by 10.3%. He further cited a study which predicted that wireless telephones would account for 20% of worldwide telephone traffic by the year 2005. He stated that Internet telephone technologies also were emerging as a significant competitor in the long distance market. He said:

". . . Internet protocol telephony, I'm sure you're familiar with that service. It is available in Wyoming currently. There's a company by the name of Net 2 Phone which offers service for 13 cents a minute. It is a dial 800 access, a dial around type of service, at that price.

"Also, any customer in Wyoming can make a call through Internet telephony to a PC, so PC to PC is available in this state at 5 cents a minute. That technology is in its infancy, but I'm sure it will grow in its popularity. It is available in the market." (Tr., pp. 49-50.)

27. Teitzel also cautioned against underestimating the use of "dial around" (10-10-XXX) service as an alternative to traditional long distance services. He testified that companies offering dial around services were pricing such services comparably to rates offered by traditional companies and had even diversified into the 1+ intraLATA equal access market. In addition, and more importantly, Teitzel testified that MCI and AT&T had both recently introduced dial around programs. In his prefiled testimony, he stated:

"With 15 percent of AT&T customers, 26 percent of MCI customers and 24 percent of Sprint's customers using dial around services, these companies will feign to compete against themselves if in the end it means capturing the customer's business." (U S WEST Exhibit 1, p. 8.)

28. With regard to the second prong of the statutory test of W.S. § 37-15-202(a) ("the extent to which telecommunications services of alternative providers are functionally equivalent or may be substituted at comparable prices, terms and conditions;"), Teitzel testified that the largest providers of long distance service operating in the state all offer service for both residential and business customers and that many smaller providers also offer service to both classes of customers. He stated that the companies providing 1+ intraLATA equal access have both the regulatory authority and technical capability to offer service anywhere within U S WEST's Wyoming service territory. He explained, that, while service may be available statewide, many competitive companies generally target high usage customers. He added, however, that customers in every exchange served by U S WEST have competitive options for their long distance service. (Id. at 9.)

29. Teitzel stated that customers in every exchange served by U S WEST have alternatives for intraLATA long distance service that are functionally equivalent to the long distance service offered by U S WEST and, in the case of 800 and WATS services, U S WEST's competitors offer service that in some cases functionally exceeds that offered by U S WEST. He further testified that U S WEST's competitors are also able to offer multi-jurisdictional service, a

functionality not available to U S WEST due to federal regulatory constraints, imposed under the federal Telecommunications Act of 1996. In addition, Teitzel stated that, because of the implementation of 1+ intraLATA equal access in Wyoming as mandated by the Wyoming Telecommunications Act of 1995, customers could easily use the services of alternative providers. He stated that it could therefore accurately be stated that the services offered by U S WEST's competitors are, at a minimum, functionally equivalent to those offered by U S WEST. (Id. at pp. 9-10.)

30. Teitzel testified that service offered by competitors on the most basic level is comparable in prices, terms and conditions to that currently offered by U S WEST. He indicated that the current per minute charge for a five minute call within Wyoming, based on U S WEST, AT&T and MCI's standard Message Telecommunications Service tariffs, breaks down to 25¢ for U S WEST; 36¢ for AT&T and 33¢ for MCI. Teitzel provided further examples, based upon tariffs on file with the Commission, of competitive companies' long distance offerings. Specifically, he noted:

"Union Telephone Company which offered Wyoming customers long distance service 'anytime, anywhere in the United States for \$.14/minute.'

"McLeod offered discounted long distance service as a component of their PrimeLine service for rates as low as \$.12/minute for customer who make \$50 or more per month in long distance calls within the contiguous 48 states.

"Qwest's Product 430 offers residential customers a rate of \$.10/minute; Product 431 is a toll-free 800-type service with, again, a rate of \$.10/minute; and Product 116 is an outbound WATS-type service for businesses whose monthly usage exceeds \$1,000.00. Intrastate service is provided at a rate of \$.075/minute. The minimum service period is one month. It is furnished through dedicated facilities.

"Tri Tel offers its customers a rate of \$.15/minute for all direct dialed calls anywhere within the state of Wyoming any time of day, any day of the week." (Id. at 11.)

Teitzel stated that the above data demonstrated that competitors were offering ". . . a wide variety of services and options that are functionally equivalent and comparable to U S WEST's intraLATA long distance service in prices, terms and conditions," and that these services were readily available to Wyoming customers. He further noted that the services are not identical, but similar and substitutable in compliance with the requirements of the Wyoming statute. (Id. at 10-11.)

31. Teitzel testified that all long distance providers in Wyoming, except U S WEST, were presently able to offer both interLATA and intraLATA services which served to skew the competitive playing field against U S WEST thereby compromising U S WEST's ability to fairly compete. In addition, he stated that intraLATA 1+ equal access had made it easy for customers to select an alternate carrier for all their long distance needs. (Id. at 12.) He further testified:

"And I would go on to say that in many cases our competitors are offering inter and intraLATA services on a package basis. As you know, at this point U S WEST does not have that capability. We also know that customers want one-stop shopping for their long distance calling services, so to that extent we will argue that U S WEST will continue to be disadvantaged even if we're granted competitive flexibility for long distance services until we also have intraLATA relief." (Tr., pp. 50-51.)

32. With regard to the third prong of W.S. § 37-15-202(a)'s statutory test (wherein we must examine the "existing economic, regulatory or technological barriers to entry"), Teitzel testified that the implementation of 1+ intraLATA equal access effectively removed any perceived regulatory, economic or technological barriers to entry for competitors in the Wyoming market. He argued that, if regulatory barriers did exist, they actually disadvantaged U S WEST. He stated that, due to regulatory requirements, competitors have the ability to preview U S WEST's promotional strategy through a review of its tariff filings and are provided with 30 days in which to form a response. He stated that, because of a competitor's ability to intervene, U S WEST's marketing plans may be delayed for extended periods of time and that only U S WEST must provide costly supporting documentation with its filings. He stated that, in contrast, U S WEST's competitors are allowed to file tariffs relating to new service offerings or changes in existing services on one day's notice and without the added burdens placed on U S WEST. (U S WEST Exhibit 1, pp.13-14.)

33. Teitzel testified that approval of U S WEST's application would be in the public interest as pricing flexibility would cause competing companies to develop creative and effective methods to respond to the long distance needs of

Wyoming consumers and that a level playing field would help ensure that no company was inappropriately disadvantaged. (Id. at 15.)

34. In summary, Teitzel testified:

x ". . . I have demonstrated that a number of alternative providers are now providing intraLATA long distance service in Wyoming. Competitors are providing services that are direct substitutes for U S WEST's long distance services. The rapidly evolving telecommunications industry, with its mega-mergers, alternative local exchange providers, and shifts in regulatory paradigms, has resulted in a competitive local exchange market. U S WEST must be allowed to compete equitably . . . The conditions outlined in W.S. § 37-15-202(a) enabling a service to be classified as competitive have clearly been met." (Id. at 18.)

35. Teitzel acknowledged that, in the Order denying U S WEST's previous application to have its toll service declared competitive, the Commission directed U S WEST to demonstrate the effectiveness of the explicit safeguards, specifically imputation and cost-based pricing, in the Wyoming Telecommunications Act of 1995 both at present and in the future. He said that U S WEST intended to continue imputation and will continue to price its services above their respective total service long run incremental costs. He identified the benefits of competitive classification, stating that competitive pricing flexibility would enhance U S WEST's ability to quickly respond to the competitive market and that the ability to introduce new services and new versions of toll services on one day's notice would place U S WEST in competitive parity with other providers in Wyoming. In conclusion, Teitzel urged the Commission to approve the petition as filed. (Tr., pp. 51-53.)

36. Teitzel argued, if U S WEST's intraLATA toll services were declared competitive by the Commission, that they would not be subject to further regulation by the Commission and that they would not be subject to a hearing requirement for prices changes to those services or a price complaint lodged by a competitor or a consumer. He stated, however, he believed that "other legal remedies" would be available. In making these arguments, he also acknowledged that he was not an attorney. (Tr., pp. 64-65.)

37. Teitzel testified that U S WEST believed that access charges created neither a barrier to entry into the market nor a barrier which established competitors would have to overcome to remain in the market. He reiterated U S WEST's position that viable competition exists within the Wyoming market with access rates at their current levels. He stated:

"Now, sitting here today I strongly believe that the trend in access charges will be down but even at their current levels, I would submit to you that they do not represent an economic barrier." (Tr., p. 66.)

38. Teitzel assured the Commission that, with regard to statutorily required imputation, U S WEST would voluntarily provide an imputation study and update that study "whenever an input factor changed." He further testified that he believed imputation to be a dynamic concept since the provision of long distance services is evolving as new technologies are implemented which will render certain elements of access unnecessary, thereby altering the interpretation of the laws governing access. (Tr., pp. 75-76.)

39. Teitzel testified that there was a distinction between "competition" and "effective competition," but found the distinction subtle. Commenting on the Wyoming Telecommunications Act of 1995, Tietzel stated that:

"Unfortunately the statute didn't call out a specific threshold, so it is somewhat of a subjective call as to when is competition effective.

"Again, I think if comparable services are offered in the market, if you have 50 competitors providing services in the market and customers have chosen with their dollars to take their business to those competitors, I think it is clear the market is competitive and effectively competitive."

Thereafter the Commission sought clarification from Teitzel, thus:

"Is there a need to -- is there a need for any more additional information on those competitors and what size of the market they might have? Do 48 other competitors, each with 1 percent, give you effective competition, or are there some other conditions that you would have to assess regarding some of those other players?"

He responded:

"I would suggest that to the extent you've got one, two or three large carriers that comprise a part of that 50 percent volume of toll that's carried by the competitive market, a lot of that volume is concentrated amongst a very few number of carriers, I think that does support a finding that the market is more competitive as opposed to having that volume spread across 20 very small competitors."

(This paragraph generally, Tr, pp. 84-85.)

#### AT&T's Position

40. Warren R. Fischer, a Manager in AT&T's Access Management Group, articulated AT&T's concerns with U S WEST's application. He stated that AT&T did not appear in the proceeding to unilaterally oppose U S WEST's petition to gain relief from regulatory oversight regarding its intraLATA toll services; but, AT&T had continuing concerns about whether U S WEST's access pricing did, in fact, represent a barrier to entry under W.S. §37-15-202(a)(iii). To that end, Fischer urged the Commission to consider U S WEST's application in light of other issues currently pending and to ". . . link the implementation of the rules promulgated under General Order 74 with the eventual reclassification of U S WEST's intraLATA toll service as effectively competitive." Fischer acknowledged that AT&T's principal point of contention in this proceeding related to the test of W.S. § 37-15-202(a)(iii) rather than the other tests of the statute. (Tr., pp. 98-100 and 144.) Consistent with this, Fischer testified, in his opinion, that U S WEST had failed to substantiate its contention that no economic barriers to entry exist based upon [i] U S WEST's monopoly provision of switched access services within its service territory, and [ii] AT&T's belief that U S WEST's switched access prices exceed approved TSLRIC calculations, thereby providing U S WEST with a distinct advantage. Fischer further testified that U S WEST's retention of such a pricing advantage would adversely affect competitors' abilities to provide functionally equivalent services at comparable prices, terms and conditions over the long term. (AT&T Exhibit 1, p. 3.) He testified:

"I believe that U S WEST's petition is still premature because subsidies still exist within the access prices charged by U S WEST. Access priced above TSLRIC is a significant economic barrier because a monopoly provider such as U S WEST can price its services below the costs incurred by its competitors who rely upon U S WEST to provide the underlying access service. U S WEST only incurs the TSLRIC (cost) of access while its competitors pay the price of access to use the same service." (Id. at 7.)

41. Fischer testified that the implementation of 1+ intraLATA equal access removed technological barriers to entry but did not have any effect on economic barriers. He asserted that U S WEST's claims regarding proposed reductions to access were based upon Commission approval of its proposed price plan which was ultimately rejected by the Commission. He further stated that the proposed switched access rules in General Order 74 mandate that access be priced at TSLRIC and until such pricing is implemented, competitors will be disadvantaged and a barrier will exist. (Id. at 8.)

42. Fischer testified that switched access pricing could constitute a barrier to entry in the intraLATA toll market. He stated that although U S WEST must impute switched access in its toll price floors, those floors are still priced in substantial excess of cost thereby providing U S WEST with a profit stream and an advantage not available to its competitors. He testified:

"It is a profit from a monopoly service that can, among other things, be used to fund advertising campaigns or make network improvements that will win customers for its toll services. This is an enormous economic barrier for competitors to try to overcome." (Id. at 10.)

43. Fischer further contended that as long as access remained priced above its cost, U S WEST would be in a position to "price squeeze" competitors out of the intraLATA toll market, with the net effect being that more efficient providers would be precluded from offering Wyoming customers substitutable services at comparable prices. (Id.)

44. Fischer strongly urged the Commission to consider not only the current situation relative to intraLATA toll in Wyoming but any future ramifications which might result from granting U S WEST its proposed relief from regulatory

oversight of this service. He recommended that the Commission abstain from approving U S WEST's application until such time as it prices access in a manner consistent with the access rules promulgated in General Order 74, or in the alternative, grant the application contingent upon access being priced at TSLRIC pursuant to the rules. (Tr., p. 105.)

45. Fischer clarified his argument relative to access charges being a barrier to entry stating that he believed them to be a barrier to sustainable competition. (Id. at 106.) He further acknowledged that he had presented no facts in the proceeding to demonstrate that any of the 50 competitive carriers in Wyoming could not compete with U S WEST; but he did, however, reiterate his concerns regarding their ability to sustain profitability. (Id. at 115.)

46. Fischer conceded that adding the word "sustainable" to the requirements of W.S. § 37-15-202(a)(iii) served to expand the scope of the statute beyond the legislative intent. (Tr., pp. 144-145.) Regarding his argument that we must evaluate "sustainable" competition, Fischer said:

". . . I believe what I've illustrated is you can't just look at what happens at the onset of the market entry by a competitor. What will happen down the road, will competition be able to exist should rules change? (Tr., p. 145.)

Fischer was not aware of any of the 30 or 50 existing competitive Wyoming interexchange carriers dropping out of the market, and he knew of none, including AT&T, which had indicated a desire to cease providing 1+ long distance service in Wyoming. Although he preferred applying his advocated sustainability argument to this case, he could not assist the Commission directly with specific conditions which the Commission could impose now which would provide guidance for a later examination of the state of competition in the interexchange telecommunications market in Wyoming (should the Commission grant U S WEST's petition). He rejected looking at the absolute number of competing service providers later remaining in the market, but advocated concentrating on the reasons why they left or were planning to leave. These factors would, in Fischer's opinion, include the inability to price competitively. He would exclude from the list of troubling reasons for leaving such things as simple business ineptitude and a company decision that the size or composition of the Wyoming market was not suited to its goals. (Tr., pp. 145-148 and 150.)

47. Fischer conceded that most of the fifty current competitors could leave the relevant Wyoming market, and that market could still be considered subject to competition. He clarified what examination should be undertaken at that point in time to see whether competition existed:

"I still think you would have to consider the other factors that define effective competition. If no one is left to provide comparable services on rates, terms and conditions for whatever reason, then whatever status the market was in has changed." (Tr., p. 148.)

He would not state an exact number of months or years into the future a later test for sustainable competition should take place, but he did say that the Commission should ". . . look at it at various points in the future to find out if the level of competition has changed dramatically and what those reasons might be for that change." (Tr., pp. 150-151.) He acknowledged that the Commission could in the future find a service no longer subject to competition pursuant to the provisions of W.S. § 37-15-202(b); and taken together, his suggestions essentially backed a later reexamination of the state of competition in the Wyoming interexchange market on the basis of the factors contained in W.S. § 37-15-202 (a). (Id. at 146-151.)

48. With regard to the distinction between "competition" and "effective competition," Fischer testified that, while the statute provides a starting point, he believed that:

". . . effectively competitive means it is somewhat sustainable, that you have enough momentum in the marketplace that the competitors that are operating there on a playing field with U S WEST have the ability to compete for the long term." (Id. at 152.)

Essentially reiterating the competitive analysis factor set out at W.S. § 37-2-201(a)(ii) ["The extent to which telecommunications services of alternative providers are functionally equivalent or may be substituted at comparable prices, terms and conditions; . . ."], Fischer testified that the Commission could evaluate the long term market situation through a comparison of the rate plans being offered to Wyoming consumers. He stated:

"If you don't find enough competitors that are offering pricing that at least matches U S WEST or in some cases may

try to better what U S WEST offers, then I guess you have to ask is there enough latitude within the market that competitors can do so or are they constrained by some barrier?" (Id. at 153.)

### Applicable Legal Standards

49. The Wyoming Telecommunications Act of 1995 provides specific, straightforward guidance on how the Commission must analyze such cases as this. Under W. S. § 37-15-202, Competitive services:

"(a) Upon petition by any telecommunications company, the commission may, after notice and opportunity for hearing, find and conclude that a telecommunications service is subject to competition. Any service found to be effectively competitive shall not be subject to regulation of prices by the commission. The commission shall consider only the following factors in determining whether a telecommunications service is subject to effective competition:

"(i) The extent to which the same or equivalent telecommunications services are available from alternative providers in the relevant market;

"(ii) The extent to which telecommunications services of alternative providers are functionally equivalent or may be substituted at comparable prices, terms and conditions;

"(iii) Existing economic, regulatory or technological barriers to entry."

50. In this statute, the Wyoming Telecommunications Act of 1995 uses the terms "effective competition" and "competition" without explanation as to what, if any, material distinction should be drawn between the two. It appears therefore that the drafters intended no real difference. Because the criteria for reviewing services to decide whether or not they should be price regulated are presented in the statute as an exclusive "effective competition" test, we will apply the three factors to test for "effective competition;" and we will generally use the terms "effective competition" and "competition" interchangeably. We find no structural or other evidence of a desire to set up a two-tiered test for the applicability of price regulation, and we will not invent one. A service subject to "effective competition" is therefore subject to "competition" for purposes of determining its regulatory treatment. We will not attempt to discern subtle differences where none need to be identified. We note, however, in finding no distinction between these competition-based terms, that the framers of the Wyoming Telecommunications Act of 1995 did not include the word "sustainable" anywhere in W.S. § 37-15-202. We cannot presume this to be an oversight, and we will not add it now.

51. The tests for the existence of competition sufficient to allow the deregulation of the price of a service, found at W.S. § 37-15-202(a), contain such phrases as "extent to which", "same or equivalent" and "relevant market." Because they are phrased in this way, they require the Commission to apply its specialized utility knowledge and experience to the facts of the case to reach a reasoned decision. The standards are not automatic or unreasoning, and our decision must be based on the facts of the case.

52. W.S. § 37-15-202(c) provides us with a legislative policy judgment that certain services are to be considered subject to competition for purposes of regulation under the Wyoming Telecommunications Act of 1995; and U S WEST's interexchange services offered in Wyoming are not among the exempted services.

53. We do not interpret these provisions of the Wyoming Telecommunications Act of 1995 in a vacuum. W.S. § 37-15-102 expresses the intent of the Act, but it also clearly states how we are to construe the Act. It states that:

"It is the intent of this act to provide a transition from rate of return regulation of a monopolistic telecommunications industry to competitive markets and to maintain affordable essential telecommunications services through the transition period, and the provisions of this act shall be construed to achieve those goals."

We must therefore favor a procompetitive result, and we must be mindful that of the impact of our actions on the price of services.

54. Looking to the Wyoming Administrative Procedure Act, W.S. § 16-3-114(c)(ii)(E) requires our decisions to be supported by substantial evidence of record, and W. S. § 16-3-108(a) requires the support of "the type of evidence commonly relied upon by prudent men in the conduct of their serious affairs." W.S. § 37-15-401(a)(v) reminds us that

the Wyoming Administrative Procedure Act applies to the Commission's telecommunications proceedings; and this is repeated by W.S. § 37-15-202(b). The Wyoming Supreme Court has held that the Commission, because of its experience and expertise, is in the best position to evaluate the weight and substance of the evidence presented. *Mountain Fuel Supply Co. v. Public Serv. Comm'n*, 662 P.2d 878 (Wyo. 1983).

### Commission Conclusions

55. Before stating our conclusions, we must emphasize certain observations urged on us by the parties to this case that we must reject and which, we must emphasize, should play no part in our decision under Wyoming law.

a. U S WEST commented on the standard of W.S. § 37-15-202(a)(iii), saying:

"And sub point (iii) says, "Existing economic, regulatory or technological barriers to entry," so to the extent those barriers have been removed or substantially reduced, toll can be classified as competitive." (Tr., p. 48.)

The phrase "removed or substantially reduced" does not appear in the statute; and it constitutes no more than the wish of U S WEST that the statutory test be considered less stringent to make its interexchange service more easily found to be subject to effective competition. We reject this suggested explanation.

b. We are urged by AT&T to consider "effective competition", as that phrase is used in W.S. § 37-15-202(a)(iii) to mean "sustainable" competition. Just as U S WEST would lower the bar, AT&T would raise it in this case. As above, we note that the word "sustainable" does not appear in the statute. We will not force that interpretation onto this case, and we reject the invitation to engage in statutory engineering. We also note that a detailed examination of the AT&T position regarding "sustainable" or "effective" competition shows that there is really little or no difference between the two, with the exception that the word "sustainable" more strongly invites us to speculate on what will happen in the future and to base our decision on what might happen then. The question of "what will happen in the future" is answered not by W.S. § 37-15-202(a) but by W.S. § 37-15-202(b) which allows us to declare a formerly competitive service no longer subject to competition. Given this clear expression of how we should examine services in the future, we will not base our judgment in this case on how long into the future competition might appear to be "sustainable." If it later appears not to be sustained, we will be back in another proceeding to make an examination under the criteria listed in W.S. § 37-15-202(a), but it will be, as here, an examination of the facts of the industry as they then appear, just as this case must also be decided on the extant facts rather than on speculation.

c. Some observations were made in the course of this proceeding that the granting of U S WEST's application by the Commission would be somehow "deregulatory" in nature. Approval of U S WEST's application here means nothing more than that it would enjoy pricing flexibility with respect to its toll products. See, W.S. § 37-15-202(a). A larger deregulatory intent should not be inferred.

56. U S WEST is a telecommunications company as defined by W.S. § 37-15-103(a)(xi), authorized by the Commission to provide local exchange and other telecommunications services within designated service territories throughout Wyoming and, as such, subject to the Commission's jurisdiction pursuant to the provisions of W.S. §37-15-401.

57. Proper public notice was given in this proceeding in compliance with the requirements of the Wyoming Administrative Procedure Act, the Wyoming Telecommunications Act of 1995 and the Commission's Procedural Rules and Special Regulations. The interventions of McLeod, AT&T, Union Telephone and MCI were properly granted. At the public hearing held with respect to this matter, all parties were given an opportunity to participate fully in the proceedings in person and through counsel.

58. The Commission concludes that effective competition currently exists in Wyoming under the stated criteria of W.S. § 37-15-202(a). In partial support for this conclusion, U S WEST has demonstrated by substantial evidence in this case:

a. an increase in the number of companies offering services similar to its interexchange services in Wyoming;

b. measurable decreases in its relevant market shares.

59. We are persuaded by the uncontroverted substantial evidence presented at the hearing that equivalent long distance services are available in Wyoming from alternative carriers (consistent with the criterion of W.S. § 37-15-202(a)(i)). The Commission accepts that over 50 competitive carriers, including established nationally recognized entities, established regional companies and a variety of lesser-known companies, are all currently doing interexchange business in Wyoming. This represents an increase of approximately 67% since January of 1998. We further find that 10-10-XXX "dial around" service and Internet Protocol telephony are also available to Wyoming consumers and that they provide additional choices for consumers seeking telecommunications and telecommunications-like services. We conclude that U S WEST has demonstrated, by the substantial weight of the evidence presented, the availability of a variety of equivalent services from alternative providers; and that they are available in the "relevant market" that being U S WEST's Wyoming service territories. Therefore, U S WEST has satisfied the first statutory test.

60. We are also convinced by the substantial evidence of record in this case that competitive carriers are offering Wyoming consumers functionally equivalent or substitutable services at similar prices, terms and conditions as described in W.S. § 37-15-202(a)(ii). We are persuaded by the undisputed statistical evidence presented by U S WEST witness Teitzel that functionally equivalent services and functionally superior services are available from other carriers at comparable (and sometimes lower) prices. U S WEST has therefore satisfied the second statutory test. We further believe that this conclusion is in complete harmony with the public interest standard and mandates of W.S. § 37-15-102.

61. Under W.S. § 37-15-202(a)(iii), we must "consider" "existing economic, regulatory or technological barriers to entry" as a factor in our decision. The statute does not require us to find that no such barriers exist or that they could never arise in the future. We must therefore judge the effect of any barriers on the emerging competitive interexchange service market in Wyoming. With this in mind, the substantial evidence shows, and we therefore find, no existing regulatory or technological barriers to entry in the intraLATA toll services market as those terms are used in W.S. § 37-15-202(a)(iii), which would preclude a competitor from doing competitive interexchange business in Wyoming. The substantial evidence of record clearly demonstrates that the number of competing companies is increasing within the state.

62. We are not persuaded by, and conclude that we must reject, AT&T's argument that access charges pose an economic barrier to entry. First, we could find no factual support in the record to substantiate this position. AT&T urged us to base our decision largely on events that may or may not occur in the future, i.e., that interexchange carrier competition may not be "sustainable." We rejected this "criterion" above as both a rewriting of our statute and a call to indulge in speculation. We cannot render a decision in this case based upon what may occur in the future. W.S. § 37-15-202(a) provides an exclusive list of criteria which we must apply in deciding this case and subsection (iii) requires us to look only at evidence of "existing" barriers. The facts of U S WEST's access pricing have been urged on us by AT&T as constituting a barrier. We find the facts of U S WEST's pricing to be generally accurately stated; but, as we said above, we find no factual support for the proposition that these facts also describe an existing barrier to entry. Since the statute does not speak in terms of the nonexistence of economic barriers to entry, it requires us to evaluate those barriers and apply our expertise to decide the case. The substantial evidence of record shows that U S WEST's access pricing has not stifled the development of interexchange service competition in Wyoming. We conclude that no economic barrier to entry exists sufficient in gravity to overturn our finding that U S WEST has met the criterion set out in W.S. § 37-15-202(a)(iii). Where AT&T tells us that perhaps 200 companies might be competing in Wyoming if access were priced to their liking, we note both that [i] this is unsupported speculation and [ii] more than 50 companies have come to the market.

63. In general, the application of U S WEST should be granted as discussed hereinabove, based on the evidence adduced in the hearing of this case and on the legal bases described above. The Commission further concludes that to find otherwise would not follow the public interest mandate of W.S. § 37-15-102. Because this conclusion of the Commission is subject to being overturned later under W.S. § 37-15-202(b) if U S WEST's intraLATA long distance services should no longer be subject to effective competition, we make a standing invitation to the parties to provide the Commission with further information on the state of competition in this market at any time. Under the Wyoming Telecommunications Act of 1995, the Commission retains continuing jurisdiction to revisit this matter in the future if events warrant it.

IT IS NOW THEREFORE ORDERED THAT:

1. Pursuant to public deliberations conducted during the Commission's regularly scheduled open meeting on March 11, 1999, and by majority vote, U S WEST's application for a finding that its Wyoming intraLATA interexchange telecommunications services are subject to effective competition under W.S. § 37-15-202 is hereby approved.
2. Pursuant to open meeting action taken on March 11, 1999, following legal argument by the parties, U S WEST's Motion for Sanctions Against AT&T Communications of the Mountain States, Inc., is hereby denied.
3. U S WEST is directed to file the pertinent imputation studies required under W.S. § 37-15-402(d) and Section 547 of the Commission's TSLRIC Rules.
4. This Order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming, on April 20, 1999.

Public Service Commission of Wyoming

STEVE ELLENBECKER, Chairman

(SEAL) KRISTIN H. LEE, Commissioner

Attest:

STEPHEN G. OXLEY, Secretary and Chief Counsel

Dissent of Deputy Chair Steve Furtney

from the Majority Opinion in Docket No. 70000-TA-98-442 (Record No. 4516):

The Second Application of U S WEST Communications, Inc., for a Finding  
That Its Interexchange Services Are Subject to Competition

I dissent from the majority opinion in this case. While I agree that the evidence suggests that there currently is competition in the Wyoming intraLATA interexchange telecommunications (intraLATA toll) market, I disagree with the conclusion reached in the majority opinion that the intraLATA toll market is subject to effective competition as provided for in W.S. § 37-15-202(a).

I agree with the description of access pricing given for AT&T and McLeod at the public hearing in this case by Warren Fischer, and I consider it to be a significant economic barrier. Mr. Fischer described monopolistically priced access service which is not available from competitors and for which every company seeking to compete in the intraLATA toll market must pay. U S WEST is currently in the position of being a monopoly provider of switched access service, and it is charging switched access prices commensurate with its market position. In my opinion, this constitutes an economic barrier to entry. An effectively competitive market is one which provides competitors with a reasonably fair opportunity to compete well into the future with minimal regulatory oversight. Without effective regulation over U S WEST's switched access service pricing, U S WEST's current market position gives it the ability to obtain monopoly rents for its switched access service and to impose an anti competitive price squeeze on competitors in the intraLATA toll market. It thereby constitutes an economic barrier to entry which is sufficient to support a finding, under the criteria of W.S. § 37-15-202(a) by which we must judge, that U S WEST's services are not yet subject to effective competition. It is still premature to conclude and declare that the Wyoming intraLATA toll market is effectively competitive.

W.S. § 37-15-202(b) provides the means, if warranted at some future date, for the Commission to reverse the majority decision finding U S WEST's intraLATA toll service subject to effective competition. Under this subsection, the Commission may find that relevant services are no longer subject to effective competition and that their prices are then once again subject to regulation by the Commission. My colleagues take more comfort in this statutory provision than I do. Such a determination is likely to require a lengthy legal process and could easily have the effect of eliminating any further interest by those competitors who are now most interested in competing in the Wyoming intraLATA toll market. I believe the more prudent Commission action would be to make sure barriers to market entry are truly gone before finding and declaring that the intraLATA toll market is subject to effective competition and thereby price-deregulated. If we are to follow the mandate of W.S. § 37-15-102 that we give a procompetitive interpretation to the Act and make our decisions in a way that encourages the development of competition, we should be careful not to jeopardize competitive interests by acting too hastily to declare a service subject to effective competition and thereby price-deregulated before barriers to competitive entry are fully removed.

Dated: April 21, 1999.

STEVE FURTNEY, Deputy Chair

