

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Merger of the) DOCKET NO. UT-991358
Parent Corporations of Qwest)
Communications Corporation, LCI) JOINT INTERVENOR RESPONSE
International Telecom Corp., USLD) TO JOINT APPLICANTS' LEGAL
Communications, Inc., Phoenix Networks,) MEMO ON JURISDICTION
Inc. and U S WEST Communications, Inc.)
_____)

NEXTLINK Washington, Inc., Advanced TelCom Group, Inc., McLeodUSA
Telecommunications Services, Inc., Covad Communications Company, Metronet Service
Corporation, and Northwest Payphone Association (collectively "Joint Intervenors") provide the
following Response to Joint Applicants' Legal Memorandum on Jurisdictional Issues. Whether
pursuant to the Commission's general power to regulate the services and practices of U S WEST
Communications, Inc. ("U S WEST"), or specific statutes governing transfers of property and
affiliated interest dealings, the legislature has provided more than adequate authority to the
Commission to examine the proposed merger and ensure that the merger complies with, and
promotes, the public interest in Washington.

DISCUSSION

The Commission has previously resolved the basic jurisdictional issues applicable to the
proposed merger between U S WEST, Inc., and Qwest Inc. in favor of asserting jurisdiction over
such mergers. *In re Application of PacifiCorp and Scottish Power PLC*, Docket No. UE-981627,
Second Supp. Order (March 1999). Commission Staff has applied the Commission's decision to

a proposed merger involving the parent of an incumbent local exchange company. *In re Application of GTE Corporation and Bell Atlantic Corporation*, Docket No. UT-981367, Commission Staff Memo in Opposition to Summary Determination (June 28, 1999). The Joint Applicants, however, take issue with that analysis, essentially contending that the Commission's general authority is insufficient to grant jurisdiction over the proposed merger and that the Commission is otherwise without authority to review a merger between the parent corporations of public service companies.¹ The Joint Applicants are mistaken.

The Joint Applicants focus on RCW 80.01.040 as the source of the Commission's general authority to regulate U S WEST, claiming that "the Commission's authority permits it only to undertake those actions authorized expressly, or by necessary implication, elsewhere in Title 80." Joint Applicant's Memo at 12. The Washington legislature has done just that in RCW 80.36.140, which expressly authorizes the Commission to investigate the rules, regulations, and practices of

¹ The Joint Applicants also raise the specter that "a Commission decision that it has jurisdiction over transactions between holding companies could call into question the validity of past mergers and transfer of control among such entities which have taken place without Commission review." Joint Applicants' Memo at 13. With the exception of the proposed merger between GTE and Bell Atlantic, however, all such mergers and transfers of control have occurred between parent corporations of regulated telecommunications companies that were classified as competitive. The Commission has consistently waived the statutory restrictions on transfers of property and affiliated interest dealings for competitively classified companies, and has concluded that because of these waivers, mergers and transfers of control involving only these companies do not require Commission action. *In re Application of TCG Seattle for an Order Authorizing the Transfer of Ownership Interests*, Docket No. UT-950621, Order Dismissing Application (Nov. 22, 1995). Commission assertion of jurisdiction over the proposed merger between U S WEST, Inc., and Qwest, Inc., thus would have no impact whatsoever on the validity of past or future mergers or transfers of control involving only the parent corporations of competitively classified companies.

any telecommunications company and to take necessary action to ensure that they are just, reasonable, proper, and nondiscriminatory:

Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, that the rates, charges, tolls, or rentals demanded, exacted, charged or collected by any telecommunications company for the transmission of messages by telecommunications, or for the rental or use of any telecommunications line, instrument, wire, appliance, apparatus or device or any telecommunications receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance or device, or any telecommunications extension or extension system, or that the rules, regulations or practices of any telecommunications company affecting such rates, charges, tolls, rentals or service are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of law, or that such rates, charges, tolls or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force, and fix the same by order as provided in this title.

Whenever the commission shall find, after such hearing that the rules, regulations or practices of any telecommunications company are unjust or unreasonable, or that the equipment, facilities or service of any telecommunications company is inadequate, inefficient, improper, or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities and service to be thereafter installed, observed and used, and fix the same by order or rule as provided in this title.

RCW 80.36.140 (emphasis added).

Although the Joint Applicants do not reference this statutory provision, they claim that the Commission's authority extends only to "the services, rates and practices of the companies subject to its regulation" and that the Commission "lacks authority to review corporate transactions involving other entities." Joint Applicants' Memo at 13. U S WEST, Inc., however,

is not simply some "other entity." Rather, U S WEST, Inc., substantially directs the operations of U S WEST, the regulated company that is the largest incumbent monopoly provider of telecommunications service in Washington. U S WEST, Inc., has "the exclusive power and final authority with respect to decisions relating to enumerated corporate actions, including, among others, material acquisitions and dispositions, *the allocation of capital resources*, termination of certain senior executive officers and *the setting of general corporate strategy*." Joint Application at 6 (emphasis added). U S WEST, Inc., consistently represents that it provides the services offered by U S WEST:

U S WEST, Inc., is a Delaware corporation which directly, and indirectly through wholly owned subsidiaries, provides integrated communications services to approximately 25 million customers nationally, including the western and mid-western states. *U S WEST, Inc.'s primary products and services include local telephone services; long distances services within specified calling areas; high-speed data networking, including Internet access and digital subscriber line (DSL) services; wireless personal communications services (PCS); print and electronic directories; operator services, and video services in limited markets.*

Joint Applicants' Memo at 3 (emphasis added).

U S WEST, Inc., by its own admission, is far more than simply a "holding company" for U S WEST. U S WEST, Inc., actively participates in the management of U S WEST,² at least to

² This unity of management also supports the conclusion that the proposed merger represents a transfer of property subject to Commission approval. Company stock is "property," and U S WEST, Inc., has used its ownership of U S WEST's stock to control how U S WEST provides service as the largest incumbent local exchange company in Washington. U S WEST stock, therefore, is property that is "necessary or useful in the performance of [U S WEST's] duties to the public." RCW 80.12.020. The fact that U S WEST, Inc., may be the entity that is effectively transferring U S WEST's stock to Qwest Inc. does not insulate the

the extent that it dictates U S WEST's "practices" for providing service, such as determining the level of network investment and dealing with competitors. The Commission's authority to investigate U S WEST's practices thus necessarily includes the authority to determine whether a change in the entity that will direct the practices of the largest incumbent local exchange company in the state is consistent with the public interest, including whether the resulting practices will be just, reasonable, proper, and nondiscriminatory.

Affiliated interest statutes also provide the Commission with authority to review the proposed merger. U S WEST, Inc., is an affiliate of U S WEST. *See* RCW 80.16.010 ("affiliated interest" defined to include any corporation holding five percent or more of the voting securities of a public service company). By directing U S WEST management through the allocation of capital resources, terminating executive officers, and setting corporate strategy, among other actions, U S WEST, Inc., provides "management, . . . financial or similar services" to U S WEST that must be approved by the Commission.³ RCW 80.16.020. Those arrangements are subject to continuing Commission oversight to ensure that they comply with, and promote, the public interest:

transaction from scrutiny under the transfer of property statutes when U S WEST, Inc., controls U S WEST and has "exclusive power and final authority with respect to decisions relating to . . . material acquisitions and dispositions." Joint Application at 6.

³ U S WEST, Inc., also provides legal services to U S WEST -- "in house" counsel representing U S WEST in regulatory matters before the Commission, as well as in interconnection contract negotiations under the Telecommunications Act of 1996, are all U S WEST, Inc., attorneys.

The commission shall have continuing supervisory control over the terms and conditions of such contracts and arrangements as are herein described so far as necessary to protect and promote the public interest. *The commission shall have the same jurisdiction over the modifications or amendment of contracts or arrangements as are herein described as it has over such original contracts and arrangements.* The fact that the commission shall have approved entry into such contracts or arrangements as described herein shall not preclude disallowance or disapproval of payments made pursuant thereto, if upon actual experience under such contract or arrangement, it appears that the payments provided for or made were or are reasonable. Every order of the commission approving any such contract or arrangement shall be expressly conditioned upon the reserved power of the commission *to revise and amend the terms and conditions thereof, if, when and as necessary to protect and promote the public interest.*

RCW 80.16.050 (emphasis added).

The proposed merger would result in the assignment of the rights and obligations of U S WEST, Inc., in the affiliated interest arrangements to Qwest Inc., thereby modifying those arrangements. Accordingly, the Commission has explicit statutory authority to review the proposed modification to those arrangements and to reject or "revise and amend the terms and conditions thereof, if, when and as necessary to protect and promote the public interest." *Id.* Whether the relationship between U S WEST, Inc., and U S WEST is viewed as the practices of a single company or as an arrangement between affiliated interests, therefore, the Commission has statutory authority to review the change in that relationship presented by the proposed merger and to impose all conditions necessary to ensure that the proposed merger promotes the public interest.

CONCLUSION

The Commission has ample authority to review the proposed merger, both as part of its general authority to ensure that the practices of U S WEST are fair, just, reasonable, and nondiscriminatory and pursuant to specific statutory restrictions on transfers of property and affiliated interest arrangements. The Commission, therefore, should exercise that authority to review the proposed merger and to take all necessary steps to ensure that the proposed merger complies with and promotes the public interest.

RESPECTFULLY SUBMITTED this 1st day of November, 1999.

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