BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of MCI WORLDCOM, INC. AND SPRINT CORPORATION For an Order (1) Disclaiming Jurisdiction Or,	Docket No. UT-991991 JOINT PETITIONERS' BRIEF ON JURISDICTION

WorldCom, Inc. ("WorldCom")[1] and Sprint Corporation ("Sprint") −(collectively the "Joint Petitioners") request an order disclaiming jurisdiction over the Joint Petitioners' merger because: 1) the Commission lacks jurisdiction over the merger under state law; and 2) even if the Commission has jurisdiction under relevant statutes, it has waived its jurisdiction, and a revocation of such waiver is not warranted.

In the alternative, if the Commission should decide it has jurisdiction under state law, the Commission should forebear from denying the merger or conditioning the merger on any restructure of the proposed transaction that is inconsistent with or more stringent than any modification that may be ordered by federal authorities. Under the Commerce Clause of the U. S. Constitution and Section 253 of the Telecommunications Act, the Commission is preempted from denying the merger. The Commission is also preempted from conditioning the merger on any requirement that would restrict the post-merger entity's ability to provide interstate services in Washington.

[1] Effective May 1, 2000, the name of MCI WorldCom, Inc. has been changed to "WorldCom, Inc."

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

EXECUTIVE SUMMARY

Under Washington state law, this Commission lacks jurisdiction over the proposed transaction that is the subject of the Joint Petition. The Commission's jurisdiction extends only to (i) the sale or other transfer of public utility assets by a *public service company;* (ii) the merger or consolidation of one *public service company* with another; or (iii) the acquisition by a *public service company* of the assets or securities of another. This transaction will take place purely on the holding company level when WorldCom, Inc. and Sprint Corporation merge. Neither holding company is a public service company and none of the public service company subsidiaries will be selling or transferring assets, merging with another public service company, or acquiring the assets or securities of another public service company. Hence, this transaction is not within the Commission's jurisdiction.

Even if this transaction were otherwise within the Commission's jurisdiction, the Commission waived jurisdiction over transactions involving the Joint Petitioners (other than Sprint's United Telephone Company of the Northwest operating subsidiary) in 1986, based on a finding that the competition to which the Joint Petitioners were subject was sufficiently effective as to serve the same purpose as public interest regulation. The record in this proceeding is devoid of any evidence that competition in the telecommunications market is any less competitive than it was in 1986, and for the time period regarding which there is evidence of record, that evidence shows that the market continues to grow ever more competitive. The Commission cannot, on this record, revoke the previously granted waiver.

Even if the Commission otherwise had jurisdiction over the merger, the Commerce Clause of the U.S. Constitution forbids it to exercise such jurisdiction in a manner that unduly burdens, or discriminates against, interstate commerce. Should the Commission deny the Joint Petition, or condition approval on the transfer to a third party of some portion of the intrastate long distance operations of the Joint Petitioners, such an action would in practical effect require the Joint Petitioners to stop providing presubscribed interstate long distance in

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Washington as well. Thus, such an action would violate the Commerce Clause.

The Commission is also preempted from taking such action by Section 253 of the Telecommunications Act of 1996, which provides that no state may adopt a legal requirement that has the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service. Rejection of the Joint Petition, or conditioning it on transfer of some portion of the long distance operations would have just such an effect on Joint Petitioners and is therefore prohibited.

I. Background

A. Description Of The Companies

1. WorldCom, Inc.

WorldCom is a publicly traded Georgia corporation. Its principal offices are located at 500 Clinton Center Drive, Clinton, Mississippi, 39056. WorldCom is a global telecommunications company. Through various operating subsidiaries, WorldCom is authorized to provide intrastate IXC services in 50 states and the District of Columbia, including intrastate services within Washington.[2] The WorldCom IXC subsidiaries also are authorized by the Federal Communications Commission ("FCC") to offer domestic interstate and international voice and data telecommunications services nationwide. WorldCom's IXC subsidiaries, including those operating in Washington, also offer international public switched voice, private line, and data services to other carriers and to business, government, and residential customers, including direct services to approximately 160 foreign countries. These international services are also provided pursuant to FCC authorizations.

WorldCom subsidiaries are qualified as competitive local exchange carriers ("CLECs") in all 50 states. WorldCom has acquired multichannel multipoint distribution

---

[2] WorldCom's regulated subsidiaries (all of which are competitively classified) include: BLT Technologies, Inc. (IXC), Touch 1 Communications, Inc. (IXC), TTI National, Inc. (IXC), MCI WorldCom Communications Inc. (IXC, debit card), MCI WorldCom Network Services, Inc., Teleconnect Long Distance Services & Systems, Co. d/b/a Telecom*USA (IXC), and Metropolitan Fiber Systems of Seattle, Inc. (CLEC).

services ("MMDS") frequencies in a number of markets and plans to develop this spectrum to offer wireless direct broadband access independent of landline telephony or cable television facilities. WorldCom also operates SkyTel Communications, Inc., the nation's third largest paging carrier (based on revenues), that offers a wide array of services to residential and business customers.

2. Sprint Corporation

The principal offices of Sprint are located at 2330 Shawnee Mission Parkway, Westwood, Kansas 77205. Sprint subsidiaries offer local telephone services in 18 states, including Washington, that together serve more than 7.9 million local access lines. United Telephone Company of the Northwest d/b/a Sprint is an incumbent local exchange company ("ILEC") providing retail telecommunications services in the Yakima Valley, Mid-North Columbia, North Kitsap, and East Jefferson County areas of Washington. United serves approximately 89,000 customer access lines in 31 exchanges.

Through various operating subsidiaries, Sprint is authorized to offer intrastate interexchange telecommunications ("IXC") services in 50 states and the District of Columbia, including intrastate services within Washington. Sprint Communications Company, Limited Partnership and ASC Telecom, Inc., d/b/a Alterna Telephone provide long distance telecommunications services throughout the state. The Sprint IXC subsidiaries also are authorized by the FCC to provide interstate and international voice and data telecommunications services nationwide. Sprint subsidiaries are also certified as competitive local exchange carriers ("CLECs").[3] The Sprint PCS group operates a 100% digital PCS wireless network in the contiguous United States, including the Bremerton, Olympia, Portland-Vancouver, Seattle-Bellevue-Everett, Spokane, and Tacoma MSAs, with licenses to provide nationwide service

---

[3] Sprint's regulated subsidiaries include: United Telephone Company of the Northwest (ILEC and primary toll carrier), Sprint Communications Company, LP, which was competitively classified in WUTC Docket No. UT-971048. (IXC, CLEC and debit card), and ASC Telecom, Inc., d/b/a Alterna Telephone (IXC and debit card).

using a single frequency and a single technology.

In addition to offering these telecommunications services, Sprint subsidiaries also have announced plans to utilize the company's 100% digitally switched domestic U.S. telecommunications network to offer customers a full range of advanced and other information services. Integrated On Demand Network ("ION") service extends Sprint's existing advanced network capabilities to the customer and enables Sprint to provide the network infrastructure to meet customers' broadband network demands for data, Internet, and video.

B. Description Of The Transaction

The merger will be achieved through a stock-for-stock transaction between the WorldCom and Sprint holding companies. The merged company will be named WorldCom, Inc. Upon merger closing, the separate corporate existence of Sprint Corporation will cease, and the present wholly-owned subsidiaries of Sprint that hold authorizations from this Commission will survive as wholly-owned subsidiaries of WorldCom. The merger does not involve any assignment of Sprint's or its subsidiaries' authorizations or licenses, or any change in the licensees that hold such authorizations and licenses, and the same companies will continue to provide service to the public. The only change in ownership of the Sprint subsidiaries will occur at the holding company level.

This transaction is subject to approval by the FCC, notification to and/or review by other governmental agencies, including the Hart-Scott-Rodino ("HSR") merger review procedures before the U. S. Department of Justice ("DOJ"), other state public utility commissions, the European Union, and Brazilian antitrust authorities.

II. The Commission Has No Jurisdiction Over This Merger

A. Overview of Commission Authority

The Commission has jurisdiction to review transfers of property and mergers by registered public service companies, but not their stockholders or parent holding companies. RCW 80.01.040 directs the Commission to:

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

> Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of *all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation*, and related activities; including, but not limited to, . . . telecommunication companies . . . . (emphasis added).

RCW 80.12.020 states:

> No *public service company* shall sell, lease, assign or otherwise dispose of the whole or any part of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public, and no *public service company* shall, by any means whatsoever, directly or indirectly, merge or consolidate any of its franchises, properties or facilities with *any other public service company*, without having secured from the commission an order authorizing it so to do . . . . (emphasis added.)

Finally, RCW 80.12.040 provides that:

> No *public service company* shall, directly or indirectly, purchase, acquire, or become the owner of any of the franchises, properties, facilities, capital stocks or bonds of *any other public service company* unless authorized so to do by the commission. . . . Any contract by any *public service company* for the purchase, acquisition, assignment or transfer to it of any of the stocks or other securities of *any other public service company*, directly or indirectly, without the approval of the commission shall be void and of no effect. (emphasis added.)

The Commission has no jurisdiction beyond the plain wording in these statutes.

The Commission's jurisdictions is defined by, and strictly construed in accordance with, its enabling statute. "Agencies are creatures of the Legislature, without inherent or common-law powers and, as such, may exercise only those powers conferred by statute, either expressly or by necessary implication." *Skagit Surveyors v. Friends*, 135 Wn. 2d 542, 558 (1998); *In re Electric Lightwave, Inc.*, 123 Wn. 2d 530, 536-537 (1994); *Kaiser Aluminum v. Labor & Industries*, 121 Wn.2d 776, 780 (1993); *The Erection Company v. The Department of Labor and Industries*, 121 Wn.2d 513, 519 (1993). "An agency cannot legislate, its rules must be within its statutory framework." *Anderson, Leech & Morse, Inc. v. Washington State Liquor Control Bd.*, 89 Wn.2d 688, 694 (1978). Agencies "may not amend or change enactments of the legislature." *Kitsap-Mason Dairymen's Assn. v. Washington State Tax Commn.*, 77 Wn.2d 812,

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

856 (1970); *Pierce Cty. v. State*, 66 Wn.2d 728, 731 (1965).

The Commission can review three types of transactions under the limited authority granted by the jurisdictional statutes:

1) Sale, lease, assignment or disposition by a public service company of its public utility assets under RCW 80.12.020 (the "Disposition Clause"),
2) Merger or consolidation by a public service company of franchises or facilities with another public service company under RCW 80.12.020 (the "Consolidation Clause"), or
3) Acquisition by a public service company of the assets or securities of another public service company under RCW 80.12.040 (the "Acquisition Clause").

See In the Matter of PacifiCorp and Scottish Power, Second Supplemental Order, 1999 Wash UTC LEXIS 124 at *8-9, 192 P.U.R. 4th 143 (1999)("*Scottish Power/PacifiCorp*"); In the Matter of GTE Corporation and Bell Atlantic Corporation, Fourth Supplemental Order, Docket No. UT-990672 at p. 19 (1999)("*GTE/Bell Atlantic*").

All three clauses upon which jurisdiction over this transaction might be asserted deal with actions by a "public service company," defined as "every company now or hereafter engaged in business in this state as a public utility and *subject to regulation as to rates and service by the utilities and transportation commission under the provisions of this title*." RCW 80.12.010 (emphasis added). Washington courts have elaborated as follows:

> A corporation becomes a public service corporation, subject to regulation by the Department of Public Service, only when, and to the extent that, its business is dedicated or devoted to a public use. The test to be applied is whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be serviced by the utility; or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.

Inland Empire Rural Electrification, Inc. v. Department of Public Service, 199 Wash. 527, 537 (1939); see also, West Valley Land Company, Inc. v. Nob Hill Water Association, 107 Wn.2d 359, 365 (1986).

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

As is discussed in greater detail below, because neither party to the proposed transaction is a "public service company," the Commission lacks any basis in any of the three clauses to assert jurisdiction over the merger.

B. The Disposition Clause (RCW 80.12.020)

The Disposition Clause applies to "sale, lease, assignment or disposition by a public service company of its public utility assets." RCW 80.12.020. This clause is not applicable to the Joint Petitioners' merger. Both WorldCom and Sprint are holding companies, not public service companies. They are not registered to provide telecommunications service in Washington. The Commission has never held a classification proceeding regarding these companies. They do not own, operate or manage telecommunications facilities in Washington and do not have rates and services regulated by the Commission. Although the Joint Petitioners' subsidiaries are public utilities regulated by the Commission, the Joint Petitioners themselves are not.

As described in greater detail above, these holding companies will merge through a stock-for-stock transaction. The only change in ownership will occur at the holding company level. Following the merger, the same public service company subsidiaries of the Joint Petitioners will serve the public under their current authorizations. These subsidiaries own all the "public utility assets" – i.e. the assets necessary or useful for the provision of telecommunications services in Washington. *See* RCW 80.12.020. The subsidiaries will remain the owner of those assets after the transaction is completed. Accordingly, the merger does not involve the sale, lease, assignment or disposition of public utility assets by a public service company, and does not fall within the purview of the Disposition Clause.

The Indiana Supreme Court analyzed an Indiana statute similar to RCW 80.12.020 under similar facts and concluded that the Indiana Commission did not have authority to review and approve a merger between two parent companies where neither operated as a public utility. *Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission*, 715 N.E. 2d 351

(Ind. 1999)("*Indiana Bell*"). *Indiana Bell* involved a merger between SBC Communications, Inc. and Ameritech, the parent company of Indiana Bell. Like this one, that merger was a stock transaction occurring at the holding company level. Pursuant to the SBC-Ameritech plan of merger, Ameritech Corporation would continue to own Indiana Bell, and SBC would be owned by Ameritech.

The Indiana Commission claimed jurisdiction to review the merger based on Indiana Code Section 8-1-2-83(a), which states in relevant part that:

> No *public utility* . . . shall sell, assign, transfer, lease or encumber its franchise, works or system to any other person, partnership, limited liability company or corporation . . . without the approval of the commission after hearing.

(emphasis added.) In rejecting the Indiana commission's assertion of jurisdiction over the transaction, the court stated:

> There is no dispute that the effect of the proposed transaction will be to transfer control of Indiana Bell from Ameritech, its current parent, to SBC. It is equally undisputed that Indiana Bell will do nothing to effect the transaction. Its ownership -- more precisely its indirect ownership -- will change, but it will remain the same regulated utility that exists today with the same assets and liabilities, the same customers and suppliers, and the same corporate structure and capitalization. *The issue, in simple terms, is whether section 83(a) requires the Commission's approval for a transfer of control of a public utility if the assets of the operating company -- in this case Indiana Bell -- remain in the operating company and the only things transferred are the outstanding shares of the operating company.*

Indiana Bell, 715 N.E.2d at 354 (emphasis added.)

The court ruled that the Indiana Commission did not have jurisdiction because the Ameritech holding company was not a "public utility" under the statute. The court also rejected the contention of the Indiana Commission that there was a jurisdictional transfer of control of Indiana Bell, a public utility, from Ameritech to SBC. The court stated:

> One problem with this view, which certainly enjoys some support in policy, is that the statute does not support it. As a matter of grammar, the prohibition of section 83(a) operates on public utilities, not anyone else.

Indiana Bell, 715 N.E.2d at 355.

Whatever view this Commission may have regarding the policy benefits over reviewing the mergers of parents of public service companies, this Commission cannot expand its jurisdiction beyond that expressly granted by statute based on its view of policy. That is the exclusive role of the Washington legislature. The Joint Petitioners' transaction and the relevant statutes are substantially the same as in *Indiana Bell.* As in Indiana Bell, the subsidiaries will do nothing to effect the transaction. As in Indiana Bell, the same regulated subsidiaries will be subject to the regulatory oversight of the Commission following the transaction. Only their indirect ownership will change. Moreover, the Indiana Statute is almost identical to the Disposition Clause in RCW 80.12.020, and both statutes apply to public service companies only.[4] Under the reasoning in *Indiana Bell*, the WUTC has no jurisdiction over the Joint Petitioners' merger.

The Public Service Commissions of Missouri and Nebraska have reached the same conclusions under similar facts and statutes. In *SBC Communications, Inc.,* Case No. TM-99-76, 1998 WL 996180 (Mo. P.S.C. Oct. 20, 1998), the Missouri Public Service Commission determined that its jurisdictional statute -- which authorized jurisdiction over "all telecommunications facilities, telecommunications services and to all telecommunications companies" within the state, *see* Mo. Stat. § 386.250 (West 1999) -- did not give it the authority "to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies." *SBC Communications*, 1998 WL 996180,

---

[4] The Indiana statute uses the term "public utility," while RCW 80.12.020 refers to a "public service company." This is a distinction without a difference, however, because RCW 80.12.010 defines a public service company as "every company now or hereafter engaged in business in this state as a public utility . . . ." The Commission distinguished the Indiana statute in *Scottish Power/PacifiCorp* by noting that the Indiana statute states "transfer" instead of "dispose of," which is used in the Washington statutes. However, the key issue regarding this transaction – as in the transaction at issue in *Indiana Bell* – is not whether something is being "transferred" (or "disposed of"), but rather whether what is being transferred includes the "franchises, properties or facilities" of a "public service company." *See Indiana Bell*, 715 N.E.2d at 3355-356. Thus, this minor difference in wording is immaterial.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

at *2.

Similarly, the Nebraska Public Service Commission, which has authority over all carriers "furnishing telecommunication services for hire" in Nebraska, pursuant to Section 75-109 of the Nebraska Code, concluded that "[a]cquisition, merger, or other change of control transactions involving holding companies or other parent entities one or more levels upstream from the Nebraska certificated common carriers, which holding companies and/or other upstream parent entities significantly engaged in *interstate commerce beyond the borders of this State*, and. . . which transactions only indirectly affect the Nebraska certificated carrier, shall not be subject to Commission jurisdiction." *In re Jurisdiction to Authorize Acquisitions, Mergers or Other Transfers of Control*, 186 P.U.R.4th 36, 1998 WL 406789 (Neb. P.S.C. Mar. 10, 1998) (emphasis added).

C. The Consolidation Clause (RCW 80.12.020)

The Consolidation Clause requires that the Commission grant approval before a public service company can "merge or consolidate any of its franchises, properties or facilities with any other public service company." RCW 80.12.020. On its face this clause also does not apply to the Joint Petitioners' merger.

Like the Disposition Clause, the Consolidation Clause applies only to actions by a public service company. As noted above, neither of the Joint Petitioners is a public service company under Washington law. Additionally, the Joint Petitioners' regulated subsidiaries are not merging or consolidating any of their franchises, properties or facilities. These subsidiaries will continue to own separately their respective franchises, properties and facilities.

> The fact that the other subsections explicitly state that they apply to stock of a public utility demonstrates that the General Assembly knows how to say stock when it means stock. The language of this section reinforces the conclusion that the legislature made a conscious choice to exclude transactions in stock from the Commission's section 83(a) jurisdiction.

Indiana Bell, 715 N.E.2d at 356. Similarly, the Washington legislature "knows how to say stock when it means stock." Thus, RCW 80.12.020 cannot be read to include stock transactions.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

D. The Acquisition Clause (RCW 80.12.040)

Under the Acquisition Clause, public service companies may not directly or indirectly acquire the shares of other public service companies without Commission approval. RCW 80.12.040. However, no "public service company" is acquiring shares as part of the Joint Petitioners' merger. The only acquisition of shares in this transaction will take place at the parent company level. WorldCom, Inc., which is not a public service company, will be the only entity acquiring shares in this transaction, and the shares acquired will be those of the Sprint holding company, which is also not a public service company. Even after the merger of the Sprint holding company into the WorldCom holding company, it will be the new WorldCom holding company, which is not a public service company, that holds the shares of the regulated Sprint subsidiaries. Consequently, the Acquisition Clause is inapplicable.

E. The Commission Does Not Have Jurisdiction Over Mergers Of Holding Companies With Public Utility Company Subsidiaries

The Commission recently assumed jurisdiction over the holding company mergers of Bell Atlantic/GTE and Scottish Power/PacifiCorp. The Commission theorized that the public utility subsidiaries of the holding companies were instruments of their parents. Consequently, the subsidiaries effectively "disposed of" their assets when the parents merged. *See Bell Atlantic/GTE* at p. 16; *Scottish Power/PacifiCorp* at *18. The Commission described this as an "indirect transfer of control," triggering Commission jurisdiction. *GTE* at p. 16.

The Joint Petitioners respectfully disagree. In fact, the WUTC has no authority over the Joint Petitioners at all. RCW 80.12.020 and 040 plainly state that the Commission has jurisdiction over mergers of *public service companies only*. The Legislature omitted any reference in the statute to "indirect transfers of control" or mergers of stockholders or parent companies. The Commission must presume that the Legislature left these out intentionally. *The Department of Labor and Industries v. Eula A. Cook*, 44 Wn.2d 671, 678 (1954). The Commission "cannot read into a statute anything which it may conceive that the legislature has unintentionally left out." *Id.*

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

This analysis is consistent with a 1949 Washington Attorney General's Opinion, which also concluded that the Commission can review transactions of public service companies but not their stockholders. In that case, a shareholder sought to sell a majority interest in Prescott Telephone Company, a closely held telephone company. The Attorney General determined:

> [The jurisdictional statute] confers no authority on the public service commission to approve or disapprove the transaction in question. *The sales involve only acts by stockholders disposing of their interests in the public service corporation, and do not involve any action by the public service company to "sell, lease, assign or otherwise dispose of* the whole or any part of its franchises, properties, or facilities whatsoever, which are necessary or useful in the performance of its duties to the public. . . ."
>
> *The jurisdiction of the public service commission under the statute is over the activities of the public service company and not over the activities of its shareholders.* By such act of the stockholders the public service company, the artificial entity, distinct from its stockholders, has not disposed of anything; there has merely been a change in the controlling interest of the public service company.

Wash. Atty. Gen. Opinion, November 25, 1949, p. 4 (emphasis added)("*Attorney General Opinion*"). Importantly, the transfer of holding company stock proposed by Joint Petitioners is even less directly related to an activity of a public service company than the transfer of public service company stock which formed the basis for this Attorney General opinion. Yet, even in that transaction, the *Attorney General Opinion* noted that its ruling might permit corporations to "escape to a measure the jurisdiction of the commission that could properly be exercised if its form of organization were otherwise," but concluded that "this is a matter to be addressed by the legislature." *Id*. at p. 6.

The Commission distinguished this opinion in the *Scottish Power/PacifiCorp* and *GTE/Bell Atlantic* proceedings. The Commission argued that the *Attorney General Opinion* merely involved a stockholder selling stock, and there was no action by the regulated company. It concluded that the Bell Atlantic/GTE and Scottish Power/PacifiCorp mergers were different because the holding companies exercised so much control over the regulated subsidiaries that the actions of the holding companies were effectively the actions of the subsidiaries. These holding

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

companies conceived the transactions, negotiated the mergers, and submitted them to the shareholders for approval. *See Scottish Power* at *21-22; *Bell Atlantic/GTE* at p.17.

This analysis disregards the plain language of the law, which applies only to public service companies. The statute does not direct the Commission to weigh the amount of control that a parent company has over the regulated subsidiary; indeed, as the sole shareholder of wholly-owned subsidiaries, *all* such parents exercise *de jure* control over such subsidiaries. As a result, the Commission's analysis would engraft onto the statute an entire new class of reviewable transactions that is not authorized by the language of the statute itself. Such a wholesale expansion of the scope of the Commission's jurisdiction, is clearly impermissible under the *Skagit* and related decisions cited above. In the case of the Joint Petitioners' proposed merger, the public service companies subject to the Commission's jurisdiction have done nothing to effect the transaction. Actions by the corporate parents alone triggered the transaction underlying this application, and only the parents' acts will be necessary to consummate the transaction. As neither of these entities is a public service company subject to the Commission's jurisdiction, there is no jurisdiction over the transaction.

F. The Commission's General "Public Interest" Authority Under RCW 80.01.040 Does Not Confer Jurisdiction In the Absence of Specific Statutory Authority

The Commission also asserted jurisdiction over the Scottish Power merger based in part on its general authority to regulate in the "public interest" under RCW 80.01.040. The Joint Petitioners respectfully submit that this also was an improper expansion of the Commission's regulatory jurisdiction.

In exercising its general authority, the Commission may only undertake those actions authorized expressly, or inferred by necessary implication. *Washington Independent Telephone Association v. TRACER*, 75 Wn. App. 356, 363. The Commission has specific statutory authority to protect customer interests with regard to the services, rates and practices of the companies subject to its regulation, such as the Joint Petitioners' subsidiaries (and it will retain such jurisdiction following the consummation of the holding company merger). It may

also review any proposed mergers of those public service subsidiaries; it does not have specific authority to review the mergers of their non-regulated parents. The Commission's general "public interest" authority does not expand on its specific authority. *See* RCW 80.01.040(3). As our Supreme Court has noted, the Commission's jurisdiction may not rest upon simple appeals to the "public interest" requirements of RCW 80.01.040(3):

> Although RCW 80.01.040(3) demands regulation in the public interest, that mandate is qualified by the following clause "as provided by the public service laws. . . ." Appellants fail to point out any Section of Title 80 which suggests that nonregulated [businesses] are within the jurisdictional concern of the Commission. *An administrative agency must be strictly limited in its operations to those powers granted by the legislature. . . .* We conclude that the Commission correctly determined that it had no authority to consider the effect of a regulated utility upon a nonregulated business.

Cole v. Washington Utilities and Transportation Commission, 79 Wn.2d 302, 306 (1971) (citations omitted) (emphasis added).[5]

In the absence of any specific statutory provision authorizing Commission action, "reliance on RCW 80.01.040(3) is of no avail." *Washington Independent Telephone Association*, 75 Wn. App. at 368. Simply put, jurisdiction over a parent company merger cannot arise under RCW 80.01.040(3) when that review is not otherwise "provided by the public service laws."

G. The Joint Petitioners' Merger Is Distinguishable From *Scottish Power*

The Commission concluded that it had jurisdiction over the Scottish Power/PacifiCorp merger. In that case, however, PacifiCorp was a public service company subject to the Commission's jurisdiction under Chapter 80.12 RCW. As the corporate entity operating as an electrical company within the state of Washington, PacifiCorp could not claim that it was not a "public service company." The other party to the transaction, Scottish Power PLC, was not a public service company.

---

[5] One corollary of the Court's conclusion is that, even if this Commission otherwise had authority to review this merger, it is clearly not empowered to consider the effects of the merger on activities not regulated by this Commission, such as the provision of interstate services.

In this application, however, neither Joint Petitioner is a public service company subject to the Commission's jurisdiction. Just as important, the entities subject to the Commission's jurisdiction have taken no action to effect the transaction. This is the same factual situation as in *Indiana Bell*, where the court observed:

> There is no dispute that the effect of the proposed transaction will be to transfer control of Indiana Bell from Ameritech, its current parent, to SBC. *It is equally undisputed that Indiana Bell will do nothing to effect the transaction.*

Indiana Bell, 715 N.E.2d at 353, 354 (emphasis added). Accordingly, there is no jurisdiction over the merger.

III. The Commission Waived Jurisdiction To Review The Mergers Of All WorldCom And Sprint Subsidiaries Except United

Even if the Commission has jurisdiction to review holding company mergers, the Commission waived its right to review the WorldCom/Sprint merger. In 1986, the WUTC released an order ("*Waiver Order*") that waived jurisdiction over all transfers of property, affiliate transactions and issuance of securities by the WorldCom and Sprint, based on the Commission's determination that the long-distance market was subject to effective competition.[6] The Commission has granted additional waivers to other WorldCom and Sprint subsidiaries since that time.[7] United Telephone Company of the Northwest d/b/a Sprint ("United") is the only subsidiary without a waiver. As a result, even if the Commission had jurisdiction to review this merger, such jurisdiction would only extend to a consideration of the merger's effect on United and its operations.

IV. The Record In This Proceeding Contains Insufficient Evidence To Support Revocation Of The Waivers Held By Subsidiaries Of WorldCom And Sprint

On October 28, 1999, the Commission initiated a proceeding to revoke the waivers granted in the *Waiver Order* to WorldCom and Sprint's subsidiaries.[8] The Commission

---

[6] Commission Order Granting Petitions in Part, In the Matter of U.S. Sprint Communications Company and MCI Telecommunications Company, Cause Nos. U-86-79 and U-86-101 (Sept. 30, 1986).
[7] *See, e.g.*, WorldCom Network Services, Docket UT-910968.
[8] Commission Order Reopening Cause Nos. U-86-79 and U-86-101, In the Matter of Petitions of Sprint Communications Company and MCI Telecommunications Corporation (October 28, 1999). Assuming

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

can revoke a waiver only if it determines that such a revocation "would protect the public interest." RCW 80.36.320; WAC 480-120-024. Under the APA, this determination must be supported by sufficient evidence. RCW 34.05.570(3)(e).

What constitutes the "public interest" for this purpose has not been defined by the legislature. Logically, however, since the original grant of the waiver was based on the premise that competition would be sufficiently effective as to serve the same purposes as public interest regulation (see RCW 80.36.320(2); WAC 480-120-024), any revocation must be based on a finding that competition is no longer as effective as it was at the time the waiver was granted. The Commission's original finding was that:

> . . . U.S. Sprint and MCI are competitive telecommunications companies whose services are subject to effective competition. For purposes of this order, the relevant market for both companies is the market for interexchange telecommunications services (switched and private line) in the state of Washington. The number and size of alternative providers assure that competitive providers will be available to meet customer needs. The alternative providers are able to offer substitute services at competitive rates, terms and conditions. Neither company has a captive customer base.

Waiver Order at 13. Accordingly, the Commission concluded, the issuance of the merger was justified because competition would serve the same purpose as public interest regulation. *See Id.* at 13-14 There is nothing in the staff's case or elsewhere in the record to support a finding that the Commission's prior findings supporting the waivers no longer apply.

The staff's case consists of the testimony of Dr. Blackmon. Nowhere in his testimony did Dr. Blackmon ever indicate that the competition to which the WorldCom and Sprint subsidiaries are subject today is less effective than the competition to which those entities were subject in 1986. Dr. Blackmon's analysis was limited to a presentation as to the levels of competition in the long distance marketplace in 1994, 1996, 1998, and post-merger (assuming

---

that the Commission's jurisdiction over public service companies extends to mergers of parent corporations and stockholders which the Joint Petitioners dispute, revocation would give the Commission jurisdiction to review the merger of WorldCom and Sprint.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

the companies' market shares immediately prior to the merger were identical to those the companies enjoyed in 1998). *See* Exhibits 247 and 248. Dr. Blackmon presented no data and reached no conclusions as to the effectiveness of long distance competition today relative to its effectiveness in 1986. Such data as Dr. Blackmon did present shows a consistent decline in long distance market concentration during the 1994-1998 time period, notwithstanding intervening events such as the MCI/WorldCom merger in 1998 that would have had the effect of briefly raising market concentration levels. *Id.*

Since Dr. Blackmon used concentration as his sole proxy for the effectiveness of competition,[9] it follows that Dr. Blackmon concluded that the long distance market is, if anything more competitive today than it was in 1994. Thus, any conclusion that the WorldCom and Sprint subsidiaries are less subject to effective competition today than they were in 1986 – which would be required to justify revocation of the waiver – could be reached only if the Commission concluded that the market grew significantly less competitive between 1986 and 1994. Yet the staff presented no evidence of any nature regarding the changes in the level of competitiveness between 1986 and 1994.[10] Moreover, the staff conceded in a data request response that it does not know whether the combined WorldCom/Sprint would be subject to effective competition even after the merger. Exhibit 255.

The staff failed to address revocation as a separate issue at all in its testimony. Dr. Blackmon asserted his conclusion that the merger would not be in the public interest but did not reach the revocation issue. If he had, he might well have been forced to admit that, even after the merger, the Joint Petitioners will still be subject to competition that is at least as effective as

---

[9] Dr. Blackmon acknowledged at hearing that, having performed a Herfindahl-Hirschman Index ("HHI") analysis of the type described in the DOJ Merger Guidelines (the "Merger Guidelines") to measure the concentration of the long distance market, he did not then analyze any of the other factors the DOJ uses in determining whether a particular level of concentration translates to an actual lack of effective competition in a particular market. (*See* Tr. excerpts at 14-18.)

[10] A passing familiarity with the history of the telecommunications industry over the past two decades suggests that it would have been extremely difficult for staff to make a case that the long distance market was less competitive in 1994 – or is less competitive today – than it was in 1986, but staff did not even attempt to make that case.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

(and probably substantially more effective than) it was in 1986. Unless the market ceases to be effectively competitive after the merger -- and Staff has admitted that it cannot say this will be the case -- then competition will continue to serve the same purposes as public interest regulation and revocation is not justified. Simply put, the Staff's failure to address the important threshold issue of revocation leaves the Commission without a sufficient record to revoke the Commission's waiver of jurisdiction over merger.

Finally, revocation on this limited record would render waivers essentially meaningless. They would provide a carrier with no certainty if the Commission could revoke them without determining that the carrier is no longer subject to effective competition. In this case, revocation would also be discriminatory. AT&T would still retain its waivers of statutes and rules even though it has significantly greater market share than the Joint Petitioners-- approximately 41.80% of the Washington intrastate long distance market. *See* Exhibit 247. In contrast, the Joint Petitioners combined have only 32.90% of the Washington intrastate long distance market and have no captive customers. *See* Exhibit 247. Accordingly if the market were less effectively competitive today than in 1986 as regards the WorldCom and Sprint subsidiaries, the same would be true for AT&T, and AT&T's waivers should be revoked as well. Revocation under these circumstances, with no evidence on point, would be arbitrary and capricious.[11]

V. The Commission Would Violate The Commerce Clause Of The U.S. Constitution If It Denies The Merger Or Imposes Conditions That Would Restrict The Merged Entity's Ability To Offer Interstate Services

The Commerce Clause of the U.S. Constitution provides that "Congress shall have the power . . . to regulate Commerce . . . among the several States . . .." U.S. Const. Art. I, § 8, cl. 3. The "dormant" or "negative" Commerce Clause refers to the negative implications flowing from this constitutional grant of exclusive Congressional power; *i.e.*, the inability of states to discriminate against, or unduly burden, interstate commerce. *Oklahoma Tax Comm'n v.*

[11] It also could violate the non-discrimination provisions of 47 U.S.C. § 253(b). See discussion *infra*.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Jefferson Lines, Inc., 514 U.S. 175 (1995). "It is well-settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389 (1984). The Commerce Clause (combined with the Supremacy Clause, U.S. Const. Art. VI, cl. 2) prohibits states from enacting laws that unduly burden interstate commerce. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). A state law affecting interstate activity is virtually per se invalid if it discriminates against interstate commerce in intent or impact. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). Even if the discriminatory effect is unintentional, the underlying regulation must still address a substantial and reasonable local interest. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

The WUTC has no power, under the United States Constitution or federal law, to take any action which would impede the free flow and growth of interstate telecommunication. Any decision by the WUTC to deny Joint Petitioner's merger or impose conditions that would restrict the Joint Petitioners' ability to provide interstate services[12] is unconstitutional and an ultra vires order. The FCC, the Department of Justice, and the European Union are all evaluating this merger. While the WUTC may have its role to play in reviewing the intrastate impact of mergers of carriers engaged in both intrastate and interstate telecommunications,[13] the WUTC cannot exercise such role by burdening the provision of the interstate services. Any attempt at such regulation by the WUTC would be unconstitutional, and would have severe negative consequences extending beyond Washington, as discussed below.

A. A Negative Ruling By The Commission Would Facially Discriminate Against Interstate Commerce By Effectively Prohibiting The Joint Petitioners From Offering Presubscribed, Interstate Service

If the Commission were to disapprove the transaction or (as was suggested by

[12] As shown below, such conditions would include any requirement that one or both of the entities cease, or transfer to a third party, its intrastate long distance operations in this state.

[13] As discussed above, however, under state law, this role does not extend to the review of holding company mergers such as this one.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

staff's witness) require either or both of the Joint Petitioners' to cease or transfer to a third party their in-state long distance operations as a condition of the merger, the Joint Petitioners would have to exit the Washington intrastate market. This would effectively prohibit the Joint Petitioners from offering presubscribed, *interstate* service in Washington. Such a result is prohibited by Federal law and the "dormant" Commerce Clause.

In Washington, there is a "two-PIC" carrier presubscription regime. Under this regime, customers presubscribe to one interLATA and one intraLATA carrier, and the interLATA carrier carries both interstate and intrastate interLATA 1+ calls. Tr. excerpts at 59. LATAs do not conform to state borders. Washington has more than one LATA, and two Washington LATAs include territory in other states (Oregon and Idaho). As a result, an interLATA call can be either intrastate or interstate. For example, a call from Seattle to Spokane is an *intra*state, *inter*LATA call, while a call from Seattle to Portland is an *inter*state, *inter*LATA call. In the two LATAs which include territory in other states, intraLATA service also includes both intrastate and interstate calls. Thus, a call from Seattle to Tacoma is an *intra*state, *intra*LATA call, while a call from Vancouver to Portland is an *inter*state, *intra*LATA call. *See* Exh. 109.

All of this means that customers cannot presubscribe to a carrier solely for interstate calls. A carrier that offers interLATA presubscribed service must transmit both interstate and intrastate calls, since a customer can only PIC one carrier for all interLATA calls. Moreover, in two LATAs (both of which are served by Joint Petitioners), the carrier PIC'ed by a customer for intraLATA service will carry both intrastate and interstate calls. Therefore, as Dr. Blackmon acknowledged (Tr. excerpts at 58-62) the Joint Petitioners simply cannot offer presubscribed, interstate service if they are not permitted to offer intrastate service. At best, the Joint Petitioners could offer dial-around service for interstate calls, thereby obviating the equal access that is a cornerstone of federal policy. Effectively, Washington customers would be unable to choose WorldCom or Sprint as their presubscribed interstate carrier. This would soon

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

eliminate the Joint Petitioners as effective competitors in Washington. *See* Exhibit 246 (Blackmon Direct) at 8. The Commerce Clause forbids such an outcome.[14]

B. A Negative Decision On The Merger Will Facially Impact Interstate Commerce

As explained above, Joint Petitioners would be effectively eliminated as carriers for Washington consumers if the WUTC were to rule against the merger. As clarified by the Supreme Court in *C & A Carbone*, state regulation whose "economic effects are interstate in reach" and which "deprives out-of-state businesses of access to a local market" facially discriminates against interstate commerce, and is virtually *per se* unconstitutional. 511 U.S. at 389. The only constitutional way in which the WUTC can justify its denial of the merger requires the WUTC to show, "under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone*, 511 U.S. at 392.

This is a standard the WUTC cannot meet. First, regulation of interstate long distance carriers such as Joint Petitioners is not, and never has been, a "legitimate local interest," which since the passage of the Communications Act of 1934, has been exclusively a matter of federal jurisdiction. Moreover, the Telecommunications Act of 1996 scaled back the states' authority over intrastate telecommunications in the name of the *national* interest in reducing such stifling regulation. "[C]ourts have long held that state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause." *American Libraries Assoc. v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997)(striking down local laws seeking to regulate internet carriers as violating Commerce Clause).

As shown above, any "local interest" in intrastate competition would actually be *harmed*, not benefited, by disapproval of the merger or requiring cessation or divestiture of intrastate long distance, since that would effectively require the Joint Petitioners to exit the

[14] The only other way Joint Petitioners could conceivably offer presubscribed interLATA and intraLATA service, should the WUTC reject the merger, is if they blocked all 1+ intrastate calls. This would be completely unworkable, as it would leave the customer unable to make an intrastate, interLATA call on a 1+ basis.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Washington interstate market as well. Especially where, as here, any purported "local interest" in regulation is shown to be illusory, a court will not hesitate to invalidate the regulation. *Kassel v. Consolidated Freightways*, 450 U.S. 662, 671 (1981). There simply is no place for WUTC regulation here, because of the unconstitutional effects of such regulation on interstate telecommunications.

C. An Order Conditioning Approval Of The Transaction On The Transfer To A Third Party Of Any Portion Of The Presubscribed Intrastate Long Distance Business Would Undoubtedly Be Unconstitutional

Staff has suggested that it might be appropriate for the WUTC to condition the approval of this transaction on a requirement that the Joint Petitioners transfer to a third party some portion of their intrastate long distance operations. Putting aside for a moment the issue of the WUTC's authority under the Telecommunications Act of 1996, the only possible reason for the WUTC to order such a condition would be that it perceived that the Washington public interest would be disserved if the merger resulted in the state having only two, rather than three, "brand-name" long distance carriers.[15] However, such intrastate commerce protection at the expense of interstate commerce is exactly what the dormant Commerce Clause forbids.

The central rationale of the dormant Commerce Clause is to prohibit local economic protectionism at the expense of interstate commerce. *C&A Carbone*, 511 U.S. at 389. As summarized by the Supreme Court in that case: "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the [state] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. . . . The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests." *C&A Carbone*, 511 U.S. at 392-93.

Rejection of the merger or requiring such a transfer of long distance would be discriminatory because it would mean in practical effect that the only merged carriers able to

---

[15] As will be discussed in detail in the Joint Petitioners' brief on the merits in this proceeding, Joint Petitioners have shown that this conclusion would be substantively incorrect.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

provide presubscribed interstate services in Washington would be those that were authorized by this Commission to merge their intrastate Washington operations. A divestiture order therefore would constitute local protectionism. Pursuant to the federal Constitution, the WUTC has no authority to issue or enforce such an order.

D. Even Assuming A WUTC Merger Rejection Or Condition Requiring Transfer Were Not Facially Discriminatory Against Interstate Commerce, Its Actual Effect Would Be To Unconstitutionally Burden Interstate Telecommunications

A Commission order disapproving the transaction or conditioning approval upon transfer of long distance operations would have the practical effect of creating an undue burden on the ability of the Joint Petitioners to offer interstate service and denying customers the ability to presubscribe to their desired interstate carrier. Even assuming such an order were not facially discriminatory to interstate commerce, the undue burden that order would impose upon interstate commerce would render the order null and void under the Commerce Clause. *Brown - Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). The WUTC must consider what the effect would be on interstate communications if all 50 states were allowed to apply their own unique regulatory scheme to the proposed merger. *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989). Allowing individual state regulatory bodies, including the WUTC, to set their own idiosyncratic terms for the proposed merger would result in the very "balkanization the [Commerce] Clause is primarily intended to prevent." *C&A Carbone*, 511 U.S. at 406 (O'Connor, J., concurring). So long as the WUTC *can* promote competition without interfering with interstate commerce, *it must do so* or its actions are deemed unconstitutional. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Here, the WUTC can adequately promote its legitimate goals of fostering competitive rates and service through its traditional role of rate setting and tariff enforcement. Even after the merger, the WUTC will still be overseeing and approving of local ratemaking. Even after the merger, the WUTC will still retain its consumer protection enforcement powers, as specifically reserved in 27 USC 253(b). Even after the merger, the WUTC will still be able to

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

foster the advancement of universal service and ensure the continued quality of the telecommunications services provided by those carriers to Washington's citizens. Because the WUTC can adequately address its goals without the impermissible burden of rejecting the Joint Petition or conditioning it on transfer of long distance operations, the Constitution mandates that it must do so.

VI. Denial Of The Transaction Or Conditioning It On Transfer Of Long Distance Operations Would Violate Section 253 Of The Telecommunications Act

A. Congress Divested The States Of Most Regulatory Authority In The 1996 Act

"The Federal Telecommunications Act of 1996 ("Telecommunication Act") was enacted 'to promote competition and *reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.'" *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 52 F. Supp. 756, 760 (N.D. Tex. 1998) ("*City of Dallas I*") (quoting the subtitle of the Telecommunications Act, 47 U.S.C. §§ 151 *et. seq.*) (emphasis added). WorldCom and Sprint seek to merge in order to more effectively compete with AT&T, and with the incumbent local exchange carriers. The Telecommunications Act's purpose is to promote competition by removing barriers to entry into the market, specifically, but also barriers to the increased ability of companies to compete. "Although the [Telecommunications Act] is technically written as a set of amendments to the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, it actually represents a dramatic shift in the nature of telecommunications regulation." *Cablevision of Boston v. Public Improvement Commission*, 184 F.3d 88, 97 (1st Cir. 1999). The Telecommunications Act now "imposes significant limitations on the authority of state and local governments to regulate the industry." *PECO Energy Co. v. Township of Haverford*, No. 99-4766, 1999 W.L. 1240941 * 5 (E.D. Penn. Dec. 20, 1999).

> Regulation of the telephone industry (once the principal form of telecommunications) was long premised on the belief that only monopolies could provide reliable, universal service. Thus, state and federal regulators spent decades protecting monopolies from competition. The [Telecommunications Act] takes the opposite

> approach: rather than shielding incumbent telephone companies from competition, it requires them to provide other participants in the telecommunications market with competitive access to their networks and services. This shift exemplifies a widespread change in the laws governing regulated industries.

Cablevision of Boston, 184 F.3d at 97. The Telecommunications Act results from this desire to increase competition and encourage innovation through competition rather than regulation. Congress divested the States of most of their regulatory authority over telecommunications companies in the 1996 Act.

Section 253 (a) of the 1996 Act provides: "No State or local statute or regulation or other State or local legal requirements, *may prohibit or have the effect of prohibiting* the ability of any entity *to provide interstate or intrastate telecommunications service*." 47 U.S.C. § 253(a) (emphasis added). "Congress also recognized the continuing need for state and local governments to regulate telecommunications providers on grounds such as consumer protection and public safety . . . ." *Cablevision of Boston*, 184 F.3d at 98. Section 253(b) reflects this need by carving out safe harbor provisions for states to regulate telecommunications providers in these areas.

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 253(b). As the Conference Committee Report makes clear, states may not exercise the limited authority granted them in Section 253(b) "in a way that has the effect of imposing entry barriers *or other prohibitions preempted by new Section 25[3](a)*." 1996 U.S.C.C.A.N. 138. The legislative history also discusses what Congress intended by "public safety and welfare" and "the rights of consumers."[16]

---

[16] *See Id*. at 138-139. No one has contended that this merger will have a detrimental impact on universal service or service quality, and therefore those clauses of Section 254(b) are not implicated here.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

1. Public Safety And Welfare

"[T]he legislative history indicates that '[b]y "public safety and welfare," the Committee means, among other things, making certain that emergency services, such as 911, are available to the public.'" *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 324 (2d Cir. 2000) (quoting H.R. Rep. No. 104-204, at 75 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, at 41). The legislative history makes explicit that Congress intended that the "public safety and welfare" proviso allows states to impose regulation *only* "if such terms and conditions do not effectively prohibit the provision of competitive services." 1996 U.S.C.C.A.N. 10, 41. Rejection of the merger, or requiring divestiture, would clearly have the effect of prohibiting the merged entity from offering competitive service in Washington. For this reason, the Commission cannot rely on this statutory carve-out to assert jurisdiction here. Even if state law otherwise empowered the Commission to review this holding company transaction (and as shown above it does not), the Commission is limited by Section 253 in the relief it can impose in this proceeding. Such relief must be the minimum necessary to protect the public safety and welfare, and cannot extend to rejection or required transfer.

2. Safeguarding The Rights Of Consumers

Under another provision of Section 253(b), Congress allowed the states to retain their ability to regulate in the area of consumer protection. Specifically, in regard to consumer rights Congress was concerned about the recent practice of "slamming," where a phone customer's long distance provider would be switched without his or her permission. This practice had come to the attention of Congress prior to passage of the Telecommunications Act and was discussed in the conference committee report. This provision of Section 253(b) is not a grant of authority to review mergers and acquisitions in the telecommunications arena, but a recognition of the states' role in protecting consumers from illegal and corrupt practices, like slamming or consumer fraud. Like the proviso with regard to public safety and welfare, this proviso applies only to the extent regulations imposed by the state "do not effectively prohibit the provision of competitive services" and consequently, this clause does not permit this

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Commission to reject, or require transfer of long distance operations as a condition of, this merger.

B. Because 47 U.S.C. § 253 Is A Federal Law, It Preempts State Laws And Regulations Under The Supremacy Clause Of The United States Constitution.

"Congress has the power to preempt state and local law under the Supremacy Clause, which states that 'the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185, 1189-90 (10th Cir. 1999) (quoting U.S. Const. Art. VI cl. 2). "It is a 'familiar and well-established principle' that the Supremacy Clause . . . invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985).

> Federal law preempts state or local law in three situations: "(1) express preemption, which occurs when the language of the federal statute reveals an express congressional intent to preempt state law . . .; (2) federal preemption, which occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a State to supplement it; and (3) conflict preemption, which occurs either when compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Southwestern Bell Wireless, 199 F.3d at 1190 (quoting *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998).

In Section 253(a), Congress has expressly preempted state statutes, regulations, and legal requirements that negatively impact a company's ability to provide telecommunications services, both interstate and intrastate. Section 253(b) reinstates state authority to regulate the telecom industry only "on a competitively neutral basis" in specific categories, none of which are

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

implicated by this merger.[17] State and local governmental authority to impose barriers on telecommunication companies' provision of telecommunications services has been expressly overridden under 47 U.S.C. § 253.[18]

Moreover, federal courts have applied Section 253 in striking down local requirements that conflict with the Telecommunications Act, 47 U.S.C. § 253, and its underlying policies. *See PECO Energy Co. v. Township of Haverford*, No. 99-4766, 1999 WL 1240941 (E.D. Pa. Dec. 20, 1999); *AT&T Communications v. Austin, Texas*, 975 F. Supp. 928 (W.D. Tex. 1997) (granting preliminary injunction). The Telecommunications Act's "purpose is to decrease regulation and increase competition in the telecommunications industry. To this effect, it imposes significant limitations on the authority of state and local governments to regulate the industry." *PECO Energy*, 1999 WL 1240941 at *5.

In *AT&T Communications v. Austin, Texas*, 975 F. Supp. 928 (W.D. Tex. 1997), the court granted AT&T's motion for a preliminary injunction against enforcement of an Austin ordinance regulating local telephone companies serving Austin. AT&T sought to enter Austin's local exchange market by buying at wholesale services from the incumbent Local Exchange Carrier ("LEC"), or local telephone service provider, and by purchasing access to the LEC's network functions on an "unbundled" basis to create its own services. Significantly, AT&T did not choose to construct its own facilities in Austin and, therefore, was not using a public right-of-way. *AT&T v. Austin*, 975 F. Supp. at 933-34. *See also* 47 U.S.C. § 253(c).

Austin passed an ordinance requiring AT&T and other telecommunications service providers to obtain municipal consent in order to operate services in Austin, despite the

---

[17] "Nothing in this section shall affect the ability of a state to impose on a competitively neutral basis and consistent with section 254 of this Section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C.§ 253(b).

[18] "If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement tot he extent necessary to correct such violation or inconsistency." 47 U.S.C. § 253(d).

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

service provider having previously been certified by the state public utility commission. To obtain consent, telecommunications service providers had to provide extensive information and a variety of fees. Without consent the service providers could not compete in the Austin market without being subject to criminal penalties and fines.

AT&T brought a federal action against the City of Austin alleging, among other things, that the ordinance was preempted under Section 253. The court found the preemption claim to be compelling. 975 F. Supp. at 935. It also found that the FCC had neither exclusive nor primary jurisdiction over preemption issues arising under 47 U.S.C. § 253. The court defined the "limited" issue raised in the preliminary injunction action as the scope of Austin's authority under federal and state law to regulate a local telecom service provider in the absence of the provider using the public rights-of-way. On that issue the court found that Austin had overstepped its authority under the Act and enjoined enforcement of the ordinance. "The City's interest in regulating local telephone service providers is limited by federal and state law to managing and demanding compensation for the use of the City's public rights-of-way." 975 F. Supp. at 942-43.

Here the WUTC is limited to the express carve-outs found in section 253(b), there being no issue as to use of public rights-of-way. As discussed above, none of these carve-outs apply. As in *AT&T v. Austin*, any attempt to prohibit the merger is an overstepping of the WUTC's authority under the Telecommunications Act. Disapproval of this transaction would bar the companies from competing in the Washington market. Such an effect is prohibited by the Telecommunications Act as prohibiting or having "the effect of prohibiting" the ability of any entity to provide any interstate or intrastate telecommunications service.

VII. Conclusion

At the threshold, the Commission has jurisdiction only to regulate mergers of regulated, operating companies, not their shareholders or parent companies that have operations in numerous states and countries. Even if the Commission has the power to review this merger,

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

it has waived such jurisdiction, and revocation of such waiver is not warranted. Finally, even if the Commission otherwise had jurisdiction, it cannot exercise such jurisdiction by rejecting this transaction or conditioning it on transfer to a third party of any long distance business.

For the foregoing reasons, the Joint Petitioners request this Commission to issue an order denying jurisdiction over the merger.

Dated this 23rd day of May, 2000.

MILLER NASH, LLP

By______________________
Brooks E. Harlow

SWIDLER BERLIN SHEREFF FREIDMANN, LLP

By______________________
Jean L. Kidoo
Attorneys for WorldCom, Inc.

Eric Heath
Sprint Corporation
Mailstop NVLSVB0110
330 S. Valley View Blvd.
Las Vegas NV 89107

Ann Hopfenbeck, Senior Attorney
WorldCom, Western Public Policy
707 17th Street, Suite 3600
Denver CO 80202