

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re the Application of

U S WEST, INC., and QWEST
COMMUNICATIONS
INTERNATIONAL INC.

For an Order Disclaiming Jurisdiction
or, in the Alternative, Approving the U
S WEST, INC.-QWEST
COMMUNICATIONS
INTERNATIONAL INC. Merger

NO. UT-991538

PUBLIC COUNSEL RESPONSE TO
JOINT APPLICANTS' OBJECTIONS
TO OR PETITION FOR
RECONSIDERATION OF THIRD
SUPPLEMENTAL ORDER
OUTLINING SCOPE OF REVIEW

I. INTRODUCTION

Public Counsel opposes the attempts by the Joint Applicants in their Objections and Petition for Reconsideration (hereinafter "Objections") to limit the scope of review in this proceeding. The Commission has carefully and appropriately established the issues to be reviewed in this docket and should decline to reconsider its Third Supplemental Order or otherwise grant the Joint Applicants' objections.

II. ARGUMENT

A. Joint Applicants Misstate the Standard of Review

Joint Applicants' portrayal of the standard of review from the *Scottish Power* proceeding is incomplete and inaccurate. The Commission's full description of its review standard is as follows:

In order to approve the proposed transaction, the Commission must determine whether it is in the public interest. *There is no bright line against which to measure whether a particular transaction meets the public interest standard. As we observed in another recent merger case, "the approach for determining what is in the public interest varies with the form of the transaction and attending circumstances."* *In Re PacifiCorp and Scottish Power PLC*, Docket No. UE-981627, Third Supplemental Order on Prehearing Conference (April 2, 1999), p.3

Applicants' initial burden requires them to produce sufficient evidence to demonstrate no harm will result as a result of the transaction. That is the burden of going forward with the *prima facie* case. Assuming Applicants meet their initial burden, other parties who assert the transaction, as proposed, is inconsistent with the public interest then must offer evidence to support their assertions. If there is evidence to support allegations that the proposed transaction is not consistent with the public interest, the burden then shifts back to the Applicants who bear the ultimate burden of proof.

Third Supplemental Order Outlining Scope of Review, p. 3. (Third Supplemental Order)(emphasis added). To portray this as a simple “no harm” standard is inaccurate. The Commission has set the scope of this case so as to permit issues to be raised which bear on the public interest. This permits other parties to respond to a *prima facie* case if made by Joint Applicants by a showing that the transaction is not in the public interest.

Joint Applicants' repeated use of intemperate language in their objections to characterize the actions and motivations of other parties to this proceeding is unfortunate. This merger involves the largest incumbent provider of telecommunications service in the state, serving well over 2 million Washington customers, with a correspondingly large impact on economic and societal interests. To suggest that such a merger is *ab initio* “straightforward and non-controversial” and that the public review of the transaction should be severely limited is to suggest that the transaction be in effect rubber-stamped. There is no basis in Washington law for so restricting the Commission or the public role.

To a large extent, Joint Applicants' objections reassert an argument made and rejected at the prehearing conference on September 23, namely, that “there will be no change to the ‘regulated entity’ and, therefore, nothing about which to be concerned” and further that “the issues identified by other parties may be proper subjects for other dockets, but not for the present docket.” Third Supplemental Order, p. 4. This argument overlooks the fact that while the Commission may be able to look at issues like competition or access services or other matters outside a merger docket, what is raised here is the impact which the merger will have in those

areas. This bears directly on whether the transaction is in the public interest. The Joint Applicants are, in effect, asking the Commission to rule that the merger is in the public interest without examining what effect it is expected to have. It would do the parties or the public no good to learn after the merger was approved that, for example, competition would be impaired, or service quality would decline. In addition, such an approach would render the Commission's statutory merger review a nullity. If any issue that can be addressed in a separate proceeding is treated as not relevant to merger review, merger review disappears, since virtually any telecommunications issue could potentially be addressed in a separate docket.

B. The Issues Identified by the Commission Are Within the Scope of the Proceeding.

The Third Supplemental Order identifies the following issue areas as appropriate for review: (1) competition issues (distortion or impairment of the development of competitive markets); (2) merger benefits and synergies; (3) financial impacts (cost of capital, capital structure, access to financial markets); (4) quality of service. While the filed objections are couched in broad language, it appears that Joint Applicants' only actual challenge is directed at the competitive issues (see, however, discussion below in Section D). Objections, p. 4.

Apparently, Joint Applicants seriously assert that the "status of competition" in Washington is something which the Commission should not examine in a merger proceeding involving the largest incumbent local telecommunications provider in the state. Objections, p. 4. Public Counsel strongly disagrees. The impact of this merger on the goal of retail competition for residential and small business customers is a core issue. Indeed, the competitive impact of a merger is perhaps the first question, which must be answered, even if no other question is asked. This is consistent with state policy of the promotion of diversity of supply in telecommunications markets. RCW 80.36.300(5).

Joint Applicants argues that certain Telecommunications Act related issues, such as interconnection, Section 271, and OSS should be excluded because “such topics” were excluded in *Scottish Power*. Objections, p. 4. Of course, in the energy field there is no counterpart to the Telecommunications Act of 1996 so “such topics” were not raised or excluded in *Scottish Power*. In *Scottish Power* the Commission declined to address the impacts of energy restructuring because the issues were too speculative in the absence of either a federal or Washington retail energy restructuring statute. Here by contrast, the competitive issues raised by Telecommunications Act of 1996 are real. Moreover, they are issues which have been addressed by regulators at both the state and federal levels when reviewing telecommunications mergers since 1996.

C. Joint Applicants’ Challenge to Discovery Is Not Well-founded

As additional support for their objections, Joint Applicants, again in intemperate fashion, launch a generic attack on the discovery being conducted by the parties to this docket. There are at least two points to made here. First, Joint Applicants effort to preemptively challenge discovery of other parties on this kind of blanket basis is inappropriate as a procedural matter. If Joint Applicants have objections to particular data requests, the Commission rules provide remedies, including objections and protective orders, which can be tailored to precise issues raised by specific requests and presented to the presiding officer for resolution. Second, the scale of discovery is entirely appropriate to the significance and complexity of this case. This is an important proceeding for Washington customers, for competitors and for the state as a whole. The issues are complex, the merging companies are large. Qwest has not had extensive operations in this state and is not well known in Washington. The parties have a legitimate need to obtain information to assess the extensive claims made in support of this merger and to

evaluate its effects in order to prepare their testimony. Given the schedule established, that discovery needs to be accomplished expeditiously. Instead of cooperating with this legitimate need, the Joint Applicants seek to restrict the parties' ability to get an accurate picture of the effects of the merger.

The Joint Applicants' refer to a supposed "warning" by the Commission regarding the examination of rates and attempt to characterize the discovery efforts to date as somehow in violation of a Commission directive. Objections, p. 5. The Joint Applicants misapply the cited language. The quoted passage is part of the issue statement regarding financial impacts, and does not "warn" parties that they must limit their discovery. Moreover, the Joint Applicants omit the next sentence of the order, which states: "Our concern in this proceeding is whether the transaction itself has any implications for rates, terms, or conditions of service." This allows a reasonable scope of inquiry by the parties. The fact that Joint Applicants are unhappy about the volume of discovery received is not a basis for the Commission to narrow the scope of its review of the merger.

D. The Joint Applicants Seek to Narrow Service Quality and Merger Benefit Review

Joint Applicants concede that service quality and synergy issues are within the scope of the Commission's review. Objections, p. 8. However, the formulations of those two issues set out in the Objections should be rejected as unduly narrow. The Commission's statement of the service quality issue includes an assessment on a present basis as well as on a "going forward basis," Third Supplemental Order, p. 5, while the Joint Applicants apparently wish to exclude discussion of the present. Objections, p. 8. The Joint Applicants statement of the synergy issues is also significantly narrower than that of the Commission. Public Counsel urges the Commission to retain the statement of the scope of review on these issues which is set out in the

Third Supplemental Order. The Joint Applicants' provide no justification or authority for their suggested limitations.

III. CONCLUSION

For the foregoing reasons, Public Counsel urges the Commission to deny the Joint Applicants' Objections and Petition for Reconsideration. The Third Supplemental Order is consistent with the standard of review and establishes an appropriate set of issues for this proceeding.

DATED this ____ day of November, 1999.

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