

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re Application of U S WEST, Inc. and QWEST COMMUNICATIONS) INTERNATIONAL, INC.)	DOCKET NO. UT-991358
For An Order Disclaiming Jurisdiction, or) Alternative, Approving the U.S. WEST,) INC. – QWEST COMMUNICATIONS) INTERNATIONAL, INC. Merger.)	AT&T’S RESPONSE TO JOINT APPLICANTS’ OBJECTION TO OR PETITION FOR RECONSIDERATION OF THIRD SUPPLEMENTAL ORDER OUTLINING SCOPE OF REVIEW

**AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.’S RESPONSE TO
JOINT APPLICANTS’ OBJECTIONS TO OR PETITION FOR RECONSIDERATION
OF THIRD SUPPLEMENTAL ORDER OUTLINING SCOPE OF REVIEW**

INTRODUCTION

AT&T Communications of the Pacific Northwest, Inc. (“AT&T”), hereby submits its Response to Joint Applicants’ Objections to, or Petition for Reconsideration of, Third Supplemental Order Outlining Scope of Review. AT&T supports the Commission’s proposed scope of review and encourages the Commission to fully examine all of the issues raised in the Order, as well as those raised by others that are reasonably related to the issues within the Order.¹

AT&T also notes that Joint Applicants are using their Objection as an improper collateral attack on valid data requests. AT&T believes the Commission should require complete responses to data requests and place Conditions on the merger that will ensure the public interest

¹ AT&T assumes for the purpose of this Response that the Commission possesses jurisdiction over the merger. See In re Application of U S WEST, Inc. and Qwest Communications International, Inc., Docket No. UT-991358, Third Supplemental Order Outlining Scope of Review at 2 (Oct. 11, 1999), citing RCW 80.01.040, 80.12.020; WAC 480-143-20, 480-143-170.

is protected. The Commission should do so for two reasons: (1) Washington law favors a broad inquiry and the application of conditions to ensure protection of the public interest, and (2) the application itself submitted by U S WEST and Qwest raises many of the issues described in the Order; however, as to many of those issues raised on the face of the Application, it fails to provide satisfactory answers.

ARGUMENT

A. Washington Law Grants the Commission Authority to Investigate a Broad Scope of Issues and to Require Conditions Before Approving the Merger

Joint Applicants claim that the Commission should not be applying a “public interest” standard to its scope of review, yet Washington law mandates that very standard. The Revised Code of Washington orders the Commission to regulate telecommunications companies “in the public interest.” Rev. Code Wash. § 80.01.040(3). Regulations also state that the Commission must deny proposed transactions that are “not consistent with the public interest.” WAC § 480-143-170. U S WEST and Qwest may prefer that the Commission apply a different, narrower standard, but the law is to the contrary.

Joint Applicants suggest that the Commission’s public interest review is narrowly circumscribed to ensuring that the merger will not cause harm. Objections at 2-3. However, the case cited by Joint Applicants for the “no harm” proposition also says that there is no rigid test for evaluating the public interest. In re Pacificorp and Scottish Power PLC, Docket No. UE-981627, Third Supplemental Order at 2 (April 1999). Instead, the Commission may use its discretion and prevent harm by tailoring its scope of review on a case by case basis. Id.; See also In re Puget Sound Energy, Inc., Docket No. UE-990267, Third Supplemental Order Approving Sale at 7 (Sept. 1999) (“Over time, and across different industries and transactions, different

considerations may prove relevant to determining the public interest.”). The Commission must balance both the benefits and the risks of the transaction to the public, rather than limiting itself to a narrow definition of harm. In re Pacificorp and Scottish Power PLC, Docket No. UE-981627, Fifth Supplemental Order Accepting Stipulations at 13 (Oct. 14 1999).²

The proposed merger between Joint Applicants is one that warrants a broad scope of review by the Commission. The merger would determine the control of one of Washington’s incumbent local exchange carriers and that carrier’s important assets. Although Joint Applicants depict the transaction as one involving only parent companies, those parent companies control the practices of their subsidiaries, and therefore the merger would have direct consequences for Washington consumers. The circumstances, and potential consequences, of this transaction demand that the Commission use its discretion to conduct a thorough review in the public interest.

Joint Applicants warn that the proceedings could become a fishing expedition for “concessions” more appropriately considered in other proceedings. Objections at 3-4. Again, Joint Applicants misinterpret the Commission’s mandate. The Commission recently confirmed that its duty to protect the public interest encompasses the power to place conditions on transactions, including mergers. See In re Pacificorp and Scottish Power PLC, Docket No. UE-981627, Second Supplemental Order (Mar. 1999); See also U S WEST Communications, Inc. v. Washington Utilities and Transportation Commission, 134 Wn.2d 74, 949 P.2d 1337 (1998) (Affirming Commission action, including conditions, and holding that Commission has broad

² The FCC has looked at the effect a merger has on competitors when crafting conditions to protect the public interest, rather than just at the effect on consumers. See In re Applications of Ameritech Corp. and SBC Communications, Inc., CC Docket No. 98-141, Memorandum Opinion & Order at 27.

discretion if parties receive notice of issues).

The range of conditions appropriate is limited only by the Commission's discretion and the public interest. For example, the Commission in Pacificorp imposed conditions regarding performance standards, customer service, investment in facilities, transition plans, as well as imposing ongoing monitoring conditions. Id. Similarly, the Commission in this case has jurisdiction to apply a broad range of conditions that protect customers and competitors before granting approval of the U S WEST/Qwest merger.

The FCC also recently has demonstrated the strong relationship between conditions and mergers and protection of the public interest. When approving the merger of SBC and Ameritech—with conditions—the FCC said it would be “seductively simple, yet short-sighted, to believe that our role is limited to voting an application up or down, measuring an application solely against whether it violates a specific provision of the Act or a specific Commission rule.” Ameritech Order at 148. The FCC concluded that it could fulfill its public interest duty best by placing a broad array of conditions on the merger rather than by rejecting the merger outright.³ Just like the FCC, the Commission in this case has the duty to order a broad range of conditions that protect customers and competitors before granting approval of the U S WEST/Qwest merger.

B. The Merger Application Raises Issues That Require Investigation and Conditions

The merger application raises many issues but fails to provide either satisfactory or

³ Joint Applicants claim that issues regarding the Telecommunications Act are outside the scope of these proceedings, but the FCC has emphasized that its actions do not preclude states from placing their own conditions on transactions, as long as the conditions do not contradict the FCC's assessment of public interest. Id. at 151.

sufficiently detailed answers. This, in itself, demands a wide scope of inquiry that thoroughly examines the proposed merger. The application raises many issues, and makes sweeping statements, yet it fails to adequately or fully address how the merger will affect the public interest.

For example, the merger application makes a sweeping claim that the merger will be administratively “transparent” to customers and later claims that there will be “no adverse impact upon the continuity and quality of service provided to U S WEST’s Washington customers.” Merger Application at 9, 11. It bolsters this promise of continuity by alleging that customers “will continue to be served and billed pursuant to existing tariffs and operating authorities” Application at 9. Yet applicants fail to support these claims by outlining concrete plans for ensuring and improving quality of service.

Not only are the claims regarding quality of service unsupported, they contradict the application’s separate claims about service and rates for both retail and wholesale customers. The application promises “competitive prices and more choice.” Application at 13. However, as described above, U S WEST and Qwest also promise not to alter service and not to vary from existing tariff prices. U S WEST and Qwest provide no explanation of how they will reconcile or achieve the two goals. Nor do they indicate whether wholesale customers interconnecting with the merged company can expect improved terms as well, or whether they will be left with U S WEST’s inadequate offerings. Similarly, the application espouses a commitment to both urban and rural customers but avoids any clear statement about whether the merged company will continue the practice of selling rural exchanges. Application at 12.

U S WEST and Qwest continue their sweeping but contradictory promises on the issue of competition. The merger application claims that because the companies “offer different services

and have different core capabilities, and because overlaps between the services of the two companies are incidental and limited in scope, the merger will have no negative impact on competition.” Application at 11. Yet the application goes on to allege the benefits derived from the “economies of scope and scale” that will lead to increased competition. Application at 11. It also neglects to explain that the intraLATA toll market will lose one competitor and that the former competitor will acquire competitive advantages in the inter and intra state long distance markets by effectively paying lower access charges through the mechanism of inter-affiliate transfers.

Perhaps the most confused section of the application involves the divestiture required for compliance with Section 271 of the Telecommunications Act of 1996. U S WEST and Qwest acknowledge that they must divest Qwest’s interLATA services before consummating the merger. Application at 9 n.4, 12. However, instead of describing which services will be divested or how divestiture will occur, the application simply states that Qwest “is in the process of identifying affected services and making arrangements to divest those services.” Application at 9 n.4.⁴ U S WEST and Qwest further muddy the issue by stating that Qwest will comply with “any applicable” Commission requirements for changing customer accounts. Application at 9 n.4. It remains unclear which Commission conditions Qwest will deem “applicable” and whether, when,⁵ and how Qwest intends to comply with conditions that address divestiture of facilities and services as well as divestiture of customer accounts.

⁴ Joint Applicants have filed a divestiture plan with the FCC and in some states, although they have failed to file one in Washington. Even the plan filed with the FCC fails to provide enough detail and remains too limited in scope to meet the requirements of Section 271.

⁵ Joint Applicants have not provided any guidance on timing. It is unclear whether divestiture will occur on the day the merger closes, after the merger, after approval by the Commission, or whether the divestiture already is occurring.

Also significant are issues the merger application avoids altogether. Qwest CEO Joseph Nacchio recently assured regulators that the merged company will invest \$5.3 billion in network infrastructure in the U S WEST region and that the merged company will not be as hostile on local competition issues. As recently as last week, U S WEST CEO Solomon Trujillo announced what the company describes as “the most sweeping service initiative in the company’s history.”⁶ Mr. Trujillo said U S WEST is investing \$4 billion dollars in 1999 to expand and upgrade its network and had commenced an unprecedented service improvement initiative.⁷ None of these representations, however, is included in the application for approval, much less substantiated in documentation U S WEST and Qwest have provided the Commission.

The above examples point out only a few of the unsupported and contradictory allegations in the application that raise questions about whether this merger will harm the public interest.⁸ The Commission’s jurisdiction allows it to place far-reaching conditions on mergers to protect the public interest, and the inadequate nature of the merger application shows this is an appropriate case in which to exercise that aspect of the Commission’s jurisdiction. The Commission should delve beneath the application’s conclusory approach to the approval process and should impose any conditions required to ensure that the merger truly serves the public interest.

C. Data Requests Served on Joint Applicants Properly Fit Within the Scope of These Proceedings

⁶ See www.uswest.com/news/102599.html.

⁷ Id.

⁸ The application also makes sweeping claims regarding other areas, including how the merged company will provide advanced services, how it will obtain Section 271 approval, and how Qwest and U S WEST will combine their resources. See Application at 9, 12 (advanced services); 12-13 (Section 271); 11-12 (combining networks).

Finally, Joint Applicants use their Objection as an improper forum to attack data requests by intervenors such as AT&T. Among other things, Joint Applicants claim AT&T's requests seek information beyond the state's boundaries, seek proprietary information, and reach beyond the scope of proceedings. All of these claims are unfounded.

Joint Applicants claim they need not produce information related to matters outside the geographic boundaries of Washington state. Despite this, Joint Applicants have claimed to the Commission that the merger will lead to expanded service offerings "both inside and outside the 14-state regions." Application at 11. Joint Applicants further make remarks such as, "Following the merger, Qwest, Inc. will be particularly focused on the needs of all customers – urban and rural, business and residential – in Washington and throughout the 14-state U S WEST region." Application at 12. Having invited Commission inquiry regarding the impact of the merger within Washington, the 14-state region and the United States, Joint Applicants cannot properly limit the scope of discovery only to matters within Washington.

Moreover, this Commission cannot fully measure or evaluate the impact of the proposed merger simply by limiting its inquiry to matters within Washington. The merger may have a disproportionate impact on Washington if, as Joint Applicants represent, the merged company will focus on providing advanced services, perhaps at the expense of basic local exchange service.

Joint Applicants also object that some data requests allegedly seek proprietary or confidential information relating to the proposed merger. First, a protective order exists in this docket, so their purported concern is unfounded. Second, Joint Applicants cannot legitimately attempt to hide information behind some cloak of confidentiality when it is germane to the assertions Applicants have made in support of their proposed merger. To contend, for example,

that the proposed merger will enhance competition or improve the quality of service, yet keep a secret the very information Joint Applicants ostensibly rely upon in support of such assertions deprives the Commission of the ability to adequately assess the propriety of the merger.

Finally, Joint Applicants claim AT&T's data requests address topics outside the scope of the proceedings. As described above, the Commission has power to order a broad scope of inquiry, and it did so in the Third Supplemental Order. Despite the Order's breadth, Joint Applicants claim that it does not cover data requests regarding access charges, interconnection, Section 271 of the Telecommunications Act and other issues. Objections at 6. At the pre-hearing conference, intervenors raised the same issues that Joint Applicants now oppose. See Order at 3. The Order itself states that "[w]e find the issues identified by the intervenors, Public Counsel, and Staff to be proper subjects for inquiry in this proceeding." Order at 4. Therefore, the Commission has included the disputed issues within the Order's scope, and Joint Applicants are simply wrong to argue otherwise. Order at 3.

The data requests may pose questions that Joint Applicants would rather avoid. That fact does not deem the requests improper. The data requests fall within the scope of the Commission's Order, and the Commission should require complete responses from Joint Applicants.

CONCLUSION

AT&T submits the foregoing Response to the Joint Applicants' Objections to, or Petition for Reconsideration of, Third Supplemental Order Outlining Scope of Review. The Commission has the power, and the duty, to conduct a broad inquiry and place an array of conditions on the merger. U S WEST and Qwest have submitted an application that fails to protect the public interest. The Commission should not approve the merger between U S WEST and Qwest unless it thoroughly considers all issues, has balanced the benefits and risks, and has imposed conditions on U S WEST and Qwest that will protect the public interest.

Respectfully submitted on this ____ day of November, 1999

DAVIS WRIGHT TREMAINE LLP

By: _____

Daniel M. Waggoner, Esq.
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
Telephone: (206) 628-7707
Facsimile: (206) 628-7699
E-mail: DanWaggoner@dwt.com

Mary Tribby, Esq.
Tom Pelto, Esq.
AT&T Law Department
1875 Lawrence St., Ste. 1575
Denver, CO. 98202
Phone: (303) 298-6508 (Mary Tribbey)
Phone: (303) 298-6009 (Tom Pelto)
Fax: (303) 298-6301 (Mary Tribby)
Email: mbtribby@att.com
Tom Pelto, Esq.

Attorneys for AT&T COMMUNICATIONS
of the PACIFIC NORTHWEST, INC.

CERTIFICATE OF SERVICE

Docket No. UT-991358

I hereby certify that on the date given below the original and 19 copies of AT&T's Response to Joint Applicants' Objection to or Petition for Reconsideration of Third Supplemental Order Outlining Scope of Review in the above-referenced docket were sent via Federal Express and an electronic copy provided by electronic mail, to:

Ms. Carole J. Washburn, Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, Washington 98504-7250

On the same date, true and correct copies were sent by regular first-class US mail, postage prepaid, to:

Commission Staff

Sally G. Johnston
Office of Attorney General
1400 S. Evergreen Park Drive SW
Olympia WA 98504

U S WEST Communications

Lisa A. Anderl
U S WEST
1600 – 7th Avenue, Suite 3206
Seattle, WA 98191

Qwest Communications

Gina Spade
Hogan & Hartson LLP
555 – 13th Street NW
Washington DC 20004

Public Counsel

Simon ffitc
Public Counsel Section
Office of the Attorney General
900 Fourth Avenue, Suite 2000
Seattle, WA 98164-1012

U S WEST Communications

Theresa Jensen
US WEST Communications, Inc.
1600 – 7th Avenue, Room 3206
Seattle, WA 98191

Qwest Communications

Drake S. Tempest
Qwest Communications
555 – 17th Street
Denver, CO 80202

Qwest Communications

Genevieve Morelli
Qwest Communications Corp.
4250 North Fairfax Drive
Arlington, VA 22203

U S WEST Communications

James Van Nostrand
Perkins Coie
411 – 108th Avenue NE, Suite 1800
Bellevue, WA 98004-5584

U S WEST Communications

Wendy M. Moser
U S WEST, Inc.
1801 California Street, Room 5100
Denver, CO 80202

U S WEST Communications

C. Scott McClellan
U S WEST
1600 – 7th Avenue, Room 3204
Seattle, WA 98191

WITA

Washington Independent
Telephone Association
2405 Evergreen Park Drive SW, Suite B-1
Olympia WA 98502

McLeodUSA

David Conn
McLeodUSA
Telecommunications Services
PO Box 3177
Cedar Rapids, IA 52406

Northwest Payphone Assoc.

Brooks Harlow
Miller, Nash, Wiener, Hager & Carlson
601 Union Street, Suite 4400
Seattle, WA 98101-2352

TRA

Andrew Isar
Telecommunications Resellers Assoc.
3220 Uddenberg Lane, Suite 4
Gig Harbor, WA 98335

NPA

Jeanne Stoller
Northwest Payphone Assoc.
PO Box 17727
Salem OR 97305-7727

Metronet Services

Greg Bogus
Metronet Services
800 Stewart Street, Suite 300
Seattle, WA 98101

Covad

W. Clay Deanhardt
Covad Communications
2330 Central Expressway
Santa Clara, CA 95050

WITA

Richard Finnigan
2405 Evergreen Park DR SW, Suite B-3
Olympia WA 98502

Level 3 Communications

Robert Nichols
Nichols & Associates
2060 Broadway, Suite 200
Boulder CO 80302

SBC National Inc.

Arthur Butler
Ater, Wynne LLP
601 Union Street, Suite 5450
Seattle, WA 98101-2327

ACI Rhythms

Jo Gentry
ACI Rhythms
7337 S. Revere Parkway
Englewood CO 80112

Level 3 Communications

William Hunt
Level 3 Communications
1025 Eldorado Blvd
Broomfield CO 80021

SBC National Inc.

Edward Eckhart
SBC National, Inc.
One Bell Plaza, Room 3611
Dallas TX 75202

Rhythm Links, INC.

Angela Wu
Ater, Wynne LLP
601 Union Street, Suite 5450
Seattle, WA 98101-2327

Advanced TelCom Group

Kath Thom
VP, Reg. & Public Policy
100 Stony Point Road, Suite 130
Santa Rosa, CA 95401

NEXTLINK Washington

Kaylene Anderson
Regulatory Manager
1000 Denny Way, Ste. 20-0
Seattle, WA 98109

GST

Brian Thomas
GST Telecom Washington, Inc.
4001 Main Street
Vancouver, WA 98662

Rhythms NetConnections

Douglas Hsiao
Rhythms NetConnections, Inc.
7337 S. Revere Parkway, #100
Englewood, CO 80112

NEXTLINK Washington

Gregory J. Kopta
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101

McLeodUSA

Mark Trincherro
Davis Wright Tremaine
1300 SW Fifth Avenue, #2300
Portland, OR 97201

NorthPoint communications

Christine A. Mailloux
Asst. General Counsel
303 Second Street
San Francisco, CA 94107

Pension Equity Counsel

Gary White
AUSWR
5004 Varco Road NE
Tacoma, WA 98422

GST

Gary Yaquinto
GST Telecom Washington, Inc.
3003 N. Central Avenue
Phoenix, AZ 85012

New Edge Networks

Robert Y. McMillin
New Edge Networks, Inc.
P.O. Box 5159
3000 Columbia House Blvd.
Vancouver, WA 98668

AT&T Communications

Ron Gayman
AT&T Communications
1501 S. Capitol Way, Suite 204
Olympia WA 98501-2200

DATED this _____ day of November, 1999.

By: _____