BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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| In the Matter of the Merger of the<br>Parent Corporations of Qwest<br>Communications Corporation, LCI<br>International Telecom Corp., USLD<br>Communications, Inc., Phoenix Networks,<br>Inc. and U S WEST Communications, Inc. | )<br>)<br>)<br>)<br>)<br>)<br>) | DOCKET NO. UT-991358<br><br>JOINT INTERVENOR RESPONSE<br>TO JOINT APPLICANTS'<br>OBJECTIONS TO THIRD<br>SUPPLEMENTAL ORDER |

NEXTLINK Washington, Inc., Advanced TelCom Group, Inc., and McLeodUSA Telecommunications Services, Inc. (collectively "Joint Intervenors"), provide the following Response to Joint Applicants' Objections to, or Petition for Reconsideration of, Third Supplemental Order Outlining Scope of Review. The Joint Applicants raise the same objections to the scope of review that they stated at the prehearing conference, and those objections have not gained merit over time. Indeed, the primary purpose of their pleading appears to be to provide the Commission with their objections to data requests before parties even had the opportunity to meet and confer, much less file motions to compel. The Commission established the appropriate scope of review in the Third Supplemental Order and should not reconsider that decision or prematurely address the Joint Applicants' objections to data requests.

## DISCUSSION

### A. The Commission Properly Tailored the Scope of Review to the Applicable Public Interest Standard.

The legislature has charged the Commission with ensuring that transactions that will have a significant impact on the provision of telecommunications services in Washington, at a minimum, are consistent with and promote the "public interest." RCW 80.01.040; RCW 80.12.020; RCW 80.16.050; RCW 80.36.140. Applying this standard to the proposed merger in this docket, the Commission observed that "[t]here is no bright line against which to measure whether a particular transaction meets the public interest standard," and "'the approach for determining what is in the public interest varies with the form of the transaction and the attending circumstances.'" Third Supp. Order at 3 (quoting *In re PacifiCorp and Scottish Power PLC*, Docket No. UE-981627, Third Supp. Order at 3 (April 2, 1999) ("*Scottish Power Third Order*")). The Commission, therefore, properly established a scope of review that will provide the Commission with the information necessary to determine whether, and the extent to which, the proposed merger will affect the telecommunications services U S WEST provides.

The Joint Applicants nevertheless contend that Commission has adopted a "no harm" standard but that "the scope of proceedings outlined in the Third Supplemental Order bears no relationship to the no harm standard." The Joint Applicants are mistaken. The Commission never has limited itself to the "no harm" standard Joint Applicants describe, but has required only that "Applicants' *initial* burden is satisfied if they at least demonstrate no harm to the public interest." *Scottish Power Third Order* at 2 (emphasis added). The Third Supplemental Order

also requires that the Joint Applicants satisfy their obligation to present a *prima facie* initial showing of no harm, but that interested parties may challenge that showing and the Joint Applicants bear the ultimate burden to prove that the proposed merger is consistent with the public interest. This standard is fully consistent with Commission precedent and statutory requirements.

The Joint Applicants also inaccurately construe the Commission's obligation as limited to ensuring that consumers and competitors will be no worse off than they are now. The statutes are not susceptible to such an interpretation. Even if U S WEST's provisioning of service remains unchanged, the proposed merger may be inconsistent with the public interest if U S WEST's current performance is inconsistent with the public interest. The harm that results from the proposed merger thus may be that it maintains the status quo instead of demonstrably improving U S WEST's current unacceptable service quality and anticompetitive behavior. Whether viewed as a benefit or "no harm," therefore, the Joint Applicants must demonstrate at a minimum that the proposed merger will result in the provision of telecommunications service by U S WEST that is consistent with the public interest and statutory requirements.

The Joint Applicants have themselves set the bar higher than the minimum requirements in their application. As the Commission accurately notes, the Joint Applicants repeatedly represent that the proposed merger will bring benefits to Washington consumers. Third Supp. Order at 4; Joint Application at 2 & 11. The Joint Applicants cannot make such sweeping representations and then claim that the Commission's review does not include any investigation

into the accuracy of those representations. The Joint Applicants themselves opened the doors to service quality and competitive concerns by promising improvements and less hostility to competition, as well as by seeking to change the ownership and management of a company that is renowned for its poor service quality and antipathy to the development of local exchange competition. The Commission, therefore, has properly discounted Joint Applicants' calls to "pay no attention to that man behind the curtain," and established a scope of review that will enable the Commission to satisfy its statutory obligations to conduct a thorough review of the effects of the proposed merger.

**B. U S WEST's Lack of Compliance With the Act Is Within the Scope of This Proceeding.**

The Commission properly concluded that its review of the proposed merger includes the impact of the proposed merger on the development of competition in Washington -- including issues arising out of the Telecommunications Act of 1996 ("Act"). The Joint Applicants, however, contend that such issues are outside the scope of this proceeding because they "have been, are being, and likely will be addressed in the future through appropriate separate proceedings." Joint Applicants' Objections at 4. Again, the Joint Applicants seek to have their cake and eat it too.

The Joint Applicants have represented in this proceeding that "the merger will have no negative impact on competition," Application at 9, but will produce "significant procompetitive effects." Application at 2. The Commission and intervenors are entitled to explore the truth of those statements. Even if the Joint Applicants had not sought to sell the proposed merger as

allegedly pro-competitive, investigation into its competitive impacts not only would be appropriate but indispensable. The legislature has unequivocally established the public policy of this state to "[p]romote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state." RCW 80.36.300(5). The Commission cannot determine whether the proposed merger is consistent with the "public interest" without reviewing the impact on the development of competition in Washington. Such a review, moreover, cannot be conducted unless the Commission assesses the existing state of competition -- including the extent to which U S WEST is refusing or failing to satisfy its legal obligations as a result of decisions being made by existing management at U S WEST, Inc. -- as a base line against which to measure both whether the proposed new management will alter the current status of competition and whether any alteration (or the lack thereof) would be consistent with the public interest.

The Joint Applicants nevertheless contend that the Commission has departed from past practice, but the order on which Joint Applicants rely does not support their position. To the contrary, the Commission concluded in *Scottish Power*, "Questions regarding how Scottish Power will improve customer service, the source of funding for improvements, the need for improvements, the effects of promised efficiencies, the fund allotment for low income assistance, and related issues require more information and analysis." *Scottish Power Third Order* at 3. The Commission's Third Supplemental Order is fully consistent with its prior decisions.

Joint Applicants also claim that affiliated interest and divestiture issues should not be reviewed in this proceeding because the Commission determined in *Scottish Power* that "the appropriate time to review any proposed divestiture of particular assets is when there is actually a proposal before the Commission." Joint Applicants' Objections at 4-5 (quoting *Scottish Power Third Order* at 4). In sharp contrast to *Scottish Power*, however, Qwest Inc. must divest its interLATA operations in Washington and throughout the U S WEST region *before* consummation of the proposed merger. The appropriate -- indeed only -- time to review that divestiture, therefore, is in this proceeding because the Commission will have no other opportunity to do so. Similarly, the integration of the networks and operations of the Joint Applicants and their subsidiaries that would result from the proposed merger generates multiple issues of affiliated interest relationships that the Commission must address in this proceeding to ensure compliance with state and federal law prior to closure of the proposed merger. Again, the scope of review established by the Commission in this proceeding is consistent with past merger reviews.

### C. The Commission Should Not Address Objections to Data Requests Absent a Motion to Compel Responses and Should Not Reconsider Its Third Supplemental Order.

The Joint Applicants devote most of their pleading to objecting to data requests that have been propounded by interested parties to this proceeding. The Joint Applicants may not use their objections to the Third Supplemental Order as a vehicle for a preemptive strike on data requests to which they object. The Joint Applicants have objected to virtually every data request

propounded to them, and have done so only recently. Parties are still in the process of meeting and conferring to attempt to resolve or at least narrow their disputes, and by attempting to bring these issues to the Commission in an unrelated pleading, the Joint Applicants only subvert the discovery dispute resolution process. The Commission, therefore, should ignore the Joint Applicants' objections to data requests. A response to motions to compel responses, rather than an objection to the Commission's prehearing conference order, would be the proper pleading in which to make and explain such objections.

Notwithstanding the impropriety of the Joint Applicants' attempts to raise discovery issues, their discussion of the data requests and their proposed scope of review highlight their crabbed view of the Commission's obligations. The Joint Applicants continue to insist that the Commission simply rubber stamp the proposed merger and disregard all of its potential impacts. The Commission properly has refused that request. U S WEST is the largest incumbent local exchange company in Washington, with over $1 billion in annual intrastate revenues and operations that directly or indirectly affect virtually all, if not all, consumers and competitors in this state. Qwest -- one of those competitors -- now seeks to own U S WEST and direct its operations. The Commission would be remiss in its statutory obligations to protect the public interest if it did not thoroughly examine every potential impact of the proposed merger on U S WEST's operations. The Commission has undertaken to do just that in its Third Supplemental Order.

## CONCLUSION

The Joint Applicants have raised no legitimate objections or grounds on which the Commission should reconsider its Third Supplemental Order. Accordingly, the Commission should overrule their objections and refuse to reconsider its decision.

RESPECTFULLY SUBMITTED this 4th day of November, 1999.

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