

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Petition of
VERIZON COMMUNICATIONS, INC. and
MCI, INC.

For a Declaratory Order Disclaiming
Jurisdiction Over or, in the Alternative, a
Joint Application for Approval of
Agreement and Plan of Merger

DOCKET NO. UT-050814

BRIEF OF COMMISSION STAFF
ON JURISDICTION

1 Commission Staff submits this brief in support of the Commission's assertion of jurisdiction over the merger of Verizon Communications, Inc. and MCI, Inc., with respect to the transaction's effects on intrastate telecommunications services within the state of Washington. Staff has submitted a separate brief on the proposed settlement and the merits of the proposed transaction.

I. INTRODUCTION

2 The Commission should assert jurisdiction over this merger of public service company subsidiaries wholly owned by Verizon Communications, Inc., and MCI, Inc., holding companies, because Commission precedent and statutory language informed by legislative policy compel it. Under the disposition, merger, and acquisition clauses of the property transfer statutes, chapter 80.12 RCW, the Commission has the authority to review this transaction.

II. BACKGROUND OF THE TRANSACTION AND THE PROCEEDING

A. Description of the Companies

1. Verizon.

3 Verizon Communications, Inc. (Verizon) is a holding company that wholly owns the following subsidiary companies:

- a. Verizon Northwest Inc. (Verizon NW) is Washington State's second largest local exchange company. Verizon NW offers a broad range of telecommunications services in the state of Washington, including high capacity private line services and long distance service.
- b. Bell Atlantic Communications, Inc., d/b/a Verizon Long Distance (VLD) is an interexchange carrier offering long distance services pursuant to a price list on file with the Commission.
- c. Verizon Avenue Corp. is a "full service" competitive local exchange company (CLEC). It resells local and long distance services pursuant to a price list on file with the Commission.
- d. Verizon Select Services, Inc. is an interexchange carrier offering long distance services pursuant to a price list on file with the Commission.

4 Each of these companies, except for Verizon NW, has been classified as a competitive telecommunications company pursuant to RCW 80.36.320.

2. MCI.

5 MCI, Inc. (MCI) is a holding company that wholly owns the following subsidiary companies:

- a. MCI Worldcom Communications is an interexchange carrier offering long distance services pursuant to a price list on file with the Commission.
- b. MCI Worldcom Network Services is an interexchange carrier offering long distance services pursuant to a price list on file with the Commission.
- c. MCImetro Access Transmission Services is a full service CLEC that offers local exchange services pursuant to a price list. This company serves less than two percent of the access lines in Washington State.

- d. Teleconnect Long Distance Services and Systems d/b/a Telecom USA is an interexchange carrier offering long distance services pursuant to a price list on file with the Commission.
- e. TTI National is an interexchange carrier offering long distance services pursuant to a price list on file with the Commission. This company no longer offers service in the state of Washington.

6 All of these MCI subsidiaries have been classified as competitive
telecommunications companies pursuant to RCW 80.36.320.

B. Description of the Transaction

7 According to the Joint Petition, Verizon, a holding company, will purchase 100% of
the holding company, MCI, Inc. MCI, Inc. will merge into a Verizon subsidiary called ELI
Acquisition, LLC, which will be renamed “MCI, LLC.” Thus, all of the WUTC-regulated
subsidiaries of Verizon and MCI will be owned by a common parent, Verizon
Communications, Inc.¹ Verizon expects savings and synergies to result from its use of MCI
network facilities, bundling of Verizon and MCI products and services, and headcount
reductions, largely at MCI, which will enable the new firm to more efficiently provide
shared administrative services to its subsidiaries.² Specifically, the Verizon CFO, legal, and
human resources personnel will serve not only the Verizon affiliates but the former MCI
affiliates as well.³

III. DOES THE COMMISSION HAVE JURISDICTION TO REVIEW AND APPROVE THE TRANSACTION?

8 Regulatory policies enunciated by the legislature inform the statutory provisions
applicable to transfers of telecommunications companies. The language of the statutes, read

¹ Folsom, Ex. 150T-HC at 5.

² See *id.* at 8.

³ King, Ex. 411T-H at 13.

in accordance with these policies, as well as prior Commission decisions, establish that the Commission has statutory authority to examine this transaction.

9 The legislature has charged the Commission to “regulate in the public interest ... 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 telecommunications companies.” RCW 80.01.040(3). “Telecommunications company” includes every corporation or company that owns, operates, or manages any facilities used to provide telecommunications to the general public. RCW 80.04.010. Every telecommunications company is a public service company. RCW 80.04.010.

10 In general, public service companies must obtain Commission approval in order to transfer the property of any public service company. Chapter 80.12 RCW. Under chapter 80.12 RCW, the property transfer chapter, public service companies are 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 [Title 80].” RCW 80.12.010. Consequently, any sale or merger by a public service company of its franchises, properties, or facilities is subject to Commission scrutiny. RCW 80.12.020. If Commission approval is not granted, the transaction will be void. RCW 80.12.030. In addition, transactions in which a public service company plans to “directly or indirectly, purchase, acquire, or become the owner of” the property of another public service company are likewise void if made without Commission approval. RCW 80.12.040.

11 These requirements on transfers do not apply, however, to local exchange companies serving less than two percent of the access lines in the state of Washington. RCW

80.12.045. In addition, a revocable waiver of the requirements of Chapter 80.12 RCW applies by operation of rule to companies the Commission has classified as competitive. *See* WAC 480-121-063.

A. Does the transaction involve a property disposition of a public service company under RCW 80.12.020?

12 The Disposition Clause of RCW 80.12.020 provides the following:

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, ... without having secured from the commission an order authorizing it so to do....

1. The transfer of subsidiaries from MCI, Inc., to Verizon Communications, Inc., constitutes a disposition of MCI's subsidiary public service companies.

13 MCI, Inc., is transferring not only itself as an entity but the control of its public service company subsidiaries to Verizon. This transfer of control away from MCI shareholders constitutes a "disposition" that is contemplated in the statute by the language, "sell lease, assign or otherwise dispose of." At the completion of the transaction, ownership and control, though they may be exercised indirectly, of the MCI public service subsidiary companies will lie with Verizon.

2. The Commission's prior decisions on jurisdiction in holding company transfers confirm the Commission's jurisdiction over this merger.

14 The Petitioners argue that because the "transaction involv[es] the merger of the corporate parents of public service companies" but not of the public service companies themselves that the Commission does not have jurisdiction.⁴ This argument was roundly rejected by the Commission in its decision on jurisdiction in the GTE/Bell Atlantic merger

⁴ Joint Petition of Verizon & MCI at ¶ 21.

proceeding, Docket No. UT-981367, which also involved a merger of holding companies (and involved Verizon NW's predecessor, GTE Northwest). There, the Commission found that—

With respect to the act of 'disposing' of control over a public utility, the act of the parent corporation is the act of the subsidiary where the parent has exclusive authority to undertake the act. We also find identity between the parent and subsidiary corporations, to the extent of shared operations and decisions that affect directly the provision of services to customers in Washington State. In effect, we pierce the corporate veil and conclude that GTE Corporation and GTE Northwest are a single telecommunications company falling within the definition of 'public service company' for purposes of considering a transaction that involves the disposition of the whole of GTE Northwest's property and facilities used to provide regulated telecommunications services in Washington State.⁵

15 As in *GTE/Bell Atlantic*, the holding company structure in the Verizon-MCI transaction is not a barrier to the Commission's regulatory jurisdiction. Petitioners complain not only that the GTE-Bell Atlantic decision does not explain how a "disposition" of a public service company occurred in a transaction involving only parent company stocks but that it also disregards the distinction in corporate form between a parent company and its subsidiary. The point that the petitioners' argument fails to take into account is that piercing the corporate veil is exactly the analysis needed when corporate form threatens to obscure its substance. Where, as here, parent corporations have complete ownership of and, thus, the power to direct or restructure the operations of their public service company subsidiaries, the Commission's regulatory authority would be meaningless if it did not reach these entities.

16 The Commission first asserted its jurisdiction over mergers and acquisitions

⁵ *In the Matter of the Application of GTE Corporation and Bell Atlantic Corporation for an Order Disclaiming Jurisdiction or, in the Alternative, Approving the GTE Corporation-Bell Atlantic Corporation Merger*, Fourth Supp. Order Approving and Adopting Settlement Agreement, Granting Application, Subject to

accomplished at the holding company level of Washington utility companies when it decided to review Scottish Power’s acquisition of PacifiCorp.⁶ The PacifiCorp-Scottish Power transaction involved the transfer of control of a single Washington public service company to an entity with no existing presence as a public utility providing service in Washington. In contrast, the merger between Verizon and MCI involves the combination of both Verizon and MCI telecommunications subsidiaries that serve Washington customers. The Commission asserted jurisdiction in the transaction between holding companies in *PacifiCorp/Scottish Power* under the Disposition Clause and should apply that precedent, as well as its decision in *GTE/Bell*, to confirm its jurisdiction in the Verizon-MCI transaction.

B. Is there a “merger or consolidation” between public service companies under RCW 80.12.020?

17 The Merger Clause of RCW 80.12.020 states the following:

[N]o 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.)

18 All of the arguments for “piercing the veil” set forth in the Disposition Clause analysis apply to the Merger Clause as well. In addition, the “directly or indirectly” language of the Merger Clause evidences a legislative intent to sweep aside irrelevant issues of corporate form and to prevent utility companies that sell services to Washington consumers from evading the Commission’s jurisdiction with devices like the holding

Conditions, at 16-17, Docket No. UT-981367 (1999).

⁶ *In the Matter of the Application of PacifiCorp and Scottish Power PLC for an Order (1) Disclaiming Jurisdiction or, in the Alternative, Authorizing the Acquisition of Control of PacifiCorp by Scottish Power and (2) Affirming Compliance with RCW 80.08.040 for PacifiCorp’s Issuance of Stock in Connection with the Transaction*, Second Supp. Order: Commission Decision and Order Regarding Jurisdiction, Docket No. UE-981627 (1999).

company/operating company form of organization.

19 Also important to the question of jurisdiction is Verizon NW's status as a noncompetitive company. There is no question that the property transfer statute, chapter 80.12 RCW, applies to Verizon NW. Consequently, when the corporate veil is pierced, the Commission has jurisdiction to examine a merger involving Verizon NW and other public service companies.

C. If the Commission would otherwise have jurisdiction, is the transaction exempt under RCW 80.12.045?

20 As provided in RCW 80.12.045,

Subject to RCW 80.04.530(1)7, this chapter does not apply to a local exchange company that serves less than two percent of the access lines in the state of Washington.

21 Although MCI's local exchange company, MCImetro Access Transmission Services (MCImetro), may be exempt from seeking approval for the transaction, its partner in the merger, Verizon NW (Verizon's local exchange company), is not. Because Verizon NW is a noncompetitive company, the Commission has authority under the property transfer statute to review transfers involving Verizon NW. Furthermore, regardless of MCImetro's possible exemption under chapter 80.12 RCW, MCImetro still meets the definition of a public service company. Consequently, under at least the Merger Clause and the Acquisition

RCW 80.04.530 provides the following:

Except as provided in (b) of this subsection, the following do not apply to a local exchange company that serves less than two percent of the access lines in the state of Washington: RCW 80.04.080, 80.04.300 through 80.04.330, and, except for RCW 80.08.140, chapters 80.08, 80.12, and 80.16, RCW.

(b) Nothing in this subsection (1) shall affect the commission's authority over the rates, service, accounts, valuations, estimates, or determinations of costs, as well as the authority to determine whether any expenditure is fair, reasonable, and commensurate with the service, material, supplies, or equipment received.

(c) For purposes of this subsection, the number of access lines served by a local exchange company includes the number of access lines served in this state by any affiliate of that local exchange company.

Clause, the Verizon must seek Commission approval before bringing the MCI metro and Verizon NW local exchange companies together under one parent.

D. Is there an acquisition by one public service company of another public service company's franchises, properties, facilities, capital stocks or bonds under RCW 80.12.040?

22 The Acquisition Clause of RCW 80.12.040 provides the following:

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 to do so by the commission.

(Emphasis added.) Again, the arguments for “piercing the veil” apply here, just as they do under the Disposition Clause analysis. Verizon NW, because of its noncompetitive status, is subject to the Commission’s jurisdiction under the Acquisition Clause as well as the Merger Clause. In sum, the Commission has jurisdiction to review a transfer that results in the acquisition by Verizon NW’s parent of other telecommunications subsidiaries.

23 Even setting aside the “piercing the veil” analysis announced in *GTE/Bell Atlantic*, this merger is jurisdictional because it involves the *indirect* acquisition of one public service company by another public service company, as well as the indirect consolidation of public service companies. As such, the Commission should assert these bases of authority under the property transfer chapter for its review of this merger.

E. If the Commission would otherwise have jurisdiction, is the transaction exempt because of the waivers of regulatory requirements set forth in WAC 480-121-063 for MCI’s regulated subsidiaries in Washington?

24 As a threshold matter, it is important to note that Verizon NW is not classified as competitive and, therefore, the Commission has jurisdiction to examine the effect of this merger vis-à-vis Verizon NW.

1. Legislative policy requires the Commission give effect to the transfer of property statutes and examine this transaction.

25 The legislature has declared that it is the policy of this state to “[p]romote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state.” RCW 80.36.30(5). When the operations of two telecommunications companies present in the state of Washington come under single ownership, there is a cognizable potential for anticompetitive effects within this state.

26 Petitioners maintain that jurisdiction does not follow from the transfer statutes’ disposition or merger language because this transaction “will not result in the consolidation or elimination of any facilities or other operations by the Petitioners’ subsidiaries in the State.” Given petitioners’ plans regarding bundling and shared use of networks, however, the facts suggest otherwise.⁸ Moreover, this argument ignores the problems that single ownership presents for maintaining a competitive environment. In order to give effect to the legislature’s policy of promoting telecommunications diversity, the Commission must exercise jurisdiction in this merger to examine whether there are likely to be any anticompetitive effects. In addition to its effect on competition, this merger could have a financial impact on Verizon NW (e.,g., its cost of capital) and could therefore result in increased rates for Washington consumers.

2. The Commission should revoke its waiver of property transfer requirements with respect to the MCI subsidiaries that are classified as competitive.

27 The legislature specifically provided for the easy revocation of previously granted waivers of regulatory requirements. Notably, RCW 80.36.320(5) provides as follows:

⁸ See, e.g., Danner, Ex. 23T-C at 19:1-6.

The commission may revoke any waivers it grants and may reclassify any competitive telecommunications company if the revocation or reclassification would protect the public interest.

Thus, by granting waivers, and providing for automatic waivers by rule in WAC 480-121-063(1), the Commission has not forever ceded jurisdiction over competitively classified companies but may examine their effect on competition as required by the public interest.

28 Regarding the public interest standard, there is nothing to indicate that the Commission need make a finding that competition is no longer as effective as it was at the time the waiver was granted. Even the basis for granting a company competitive classification is not so narrowly confined: One of the policies that must inform the public interest standard for revoking the waiver of particular statutes is the policy of “[p]ermit[ting] flexible regulation of competitive telecommunications companies and services.” RCW 80.36.300(5) (enacted in Laws of 1985, chapter 450, in the same piece of legislation as the competitive classification statute—RCW 80.36.320).

29 If this Commission were to recognize a constrained standard for revoking a waiver of a particular statute, the Commission would concomitantly have to become much more cautious in granting such waivers in the first place. This would be inconsistent with the policy of regulatory flexibility. The Commission should reimpose the Disposition, Merger, and Acquisition clauses of chapter 80.12 RCW for the limited purpose of reviewing this proposed merger.

F. Other jurisdictional issues.

30 Statutory language does not support a narrow definition of public service company. For purposes of the property transfer statute, public service company is broadly 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 [Title 80].” See RCW 80.12.010. Although the property transfer chapter allows for waiver of its requirements for competitively classified companies⁹ and compliance exemptions for small local exchange companies,¹⁰ it is important to note that the legislature did not exempt these two groups of companies from the definition of *public service company*.

31 Petitioners argue that because the MCI subsidiaries are classified as competitive, and, thus, are not “subject to regulation as to rates,” they fall outside of the definition of public service company under RCW 80.12.010. Joint Petition of Verizon & MCI at ¶ 28. Petitioners, however, read the statutory language too narrowly. Even if a telecommunications company currently offers service pursuant to a price list, it does not mean that the Commission has permanently lost jurisdiction to regulate that company as to “rates and service.” All telecommunications companies operating within the state of Washington are and remain public service companies subject to regulation by the Commission.

IV. CONCLUSION

32 The Commission already has decided that the Disposition Clause of RCW 80.12.020 gives jurisdiction over the proposed merger. The Commission should reaffirm its jurisdiction over holding company mergers under the Disposition Clause as well as affirming its jurisdiction under the clearly applicable Merger Clause of RCW 80.12.020 and the Acquisition Clause of RCW 80.12.040.

⁹ RCW 80.36.135(5). In addition, Commission rules, as set out in WAC 480-121-063, provide for automatic waiver of chapter 80.12 RCW for competitively classified companies.

¹⁰ RCW 80.12.045.

In addition, the Commission should conclude that it would be in the public interest to revoke the waivers of chapter 80.12 RCW for the limited purpose of reviewing this merger, especially with respect to the transaction's effect on Verizon NW's cost of capital and other effects that ultimately directly affect Washington consumers.

Dated this 23rd day of November, 2005.

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