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 JOINT PETITIONERS' BRIEF ON JURISDICTION

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I. INTRODUCTION AND SUMMARY OF POSITION

1 This Commission does not have jurisdiction over the proposed transaction between Verizon Communications Inc. ("Verizon") and MCI, Inc. ("MCI") (collectively, the "Petitioners"). First, under RCW Ch. 80.12 ("Transfers of Property"), this Commission only has jurisdiction over transactions involving "public service companies," which are companies "engaged in business in this state as a public utility and subject to regulation" by the Commission.[1] Verizon and MCI are ***holding*** companies – they do not conduct business in this state. Therefore, the Commission has no jurisdiction over them or this transaction.

2 Second, even if one ignores the plain language of the Transfers of Property chapter and assumes that Verizon and MCI are public service companies, RCW Ch. 80.12 specifically excludes from its reach those local exchange companies that serve less than two percent of the access lines in the state.[2] The unrebutted evidence shows that MCI's local exchange subsidiary falls within this exception.

3 Third, MCI's local exchange subsidiary – indeed, ***every*** MCI subsidiary operating in the state – has been classified as a competitive telecommunications company, and this Commission has waived by rule any requirement that transfers of property involving competitive companies be reviewed or approved.[3] In fact, the Commission recently refused to consider the SBC-AT&T merger on this very ground,[4] and there is no reason to treat the Verizon-MCI merger differently.

4 In sum, this transaction is not subject to the Commission's jurisdiction, and the Commission should take no action on it.

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[1] RCW 80.12.010.

[2] RCW 80.12.045.

[3] WAC 480-121-063.

[4] Docket No. UT-050309.

II. BACKGROUND OF THE TRANSACTION AND PROCEEDING

5 The Petitioner's brief on the merits, filed concurrently with this brief, sets forth the background of the transactions, and is incorporated by reference. Importantly, though, the unrebutted evidence in this case proves:

6 1. Verizon and MCI are holding companies that do ***not*** operate in Washington;

7 2. MCI's local exchange subsidiary serves less than two percent of the access lines in the state; and

8 3. The transaction will not change the relationship that the MCI and Verizon subsidiaries have with the Commission and will not affect the regulatory authority of this Commission over any of Verizon's or MCI's regulated subsidiaries. Specifically, there will be no transfer of, or change of control over, Verizon Northwest Inc., which will remain a subsidiary of Verizon. Moreover, Verizon's and MCI's state-regulated subsidiaries will continue to meet all of their obligations and commitments under the Commission's rules, regulations, and orders.

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

9 The Commission does not have jurisdiction to review the proposed transaction. As a threshold matter, the Commission is a creature of the legislature, and it is only permitted to take those actions expressly authorized by law.[5] The Transfers of Property chapter sets forth the narrow instances under which the Commission may review a transaction, and the Commission cannot expand its power by relying on its "general jurisdiction" to promote the "public interest."[6]

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[5] *Washington Indep. Tel Ass'n v. TRACER*, 75 Wn. App. 356, 363, 880 P.2d 50 (1994); *Kaiser Aluminum v. Labor & Industries*, 121 Wn.2d 776, 780, 854 P.2d 611 (1993) ([A]dministrative agencies are creatures of the legislature without inherent or common law powers and they exercise only those powers confirmed either expressly or by necessary implication.").

[6] *Washington Indep. Tel. Assn. v. Tracer, supra*, 75 Wn. App. at 368 (in the absence of any specific statutory provision granting the Commission authority, "reliance on RCW 80.01.040(3) is of no avail").

10 Under the Transfers of Property chapter, the Commission has jurisdiction over transactions under three separate clauses:

> 1. Sale, lease, assignment or disposition by a public service company of its franchises, properties or facilities which are necessary or useful to the performance of the company's duties to the public. RCW 80.12.020. (the "Disposition Clause")
>
> 2. Merger or consolidation by a public service company of its franchises or facilities with any other public service company. RCW 80.12.020. (the "Consolidation Clause")
>
> 3. Purchase or acquisition by any public service company of the franchises, properties, facilities, capital stocks, or bonds of any other public service company. RCW 80.12.040. (the "Acquisition Clause")

11 As explained below, none of these clauses apply in this case.

A. Does the Transaction Involve a Property Disposition of a Public Service Company Under RCW 80.12.020?

12 No, the disposition clause does not apply. As a threshold matter, this clause only applies to "public service companies," and neither Verizon nor MCI is such a company.

13 The term "public service company" is specifically designed for purposes of the Transfers of Property chapter to mean:

> Every company now or hereafter engaged in business in this state as a public utility[7] and subject to regulation as to rates and service by the utilities and transportation commission under the provisions of this title.[8]

14 Whether a firm is a "public service company" depends on its actual operations in Washington:

> A corporation becomes a public service corporation, subject to regulation by the [Commission], only when, and to the extent that, its business is dedicated or devoted to a public use.[9]

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[7] "Public utility" is not a defined term in Washington's statutes. The analysis outlined above, however, is consistent with the interrelationship of definitions for all of RCW Title 80. "Public service company" under RCW Title 80 "includes every . . . telecommunications company." RCW 80.04.010. A "telecommunications company" is in turn defined to include every company "owning, operating or managing any facilities used to provide telecommunications for hire, sale or resale to the general public within this state." *Id.* Neither Verizon nor MCI is a "public utility" under Washington law.

[8] RCW 80.12.010.

[9] *Inland Empire Rural Electrification, Inc. v. Dep't. of Pub. Serv.*, 199 Wash. 527, 537, 92 P.2d 258 (1939);

15 As holding companies, Verizon and MCI do not conduct any business operations with any members of the public. Neither Verizon nor MCI "provide telecommunications for hire, sale or resale to the general public within the state." Similarly, neither company "holds itself out, expressly or impliedly, to supply its service or product for use . . . by the public," which is the test the Court adopted in *Inland Empire.*[10] Thus, neither company is a public service company under Washington law.[11]

16 This analysis is supported by analogous decisions from other states. For example, in *Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission,*[12] 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.[13]

17 This Commission, however, in three of its most recent orders addressing the jurisdictional issue,[14] concluded that it had jurisdiction under the Disposition Clause over

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[10] *Id. see also W. Valley Land Company, Inc. v. Knob Hill Water Ass'n.*, 107 Wn.2d 359, 365, 729 P.2d 42 (1986).

[11] For the same reasons, neither company is a "telecommunications company" subject to the Commission's regulation under RCW 80.04.010.

[12] 715 N.E. 2d 351 (Ind. 1999).

[13] Id. at 354. *See also SBC Communications, Inc.*, Case No. TM99-76, 1998 WL 996180 (Mo. P.S.C. Oct. 20, 1998) (Commission had no authority "to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies)"; *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) (Commission had no jurisdiction over holding company in recent transactions with only an indirect effect on Nebraska carriers).

[14] *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, Docket No. UE-981627, 192 PUR4th (March 1999) ("*Scottish Power Order*"); *Matter of the Application of GTE Corp. and Bell Atlantic Corp. for an Order Disclaiming Jurisdiction or, in the Alternative Approving the GTE Corp.-Bell Atlantic Corp. Merger*, Fourth Supp. Order, Docket Nos. UT-981367, UT-990672 and UT-991164 ("*GTE-Bell Atlantic Order*"); *In the Matter of the*

parent-company mergers because "the public interest" was at stake. But as explained above, the Commission's ***general*** authority to regulate companies "in the public interest" cannot trump or expand the ***specific*** authority prescribed in the Transfers of Property chapter.[15]

18 Furthermore, in the *GTE-Bell Atlantic* case, the Commission erroneously asserted jurisdiction over a holding company transaction by adopting a "piercing the corporate veil" theory.[16] This decision conflicts with the well-settled legal principle that two separately incorporated businesses are presumed to be distinct entities.[17] Washington courts will not disregard corporate form unless (1) the corporate form was intentionally used to violate or evade a duty and (2) disregarding the corporate form is necessary and required to prevent an injustice.[18] None of these elements was present in the *GTE-Bell Atlantic* case, and none is present here. (Verizon, of course, did not appeal the *GTE-Bell Atlantic* decision because the Commission accepted the settlement in that case.) In short, the Commission has neither the legal authority, factual basis, nor the policy rationale to "pierce the corporate veil" and impute the acts of the parents to their subsidiaries operating in Washington.[19]

19 In any event, even if the Commission's earlier decisions were correct, they are inapposite. In those cases, the Commission was concerned because of a change in control of the incumbent local exchange provider. For example, in the *US WEST-Qwest* case, a CLEC was acquiring the holding company of the incumbent local exchange provider, and in the *GTE-Bell Atlantic* case, the incumbent (GTE Northwest) was to become part of a new

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Application of U S WEST Communications, Inc. and QWEST Corporation, 9th Supp. Order, Docket UT-991358 (June 2000) ("*Qwest Order*").

[15] *See* footnote 6.

[16] *GTE-Bell Atlantic Order* at 16.

[17] *See United States v. Bestfooods*, 524 U.S. 51, 118 S. Ct. 1876, 1888, 141 L.Ed.2d 43 (1998).

[18] *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 924, 982 P.2d 131 (1999).

[19] *See also., West Virginia Wetlands Conservancy, Inc. v. Public Service Comm'n of West Virginia,* 206 W. Va. 633, 527 S.E. 2d 495 (1998). There, a public interest group claimed that a real estate transaction involving a regulated utility's holding company required commission approval under a "piercing the corporate veil" theory. The commission rejected this argument and the court affirmed, finding that the argument was "specious" and noting that "the principles upon which veil piercing is predicated -- liability may be asserted when the corporate form is being used to perpetrate harm or injustice -- do not transpose to support the creation of subject matter jurisdiction." 527 S.E. 2d at 501. This case is directly on point.

holding company. Here, though, the incumbent (Verizon Northwest Inc.) will have the same holding company – there is no change in the ownership or control of the incumbent. Accordingly, these previous orders are inapplicable.

In sum, the Disposition Clause of RCW 80.12.020 does not give the Commission jurisdiction over the Verizon-MCI transaction.

B. Is There a "Merger or Consolidation" Between Public Service Companies Under RCW 80.12.020?

20 No. The Consolidation Clause (RCW 80.12.020) also does not apply to this transaction. First, the Consolidation Clause applies only to actions by a "public service company." As discussed above, neither Verizon nor MCI is a public service company. Second, the Consolidation Clause covers the merger or consolidation of "franchises, properties or facilities" with another public service company. No franchises, properties or facilities are being merged or consolidated here. The Agreement does not call for the merger of any assets, operations, lines, plants, franchises, or permits of MCI's regulated subsidiaries with the assets, operations, lines, plants, franchises, or permits of any Verizon entity.

21 Finally, the Commission Staff's Legal Memorandum on jurisdictional issues in the *US WEST-Qwest* merger case expressly conceded that neither the "Consolidation Clause" of RCW 80.12.020 nor the "Acquisition Clause" of RCW 80.12.040 applied to that merger transaction because "it is undisputed that neither US WEST, Inc. nor Qwest International Inc. is a "public service company."[20] This same analysis applies here.

C. Is there an "Acquisition of Stock" by Public Service Companies Under RCW 80.12.040?

22 The Acquisition Clause, which addresses stock transfers in which one public service company acquires the shares of another public service company (RCW 80.12.040), also does not apply to this transaction.

23 First, no "public service company" is acquiring or transferring shares, bonds, franchises, properties or facilities in this parent company transaction. Second, as noted above, Staff's

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[20] Staff Memorandum at 6, n.5.

legal analysis in the *US WEST-Qwest* merger, which concluded the Acquisition Clause was not triggered, applies with equal force here. Third, the Commission has previously ruled that the Acquisition Clause does not apply to transactions such as this. In the *GTE Corporate Acquisition Order*,[21] the Commission authorized the sale of $38 million of common stock from GTE Northwest to its parent, GTE Corporation, ***without reviewing the transaction under RCW 80.12.020 or 80.12.040.*** The Commission correctly concluded that the Acquisition Clause does not apply to a parent company.

24 Finally, the Acquisition Clause's explicit references to stock transactions support the conclusion that the Legislature did not intend the Disposition or Consolidation clauses of the statute to apply to such transactions. In other words, the Legislature's adoption of RCW 80.12.040 negates any suggestion that RCW 80.12.020 can be read to cover an "indirect" transfer of assets through a stock transaction. RCW 80.12.020 and 80.12.040 were enacted as part of the same statute, and under longstanding rules of statutory construction, the two clauses must therefore be read together. Simply put, "a difference in language indicates a difference in legislative intent."[22] In RCW 80.12.040, the legislature expressly dealt with transactions involving stocks, bonds and other securities. RCW 80.12.020 contains no such provisions. There is no basis in law for the Commission to infer that stock transactions are covered by RCW 80.12.020.

D. If the Commission Would Otherwise Have Jurisdiction, is the Transaction Exempt Under RCW 80.12.045?

25 Yes. There is no doubt the transaction is exempt from the Disposition Clause, the Consolidation Clause and the Acquisition Clause under RCW 80.12.045. This statute provides that the Transfers of Property Act does not apply to companies serving less than two percent of the access lines in the state. MCI, the holding company, serves no customers

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[21] *In the Matter of the Application of GTE Northwest Incorporated*, Docket No. UT-930748, Order Granting Application dated Aug. 4, 1993 (the "GTE Corporation Acquisition Order").

[22] *Cazzanigi v. Gen. Elec. Credit Corp.*, 132 Wn.2d 433, 466, 938 P.2d 819 (1997).

in Washington, and its local exchange subsidiary serves less than two percent of the lines in the state.[23]

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?

26 Yes. MCI's subsidiaries operating in Washington have been classified as "competitive" under RCW 80.36.320.[24] The Commission has long waived application of RCW Ch. 80.12 to competitive companies, including the subsidiaries of MCI. The Commission first issued waivers through company-specific orders[25] and later by its generally applicable rule, WAC 480-121-063. Consequently, even if the Commission had jurisdiction to review this transaction, which it does not, it has waived such authority by its rule.

27 As discussed above, the Commission did not review the acquisition by SBC of AT&T, a competitively classified company. This is consistent with other transactions involving the acquisition or sale of competitive companies in Washington, where the Commission has never pursued a formal docket to completion. For instance, Docket No. UT-020279, opened on the acquisition of AT&T by Comcast, was closed with the following note from the Commission's Staff:

> Close — The company is competitively classified and the Commission doesn't have jurisdiction over the transfer of control. The transaction involves the transfer of control/merger of the parties' parent companies. The transaction will have no immediate impact on their customers. AT&T Broadband Phone of Washington and Comcast Business Communications will continue to operate under their respective names, with no changes in current rates, terms and conditions, per Kristen Russell.

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[23] Exh. No. 60T-HC at 21-23, 29.

[24] Since 1986 the Commission has waived its jurisdiction over MCI property transfer transactions as a result of MCI's competitive classification, flowing from the 1985 Washington Regulatory Flexibility Act, RCW 80.36.300 *et. seq.* *See* 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).

[25] *See, e.g., In re MCI Telecomm. Corp.,* Docket No. U-86-101, Orders Granting Waivers, 78 P.U.R. 585, 87 WL 534153, at *13 (W.U.T.C. 1986).

28 Similarly, where Qwest Communications Corporation, an affiliate of a public service company, acquired competitive long distance lines, the Commission refused to act, citing the same rationale as was expressed in the Comcast/AT&T case.[26] There is no principled basis for deviating from this precedent.[27] Accordingly, this transaction is exempt from the Transfers of Property chapter.

IV. CONCLUSION

29 For the reasons stated above, the Commission has no jurisdiction to review this transaction. Therefore, if the Commission rejects the settlement, it should (1) address the jurisdictional issue, (2) rule that it has no jurisdiction, and (3) dismiss the case.

Respectfully submitted, November 23, 2005.

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[26] Docket UT-010956; *see also* Eschelon Telecom's acquisition of ATI, Docket UT -041908.

[27] The Commission cannot "reclassify" MCI's subsidiaries as "noncompetitive" in this docket. Under the APA, such a decision would have to be supported by substantial record evidence that the competition that justified the initial classification no longer exists. RCW 34.05.570(3)(e). Nothing in the record supports such a conclusion; indeed, the opposite is true. Ex. 1T-C at 49-93.

DOCKET NO. UT-050814
CERTIFICATE OF SERVICE

I hereby certify that on the date given below the original and 10 true and correct copies of Joint Petitioners' Brief on Jurisdiction in the above-referenced docket, were sent via e-mail and Federal Express to:

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