

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Petition of

VERIZON COMMUNICATIONS,
INC.

For Approval of Agreement and Plan
of Merger.

DOCKET NO. UT-050814

**BRIEF OF PUBLIC COUNSEL
(JURISDICTION)**

NOVEMBER 23, 2005

I. INTRODUCTION AND SUMMARY OF POSITION

1. The Washington Utilities and Transportation Commission (WUTC) has jurisdiction to review, approve, approve with conditions, or reject the proposed merger between Verizon and MCI (Joint Petitioners). In prior similar cases, the Commission has considered and rejected the Joint Petitioners' chief argument here, namely, that the WUTC has no jurisdictional authority because this a parent company stock transaction.

II. BACKGROUND OF THE TRANSACTION AND PROCEEDING

A. The Applicants.

2. Verizon Communications, Inc., is a Delaware corporation with its headquarters in New York City. Verizon's telephone operating Company subsidiaries provide regulated and unregulated telecommunications services in 29 states. Verizon provides service in Washington State through the following certificated subsidiaries: Verizon Northwest, Inc., Bell Atlantic Communications Inc., d/b/a Verizon Long Distance, Verizon Avenue Corp. and Verizon Select Services. Verizon Northwest, Inc. is the entity providing regulated local exchange service in the state. Joint Petition, ¶ 5. Verizon has approximately 4000 employees in Washington State. *Id.*, ¶ 7.
3. Verizon's domestic telecommunications services include: switched local residential and business services, local private line, voice and data, and Centrex. Verizon also provides intraLATA and interLATA toll and interexchange service (inter- and intrastate long distance) and switched and special access. *Id.*, ¶ 6, 7.
4. MCI, Inc., is a Delaware corporation with its headquarters in Ashburn, Virginia. MCI's subsidiaries provide telecommunications service on a regulated and unregulated basis throughout the United States, including in Washington State. Joint Petition, ¶ 8. MCI's subsidiaries "are subject to public utility regulation in the jurisdictions in which they operate, including

Washington...” *Id.* MCI has approximately 190 employees and contractors in Washington. *Id.*, ¶ 11.

5. MCI subsidiaries provide a range of services to the consumer mass market in Washington, including competitive local exchange service, interstate and intrastate long distance service. *Id.*, ¶ 10.

6. MCI provides service to business and government customers (its “enterprise services”) including voice, data, Internet, networking, private line and other dedicated services. *Id.* ¶ 9.

B. Description Of The Transaction.

7. The transaction is summarized in Section IV of the Joint Petition, ¶¶ 13-17. A detailed description of the transaction is contained in the Agreement and Plan of Merger (Merger Agreement) which is attached to the Joint Petition as Attachment A. Attachments B and C to the Joint Petition contain amendments to the Merger Agreement which change the consideration and certain dates.

8. As described in the Agreement, MCI will merge into ELI Acquisition, LLC (ELI), which is wholly owned by Verizon and created solely to facilitate the merger. ELI will be the surviving Company in the merger and Verizon will be its parent corporation. Verizon intends to remain ELI, the surviving Company, as “MCI, LLC.” Joint Petition, ¶ 14. After the transaction is completed, MCI will be a subsidiary of Verizon. *Id.*, ¶16.

9. Joint Petitioners describe the transaction as a parent company stock transaction, a merger between corporate parents (holding companies) and ELI, the Verizon sub created solely to facilitate the transaction. Joint Petition, ¶¶ 20, 22, 23.

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

A. Does The Transaction Involve A Property Disposition Of A Public Service Company Under RCW 80.12.020?

10. The Commission's decision six years ago *In the Matter of the Application of GTE Corporation and Bell Atlantic Corporation*, Docket No. UT-981367, Fourth Supplemental Order, provides the answer to this question as well as to the overall question of Commission jurisdiction in this case. Exh. No. 26, pp. 5-20. The *GTE/Bell Atlantic* merger, a stock transaction, was structured as a merger between GTE Corporation, the parent of GTE Northwest, the regulated operating subsidiary in Washington, and the Bell Atlantic holding Company. *Id.*, p., 6. As a result of the merger, GTE Corporation and its subsidiaries became wholly-owned subsidiaries of Bell Atlantic. *Id.*, p. 7. Verizon is the renamed successor parent corporation arising out of the merger.
11. Applicants argued that the Commission lacked jurisdiction over the merger because (a) the transaction involved parent Companies rather than regulated public service Companies, and (b) a stock transaction was not a disposition under RCW 80.12.020. *Id.*, p. 10. The issue was extensively briefed by the parties. After a lengthy and thorough discussion of the relevant facts, law, and precedent, the Commission found that it had jurisdiction over the merger. The following quote aptly summarizes the Commission's conclusion:

[T]he interpretation urged by Applicants is inconsistent with the both the terms and meaning of RCW 80.01.040 and RCW 80.12.020. We do not believe that the Legislature meant under RCW 80.12.020 to allow companies to avoid scrutiny of transfers of control over their jurisdictional enterprises by the simple expedients of erecting particular corporate structures or using stock rather than cash as consideration. Such a rigid and mechanistic reading of the statute "is counter-intuitive in this context and would subvert the purposes underlying the Commission's delegated powers." *In the Matter of the Application of PacifiCorp and Scottish Power PLC*, Docket No. UE-981627, Second

Supplemental Order, mimeo at 10, 192 PUR 4th 143 (March 1999). Indeed, it strains credulity to suggest that the Legislature intended that functionally identical transactions should be treated differently simply because one transaction involves entities that have erected a hierarchical corporate structure including holding companies, while the other transaction involves similar entities that rely on more simple corporate structures. In this case, GTE Northwest is a wholly-owned subsidiary of GTE Corporation. There is a perfect identity between the corporations for purposes of a decision to effect a complete transfer of control such as would result under the subject transaction. Indeed, as Public Counsel points out, wholly owned subsidiaries (e.g. GTE Northwest) of major international telecommunications companies “do not merge independently of their parent corporation.” Public Counsel Answer at 5. In like vein, Staff points out that “GTE-NW cannot dispose of control on its own, it is dependent on the parent to accomplish that end.” Staff Memorandum at 10.

Exh. No. 26, pp. 15-16.

12. The Joint Petition acknowledges that the MCI’s subsidiaries “are subject to public utility regulation in the jurisdictions in which they operate, including Washington...” Joint Petition, ¶ 8. As Companies providing telecommunications service in Washington, MCI subsidiaries are public service Companies under RCW 80.12.010 and RCW 80.04.010. To the extent MCI is competitively classified, it remains subject to regulation of rates, although at a reduced level.¹ MCI franchises, properties, and facilities in Washington are being disposed of by being transferred in their entirety to a wholly-owned subsidiary of Verizon. Joint Petitioners’ response to the Commission’s exercise of jurisdiction in *GTE/Bell Atlantic* and *In Re Application of US West, Inc., and Qwest Communications International*, Docket No. UT-991358, Ninth Supplemental Order, ¶¶ 23-24 (Exh. No. 27), is that they “misconstrue the nature of statutory provisions governing merger reviews[.]” Joint Petition, ¶ 25. Public Counsel disagrees. Joint

¹ The competitive classification statutes permit the Commission upon complaint to review a provider’s rates to determine whether they cover cost, whether they are fair, just, reasonable, and whether they are subsidized by regulated services. RCW 80.36.330 (2)-(6). The Commission may rescind the competitive classification to protect the public interest. RCW 80.36.330 (7).

Petitioners have failed to make any argument that effectively distinguishes the GTE/Bell Atlantic analysis from the facts in this case.²

B. Is There A “Merger Or Consolidation” Between Public Service Companies Under RCW 80.12.020?

13. As the Commission noted in the *GTE/Bell Atlantic* merger decision, merger analysis under RCW 80.12.020 can be divided into review under the so-called Disposition Clause (RCW 80.12.020), Consolidation Clause (RCW 80.12.020), and the Acquisition Clause (RCW 80.12.040). Exh. No. 26, p. 9. In *GTE/Bell Atlantic* the Commission found jurisdiction under the Disposition Clause and did not consider the others. *Id.* In this case, similarly, the Commission can simply exercise jurisdiction under the Disposition Clause.

14. However, the transaction also constitutes a merger or consolidation under RCW 80.12.020. As a common sense starting point on this issue, the Joint Petitioners themselves refer to the transaction as a merger extensively and repeatedly in the Joint Petition. Secondly, if the Commission rejects the “public service company vs. holding company” distinction, then the transaction effects a merger and consolidation by making both the Verizon and MCI public service companies operating in Washington part of the same corporate structure. Post-merger, both entities are wholly owned subsidiaries of Verizon.

Finally, there is evidence in the testimonial and hearing record that reflect that post-merger consolidation of operations will occur. These include unified management permitting more effective provisioning of services and better quality control of the network. Exh. No. 23T-C, p. 19 (Danner), combined product lines, joint use of networks, and consolidation of administrative functions. Exh. No. 150T-HC, p. 9 (Folsom).

² See also, Exh. No. 25, *In the Matter of the Application of PacifiCorp and Scottish Power PLC*, Docket No. UE-981627, Second Supplemental Order.

C. If The Commission Would Otherwise Have Jurisdiction, Is The Transaction Exempt Under RCW 80.12.045?

15. To the extent MCI Metro Access Transmission Services has less than 2% of the access lines in the state of Washington, it may be able to establish an exemption from RCW 80.12. This does not defeat the Commission's jurisdiction, however, because the other entities participating in the transaction would remain subject to jurisdiction.

16. As Ms. Roth aptly points out in her responsive testimony, however, if the Commission approves the merger then MCI will be considered a Class A company. Exh. No. 101T-HC, p. 38, ll.10-13 (Roth). A similar issue was explored in the PacifiCorp/Scottish Power merger, where jurisdiction was challenged on the basis that Scottish Power was not a public service company prior to the merger, and hence only one public service Company was involved in the merger. The Commission rejected the argument, citing many Commission precedents that found jurisdiction in cases where only one company was a public service company prior to the merger. *PacifiCorp/Scottish Power*, Docket No. UE-981627, Second Supplemental Order, p. 12. In this case, since after the merger MCI will become a Class A company and a subsidiary of the second-largest regulated telecommunications company in Washington, the current status of MCI metro Access Transmission Services does not defeat the Commission's jurisdiction..

D. Is The Transaction Exempt Because Of The Waivers Of Regulatory Requirements Set Forth In WAC 480-121-063?

17. While WAC 480-121-063 by its terms waives the provisions of RCW 80.12 for competitively classified companies, it also provides:

(2) The commission may by order revoke waivers of regulatory requirements if it determines that revocation is necessary to protect the public interest.

18. For all of the reasons set forth in the brief on the merits, the merger has a significant effect on the public interest in Washington. The fact that the proposed transaction will result in the acquisition by a dominant local service provider (Verizon) of its largest local service

competitor is more than a sufficient basis for revocation of this waiver. The competitive classification status post-merger of MCI's Washington subsidiaries within Verizon territory is questionable at best. By asserting this exemption, MCI asks that its last independent act, the decision to cease offering a service that competes with Verizon, avoid scrutiny.

E. Other Jurisdictional Issues: The Commission Has Jurisdiction Under The “Acquisition Clause” – RCW 80.12.040.

19. RCW 80.12.040 provides that 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 another public service company unless authorized by the commission to do so.” This statute provides an independent basis for the Commission to assert jurisdiction in this case. At least indirectly, through the parent transaction, Verizon is purchasing, acquiring, and becoming the owner of MCI's properties and facilities in Washington. The analysis employed by the Commission in the *GTE/Bell Atlantic* decision, piercing the corporate structure for purposes of the Disposition Clause and looking at the role of the public service companies involved, is equally applicable here.

IV. CONCLUSION

20. The Commission's carefully reasoned decision to exercise jurisdiction in the *GTE/Bell Atlantic* merger and its other recent merger dockets governs this case. In rejecting the Applicants' narrow reading of their authority, the Commission observed:

Our reading of RCW 80.12.020, as applied to the facts pertinent here, gives effect to both the broad purposes set forth in RCW 80.01.040 and the specific purposes of RCW 80.12.020. Public service companies provide essential services to our citizens: telecommunications, electricity, gas, and water. That is why their “rates, services, facilities, and practices” must be regulated “in the public interest.” RCW 80.01.040(3). *That public interest is at stake when a public service company disposes of all or part of itself (if the part or whole being disposed of is necessary or useful in the performance of the company's duties). The specific purpose of RCW 80.12.020 is to ensure that the public interest is protected by requiring the Commission's approval of the transaction that achieves the disposition.*

Exh. No. 26, p. 15.

21. Under the facts of this case, and consistent with its prior decisions, Public Counsel recommends that the Commission find that it has the authority to exercise its jurisdiction in this case in the interests of protecting Washington telecommunications consumers.

DATED this ____ day of November, 2005.

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