

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

ADVANCED TELECOM, INC. d/b/a)	DOCKET UT-111254
INTEGRA; ELECTRIC)	
LIGHTWAVE, LLC d/b/a INTEGRA;)	
ESCHELON TELECOM OF)	
WASHINGTON, INC d/b/a INTEGRA)	
TELECOM; OREGON TELECOM)	ORDER 03
INC. d/b/a WASHINGTON)	
TELECOM d/b/a INTEGRA;)	
UNICOM f/k/a UNITED)	
COMMUNICATIONS, INC. d/b/a)	ORDER DENYING JOINT CLECS'
INTEGRA; MCLEODUSA)	MOTION FOR TEMPORARY RELIEF
TELECOMMUNICATIONS)	
SERVICES L.L.C. d/b/a PAETEC)	
BUSINESS SERVICES; AND TW)	
TELECOM OF WASHINGTON LLC,)	
)	
Complainants,)	
)	
v.)	
)	
QWEST CORPORATION AND)	
CENTURYLINK, INC.,)	
)	
Respondents.)	
)	
.....)	

1 **PROCEEDING.** On July 12, 2011, Advanced Telecom, Inc. d/b/a Integra; Electric Lightwave, LLC d/b/a Integra; Eschelon Telecom of Washington, Inc d/b/a Integra Telecom; Oregon Telecom Inc. d/b/a Washington Telecom d/b/a Integra; Unicom f/k/a United Communications, Inc. d/b/a Integra¹; McLeodUSA Telecommunications Services L.L.C. d/b/a PAETEC Business Services (PAETEC); and tw telecom of

¹ These companies are collectively referred to as Integra.

washington llc (tw telecom)² filed with the Washington Utilities and Transportation Commission (Commission) a complaint against Qwest Corporation (Qwest) and CenturyLink, Inc. (collectively with Qwest, the Merged Company). Joint CLECs allege that the Merged Company has violated the terms of various settlement agreements approved in Order 14 in Docket UT-100820 regarding operational support systems (OSS) used for maintenance and repair.

- 2 **PARTY REPRESENTATIVES:** Gregory R. Merz, Gray, Plant, Mooty, Mooty & Bennet, P.A., Minneapolis, Minnesota, represents Integra and PAETEC. Lauren P. Giles, Davis Wright Tremaine LLP, Seattle, Washington, represents tw telecom. Lisa Anderl, in-house counsel, Seattle, Washington, represents the Merged Company. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, represents Cbeyond Communications LLC (Cbeyond). Jennifer Cameron-Rulkowski, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).³

MEMORANDUM

- 3 **Background and Procedural History.** On August 10, 2011, Joint CLECs filed a Motion For Temporary Relief and Request For Oral Argument (Joint CLECs' Motion). Specifically, Joint CLECs contend that:

- The settlement agreement entered into by Integra and the Merged Company (Integra Settlement) in Docket UT-100820 prevents the Merged Company from using and integrating a new OSS for 24 months after the April 1, 2011, merger closing date (moratorium)⁴ and guarantees that, before replacing or

²Integra, PAETEC, and tw telecom are collectively referred to as Joint CLECs.

³ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of the proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

⁴ Joint CLECs' Motion, at 2. Joint CLECs point out that the moratorium was subsequently extended to 30 months in an agreement reached with the Merged Company, PAETEC, and other CLECs. *Id.*

integrating a new OSS, the Merged Company will follow procedures to provide CLECs and the Commission with input into the development of the replacement.⁵

- This prohibition is substantially similar to that contained within the settlement agreement between the Merged Company, Staff, and the Public Counsel Section of the Washington State Attorney General (Public Counsel).⁶
- The Merged Company has begun the process to integrate a new maintenance and repair OSS, Maintenance Ticketing Gateway (MTG), to retire and replace Qwest legacy OSS, Customer Electronic Maintenance and Repair (CEMR) and Mediated Access Electronic Bonding Trouble Administration (MEDIACC), before the expiration of the 30 month moratorium and without complying with the procedures outlined in the Integra Settlement.⁷
- MTG will be in place and in use before the end of 2011 if the Commission does not enjoin the Merged Company from proceeding in violation of the settlement agreements and the Commission's order approving them.⁸
- If the Commission does not grant the requested injunction, and Joint CLECs prevail on their complaint, it will be a hollow victory since MTG will already have replaced the legacy Qwest OSS.⁹
- The Commission's statutes and rules provide it with the authority to enjoin the Merged Company from using and implementing a new OSS prior to the expiration of the moratorium and without the proper procedural safeguards

⁵ Joint CLECs' Motion, at 5. The Merged Company's OSS is an important issue for Joint CLECs because they rely upon access to the OSS "in order to obtain products and services that they require to compete in the local telecommunications market." Joint CLECs' Motion, at 1-2. The systems in question are used by CLECs to exchange maintenance and repair data with Qwest and "are vital to the CLECs' abilities to conduct business in Washington." *Id.* at 6.

⁶ *Id.* at 2-3.

⁷ *Id.* at 6.

⁸ *Id.* at 3.

⁹ *Id.* at 3-4.

having been followed.¹⁰ In particular, “[t]he Commission’s statutory duty to approve utility mergers and its obligation to enforce the public service laws necessarily implies that the Commission can enter an order” enjoining the Merged Company from prematurely transitioning to a new system.¹¹

4 On August 18, 2011, the Merged Company filed its Answer to Joint CLECs’ Motion (the Merged Company’s Answer). The Merged Company asserts that:

- The Commission’s authority is limited to the powers it is granted by statute or necessarily implied. *In re Electric Lightwave, Inc.*, 123 Wash.2d 530, 536, 869 P.2d 1045, 1049 (Wash. 1994) (citing *Cole v. WUTC*, 79 Wash.2d 302, 306, 485 P.2d 71(Wash. 1971)).¹²
- The Commission’s statutes do not provide for injunctive relief, nor is the power to enjoin the Merged Company necessarily implied by the Commission rules.¹³
- The power to enjoin a public utility from acting has only been granted to the Commission under very limited circumstance; for example, RCW 34.05.479 and WAC 480-07-630 provide that the Commission may conduct an emergency adjudication under immediate threat to public health, safety, or welfare.¹⁴ The Merged Company’s development of MTG does not pose an immediate danger to public health, safety, or welfare.
- The Merged Company is not replacing or retiring Qwest legacy OSS during the moratorium.¹⁵ MTG, a Qwest developed update to legacy Qwest systems,

¹⁰ *Id.* at 15-16.

¹¹ *Id.* at 16.

¹² The Merged Company’s Answer, ¶ 7.

¹³ *Id.*, ¶¶ 7-8.

¹⁴ *Id.*, ¶ 9. While the Merged Company cites to WAC 480-07-630, the Commission’s rule on telecommunication arbitrations, it is assumed that it intended to refer to WAC 480-07-620, Emergency adjudicative proceedings.

¹⁵ *Id.*, ¶ 18.

is being implemented as an optional alternative to MEDIACC.¹⁶ Joint CLECs will still be able to use CEMR and MEDIACC during the moratorium, and the Merged Company will follow the replacement process outlined in the agreements.¹⁷

- MEDIACC was implemented in 1995 and will need to be replaced at some point.¹⁸ It is possible “that MEDIACC could experience an unrecoverable failure” during the moratorium, and MTG will be available in case that happens.¹⁹

5 On August 25, 2011, the Commission heard oral arguments on Joint CLECs’ Motion. During oral arguments, Joint CLECs asserted that a case cited by the Merged Company, specifically *In re Electric Lightwave, Inc.*,²⁰ supports Joint CLECs’ argument in favor of the Commission’s authority to grant the preliminary injunction. This case as well as *In re Little*,²¹ also cited by Joint CLECs, provide an exception to the prohibition against agency action where not specifically set out by statute.

6 **Discussion and Decision.** We find that Joint CLECs’ have failed to establish the legal basis for their preliminary injunction request under these circumstances. As the Merged Company states, the Commission is a creature of statute, “strictly limited in its operations to those powers granted by the legislature.”²² While Joint CLECs are correct that the Commission has been bestowed with the duty to review transfers of ownership and control of public service companies,²³ Joint CLECs have not cited a

¹⁶ *Id.*, ¶ 25.

¹⁷ *Id.*, ¶ 27.

¹⁸ *Id.*, ¶ 31.

¹⁹ *Id.*, ¶ 32.

²⁰ 123 Wash.2d 530, 869 P.2d 1045 (1994).

²¹ 95 Wash.2d 545, 627 P.2d 543 (1981) (overruled on other grounds).

²² *Cole v. WUTC*, 79 Wash.2d 302, 306, 485 P.2d 71 (1971).

²³ RCW 80.12.020 provides that:

specific provision within this authority that allows the Commission to grant a preliminary injunction. Instead, Joint CLECs point to RCW 80.04.380, which provides that, “[e]very public service company, and all officers, agents and employees of any public service company, shall obey, observe and comply with every order, rule, direction or requirement made by the commission under authority of this title, so long as the same shall be and remain in force.” This same statute goes on to provide for Commission-imposed fines when public service companies violate the Commission’s orders or rules. There is no reference to preliminary injunctions.

- 7 In addition, the argument of Joint CLECs that *Electric Lightwave* and *Little* support its position of implied authority is equally unpersuasive. The court in *Electric Lightwave*, examining whether this Commission exceeded its authority by granting monopolies to local exchange companies,²⁴ determined that the power to grant monopolies was *not implied or necessary* for the Commission to carry out its statutory duty to review applications for competitive status.²⁵ In *Little*, the court assessed whether an inmate’s escape from prison tolled that inmate’s maximum sentence, and if so, whether the Board of Prison Terms and Paroles (Board)²⁶ has the

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, and no 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 to do so. The commission shall not approve any transaction under this section that would result in a person, directly or indirectly, acquiring a controlling interest in a gas or electrical company without a finding that the transaction would provide a net benefit to the customers of the company.

WAC 480-143-170 states that:

If, upon the examination of any application and accompanying exhibits, or upon a hearing concerning the same, the commission finds the proposed transaction is not consistent with the public interest, it shall deny the application.

²⁴ 123 Wash.2d at 535.

²⁵ *Id.* at 537. (emphasis added).

²⁶ This administrative agency was subsequently renamed the Indeterminate Sentence Review Board. RCW 9.95.001.

authority to extend the inmate's sentence expiration.²⁷ Finding in the affirmative, the court recognized that the courts fix the maximum term for a prisoner's sentence, and the Board has authority to fix the duration of the sentence, i.e., when the maximum sentence will expire.²⁸ As a result, the court reasoned that the Board has the implied authority to *administratively correct* an inmate's sentence to incorporate the inmate's time as a fugitive.²⁹ In the instant case, Joint CLECs are not asking the Commission to correct an administrative error. Further, the Board's authority to extend the inmate's sentence in *Little* was implicitly recognized in prior case law.³⁰ Joint CLECs fail to point to any existing case law which implicitly recognizes the Commission's injunctive authority.

8 Joint CLECs have not carried their burden and have failed to establish that the Commission has injunctive authority under these circumstances. The Commission finds that the Joint CLECs' Motion should be denied.

9 We do not reach the merits of Joint CLECs' allegations against the Merged Company which will be fully adjudicated based on the procedural schedule established in Order 01 in this docket. Nevertheless, the Commission takes seriously the Joint CLECs' contention that the Merged Company may be failing to honor its obligations under the settlement agreements and Order 14. Simply stated, the Merged Company is expected to fully honor and comply with each and every condition of the settlement agreements in the merger proceeding, including the OSS conditions. To the extent the Merged Company intends to make changes to the existing OSS used in the legacy Qwest territory it must do so within the parameters of the settlements which were intended to satisfy concerns that the merger could potentially harm competition. Consequently, although we deny the injunctive relief requested by Joint CLECs, we

²⁷ 95 Wash.2d at 546.

²⁸ *Id.*, at 550.

²⁹ *Id.* (emphasis added).

³⁰ *Id.* (citing *Wickert v. Wash. State Bd. Of Prison Terms and Paroles*, 13 Wash. App. 917, 918, 538 P.2d 826 (1975)).

hereby notify the parties of our intent to adjudicate fully and judiciously the allegations set forth in the Joint CLECs' Complaint.

ORDER

10 THE COMMISSION ORDERS That the motion filed by Joint CLECs seeking injunctive relief against the Merged Company is denied.

Dated at Olympia, Washington, and effective September 1, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Administrative Law Judge

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.