BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of MCI WORLDCOM, INC., and SPRINT CORPORATION	Docket No. UT-991991
For an Order Disclaiming Jurisdiction, or in The Alternative, Approving the Transfer of Control of Sprint Corporation's Washington Operating Subsidiaries to MCI WORLDCOM, INC.	Cause No. U-86-79 Cause No. U-86-101
In the Matter of the Petitions of U.S. SPRINT COMMUNICATIONS COMPANY, and MCI TELECOMMUNICATIONS CORPORATION	MOTION FOR A PROTECTIVE ORDER RE PUBLIC COUNSEL'S POST-HEARING DATA REQUEST

WorldCom, Inc. ("WorldCom") and Sprint Corp. ("Sprint") (collectively, "Joint Petitioners"), move the Washington Utilities and Transportation Commission ("WUTC"), for a Protective Order against post-hearing discovery and, in particular, providing that they need not respond to Public Counsel's data request no. 55, which was served on May 24, 2000, the week *after* the hearings concluded in this docket.

I. FACTUAL AND PROCEDURAL BACKGROUND

A pre-hearing conference was held in this docket on January 25, 2000. The Commission invoked the discovery rule in this docket at that time. Additionally, the Commission scheduled the substantive hearings in this docket for the week of May 15, 2000.[1] Thus, the Staff, Public Counsel, and intervenors were provided with ample opportunity to

[1] The hearings were initially set for May 15 through 17. Subsequently, the hearing dates were changed to May 16 through May 18.

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conduct discovery prior to the evidentiary hearings. Indeed, to allow the maximum opportunity for discovery, the Joint Petitioners did not even seek a pre-hearing and discovery cutoff, as is common in Commission cases.[2]

The parties took advantage of the ample opportunity for discovery, serving hundreds of data requests. The Joint Petitioners produced over ten thousand pages of data request responses and responsive documents to Staff, Public Counsel, and SBC. Indeed, discovery continued on a cooperative basis (but with considerable strain on the parties' resources) up to the very last minute. Supplemental discovery responses were being exchanged by both sides into the first days of the evidentiary hearings.

The evidentiary hearings concluded on May 19, 2000. Although Public Counsel requested that the record be kept open at the conclusion of the hearings, the Commission declined to grant that request. Transcript at 855-860.

The week after the conclusion of the hearings, on May 24, 2000, Public Counsel served its data request No. 55 on the Joint Petitioners. It requested that the Joint Petitioners:

> Please provide a copy of all offers, proposals, or materials produced by the petitioners, or produced to the petitioners, in connection with discussions about the proposed merger with the U. S. Department of Justice, the U. S. Federal Communications Commission, or the European Union.

(Copy attached). Joint Petitioners have not responded because they believe that post-hearing discovery is improper.

II. ARGUMENT

The rule governing data requests contemplates that a reasonable schedule, including "deadlines" be established for service of data requests. WAC 480-09-480(5). No such schedule was adopted nor were any deadlines stated in the pre-hearing conference order in this docket. However, counsel for Joint Petitioners are not aware of any Commission case in which a discovery schedule allowed for service of data requests after the conclusion of

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[2] See e.g., First Supplemental Order, Docket No. UT-003022 (April 13, 2000). See also WAC 480-09-480(5).

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evidentiary hearings. Logically any data request served so late that a timely response could not be introduced into evidence because of the conclusion of the evidentiary hearings should not be considered timely or proper.

Apart from logic, the standard for the propriety of a data request is that it must be "reasonably calculated to lead to the discovery of admissible evidence." WAC 480-09-480(6)(a)(vi). Data requests which are served after the conclusion of evidentiary hearings cannot, by *definition*, be reasonably calculated to lead to discovery of admissible evidence since the time for admission of evidence has come and gone. Indeed, in this case, Public Counsel sought to keep the record open to introduce the very type of data sought in data request no. 55:

> MR. CROMWELL: Just, actually, a brief procedural request, whether the Commission might be willing to consider formally leaving the record open for comment by the parties regarding actions in parallel matters, thinking specifically of DOJ and EC review of this matter, for actions that might occur in those proceedings that would be relevant to the Commission's consideration of those issues . . . .

Transcript at 885. The Commission declined to hold the record open. Id. At 885-860.

In spite of the fact that the Commission was unwilling to leave the record open even for final rulings or formal public actions by the DOJ and the EU, Public Counsel has now embarked on an unprecedented and improper fishing expedition for documents related to sensitive confidential negotiations and settlement discussions between the Joint Petitioners and those agencies, as well as the FCC. Public Counsel has done so without seeking any leave from the Commission to reopen the case. Apparently, Public Counsel has no concrete basis to seek reopening because the other proceedings--which are not directly related to this docket--have not been concluded. Because the record in this case is closed and the case is in the process of being briefed, discovery requests at this stage are improper.

Even assuming, for the sake of argument, that Public Counsel's data request had been served timely in this case, it is improper in substance and would still be objectionable for numerous grounds. Joint Petitioners will address here only the two most glaring concerns they have with the substance of the request.

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First, the data request encompasses "**all** . . . materials produced by the petitioners" in connection with discussions with three agencies. Those agencies' reviews are extensive. Full compliance with this request would involve production of tens of thousands or perhaps of hundreds of thousands of documents. The scope and breadth of this request goes well beyond "unduly burdensome," particularly coming post-hearing. Joint Petitioners should be permitted to focus their resources on preparing their post-hearing brief and should not have to be distracted by improper and burdensome discovery requests.

The data request also seeks copies of all "offers" and "proposals" by the Petitioners to the DOJ, FCC or EU. Public Counsel is fishing for compromise and settlement proposals that may have been made by or to the Joint Petitioners in connection with the review by the three enumerated agencies. Public policy strongly favors an environment in which compromise and settlement can be explored by parties to a dispute free of publicity and scrutiny. Whether or not a technical "privilege" applies to such offers of settlement, Public Counsel's requests thwarts this important public policy. Moreover, even if such settlement offers were considered not to be privileged, they clearly could not be admitted into evidence in this proceeding, even if the proceeding were reopened. Washington Evidence Rule 408.[3] Rule 408 is not limited in scope to offers of compromise or settlement made in the same proceeding in which the offers are sought to be introduced. In other words, Rule 408 bars evidence of offers of compromise and settlement in this docket even though the offers were made in other proceedings. Id. Because such offers would not be admissible even if they were produced, their requested production is "not reasonably calculated" to lead to the discovery of any admissible evidence.

III. CONCLUSION

Because hearings in this document have been concluded and the record is closed,

[3] Commission rules incorporate this evidence rule as a guideline. WAC 480-09-750. Although the Commission is not bound to the evidence rule, given the strong public policy behind ER408, the Commission has in the past and should continue to apply it in Commission dockets.

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the Joint Petitioners are entitled to an order protecting them from any further attempts at discovery, unless and until a party should make a proper showing and obtain an order reopening the case. In addition, the order should specifically provide that the Joint Petitioners need not respond to Public Counsel's data request no. 55.

Respectfully submitted this 6th day of June, 2000,

By _____

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CERTIFICATE OF SERVICE

WUTC DOCKET NO. UT-991991

I, Maria Carrasco, hereby certify that I have this date served a true and correct copy of MOTION FOR A PROTECTIVE ORDER RE PUBLIC COUNSEL'S POST-HEARING DATA REQUEST ON BEHALF OF WORLDCOM, INC. AND SPRINT CORP. upon the following parties by facsimile, e-mail, and U.S. mail:

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Dated at Seattle, Washington, this 6th day of June, 2000.

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Maria Carrasco

MCI Worldcom--Sprint

Docket No. UT-991991

Public Counsel Data Request No. 55

55. Please provide a copy of all offers, proposals, or materials produced by the petitioners, or produced to the petitioners, in connection with discussions about the proposed merger with the U.S. Department of Justice, the U.S. Federal Communications Commission, or the European Union.