BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of MCI WORLDCOM, INC. AND SPRINT CORPORATION 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. .	NO. UT-991991 PUBLIC COUNSEL RESPONSE TO JOINT PETITIONERS' BRIEF ON JURISDICTION

I. INTRODUCTION

RCW 80.12.20 requires Washington Utilities and Transportation Commission (Commission) approval for the merger transaction described in the Joint Petition in this docket. The transaction, by which Sprint Corporation (Sprint), and its Washington subsidiaries, Sprint Communications Company, Limited Partnership, ASC Telecom, Inc., d/b/a/ Alterna Telephone, and United Telephone Company of the Northwest, d/b/a/ Sprint (United), will become wholly-owned subsidiaries of Worldcom, Inc. (Worldcom), constitutes a disposition of "franchises, properties or facilities" for purposes of RCW 80.12.020.[1] The proposed transfer of control over Sprint falls under the regulatory jurisdiction of the Commission because it has the effect of transferring ownership and control of Sprint jurisdictional franchises, properties, or facilities. The implications of this type of transaction are as significant as any other disposition of utility property. Commission review is likewise consistent with the agency's authority to regulate

[1] The then MCI is now formally Worldcom and will be referred to as Worldcom herein pursuant to the company's statement made at hearing on May 16, 2000.

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public service companies in the public interest.

This Commission has expressly retained jurisdiction over the Washington operations of Worldcom and Sprint and a revocation of the previously granted waivers of certain regulatory requirements is appropriate at this time. Commission Order Granting Petitions In Part, Cause No.s U-86-79 and U-86-101, September 30, 1986 (Waiver Order). There are sufficient facts in the record from which the Commission may determine that its previously granted waivers may properly be rescinded and there exists no factual or legal rationale why this may not be done. Public Counsel respectfully requests that the Commission rescind the waivers of certain regulatory requirements granted to the Joint Petitioners in 1986 and thereby consider the merits of this case.[2]

II. ARGUMENT

A. The Commission Has Jurisdiction Over This Merger.

The Commission has repeatedly found that it has jurisdiction under chapter 80.12 RCW to review the merger of telecommunication companies, including where, as here, the merger is of holding companies with operating subsidiaries that are public service companies which have been competitively classified.

1. Statutory authority to review the proposed merger of Worldcom and Sprint.

The Joint Petitioners concede that the Commission has found that its jurisdiction lies in similar cases. Joint Petitioners' Brief on Jurisdiction, p. 13. The Joint Petitioners fail to respect

[2] To avoid a repetitious description of the proposed transaction Public Counsel refers the Commission to sections II. and IV. of the Joint Petition filed by the companies on December 21, 1999, pp. 3-5 and 6-7.

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the Commissions' repeated statements in different dockets regarding the scope of its jurisdiction to review mergers such as the one proposed in this docket. They blithely ignore or attempt to distinguish the Commission's prior conclusions of law regarding its jurisdiction, going so far to assert the lack of any jurisdiction over them at all. Joint Petitioners' Brief on Jurisdiction, p. 13.

a. *Washington statute requires that a disposition of property, facilities, or franchises receive Commission approval.*

The Commission has jurisdiction over the Worldcom/Sprint merger under the first or "sale/disposition clause" of RCW 80.12.020, which states in pertinent part:

> 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 to do so… (emphasis added).

The Commission's authority to review dispositions is part of its broad authority under RCW 80.01.040 to regulate the practices of public utilities, including telecommunications companies, in the public interest. *Tanner Electric Corp. v. Puget Sound Power & Light*, 128 Wn.2d 656, 666, 911 P.2d 1301 (1996). *See generally, In the Matter of the Application of Pacificorp and Scottish Power PLC*, Docket No. UE 981627, Second Supplemental Order, March 16, 1999, pp. 8-9 (hereafter "Scottish Power") and; *In the Matter of GTE Corporation and Bell Atlantic Corporation,* Docket No. UT-990672, Fourth Supplemental Order, December 16, 1999, p. 26 (hereafter "GTE/Bell Atlantic").

The Joint Petitioners have argued that the Commission cannot expand its jurisdiction on the strength of RCW 80.01.010, .020, and .040. Joint Petitioners' Brief on Jurisdiction, pp. 6-16. These arguments misread the Commission's interpretation of these statutes' role in its *Scottish Power* decision. There the Commission addressed a similar argument, pointing out that "Chapter 80.12 neither conflicts with nor limits the Commission's jurisdiction as delegated in RCW

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80.01.040," *Scottish Power*, p. 9, and going on to explain that:

> 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: electricity, natural gas, water, and telephone service. 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.

Scottish Power, p.10. The Commission's decision in *GTE*/*Bell Atlantic* similarly supports the Commission's assertion of jurisdiction to protect the public interest. *GTE/Bell Atlantic*, p. 19.

For example, there is no dispute that United, a wholly owned subsidiary of Sprint, is a public service company in Washington subject to the jurisdiction of the Commission. Joint Petitioners' Brief on Jurisdiction, p. 2. Furthermore, the Joint Petitioners concede all other subsidiaries operating in Washington are public utilities. Joint Petitioners' Brief on Jurisdiction, p. 8. The Joint Applicants' argument that the transaction avoids review because it involves the Worldcom and Sprint parent companies is addressed below; as is the apparent assertion that competitive classification by the Commission waived jurisdiction.

As a public service company, United may not dispose of any part of its property "necessary or useful in the performance of its duties to the public" without Commission approval. The scope of the statute is broad in its application to transactions. The phrase "otherwise dispose of" gives the Commission the ability to review not just sales, leases, and assignments, but to review any type of disposition, however structured, which results in the transfer of "any part…whatsoever" of company facilities or property. The breadth of the statute was affirmed by the Commission's decision in the Scottish Power case, in which the

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Commission declared:

> We perceive the legislative purpose in this connection to be that the Commission should carry out its mission to protect the public interest *whenever the control of a plainly jurisdictional public utility changes through a corporate transaction for the transfer of the whole or a controlling interest in the company.*

Scottish Power, p. 9 (emphasis added).

The Commission went on to conclude:

> Thus, the statute requires Commission approval not just for some narrow class of transactions, but for *any transfer of rights or control over anything necessary or useful to a public service company's utility operations.*

Scottish Power, p. 10 (emphasis added).

Accordingly, the relevant statute and the Commission's Scottish Power decision support and indeed require a conclusion that this transaction, which accomplishes a transfer of control over the jurisdictional facilities of United, is encompassed within the meaning of the "disposition" clause.[3]

Because a transfer of control over the entire public service company by definition includes a transfer of control over the company's franchises, properties, or facilities, jurisdiction is triggered. As the Commission noted in *Scottish Power,* it would make no sense to read the statute as applicable to the transfer of an individual asset (e.g. a generating plant or a telecommunications wire center), but not to a transaction which turns over control of the entire company to a new entity. *Scottish Power,* p. 10-11**.** This is the anomalous result, however, which follows from the Joint Applicants' hypertechnical and formalistic reading of the statute; which is similar to the interpretation previously argued to the Commission in the *GTE/Bell*

[3] The same rationale applies to the assertion of the Commission's jurisdiction over all other subsidiaries of Worldcom and Sprint doing business in Washington if the Commission finds sufficient grounds to rescind its prior waiver of regulatory conditions . United is used solely as an example which does not implicate the related issues revolving around the Commission's Waiver Order.

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Atlantic merger. *GTE/Bell Atlantic*, p. 15. It is well settled in Washington that statutes should be construed to avoid absurd results. *General Tel. v. Utils. & Transp.*, 104 Wn.2d 460, 471, 706 P.2d 625 (1985).

b. *The involvement of the parent companies in the merger does not insulate the transaction from Commission review.*

The Commission's decision in the *GTE/Bell Atlantic* case finding that its jurisdiction was sufficient to review the merger is equally applicable to the instant case:

> To the extent of this direct involvement by the parent corporation in the operations and decisions of the subsidiary, there is such identity of action and purpose that the two corporate entities should be considered a single entity subject to our statutes governing the conduct of public service corporations as defined for purposes of Chapter 80.12 RCW.

GTE/Bell Atlantic, p. 16.

The core of the Joint Petitioners' position in this case is that, because the merger involves Worldcom and Sprint as parent companies, the Commission has no authority to review the transaction. This analysis ignores the fact that the separate corporate existence of Sprint will cease and that its operating subsidiaries, United and others, will become wholly owned subsidiaries of Worldcom. As the Joint Petitioners concede, all Worldcom and Sprint subsidiaries are public utilities regulated by the Commission and thus are under this Commission's jurisdiction. Joint Petitioners' Brief on Jurisdiction, p. 8. At this time all subsidiaries except United are operating under a waiver of certain regulatory requirements. The practical effect of this transaction is a transfer of ownership and control of a jurisdictional public utility and a number of very significant operating subsidiaries doing business in Washington. The fact that the transfer may be termed indirect has no legal significance as a limitation on the Commission's review, given the broad language of the statute. As the Commission observed in Scottish Power, "any transfer of rights or control over anything necessary or useful to a public

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service company's utility operations" triggers review. *Scottish Power,* p. 10. Any other conclusion produces the absurd result of allowing a corporate transaction's structure to determine whether it receives substantive review by the Commission. The legislature does not draft laws to produce absurd results, nor will the courts read them in such a fashion to produce absurd results. *General Tel., Id.*

The list of merger benefits set out in the Joint Petition and other merger documents are all outcomes which by definition will be achieved, if at all, by the new parent corporation's exercise of ownership and control over the merged entities. Each of these areas involves, directly as well as indirectly, the operations of the regulated subsidiaries in Washington. Implicit in these assertions is a change in ownership and control of all the merged company assets and subsidiaries so as to be able to achieve these goals. It is inconsistent for the Joint Applicants to claim these benefits for the merger, but to disclaim any significant change resulting from the transfer of control at the operating company level. Indeed, the major strategic goals of Worldcom are the framework within which the subordinate goals of the operating companies, United and others, are defined and constrained.

A further weakness in the Joint Applicants' analysis is the fact that regulated public service companies, such as United, do not merge independently of their parent corporations. It is apparently the Joint Applicants' position here that the Commission could review the transaction if United decided to sell itself to Worldcom (assuming it could even do so without approval from the parent company), but that the Commission cannot review the identical transaction when the parent company, Sprint, is involved. This result not only defies reason, but appears directly at odds with the legislative delegation of broad authority to the Commission to review transactions which involve the disposition of public service company ownership and control, effectively creating a loophole which would devour virtually any effective exercise of Commission review

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of transactions of major significance to Washington's utility customers.

c. *The Commission's exercise of jurisdiction in this case is consistent with the Scottish Power and GTE/Bell Atlantic decisions.*

The Joint Petitioners acknowledge the fact that the Commission has found it possesses jurisdiction in analogous circumstances. Joint Petitioners' Brief on Jurisdiction, p. 13. They simply disagree and argue the Commission should reverse course. The Joint Petitioners attempt to distinguish the Commission's Scottish Power decision on the ground that Pacificorp was not a holding company, but a public service company. As discussed above, this argument ignores the fact that there is a public service company involved here as well, United. Indeed, the Joint Petitioners' argument here is essentially the same as that made in Scottish Power - that because the regulated subsidiary remains subject to Commission jurisdiction, and only stock changes hands, that the transaction has no significance for Washington state review purposes. That formalistic argument was rejected in Scottish Power and should be rejected here as well.

As the Commission pointed out in Scottish Power, a rigid and mechanistic reading of the statute creates a situation in which some transactions receive review, while other functionally identical ones do not. The Commission declined to adopt such an approach, where companies can avoid scrutiny of transfers of control by the manner in which they structure their merger proposals.

> Considering the fundamental requirement that the Commission regulate in the public interest - that is protect the public from harm - it is inconceivable that the Legislature meant to include within the Commission's jurisdictional scrutiny of the complete transfer of control over the operations of a jurisdictional electric company achieved by means of an asset sale, yet exclude a functionally identical transfer of control achieved by means of an exchange of stock.

Scottish Power, p. 10.

The Joint Petitioners' also make the argument that their 'analysis is consistent with" the

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1949 Attorney General's Opinion discussed and distinguished in *Scottish Power.* Joint Petitioners' Brief on Jurisdiction, p. 13. The argument is not persuasive. The Worldcom/Sprint transaction is far more closely analogous to the Scottish Power/PacificCorp or GTE/Bell Atlantic transactions than to that reviewed in the Attorney General Opinion, which involved only a shareholder disposing his interest in a public service company. Here, the transaction was not initiated by an individual shareholder, but at the corporate level, with the express intent of transferring operational control over Washington jurisdictional facilities.[4]

d. *The Commission has already concluded that Indiana authority is not useful to interpret RCW 80.12.020 because of the differences in the statutes under review.*

Joint Petitioners' brief asserts that this Commission should accord substantial weight to decisions of the Indiana Supreme Court interpreting that state's merger statute. Joint Petitioners' Brief on Jurisdiction at p. 10. This Commission, however, has already had reason to consider and reject the suggestion that Indiana Supreme Court interpretations should guide its interpretation of RCW 80.12.020. The Commission stated:

> *We find the Indiana statute at issue too different from our own to inform our decision*. In particular, we note that the Indiana statute does not use the encompassing "otherwise dispose of" language found in RCW 80.12.020. Moreover, the Supreme Court said it could not consider the statute in the context of a broad delegation of power to 'effectuate the statutory language' because it found the statute at issue to be unambiguous, specific, and not subject to judicial interpretation.

Scottish Power, p.13 (emphasis added).

[4] In furtherance of their argument the Joint Petitioners assert that "the entities subject to the Commission's jurisdiction have taken no action to effect the transaction." Joint Petitioners' Brief on Jurisdiction p. 16. Yet, the discovery process alone as well as local regulatory management participation in these proceedings reflect "actions" taken to effect this transaction. Further, one of the "synergies" the Joint Petitioners have identified is leveraging the United customer service personnel across Worldcom's CLEC operations. Joint Petition, p. 13 and Exhibit T-61, p. 14. This plan is almost certain to negatively impact the service quality received by United's customers, despite the companies' protestations to the contrary.

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The Joint Petitioners' now ask the Commission to do an about face and conclude that the statutes are, in effect, identical. In applying RCW 80.12.020 to the Scottish Power transaction, the Commission rejected a narrow reading of the language urged by the applicants in that case, stating:

> We do not believe the principles of logic permit this reasoning. Broad language such as "otherwise dispose" *includes*, not excludes, specific means of "disposal," such as stock transfers..

Scottish Power, p. 14 (emphasis in original). It is this very encompassing language which is central to the Commission's assertion of its merger jurisdiction in the Scottish Power decision, and which should be one element supporting the Commission's assertion of jurisdiction in the present case.

e. *Decisions of other states are of limited relevance to the Commission's analysis.*

Decisions of the courts or regulatory commissions of other states regarding the statutes of those states are not governing authority in Washington. The Commission noted this when it was presented with authorities from other jurisdictions in the *Scottish Power* case, including the Indiana Supreme Court case discussed in the prior section:

> We review next the [various state cases, statutes and FERC authority submitted by the parties]. None of this, of course, controls our analysis. The state cases are only marginally pertinent, if at all, and they are not precedent on which we might rely to construe our statutes….Nor, of course, are other states' statutes "precedent," in any sense of the word.

Scottish Power, p. 13. This reasoning applies with equal force here. Simply put, the Indiana, Missouri and Nebraska authorities offered here are not entitled to the weight suggested by the Joint Petitioners.

B. The Commission Never Waived Its Jurisdiction Over The Joint Petitioners.

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With all due respect to counsel for the Joint Petitioners, they have fundamentally misapprehended the nature of the Waiver Order. The issue presented by the Commission's Waiver Order is not one of jurisdiction, which has always been present, but the more limited question of whether the developments over the last thirteen and a half years (most significantly this proposed merger) justify revisiting the Commission's waiver of certain regulatory requirements. Public Counsel respectfully asserts that the proposed merger of the Joint Petitioners, as well as the record now before the Commission, justifies reexamining these issues. Based upon the facts, the Commission should reinstate the requirements of chapter 80.12 RCW, and review the merits of this case.

In 1986 both MCI and Sprint requested classification as competitive telecommunication carriers under RCW 80.36.320. In granting that request in part, the Commission entered findings of fact and conclusions of law. "The Washington Utility and Transportation Commission has jurisdiction over the subject matter of this proceeding and the parties thereto." Waiver Order, p. 17. Nowhere in the Waiver Order can be found any finding of fact or conclusion of law (let alone dicta) contrary to that express retention of jurisdiction by the Commission.

Similarly, Washington state law neither contemplates nor requires such a waiver of jurisdiction upon a finding (in whole or part) that a company is eligible to be classified as a competitive telecommunications company. There is no basis in law to be found in chapter 80.36 RCW for an assumption that the Commission lacks authority over competitively classified telecommunication companies.

RCW 80.36.320 governs the Commission's classification of telecommunication

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companies as competitive. Once the Commission has found that a company meets the requirements set forth in RCW 80.36.320(1) the company shall be classified as competitive. RCW 80.36.320(2) states that competitively classified telecommunication companies shall be subject to "minimal regulation," and defines the scope of minimal regulation as well as setting forth those mandatory actions the company must take.[5] However, subsection two also expressly states that the Commission "may" waive other regulatory requirements when competition will serve the same purpose as public interest regulation; and even impose different requirements for different companies when it is in the public interest to do so. This permissive language clearly provides the Commission the authority to exercise its discretion to waive or not waive such other regulatory requirements as are found in chapter 80.12 RCW. Where both "shall" and "may" are used, a different legislative intent is clear with "may" intending a permissive use which connotes discretion. *State v. Rains*, 87 Wn.2d 626, 633 and 634, 555 P.2d 1368 (1976). Waiver of regulatory requirements under RCW 80.36.320 is not, as a matter of law, identical to a waiver of the Commission's jurisdiction. The Joint Petitioners appear to have overlooked this important

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[5] (2) Competitive telecommunications companies shall be subject to minimal regulation. Minimal regulation means that competitive telecommunications companies may file, instead of tariffs, price lists that shall be effective after ten days' notice to the commission and customers. The commission shall prescribe the form of notice. The commission may also waive other regulatory requirements under this title for competitive telecommunications companies when it determines that competition will serve the same purposes as public interest regulation. The commission may waive different regulatory requirements for different companies if such different treatment is in the public interest. A competitive telecommunications company shall at a minimum:

(a) Keep its accounts according to regulations as determined by the commission;

(b) File financial reports with the commission as required by the commission and in a form and at times prescribed by the commission;

(c) Keep on file at the commission such current price lists and service standards as the commission may require; and

(d) Cooperate with commission investigations of customer complaints.

RCW 80.36.320(2).

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distinction.

The Commission retains as a matter of law not only jurisdiction, but the right to review the waived requirements in the future. "The competitive classification may also be reevaluated by the Commission at any time." Waiver Order, p. 3. This statement in the Waiver Order correctly paraphrases the Commission's authority under RCW 80.36.320(4) which states "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." This section provides unambiguous and express statutory authority for the Commission to revisit the waivers it granted in the Waiver Order in order to protect the public interest.[6] It is proper for the Commission to revisit the Waiver Order and re-impose the requirements of Chapter 80.12 RCW; and further it is in the public interest for the Commission to review the merits of the case now before it.

Both the express language of the 1986 Waiver Order, as well as the Commission's statutory authority to enter the order, provide clear proof that this Commission never waived its jurisdiction over the Joint Petitioners when it classified them as competitive telecommunication companies in 1986.

C. Certain Regulatory Requirements Previously Waived By the Commission Should Be Reinstated.

The proposed merger of the Joint Petitioners as well as the record now before the

[6] The Commission expressly stated that it would review this classification if either company were acquired by a company still subject to rate regulation. Waiver Order, p. 3. Public Counsel respectfully asserts that this is not the proper limit to the scope of the Commission's ability to review its Waiver Order.

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Commission justifies reinstatement of the regulatory conditions waived in 1986. The record before the Commission in this matter makes it clear that it is in the public interest for the Commission to reinstate the statutory and regulatory requirements of chapter 80.12 RCW to allow the Commission to review the merits of this case. The language of the Waiver Order, taken as a whole, make it clear that the Commission was cognizant of, and concerned by, the possibility that these waivers might, at an unknown time in the future, pose a risk of harm to the public interest. Again, as the Commission noted in 1986, "*the competitive classification may also be reevaluated by the Commission at any time.*" Waiver Order, p. 3 (emphasis added).[7]

1. It is in the public interest to revoke the waived statutory and regulatory conditions of Chapter 80.12 RCW.

It is clear that with this merger the competitive landscape, post-merger, would be significantly different than it was in 1986 when the Commission waived the requirements of chapter 80.12 RCW. On its face, the proposed merger of Worldcom and Sprint, combining the number two and number three long distance carriers into a significantly stronger number two (behind AT&T) would place the merged companies in a position of unparalleled strength, particularly in the mass market for long distance services in Washington.[8] This is distinctly different from the facts that were before the Commission in 1986.

The record developed in this docket supports a finding by the Commission that it would be in the public interest to revoke the waiver of the transfer of control statutory and regulatory

[7] It should be noted that Public Counsel is not recommending changing the Joint Petitioners' classification as competitive companies, merely the existing waiver of transfer review.

[8] For purposes of this brief Public Counsel is defining "Mass Market" as residential and small business.

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requirements found at chapter 80.12 RCW. There was extensive testimony on how the market faced by the companies today will be tremendously different from the market they will face in the near future. "The merger occurs in the context of rapid, dramatic and pervasive changes… to the traditional telecommunication marketplace." Joint Petition, p. 8. Setting aside the many unsupported assumptions and assertions made by the company witnesses regarding the future, it is clear that the long distance market, and in particular the long distance mass market has evolved and changed significantly since 1986.[9] This proposed merger alone constitutes a prima facia change of circumstances sufficient to trigger the rescission of the previously granted waivers and Commission review of the proposed transaction. The rest of the record developed before the Commission also supports this conclusion.

a. *Rescission of the regulatory waivers granted to the Joint Petitioners under RCW 80.36.320(2) does not require rescission of waivers granted to other telecommunication companies.*

The Joint Petitioners also erroneously argue that if their waivers should be revoked AT&T's waivers should as well. Joint Petitioners' Brief on Jurisdiction, p. 20. Under RCW 80.36.320(2) the Commission has the authority to waive different regulatory requirements for different companies if the differing regulatory treatment is in the public interest. The proposed merger of the number two and three long distance carriers is a facially sufficient justification for any disparate treatment regarding waivers of regulatory conditions. AT&T has not proposed a

[9] Joint Petition, pp. 11, 16, and 18-21; Exhibit T-61, pp. 3 and 5; and Exhibit T-95, pp. 8-9, 12-14, 23, and 32.

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merger that would concentrate the long distance mass market to the degree the proposed merger of Worldcom and Sprint would in this case; nor is there any change in factual circumstances that require such treatment of AT&T at this time.[10]

b. *A sufficient record to revoke the previously granted waiver of regulatory requirements exists.*

The Joint Petitioners assert the Commission is without a sufficient record to revoke the waivers granted in the Waiver Order. Joint Petitioners' Brief on Jurisdiction, p. 19. RCW 80.36.320(4) is explicit and unequivocal – the Commission may revoke these or any other waiver of regulatory conditions when doing so will protect the public interest. The law contains no test for the sufficiency of the record necessary to do so. A finding by the Commission that it is in the public interest to do so is all that is necessary in this regard. Public Counsel would respectfully assert that the proposed merger alone presents a prima facia basis for the rescission of the previously granted waivers. In addition, the record now before the Commission provides a number of examples of changes in the conduct of the companies if the proposed merger is completed.[11] It is axiomatic that the combined companies will operate differently than they do now. Finally, the changes in the competitive landscape that have accrued over the last thirteen years could, in and of themselves, be the basis for a fresh review of the regulatory conditions under which these companies operate.

c. *The Joint Petitioners bear the burden of persuasion to demonstrate that the proposed merger is in the public interest.*

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[10] If the Joint Petitioners are in fact arguing that this provision of RCW 80.36.320(2) is unconstitutional on its face or as applied to them in this case, that is a separate issue that should be briefed as such with an opportunity for all parties to respond.

[11] See Joint Petition, pp. 8-21; Exhibit T-1, p. 13; Exhibit T-61, pp. 11, 12, and 14; and Kapka Tr. pp. 275-276.

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The Joint Petitioners appear to presume that the Commission Staff bears the burden of persuasion that there exist sufficient grounds to revoke the previously granted waivers. Joint Petitioners' Brief on Jurisdiction, p. 19.

The Commission need only determine that it would "protect the public interest" for it to revoke the waivers granted via the Waiver Order and it is done. There is no statutory shifting of a burden of persuasion to the Commission, nor is there any explicit standard of proof the Commission must meet to do so other than make a finding that it would protect the public interest to do so. The burden of persuasion is on the Joint Petitioners to demonstrate to the Commission's satisfaction that this proposed merger is in the public interest. They have failed to carry their burden of persuasion in this regard.

2. It is in the public interest for the Commission to consider the merits of this case.

Unlike other merger combinations this Commission has reviewed recently, this proposed merger would combine the number two and number three long distance carriers into an extremely strong number two, just behind AT&T in market share, particularly in the long distance mass market.[12]

Without delving deeply into the merits of this case, even a cursory review of the facts presented by this proposed merger makes it clear that the public interest is implicated. The Joint Petitioners' filings with the Commission and the testimony and exhibits now part of the record are a sufficient foundation for the Commission to continue to exercise its jurisdiction.[13]

The Joint Petitioners' Constitutional and Federal Law Arguments Are Without Merit.

[12] The other telecommunication company mergers the Commission has reviewed recently did not pose the same risks of undue market concentration as this proposed merger does.

[13] If it is the opinion of the Commission that it need review the merits in depth prior to determining whether it is in the public interest for it to assert its jurisdiction in this case, revoke its previously granted waivers and consider the merits of the case, Public Counsel would respectfully request that the Commission consider Public Counsel's brief on the merits in support of this brief on jurisdiction.

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1. Commission review and action upon the proposed merger does not violate the Commerce Clause of the United States Constitution.

The Joint Petitioners' argument, reduced to its essence, asserts that virtually any action by this Commission with regard to the proposed merger would adversely affect interstate commerce and is therefore unconstitutional under a variety of theories. Joint Petitioners' Brief on Jurisdiction, p. 21. As an initial matter, any suggestion by Joint Petitioners that the mere assertion of jurisdiction by the Commission violates the Commerce Clause is far-fetched at best. In enacting the Communications Act of 1934, Congress has recognized that states have broad authority to regulate intrastate telecommunications. 47 U.S.C. §152(b). The Telecommunications Act of 1996, while creating federal authority over specified intrastate matters, did not repeal Section 152(b) or fundamentally alter the dual state/federal regulatory structure. The United States Supreme Court has consistently approved state regulation of intrastate public service company activities against claims that such regulation burdened interstate commerce. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986); *Minnesota Rate Cases*, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511 (1913); *American Network v. WUTC*, 113 Wash. 2d 59, 776 P.2d 950 (1989).

The Supreme Court has held that state regulation may permissibly have an incidental effect on interstate commerce in order to address legitimate state concerns, so long as the regulation is not unduly burdensome. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). While Public Counsel does not concede that the Commission's activities here have such an effect, it is worth noting that even where such an effect is established, a constitutional problem does not necessarily arise.

If the Commission's assertion of jurisdiction, without more, stands constitutional muster, then Joint Petitioners are left only with the argument that the particular actions taken in the exercise of that jurisdiction amount to impermissible state regulation. The difficulty for Joint Petitioners is that the Commission has not yet taken any action on the merger. It is difficult to engage in a constitutional analysis of a set of hypothetical future actions which may or may not occur. As a practical matter, therefore, the constitutional challenge in this case is premature.

Even if we assume, for purposes of argument only, some specific regulatory action by the

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Commission, for example, disapproval or divestiture, the Joint Petitioners argument fails. Two appellate decisions upholding the Commission's regulatory activities against Commerce Clause challenges provide the applicable analysis. *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391 (9 th Cir. 1995)(solid waste certificate of public convenience and necessity); *American Network, supra* (security deposit for interexchange telecommunications carriers).

As the *Kleenwell* and *American Network* decisions note, the United States Supreme Court has distinguished between two types of state regulations burdening interstate commerce: (1) those that directly burden interstate commerce, or that discriminate against out-of-state interests, and (2) those that burden interstate transactions only incidentally. *Buck v. Kuykendall*, 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623 (1925). Regulations that fall into the first category are struck down unless the state can demonstrate a legitimate local interest unrelated to economic protection and that no less discriminatory alternative exists. The Joint Petitioners have fallen far short of carrying their burden to show that Commission review directly burdens interstate commerce or discriminates against out-of-state interests. Commission review here, including potential disapproval or imposition of conditions, goes only to the intrastate telecommunications activities of petitioners. There is no successful showing of discrimination against out-of-state interests, nor of any attempt to engage in economic protection of domestic Washington telecommunications companies.

Since the potential regulatory actions of the Commission do not fall into the first category, they fall, if at all, into the second category, those regulations that only incidentally impact interstate commerce. Even assuming *arguendo* that such incidental impacts occur,[14] regulations of this type are subject to the balancing test enunciated in *Pike v. Bruce Church*, 397

[14] For example, Joint Petitioners argue that if they are not allowed post-merger to offer intrastate long distance, they would not be able to offer interstate service.

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U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). Under the *Pike* test:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits.

Here, the Commission's potential regulatory actions are intended to ensure that any transfer under Chapter 80.12 is in the public interest. Its general exercise of jurisdiction is designed to advance the policy goals of RCW 80.36.300, clearly legitimate "local" interests which have nothing to do with economic protection. Any burden on interstate commerce is at best incidental.[15]

Both *Kleenwell* and *American Network* uphold the Commission's challenged regulations under the *Pike* test. As a telecommunications case, *American Network* is particularly instructive. In that case an interexchange carrier argued that the Commission's security deposit requirement was a burden so expensive that it would lessen the ability of the carrier to properly serve interstate commerce. The Washington Supreme Court upheld the regulation, rejecting concerns raised that the regulation threatened Amnet's continued access to LEC services which were needed for interstate service, and that their working capital was reduced, stating:

> Economic hardship in itself is not sufficient to invalidate as unconstitutional a state regulation affecting interstate commerce.

American Network, 113 Wash. 2d at 76.

In summary, even if the prematurity of the constitutional challenge is overlooked, the Commission's potential regulatory actions do not run afoul of the Commerce Clause.

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[15] Of course, both petitioners currently offer both intra- and interstate service in Washington and could continue to do so, absent the merger.

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2. The Telecommunications Act of 1996 does not bar Commission review of the proposed merger.

The Joint Petitioners' reliance on Section 253 of the 1996 Act is misplaced and depends on a misreading of the Act. The Joint Petitioners' assertion that Commission jurisdiction is limited to the "express carve-outs" found in Section 253(b) ignores the continuing general jurisdiction over intrastate telecommunications regulation which is recognized in Section 152(b) of the Communications Act. In passing the 1996 Act, Congress did not generally preempt state regulation of intrastate telecommunications. Instead Section 253 is limited to preemption and focuses on prohibiting barriers to entry and on eliminating *de jure* monopoly.[16]

None of the cases cited by Joint Petitioners stands for the proposition that state authority to regulate telecommunications, including the authority to review mergers, amounts to an unlawful barrier to entry. In both *Peco Energy Company v. Township of Haverford*, 1999 WL 1240941 (E.D. Pa. 1999)(unreported decision), *AT&T v. City of Austin*, 975 F. Supp. 928 (W.D. Texas 1997), for example, the issue was the scope of a local government's authority to enforce an ordinance regarding rights of way. Right-of-way cases are of little value in analyzing the issues involved in this merger proceeding. Right of way authority is a discrete issue specifically addressed in Section 253(c), whereas Section 253(b) speaks to state regulatory authority generally. In addition, the scope of local government authority over telecommunications is significantly limited as a general proposition, unlike state regulatory authority, which is extremely broad. *Tanner Electric v. Puget Sound*, 128 Wn.2d 656, 682, 911 P.2d 1301 (1996). As a consequence, local government efforts to impose general franchise or consent regulation on carriers are especially suspect under Section 253(c). It is interesting to note, for example, that in

[16] H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. (Jan 31, 1996)(Joint Explanatory Statement of the Committee of Conference), pp. 126-127. Here both carriers have already entered the Washington market.

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City of Austin, the court in part premised its decision on the fact that it was the state of Texas, not the city, which held general regulatory authority over telecommunications providers. *City of Austin*, 975 at 941.

Significantly, Joint Petitioners cite no case under which any regulatory action of a state public service commission has been preempted or invalidated under Section 253(b).[17] Section 253(b) clearly acknowledges the continuing authority of states to regulate for broad public interest purposes including universal service, public safety and welfare, service quality, and consumer rights. Even if the Commission's authority were to derive solely from this section, a proposition with which Public Counsel does not agree, these so-called "carve outs" seem to easily incorporate the range of issues addressed in the Commission's merger review under RCW Chapter 80.12. In addition, as Joint Petitioners themselves note, the purpose of the Telecommunications Act itself is to "increase competition and encourage innovation through competition rather than regulation." Joint Petitioners Brief on Jurisdiction, p. 27. It is ironic that Joint Petitioners nonetheless rely on the Act to preclude the Commission from taking any action regarding the anti-competitive impacts of their proposed consolidation.

III. CONCLUSION

For the reasons stated above it is the position of Public Counsel that the Washington Utility and Transportation Commission has expressly maintained jurisdiction over the Joint Petitioners at all times. The Commission possesses the legal authority to assert its jurisdiction over the Joint Petitioners as holding companies who possess operating subsidiaries which are

[17] If Joint Petitioners' interpretation of Section 253 is correct, virtually any state conditions upon a merger would appear to be unlawful. Given the extent of state merger review nationally since the passage of the Act, and the widespread imposition of conditions, it is surprising, if one accepts Joint Petitioners' argument, that no merging company has brought a successful Section 253(b) challenge.

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public utilities doing business in Washington. Jurisdiction to review this matter necessarily implies jurisdiction to take action if necessary to protect the public interest, as is the case here. On the record now before the Commission it is proper for the Commission to exercise its authority and review the merits of the case before it. Further, that the facts before the Commission justify the waivers of certain regulatory requirements granted by the Commission in 1986, particularly the conditions of chapter 80.12 RCW. The Joint Petitioners' Constitutional and federal law arguments fail because they are premature and are based upon a false assumption of an adverse impact on interstate commerce of any Commission action. Public Counsel respectfully requests that the Commission enter an Order affirming its jurisdiction over the joint petitioners, reinstating the conditions waived in 1986 and rejecting the Joint Petitioners' arguments regarding jurisdiction.

DATED this _____ day of June, 2000.

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