

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of

VERIZON COMMUNICATIONS INC.
AND FRONTIER COMMUNICATIONS
CORPORATION

For An Order Declining to Assert
Jurisdiction Over, or, in the alternative,
Approving the Indirect Transfer of Control
of Verizon Northwest Inc.

Docket No. UT-090842

POST-HEARING BRIEF OF
BROADBAND COMMUNICATIONS
ASSOCIATION OF WASHINGTON

INTRODUCTION

1 The Broadband Communications Association of Washington (“BCAW”), understands this Commission has many factors to consider in deciding whether to approve the application and if so, under what conditions. BCAW takes no position on whether to approve or reject the proposed transaction. However, BCAW respectfully submits that Commission should simplify its task by *not* including among its many considerations a misguided attempt to regulate broadband internet services, as Public Counsel urges. Mandating and regulating internet services using “conditional approval” exceeds the Commission’s jurisdiction. Moreover, it is contrary to the public interest and may harm traditional phone customers, including wholesale customers such as BCAW’s members.

DISCUSSION

I. Background of BCAW.

2 BCAW is a trade association representing the interests of cable television (“TV”) companies. Exhibit RM-1T at 1. In addition to traditional one-way TV services, all of BCAW’s members now provide two-way broadband services, offering their customers high-speed internet access and related applications and services. *Id.* Nearly all of BCAW’s members provide voice communications services via unregulated voice over internet protocol (“VoIP”) applications. *Id.* Their VoIP services compete with other unregulated service providers, such as Vonage, who also run over BCAW members’ facilities, as well as with traditional phone companies, such as Verizon, and cellular companies. *Id.* Likewise, Verizon, other ILECs and cellular companies compete with BCAW’s members in the provision of high speed internet access. *Id.* at 1, 3. Verizon competes with both DSL service, over twisted copper pairs, as well as with a fiber to the home service called “FiOS.” *E.g.* Exhibit TRR-1T at 67-68.

II. Competition for Provision of Broadband Services.

3 Over the past ten years, cable companies in Washington State have invested over a billion dollars in Washington State upgrading their infrastructure in order to provide high-speed internet service over fiber optic and coaxial cable lines, as well as to provide voice services. Exhibit RM-1T at 3. In addition, ILECs, including Verizon, have deployed digital subscriber line (DSL) services throughout the state generally. *Id.* Today, the vast majority of people in the state can choose from at least two wired providers of high-speed internet, typically cable and DSL. *Id.* In addition to wireline provision of these services, wireless service providers are now common throughout the state. *Id.* In 2000, the legislature

authorized public utility districts (PUDs) to deploy high-speed internet infrastructure under legislation that gave PUDs authority to sell wholesale telecommunications services. *Id.* Several PUDs have installed fiber optic networks extensively within their service territories, and connected those networks to a multi-state fiber network owned by Bonneville Power and managed by NoaNet, an operating agency created by the PUDs. *Id.*

4 Public Counsel advocates requiring Frontier, if it acquires Verizon's service areas, to expand Verizon's current broadband coverage. That recommendation appears to be based on an assumption that the expansion areas are currently unserved or under-served by other broadband providers. Such an assumption is not well supported by the record in this case and may well be untrue. *See id.* at 4. It is quite possible all of the areas Public Counsel would mandate expanded DSL services are already served with high-speed internet access by cable, a PUD, or a ground-based wireless provider. Even if there may be a few areas with no ground-based broadband internet access, satellite coverage is ubiquitous. *Id.*

III. Public Counsel's Recommendations.

5 Public Counsel recommends that if the Commission approves the transaction, it do so only upon the imposition of numerous conditions. A number of those recommended conditions would, if adopted, essentially result in the Commission regulating broadband internet services. Because such regulation is outside the scope of the Commission's jurisdiction, the following recommendations are particularly troubling:

- Frontier should commit to making broadband services available in 100 percent of its wire centers, and to 90 percent of its Washington customers by the end of 2013. Frontier should expand broadband availability to 100 percent of its customers by 2015.

- Frontier should deploy and promote broadband services so that, by the end of 2013, at least 90 percent of its customers can achieve download speeds of 3 Mbps; 75 percent of its customers can achieve download speeds of 6 Mbps; and 50 percent of customers can achieve download speeds of 10 Mbps.
- Frontier should commit to offer broadband services at prices that do not exceed those currently offered by Verizon for 1 Mbps and 3 Mbps services, *i.e.*, Frontier should offer services at Verizon’s advertised prices for 1 Mbps and 3 Mbps service (respectively, \$19.99 per month and \$29.99 per month) for a period of 24 months following the merger.
- Frontier should not impose its broadband “download cap” in Washington.

TRR-1T at 92.

6 BCAW opposes Public Counsel’s recommendations to the extent they would have the effect of Commission regulation of the prices, terms, conditions, offering, or attributes of internet services, whether directly or indirectly.

7 Staff witnesses made recommendations similar to some of Public Counsel’s in their pre-filed testimony. Subsequently, Staff and the applicants entered into a settlement incorporating some of those conditions. Those conditions are troubling, since the circumstances suggest that a threat of regulatory action may have forced the applicants to agree to conditions relating to services the Commission does not regulate. However, taking the agreement on its face, Frontier has voluntarily decided to expand its DSL/Broadband coverage, as it is free to do in the competitive marketplace. BCAW has no desire to use the regulatory process to attempt to influence activity in a competitive market, which is the thrust of Mr. Main’s recommendations. *See generally*, Exhibit RM-1T. Accordingly, BCAW does not oppose the Staff settlement.

DISCUSSION

8 Although the Commission has, in the past, accepted conditions relating to internet service, those orders did not approach the scope or scale of the Public Counsel’s recommendations.¹ Accordingly, the potential for harm to the public interest here by injecting misguided regulation into an already competitive market is great. Moreover, the FCC has repeatedly pre-empted state attempts to regulate internet services in a number of orders which all have been affirmed by the courts.

I. The Commission Lacks Jurisdiction to Regulate Internet Services.

9 The FCC has pre-empted state regulation of internet services under a “long-standing national policy of nonregulation of information services.” *In the Matter of Vonage Holdings Corp.*, 19 FCC Rcd 22404, ¶ 21 (2004). “In a series of proceedings beginning in the 1960’s, the [FCC] issued orders finding that economic regulation of information services would disserve the public interest because these services lacked the monopoly characteristics that led to such regulation of common carrier services historically. The Commission found the market for these services to be competitive and best able to ‘burgeon and flourish’ in an environment of free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements.” *Id.*²

¹ For example, in its final Order No. 05 in, *In the Matter of the Joint Application of Embarq Corporation And Centurytel, Inc.*, (Dkt. UT-082119, 2009), the Commission approved a settlement stipulation that included a commitment to extend DSL service to 2,200 customers.

² *See also*, Notice of Inquiry, 7 FCC 2d 11 (1966) (Computer I NOI); Final Decision and Order, 28 FCC 2d 267 (1971) (Computer I Final Decision); Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979) (Computer II Tentative Decision); Computer II Final Decision, 77 FCC 2d 384 (1980); Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (Computer III) (subsequent history omitted); 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, 13 FCC Rcd 6040, 6064, ¶ 38 (1998). The Telecommunications Act of 1996 used different terminology (i.e., “telecommunications services” and “information services”) than used by the FCC in its Computer Inquiry proceeding, but the FCC has determined that

10 Since the Commission is barred from directly regulating internet services, Public Counsel can only argue that the Commission can consider alleged public interest benefits *in markets the Commission does not regulate* would offset the harm Public Counsel sees in the markets affected by the proposed transaction that *are* within the Commission’s jurisdiction. This argument is implicit in Public Counsel’s recommendations. But this argument flies in the face of state law limitations on the scope of the Commission’s jurisdiction as delineated in *Cole v. Washington Utilities & Transportation Commission*, 79 Wn.2d 302, 3026 (1971). As Mr. Main noted, “it would be as if the Commission in *Cole* had required the gas company to compete in the sale of fuel oil, too, even though the Commission did not have jurisdiction over the sale of fuel oil.” Exhibit RM-1T at 5.

11 Under *Cole*, the Commission may not consider impact in unregulated markets—there fuel oil distribution—here Internet services.

II. Regulating Frontier’s Internet Services May Harm Wholesale Customers and Is Not in the Public Interest.

12 Public Counsel has expressed a great deal of concern about the financial viability of the Verizon/Frontier transaction, noting the bankruptcy of other companies that have purchased ILEC operations from Verizon. If Public Counsel’s concerns are valid, then the transaction would pose even greater risks to wholesale customers, if approved with the recommended conditions. Public Counsel offered no evidence of the costs for Frontier to comply with its conditions. Exhibit RM-1T at 7. The financial strain if such requirements are put on Frontier could be considerable and could put wholesale and retail phone customers

“enhanced services” and “information services” should be interpreted to extend to the same functions. See, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-56, ¶ 102 (1996) (subsequent history omitted).

at risk. *Id.* Given the financial concerns, Public Counsel's attempt to impose conditions that would pile additional financial obligations on Frontier after closing the transaction are clearly *not* in the best interests of retail and wholesale phone customers.

13 Likewise, suppressing Frontier's prices by regulatory intervention in a competitive market could lead to lower revenues of Frontier and could exacerbate the very financial difficulties Public Counsel fears. *Id.* at 6. Moreover, the recommendation to suppress prices would decrease or delay Frontier's motivation to expand broadband coverage contrary to the goal of the other recommendation. *Id.*

14 The numerous conditions recommended by Public Counsel and agreed to in various settlements to protect wholesale customers do not eliminate BCAW's concerns. The Commission can issue compliance orders, but it cannot supply working capital to implement those orders if Frontier gets into the kind of financial trouble that seems to concern Public Counsel. Commission oversight of wholesale services, while helpful, is not a substitute for a financially strong ILEC that is fully capable of meeting its wholesale service commitments and obligations. *Id.* at 7.

15 Washington has a competitive environment in broadband and a growing market, while traditional phone service is declining. *Id.* at 8. Artificial regulatory requirements run the risk of forcing investments and adding operating expenses that may not be recoverable in the competitive market. There is no demonstrated need for a questionable attempt to regulate competition in an area where the Commission lacks jurisdiction. *Id.* at 8. The mere fact that **Verizon** has not deployed DSL service to 100% of its customers does not mean that those customers are unserved. And even assuming, for sake of argument, that they are unserved,

the Commission has no business picking the “winner” in providing broadband services. DSL might not be the most economic way to serve such areas. Frontier could face significant losses if forced to expand DSL based on regulatory fiat rather than sound business and economic considerations.

16 The Commission should let the competitive market work, not skew it to the potential detriment of wholesale and retail phone customers, who still rely on the existence of a financially strong and capable regulated ILEC in Verizon’s service areas. If the areas Public Counsel would force DSL service into offer a competitive return on the required investment, Frontier or a competitor will go there. *Id.*


CONCLUSION

17 If Frontier comes into this state, it should be able to deploy competitive internet services when and as it sees fit, taking into account demand, competitive considerations, and its own financial constraints or abilities. Moreover, Frontier should be free to charge competitive prices for competitive services. The Commission should not attempt to regulate

internet services at the expense of phone customers. Public Counsel's recommended conditions relating to internet services should not be adopted.

DATED this 26th day of February, 2010.

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CERTIFICATE OF SERVICE

Docket No. UT-090842

I hereby certify that I have provided a true and correct copy of the foregoing to the following parties by electronic mail and first-class U.S. mail in postage pre-paid sealed envelopes at the below addresses:

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DATED at Seattle, Washington, this 26th day of February, 2010.

/s/ _____

Carol Munnerlyn, Secretary