

**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

PETITION FOR INTERLOCUTORY  
REVIEW OF  
BROADBAND COMMUNICATIONS  
ASSOCIATION OF WASHINGTON

1           The Broadband Communications Association of Washington (“BCAW”) petitions for interlocutory review of Order No. 2, Prehearing Conference Order (“Order”), to modify the “limited” scope of BCAW’s intervention. This motion is brought pursuant to WAC 480-07-810, for the reason that the terms of the written order goes beyond the ALJ’s oral ruling by limiting BCAW’s intervention in ways that are unclear and potentially contrary to important public interest considerations that BCAW could bring to this docket.

**FACTS**

2           The facts relevant to this petition are summarized as follows:

1.       BCAW petitioned to intervene in writing on June 30, 2009, noting that its members both compete with and purchase services from Verizon.
2.       In its petition, BCAW made a commitment not to broaden the issues in this docket.
3.       Verizon did not file a written objection to BCAW’s petition, but

did object orally to BCAW's intervention on the ground that the services BCAW's members provide in competition with Verizon are "unregulated by the Commission."<sup>1</sup> TR 9.

4. The ALJ granted BCAW's intervention orally based "on the assertion of the wholesale customer interest." TR 13. However, Verizon did not ask that BCAW's intervention be limited and the ALJ said nothing about a limited intervention at the hearing.<sup>2</sup> *Id.* at 9-13.

5. Not until the day after the prehearing conference did applicants serve their pre-filed testimony on BCAW. Only then did the gross inconsistency between applicants' objection to intervention and their own case become evident. On the one hand, applicants sought to exclude input by BCAW regardless of any potential public interest benefits that might follow from consideration of unregulated services. But then on the other hand, the applicants themselves made unregulated broadband and television service the centerpiece of their case.

6. Almost 30 pages of Mr. McCarthy's testimony relies on or discusses extensively the alleged public interest benefits of the proposed transaction based on unregulated services, including broadband and television.<sup>3</sup> Mr. McCallion's testimony also relies on or refers to the supposed benefits relating to unregulated services several times.<sup>4</sup>

7. On July 28, 2009, the Commission served the Order. The Order,

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<sup>1</sup> This statement was, of course, a simplification of a very complex and still unsettled jurisdictional issue. As a Commission ALJ noted in a recent Arbitrator's Report, "the FCC has yet to determine the regulatory classification of interconnected VoIP." *In the Matter of Comcast and Lewis River*, Arbitrator's Report and Decision, ¶ 108 (UT-083055, July 20, 2009). However, as in *Lewis River*, the regulatory status of VoIP is irrelevant to this petition.

<sup>2</sup> Verizon did subsequently characterize BCAW's intervention as limited, but BCAW did not object, as it seemed to be a harmless mischaracterization, and moreover was directed at Comcast's intervention, not BCAWs. *See* TR 13.

<sup>3</sup> McCarthy Testimony, Exhibit \_\_\_\_ (DM-1T) ("McCarthy"), at 6-28, 35, 40-41, and 55-56.

<sup>4</sup> *See* McCallion Testimony, Exhibit \_\_\_\_ (TM-1T) ("McCallion"), at 4-6, 18, and 22.

unlike the oral ruling, explicitly limited BCAW’s intervention to, “its members’ interests as wholesale customers of Verizon.”

### ARGUMENT

3 **I. BCAW’s Participation Should Not Be “Limited,” Except To Not Broaden The Issues  
Already In The Case, As BCAW Has Already Committed.**

4 Verizon’s objection relied on *Cole v. WUTC*, 79 Wn.2d 302 (1971). But the  
decision in *Cole* was narrow. 79 Wn.2d at 305 (“Under the facts before us....”). Moreover,  
the scope of public interest issues that the Commission considers in telecommunication cases  
in 2009 are vastly broader than in a natural gas cases in 1971—almost 40 years ago.<sup>5</sup>

5 In *Cole*, the intervenor fuel oil dealers association sought to protect only their own  
self interests, by addressing the impact of the gas company’s pricing of particular natural gas  
services on their members. Here, unlike *Cole*, BCAW has invoked not just self interest, but  
the public interest. BCAW Petition to Intervene, ¶ 6. Here, unlike *Cole*, the regulated party  
itself has made its unregulated services the centerpiece—if not the foundation—of its case.  
*E.g.*, McCarthy at 17.<sup>6</sup> Moreover, the BCAW has pledged not to broaden the issues in the  
case, whereas in *Cole*, the fuel oil dealers attempted to inject a new issue.<sup>7</sup>

6 To the extent the Commission considers unregulated services in this docket, it  
will be because the applicants have made them the central to their case, not because of the  
intervention of BCAW. The only way that *Cole* would be analogous to this case would be if  
the gas company in *Cole* had asserted that its gas tariffs not only benefitted natural gas

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<sup>5</sup> See, e.g., *In the Matter of the Joint Application of Embarq Corporation And Centurytel, Inc.*, Order No. 5 (May 28, 2009).

<sup>6</sup> McCarthy repeatedly makes broadband services his leading argument on public interest: “First, Washington customers will benefit from greater investment in broadband and its availability over time.” *Id.*

<sup>7</sup> The original complaint in *Cole* was brought by natural gas customers, seeking to show an adverse impact on the gas company’s customers from the services complained of. The association, in contrast, sought to show an adverse impact on fuel oil dealers.

customers, but also benefitted fuel oil customers. That was not the fact in *Cole*, but it is exactly the situation here. The applicants have made the alleged public interest benefits flowing from unregulated broadband and TV service a critical part of their case. These are the very services that BCAW's members provide, as well as the very same services that Verizon asserted in its objection could not be considered by the Commission under *Cole*.

7 BCAW may or may not decide to file testimony or briefing that responds to the applicants' assertions that the proposed transactions would provide public interest benefits relating to services the Commission does not regulate. But given BCAW's obvious familiarity with such services, coupled with its commitments to address the broader public interest and not to broaden the issues, it is premature for the Commission to decide that nothing BCAW might offer could possibly assist the Commission in protecting the public interest in this docket. Moreover, it is patently unfair to preclude an intervenor from addressing issues that the applicants have made central to their case.

**II. The Commission Should Accept Interlocutory Review And Modify The Order To Allow Full Participation By BCAW.**

8 Unregulated services have been put in issue by the applicants and may be addressed by other intervenors. Presumably the Commission will address unregulated services in this docket, as it did so recently in the CenturyTel-Embarq merger docket.<sup>8</sup> Accordingly, BCAW should be allowed to address such services in the context of the public interest and without broadening the issues.

9 WAC 480-07-810(2) details three circumstances when interlocutory review is available:

The commission may accept review of interim or interlocutory orders in adjudicative proceedings if it finds that:

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<sup>8</sup> *In the Matter of the Joint Application of Embarq Corporation And Centurytel, Inc.*, Order No. 5 (May 28, 2009).

(a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;

(b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or

(c) A review could save the commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review.

Although a petitioner need only establish that one of the criteria is met, here all three are met.

10 First, if the limitation set forth in the Order is allowed to stand, BCAW's participation will be terminated as to perhaps *half* of the applicant's basis for claiming the proposed transaction is in the public interest.<sup>9</sup> Second, it would be substantial prejudice to BCAW to permit the applicants and all other intervenors to address broadband and other unregulated services without restriction, while restricting BCAW to addressing only regulated wholesale services.<sup>10</sup> This prejudice cannot be remedied after the case is concluded. Third, correcting the order now could save the Commission and other parties substantial time. In particular, if the final order is substantially prejudicial to BCAW and BCAW appeals to the courts based on its improper exclusion from the case, there is a possibility the case could be remanded for extensive further proceedings so that BCAW could participate as fully as the other parties. This could potentially delay applicants' transaction, if approved, for months. And the wasted time and costs of a "do over" are obviously substantial.

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<sup>9</sup> McCarthy at 55-57 (first three bullets out of six relate to unregulated services).

<sup>10</sup> It is also prejudicial that the limitation was added to the order and not clearly stated at the prehearing conference, thereby precluding BCAW from attempting to correct the problem at the time.

11           There is no good reason to risk all these potential harms. BCAW has committed not to broaden the issues in this case and if applicants should later feel that BCAW's testimony or briefing go beyond what is appropriate, they can move to strike.

**CONCLUSION**

12           The BCAW has not yet decided what positions it will take on applicant's testimony regarding broadband and TV services, if any. But to raise an absolute bar to BCAW taking any position on such issues at this early stage of the case is not only prejudicial to BCAW, but it also may deny the Commission helpful input that could help it craft a final order that better protects the public interest. The Commission should modify the Order and permit BCAW to participate fully, the same as all other intervenors.

DATED this 6<sup>th</sup> day of August, 2009.

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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 6<sup>th</sup> day of August 2009.

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Carol Munnerlyn, Secretary