SERVICE DATE

OCT 22 1997

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MCI TELECOMMUNICATIONS CORPORATION, Complainant, v. GTE NORTHWEST, INC., Respondent.	DOCKET NO. UT-970653 SECOND SUPPLEMENTAL ORDER DISMISSING COMPLAINT

PROCEEDINGS: On April 15, 1997, MCI Telecommunications Corporation ("MCI") filed a Formal Complaint and Petition for Declaratory Order against GTE Northwest, Inc. ("GTE"). The filing alleges that traditional rate of return regulation has resulted in GTE intrastate access rates that are unfair, unjust, unreasonable, inefficient, and unjustly discriminatory, and that tend to oppress the complainant, to stifle competition, and to create or encourage the creation of a monopoly, in violation of Commission statutes. The filing requests that the Commission enter an order for relief and declaratory order, ordering GTE to reduce its intrastate access charges to "economic cost." GTE filed a motion to dismiss, and MCI filed a response to the motion.

HEARINGS: The Commission held a prehearing conference on September 16, 1997, before Administrative Law Judge John Prusia. At the prehearing conference, the petition to intervene of AT&T Communications of the Northwest, Inc. ("AT&T"), was granted, oral argument on the motion to dismiss was heard, a schedule was set, and other procedural matters were addressed. The motion to dismiss was taken under advisement.

APPEARANCES: The parties are represented as follows: Clyde H. MacIver, attorney, Seattle, represents MCI. Judith A. Endejan, attorney, Seattle, represents GTE. Mary M. Tennyson, Senior Assistant Attorney General, Olympia, represents the Staff of the Washington Utilities and Transportation Commission ("Commission Staff"). Gregory T. Diamond, attorney, Seattle, represents Intervenor AT&T.

SUMMARY: The Commission dismisses the complaint. The complaint does not state a claim against GTE.

MEMORANDUM

I. Nature of Proceeding and Procedural History

On April 15, 1997, MCI filed a Formal Complaint and Petition for Declaratory Order against GTE. The filing alleges that traditional rate of return regulation has resulted in GTE intrastate access rates that are unfair, unjust, unreasonable, inefficient, and unjustly discriminatory, and that tend to oppress the complainant, to stifle competition, and to create or encourage the creation of a monopoly, in violation of RCW 80.04.110 and RCW 80.36.140.

The filing requests a Commission order as follows: 1) "Order GTE to reduce its intrastate access charges to economic cost, which is equal to TSLRIC or TELRIC,[1] plus a portion of shared and common costs, based on the Hatfield Model," and 2) Order such other and further relief as is shown to be appropriate and in the public interest by the evidence in this proceeding.

GTE filed a motion to dismiss on May 7, 1997. The motion contends that MCI's complaint is against the Commission's regulatory policies and practices rather than against GTE, and that the complaint process is not a suitable vehicle for addressing policy issues. The motion contends that the narrow declaratory order procedure requested by MCI is not appropriate because the issues raised in the filing transcend GTE, impact the entire telecommunications industry in Washington, and require a comprehensive approach that addresses the interrelated issues of pricing flexibility, rate rebalancing (including access charges), universal service support funding, recovery of stranded costs, and wholesale prices for interconnection, unbundled network elements, and various services. The motion contends that granting the relief requested by MCI would deprive the Commission of the ability to fashion a comprehensive solution and would effect an unconstitutional taking of GTE's property.

MCI filed a response to GTE's motion on May 27, 1997. The response contends that MCI has a legal right to complain against GTE's access rates and to seek immediate relief, and contends that the filing states a legally sufficient claim upon which relief may be granted. It contends that GTE has not stated grounds for dismissing the complaint.

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[1] TSLRIC is the acronym for Total Service Long Run Incremental Cost. TELRIC is the acronym for Total Element Long Run Incremental Cost, as defined in the Federal Communications Commission's First Report and Order, CC Docket No. 96-98, released August 8, 1996, which has been codified at 47 C.F.R. § 51.505.

The Commission treated the filing as a formal complaint. It set the matter for prehearing conference and oral argument on the motion to dismiss. A prehearing conference was held on September 16, 1997. At that time, the petition to intervene of AT&T Communications of the Northwest, Inc. ("AT&T") was granted, a schedule was set, and oral argument was heard on the motion to dismiss. The motion to dismiss was taken under advisement.

II. Summary of the Parties' Arguments on the Motion To Dismiss

GTE argues that the complaint does not state a claim against GTE. Rather, it is a complaint against the Commission's policies and practices for access charges. It is a request for relief at a policy-making level which would be applied to everyone in the local exchange community.

GTE argues that under RCW 80.04.110, a complaint must set forth an act or omission in violation or claimed to be in violation of a provision of law or an order or rule of the Commission. MCI's complaint does not say anywhere that GTE violated any statute or any order of the Commission.

GTE argues that GTE's access rates are lawful. They have been reviewed and approved by the Commission in the tariffs on file with the Commission. In 1985, in Cause No. U-85-23, the Commission established a methodology for determining access charges that Pacific Northwest Bell (now U S WEST), GTE, and other local exchange companies could assess on interexchange companies on an intrastate basis.[2] GTE has at all times complied with every Commission order on access charges, and MCI does not allege that GTE has violated Commission orders.

GTE agrees that access charge reform is appropriate in light of the new competitive environment that is developing, but argues that this is not the appropriate procedural vehicle to address access charge reform. It argues that the issue of access charge reform impacts the entire telecommunications industry in the state, and should not be addressed in a proceeding involving a single company. It argues that access charge reform is one of several interrelated issues, including universal service funding and the costing and pricing of network elements, and should not be addressed on a single-issue basis. It argues that the Commission should follow a comprehensive approach like that the Federal Communications Commission has followed in implementing the Telecommunications Act of 1996. GTE suggests that more appropriate vehicles for addressing access charge reform in Washington would be a petition to reopen Cause No. U-85-23; a petition for rulemaking; or a proceeding recently initiated by AT&T in Docket No. UT-970325.

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[2] See, Washington Utilities and Transportation Commission v. Pacific Northwest Bell Telephone Company, et al., Cause No. U-85-23, Eighteenth Supplemental Order (December 1996).

GTE argues that WAC 480-09-400(5)(c) allows the Commission to decide not to conduct an adjudicative proceeding in all cases. It urges the Commission to exercise its discretion not to conduct an adjudicative proceeding and to dismiss the complaint.

MCI argues that it has a right to bring this complaint under RCW 80.04.110, that it has stated a claim upon which the Commission may grant relief, that GTE has not met the grounds for dismissing a complaint under WAC 480-09-426, and that MCI therefore has a right to be heard.

MCI agrees that it is not alleging that GTE has violated a statute or that GTE's access charges are illegal in the sense that they have not been approved by the Commission. Rather, it is complaining under the "*Provided, further,*" proviso of RCW 80.04.110, which authorizes one public service company to complain against a competitor public service company that the rates and charges of the competitor "are unreasonable, unremunerative, discriminatory, illegal, unfair, or intending or tending to oppress the complainant, to stifle competition, or to encourage the creation of monopoly." MCI argues that its complaint is that, given the environment we are now in, GTE's access rates are unfair and unjust.

MCI argues that WAC 480-09-426 states that a party may move to dismiss a complaint if the pleading "fails to state a claim upon which the Commission may grant relief." It argues that the rule provides that in considering a motion to dismiss, the Commission will consider the standards applicable to a motion made under CR 12(b)(6), 12(c), or 50, as applicable, of the civil rules for superior court. It argues that a Rule 12(b)(6) motion to dismiss is to be granted sparingly, and that dismissal for failure to state a claim is appropriate only if it appears beyond doubt that MCI can prove no set of facts, consistent with the complaint, which would entitle it to relief. MCI argues that it has stated a claim upon which the Commission may grant relief. It argues that GTE's motion to dismiss states nothing more than a preference that the access reform issue be considered in a more generic proceeding.

MCI argues that it would be a denial of due process to dismiss this filing solely because it is anticipated that some future case may deal with the issues.

Commission Staff argues that the Commission should consolidate this complaint proceeding into the Docket No. UT-970325 proceeding initiated recently by AT&T. It argues that in the present filing against GTE, MCI presented the Commission with alternative procedures for addressing the issues, framing the filing as a formal complaint and a petition for declaratory order. It argues that it is appropriate to look at access charge reform in a broader proceeding that considers other issues related to how rates are to be set as we move to competition. Commission Staff recommends that the Commission either stay this proceeding to

give Commission Staff time to activate the AT&T proceeding, or dismiss this complaint without prejudice so that MCI may refile if there is no movement on the AT&T proceeding or on a generic proceeding.

MCI opposes consolidation of this proceeding into a large generic proceeding, arguing the proposal is a delaying tactic, and that meanwhile GTE will be profiting from excessive rates.

AT&T joins in MCI's complaint and its argument in opposition to the motion to dismiss. AT&T argues that the only issue before the Commission on GTE's motion is whether MCI has stated a claim upon which relief can be granted. It argues that the complaint does state a claim as a matter of law. It argues that the Commission should not decide the motion on the basis of whether some other proceeding might be a more appropriate vehicle for addressing the issues raised in the complaint.

AT&T argues that the complaint procedure is the only mechanism available to competitors to complain about GTE's rates. It argues that the process that exists should be respected, and that it would be a denial of due process to disregard the statute simply because GTE prefers that the issues be addressed in some other forum.

III. Discussion

Based upon current Commission policy and practice, MCI's filing does not state a claim against GTE. MCI does not allege that GTE's access rates violate any statute or Commission order. MCI does not contend that GTE's access rates are unfair, unjust, or unreasonable under the current Commission-approved structure for intrastate access rates.

MCI's complaint is with Commission policy and practice. What MCI seeks is a revision of the structure for intrastate access rates that the Commission approved in Cause No. U-85-23, followed by a review and resetting of GTE's access rates based upon the revised structure. MCI's "complaint" against GTE's rates assumes a hypothetical -- that the Commission will adopt a revised access charge structure if given the opportunity, and will adopt the structure proposed by MCI.

In Cause No. U-85-23, the Commission established an access rate structure for the industry. We conclude that revisions to the structure should be addressed in a broader forum in which all carriers affected by a change of policy can participate, and in which interrelated issues can be considered. An appropriate forum for addressing the issues raised by MCI in this filing would be Docket No. UT-970325. That docket was commenced by an AT&T petition for a Commission investigation into

universal service preservation and access charge reform. On October 8, 1997, the Commission directed the Commission Secretary to commence a Commission investigation, via the rulemaking process, to address universal service and access charge reform at the Washington intrastate level. MCI will have the opportunity to participate in that proceeding.

MCI's filing, and the arguments of the parties, raise additional concerns that we will briefly address.

MCI's filing would have the Commission either engage in single-issue ratemaking, or allow a competitor to use the complaint statute to initiate a full rate proceeding at will. The former would be inconsistent with Commission practice, and we do not believe that the latter result is intended by the complaint statute.

The Commission generally will not engage in single issue or "piecemeal" ratemaking. In re U S WEST Communications, Inc., Docket No. UT-920085, Third Supplemental Order (April 1993). The ultimate determination to be made by the Commission in a rate proceeding is whether the proposed rates and charges are fair, just, reasonable, and sufficient. RCW 80.36.140. The Commission has consistently held that these questions are resolved by a comprehensive review of the company's rate base and operating expenses, determining a proper rate of return, and allocating rate changes equitably among ratepayers. Changes to the access rates could have a substantial effect on the company's overall results of operations and therefore should not be address in a single issue rate proceeding.[3]

We disagree with MCI's contention that it has an absolute right to a hearing on its complaint. The Commission is charged by statute with regulating the rates of public utility companies in the public interest. RCW 80.01.040. If a public utility initiates a rate proceeding by filing tariff increases, the Commission is empowered, but not required, to suspend the tariff changes and to enter upon a hearing concerning the proposed changes. RCW 80.04.110. It is the Commission's responsibility to determine when the public interest requires suspension and hearing. RCW 80.04.120 may give one competitor standing to complain against another competitor's rates, but the Commission does not read RCW 80.04.120 as giving a competitor an absolute right to force the Commission to enter upon a hearing upon such a complaint, consistent with the APA. RCW 34.05.416. If one company is empowered to force a general rate proceeding upon a competitor and upon the Commission at will, there would never be any measure of finality to the Commission's

[3] A proposal to change a single rate raises two issues: (1) whether the proposed rates in a vacuum are okay; (2) the relationship between the proposed rates and other rates of the company.

determination of the reasonableness of rates, and the increase in the costs of regulation, both to the Commission and to the regulated industries, would be staggering.

The scenario does not improve if we accept MCI's argument that it has a right to a hearing upon a single rate issue. If one competitor is empowered to force Commission review of rates on issues the complainant selects, the Commission will be inundated with limited rate cases that focus solely upon issues that may decrease rates of the complainant. Such limited rate cases likely would result in unfair and unequal allocation of rates among the company's ratepayers, and would not be a productive use of the Commission's resources.

The processes set into motion when this Commission opened the local exchange market to competition during the appeal of In re Electric Lightwave,[4] which were accelerated and complicated by passage of, and efforts to implement, the Telecommunications Act of 1996, may well result in rate structures and universal service funding mechanisms that differ greatly from those that have existed in the past and which continue today. The process of bringing competition to the local exchange market involves numerous issues which are highly interrelated. The issues are extremely complex, as we are seeing in the "generic" docket which is considering cost and pricing issues related to rates for interconnection, unbundled network elements, transport, and resale (Docket No. UT-960369). We appreciate that each group of industry participants is anxious to have the issues that are most important to it considered first. However, the task must be approached in a careful and logical manner that makes an efficient use of the Commission's limited resources.

We disagree with GTE's argument that interrelated issues should be dealt with in a single proceeding, specifically Docket No. UT-960369. Such an approach would be unmanageable. We do agree that universal service and access charge reform are so intertwined that they should be addressed together, as the FCC has done at the interstate level, and that consideration of these issue should be closely coordinated with the Commission's consideration of other related issues. It is often assumed, although not proven, that intrastate access charges contain substantial implicit subsidies to local service, which help keep basic local service affordable for all. Modification of the existing access charge regimen should not be considered without also considering the impact of that modification upon universal service in Washington.

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[4] In re Electric Lightwave, Inc., 123 Wash.2d 530, 869 P.2d 1045 (1994).

Finally, it is not the Commission's intent to discourage telecommunications companies from bringing their issues forward. Our concern is with how this is accomplished. We encourage MCI to work with other carriers with similar interests, and with Commission Staff, to bring forward issues which need to be addressed by the Commission in forums which allow appropriate consideration of related issues and which make efficient use of Commission resources.

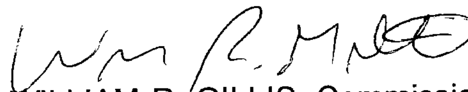
ORDER

THE COMMISSION ORDERS That the formal complaint filed by MCI in this docket is dismissed.

DATED at Olympia, Washington, and effective this 22nd day of October 1997.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANNE LEVINSON, Chair



WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-09-820(1).