

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application of		Docket No. UT-991358
U S WEST, INC. and QWEST		
COMMUNICATIONS INTERNATIONAL		
INC.		JOINT APPLICANTS' LEGAL
For an Order Disclaiming Jurisdiction or, in the		MEMORANDUM ON
Alternative, Approving the U S WEST, INC. -		JURISDICTIONAL ISSUES
QWEST COMMUNICATIONS		
INTERNATIONAL INC. Merger		

In response to the Commission's Notice of Prehearing Conference issued September 10, 1999 in this docket, Qwest Communications Corporation (“Qwest”) and U S WEST Communications, Inc. (“U S WEST”) submit this legal memorandum on behalf of their respective parent companies, Qwest Communications International Inc. (“Qwest Inc.”) and U S WEST, Inc., and those parents’ subsidiaries that are regulated by the Commission.

I. SUMMARY OF ARGUMENT

Commission authorization is necessary under RCW 80.12.020 for a *public service company* to sell, lease, assign, or otherwise dispose of any of its franchises, properties or facilities, or directly or indirectly merge or consolidate, any such franchises, properties or facilities with *any other public service company*. In addition, RCW 80.12.040 requires Commission authorization before any *public service company* can, directly or indirectly, purchase, acquire, or become the owner of any of the franchises, properties, facilities, capital stocks or bonds of *another public service company*. Neither Qwest Inc. nor U S WEST, Inc. is a public service company subject to

the Commission's jurisdiction. Therefore, the statutory authorities do not give the Commission jurisdiction over the proposed transaction.

- RCW 80.12.020 does not apply as no Washington public service company is attempting to sell, lease, assign or otherwise dispose of any of its franchises, properties or facilities in the Qwest Inc. - U S WEST, Inc. transaction.
- RCW 80.12.020 does not apply because the Qwest Inc. - U S WEST, Inc. transaction does not operate to merge or consolidate any franchises, properties or facilities of one Washington public service company with those of another public service company, either directly or indirectly.
- RCW 80.12.040 does not apply because no Washington public service company is, under the Qwest Inc. - U S WEST, Inc. transaction, directly or indirectly purchasing, acquiring or becoming the owner of any of the capital stocks or bonds of any other public service company.

Accordingly, Joint Applicants request an order of the Commission determining that it has no jurisdiction over the transaction and that no authorizations are required under Chapter 80.12 RCW.

II. BACKGROUND

On July 18, 1999, Qwest Inc., the parent company of Qwest, and U S WEST, Inc., the parent company of U S WEST, executed an Agreement and Plan of Merger (the “Merger Agreement”). A copy of the Merger Agreement was included as Exhibit 1 to the Joint Application. This strategic merger will create a next generation telecommunications company -- to be called Qwest Communications International Inc. – dedicated to bringing advanced voice, data and broadband Internet services to customers in Washington, across the United States, and around the world. Qwest Communications International Inc. will bring together Qwest Inc.’s advanced network providing broadband Internet communications with U S WEST’s innovative local service offerings and leadership in providing high-speed Internet

access through Digital Subscriber Line (“DSL”) technology.

A. Qwest Inc. and its Subsidiaries

Qwest Inc. is a Delaware corporation with its principal office and place of business located at 555 Seventeenth Street, Denver, Colorado 80202. The company is publicly traded on the NASDAQ stock exchange under the symbol "QWST."

Four Qwest Inc. subsidiaries – Qwest (the Joint Applicant here), LCI International Telecom Corp. (“LCI”), USLD Communications, Inc. (“USLD”), and Phoenix Network -- are authorized to provide telecommunications services in Washington. Qwest, LCI and USLD are also authorized by the Federal Communications Commission (“FCC”) to provide telecommunications services, including interstate interexchange and international telecommunications services, as non-dominant carriers.

B. U S WEST, Inc. and US WEST

U S WEST, Inc., is a Delaware corporation which directly, and indirectly through wholly owned subsidiaries, provides integrated communications services to approximately 25 million customers nationally, including the western and mid-western states. US WEST, Inc.’s primary products and services include local telephone services; long distance services within specified calling areas; high-speed data networking, including Internet access and digital subscriber line (DSL) services; wireless personal communications services (PCS); print and electronic directories; operator services, and video services in limited markets.

U S WEST is a Colorado corporation with its principal office and place of business at 1801 California Street, Denver, Colorado 80202. U S WEST is authorized to provide telecommunications services in Washington and currently serves 2.2 million residential and

business (both retail and wholesale) customers in this state.

C. Description of the Transaction

The Merger Agreement provides for the merger of Qwest Inc. and U S WEST, Inc. The boards of directors of Qwest Inc. and U S WEST, Inc. have approved the Merger Agreement. The proposed merger remains subject to approval by the shareholders of Qwest Inc. and U S WEST, Inc. and to receipt of all requisite Justice Department and regulatory approvals. The consummation of the merger also depends upon meeting a number of other conditions as specified in the Merger Agreement.

Under the terms of the Merger Agreement, upon closing, U S WEST, Inc. will be merged into Qwest Inc. and the separate corporate existence of U S WEST, Inc. will then cease. The direct and indirect wholly-owned subsidiaries of Qwest Inc. and U S WEST, Inc. that hold operating certificates, or other authorizations, including U S WEST, will survive as direct or indirect wholly-owned subsidiaries of Qwest. Additionally, no changes in the names of the certificated subsidiaries nor any transfers of certificates of public convenience and necessity nor transfers assets of those certificated subsidiaries are contemplated at this juncture. Following the merger, Qwest Inc. will be headquartered at 1801 California Street, Denver, Colorado 80202.

In order to effectuate the merger, Qwest Inc. will issue shares of its common stock having a value of \$69.00 for each share of U S WEST, Inc. common stock, subject to a “collar” on Qwest’s average stock price between \$28.26 and \$39.90 per share. If necessary, the obligation under the “collar” may be satisfied in whole or in part with cash if Qwest’s average stock price is below \$38.70 per share.

The merger does not involve any assignment of authorizations or licenses held by

operating subsidiaries of Qwest Inc. or U S WEST, Inc., or any change in those subsidiaries. Thus, the same companies will continue to provide service to the public. The respective customers of these Qwest Inc. and U S WEST, Inc. subsidiaries will continue to be served and billed pursuant to existing tariffs and operating authorities, as those may be amended from time to time in the ordinary course of business. Therefore, the merger will be transparent to Qwest Inc.'s and U S WEST, Inc.'s respective customers. ¹

III. ARGUMENT

RCW 80.01.040 defines the Commission's general powers and duties. It provides that:

The utilities and transportation commission shall:

(3) Regulate in the public interest, *as provided by the public service laws*, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to, . . . telecommunications companies

(emphasis added.) Two Washington public service laws are potentially relevant to this transaction: RCW 80.12.020 and RCW 80.12.040.

RCW 80.12.020, for its part, states:

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, and no *public service company* shall, by any

¹ In order to be in compliance with the Telecommunications Act of 1996 as of closing, Qwest Inc. will be required to cease providing interLATA services it currently offers in the U S WEST region. Qwest Inc. is in the process of identifying affected services and making arrangements for third party carriers to assume those service obligations. Qwest Inc. will comply with any applicable Commission requirements with respect to the transfer of customer accounts from one non-dominant carrier to another.

means whatsoever, directly or indirectly, merge or consolidate any of its franchises, properties or facilities with *any other public service company*, without having secured from the commission an order authorizing it so to do

(emphasis added.) RCW 80.12.040 provides that:

No *public service company* shall, directly or indirectly, purchase, acquire, or become the owner of any of the franchises, properties, facilities, capital stocks or bonds of *any other public service company* unless authorized so to do by the commission. . . . Any contract by any *public service company* for the purchase, acquisition, assignment or transfer to it of any of the stocks or other securities of *any other public service company*, directly or indirectly, without the approval of the commission shall be void and of no effect.

(emphasis added.) For purposes of Chapter 80.12 RCW, "public service company" is defined as "every company now or hereafter engaged in business in this state as a public utility and *subject to regulation as to rates and service by the utilities and transportation commission under the provisions of this title.*" RCW 80.12.010 (emphasis added). Neither Qwest Inc. nor U S WEST, Inc. is subject to regulation as to rates and service by the WUTC, and therefore neither is a public service company under this definition and under Title 80 generally. Thus, neither RCW 80.12.020 nor RCW 80.12.040 applies to this transaction.

A. This Transaction Does Not Involve a Transfer or Disposition of Property Under RCW 80.12.020

No Washington public service company is attempting to sell, lease, assign or otherwise dispose of any of its franchises, properties or facilities in the Qwest Inc. - U S WEST, Inc. transaction. U S WEST, Inc. is not a public service company as defined in RCW 80.12.010. Although its subsidiary, U S WEST, is engaged in business in this state as a public utility regulated by the Commission -- and therefore is a public service

company -- U S WEST, Inc. is not. Similarly, Qwest Inc. is not a public service company, although it has subsidiaries operating in this state. No public utility subject to the jurisdiction of the Commission -- *i.e.*, no public service company -- is disposing of any assets by virtue of the Qwest Inc. – U S WEST, Inc. transaction.

Nor does the transaction involve the sale, lease, assignment or disposition of assets necessary or useful to the performance of the public service company's duties to the public. Here, no assets of a public utility subject to the Commission's regulation are being transferred in any way. U S WEST is the owner of all assets necessary or useful for the provision of telecommunications services in Washington. U S WEST will remain the owner of those assets, unchanged, after the Qwest Inc. - U S WEST, Inc. transaction is completed.

In *Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission*, 1999 Ind. LEXIS 548 ("*Indiana Bell*"), the Indiana Supreme Court ruled on July 30 that the Indiana Commission did not have authority, under a statute nearly identical to this portion of RCW 80.12.020, to review and approve a merger between two parent companies where neither operated as a public utility within the state. In *Indiana Bell*, the statute at issue was Indiana Code Section 8-1-2-83(a), which states in relevant part that:

No *public utility*, as defined in Section 1 of this chapter, shall sell, assign, transfer, lease or encumber its franchise, works or system to any other person, partnership, limited liability company or corporation . . . without the approval of the commission after hearing.

(emphasis added.) This provision is almost identical to the portion of RCW 80.12.020 pertaining to dispositions of property, which states:²

² The Indiana statute uses the term "public utility," while RCW 80.12.020 refers to a "public service company." This is a distinction without a difference, however, because RCW 80.12.010 defines a public service

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.

In a transaction virtually identical to the Qwest Inc. - U S WEST, Inc. transaction, the court in *Indiana Bell* ruled that the Indiana Commission did not have jurisdiction over the merger. *Indiana Bell* involved the merger between SBC Communications, Inc. and Ameritech, the parent of Indiana Bell. That merger was a stock transaction occurring at the parent level. Pursuant to the SBC-Ameritech plan of merger, Indiana Bell would continue to be wholly owned by Ameritech Corporation, and Ameritech would be owned by SBC. The issue in that case, as framed by the Indiana Bell court, was as follows:

There is no dispute that the effect of the proposed transaction will be to transfer control from Indiana Bell from Ameritech, its current parent, to SBC. It is equally undisputed that Indiana Bell will do nothing to effect the transaction. Its ownership -- more precisely its indirect ownership -- will change, but it will remain the same regulated utility that exists today with the same assets and liabilities, the same customers and suppliers, and the same corporate structure and capitalization. The issue, in simple terms, is whether section 83(a) requires the Commission's approval for a transfer of control of a public utility if the assets of the operating company -- in this case Indiana Bell -- remain in the operating company and the only things transferred are the outstanding shares of the operating company.

1999 Ind. LEXIS 548 at *5. The same elements exist in this transaction, the effect of which

company as "every company now or hereafter engaged in business in this state as a public utility" The Commission has also noted, in discussing a previous decision of the Indiana Supreme Court, that the Indiana statute does not include the phrase "otherwise dispose of," *see* Second Supplemental Order in Docket No. UE-981627, *In re Application of PacifiCorp and ScottishPower plc* ("*ScottishPower*"), but instead includes the term "transfer." However, the key issue regarding this transaction -- as in the transaction at issue in *Indiana Bell* -- is not whether something is being "transferred" (or "disposed of"), but rather whether what is being transferred includes the "franchises, properties or facilities" of a "public service company." *See Indiana Bell*, 1999 LEXIS, at *12-13. Thus, this minor difference in wording is immaterial.

is to transfer control of U S WEST from U S WEST, Inc. to Qwest Inc. As in *Indiana Bell*, U S WEST will do nothing to effect the transaction. As in *Indiana Bell*, following the transaction, U S WEST will remain the same regulated utility, subject to the regulatory oversight of the Commission. Only its indirect ownership will change.

On these facts, the court in *Indiana Bell* ruled that the Indiana Commission did not have jurisdiction because Ameritech was not a "public utility" under the statute:

On its face this section prohibits only actions by a "public utility" that effect a "transfer" etc., of the utility's "franchise, works, or system."

The Indiana Commission, for its part, had asserted jurisdiction notwithstanding the express language of the statute, citing the shift in control of a public utility (*Indiana Bell*) to SBC from Ameritech. In rejecting this line of reasoning, the court stated:

One problem with this view, which certainly enjoys some support in policy, is that the statute does not support it. As a matter of grammar, the prohibition of section 83(a) operates on public utilities, not anyone else.

1999 Ind. LEXIS 548 at *11. Similarly, by its plain language, RCW 80.12.020 applies to "public service companies," not anyone else.

Determinations consistent with *Indiana Bell* have been reached by the Public Service Commissions of Missouri and Nebraska. In *SBC Communications, Inc.*, Case No. TM-99-76, 1998 WL 996180 (Mo. P.S.C. Oct. 20, 1998), the Missouri Public Service Commission determined that its jurisdictional statute -- which authorized jurisdiction over "all telecommunications facilities, telecommunications services and to all telecommunications companies" within the state, *see* Mo. Stat. § 386.250 (West 1999) -- did not give it the authority "to examine a merger of two non-regulated parent corporations even though they

may own Missouri-regulated telecommunications companies." *SBC Communications*, 1998 WL 996180, at *3.

Similarly, in *In re Jurisdiction to Authorize Acquisitions, Mergers or Other Transfers of Control*, Application No. C-1746/PI-19, 186 P.U.R.4th 36, 1998 WL 406789 (Neb. P.S.C. Mar. 10, 1998), the Nebraska Public Service Commission, which has authority over all carriers "furnishing communication services for hire" in Nebraska, *see* Neb. Stat. § 75-109 (West 1999), concluded that "[a]cquisition, merger, or other change of control transactions involving holding companies or other parent entities one or more levels upstream from the Nebraska certificated common carriers, . . . which transactions only indirectly affect the Nebraska certificated carrier, will not be subject to Commission jurisdiction." *In re Jurisdiction*, 1998 WL 406789.

B. This Transaction Does Not Involve a Merger or Consolidation of Two Public Service Companies Under RCW 80.12.020

RCW 80.12.020 requires Commission approval before a public service company can "by any means whatsoever, directly or indirectly, merge or consolidate any of its franchises, properties or facilities with any other public service company." This second clause of RCW 80.12.020 also has no applicability to this transaction. First, the clause applies only to actions by a "public service company." As noted above, neither Qwest Inc. nor U S WEST, Inc. is a public service company under Washington law. Nor is U S WEST "indirectly" merging or consolidating any of its "franchises, properties or facilities" with any of the subsidiaries of Qwest Inc. These subsidiaries will – like U S WEST – continue to own their respective "franchises, properties and facilities."

Further, the existence of RCW 80.12.040 further confirms that RCW 80.12.020 cannot be read to cover an "indirect" transfer of assets through a stock transaction. In RCW 80.12.040, the legislature expressly dealt with transactions involving stocks, bonds and other securities. RCW 80.12.020 contains no such provisions, but relates solely to franchises, properties or facilities. It would therefore be improper to infer coverage of stock transactions in RCW 80.12.020.³

The *Indiana Bell* court was faced with a similar statutory scheme. In that case, the Indiana Commission interpreted section 83(a) of the Indiana Code to include transactions in stock given the presence of other sections explicitly relating to stock of a public utility.⁴ This interpretation was rejected in *Indiana Bell*:

Although we generally agree that statutes must be construed together, we draw the opposite conclusion. The fact that the other subsections explicitly state that they apply to stock of a public utility demonstrates that the General Assembly knows how to say stock when it means stock. The language of this section reinforces the conclusion that the legislature made a conscious choice to exclude transactions in stock from the Commission's section 83(a) jurisdiction.

1999 Ind. LEXIS 548 at *14 (emphasis added). Similarly, the Washington legislature "knows how to say stock when it means stock," and thus RCW 80.12.020 should not be read to include stock transactions.

³ See *Cazzanigi v. Gen. Elec. Credit Corp.*, 132 Wn.2d 433, 446, 938 P.2d 819 (1997) ("a difference in language indicates a difference in legislative intent").

⁴ Section 83(b), similar to RCW 80.12.040, states that "[n]o such public utility shall directly or indirectly purchase or acquire, or become the owner of any of the property, stock, or bonds of any other public utility authorized to engage or engaged in the same or a similar business . . . unless authorized so to do by the commission."

C. This Transaction Does Not Involve a Purchase of Securities in a Public Service Company By Another Public Service Company Under RCW 80.12.040

Under RCW 80.12.040, public service companies may not acquire the shares of other public service companies without Commission approval. However, no "public service company" is acquiring shares in the Qwest Inc. - U S WEST, Inc. transaction. The only acquisition of shares in this transaction takes place at the parent company level, and neither parent company is a "public service company" within RCW 80.12.010 for the reasons stated above.⁵

D. The Commission's General Authority Under RCW 80.01.040 Does Not Overcome an Absence of Specific Statutory Authority

In the *ScottishPower* decision, the Commission relied in part on its general power and duties under RCW 80.01.040 to assert jurisdiction over that transaction. Any such reliance is misplaced, however, because the Commission's statutory authority permits it only to undertake those actions authorized expressly, or by necessary implication, elsewhere in Title 80. *Washington Independent Telephone Association v. TRACER*, 75 Wn.App. 356, 363,

⁵ The "directly or indirectly" language of RCW 80.12.040 cannot confer jurisdiction over a transaction that does not involve public service companies. Neither the Commission nor the courts have ever suggested that the "directly or indirectly" language of either RCW 80.12.020 or -040 might be invoked to reach transactions involving holding companies. If that were in fact a legitimate basis for jurisdiction, the Commission likely would have relied on this language rather than resorting to its general powers under RCW 80.01.040(3) in *ScottishPower*. Indeed, had the legislature intended to extend the Commission's prior approval authority to holding company level transactions, it would have conferred such authority on the face of the statute. In Arizona, for example, the legislature has explicitly mandated prior PUC approval for any "reorganiz[ation] of a . . . public utility *holding company*." See Ariz. Admin. Code R14-2-803 (1998)(emphasis added). There is no such requirement under Washington law.

880 P.2d 50 (1994).⁶ The Commission has specific statutory authority to protect consumer interest with regard to the services, rates and practices of the companies subject to its regulation, such as U S WEST. However, it lacks authority to review corporate transactions involving other entities.

As stated by the Washington Supreme Court, the Commission's jurisdiction may not rest upon simple appeals to the "public interest" requirements of RCW 80.01.040(3):

Although RCW 80.01.040(3) demands regulation in the public interest, that mandate is qualified by the following clause "as provided by the public service laws" Appellants fail to point out any section of Title 80 which suggests that nonregulated [businesses] are within the jurisdictional concern of the Commission. An administrative agency must be strictly limited in its operations to those powers granted by the legislature.

Cole v. Washington Utilities and Transportation Commission, 79 Wn.2d 302, 306, 45 P.2d 71 (1971) (citations omitted). As stated by the Court of Appeals in *Washington Independent Telephone Association v. TRACER*, general reliance on RCW 80.01.040(3) "is of no avail." 75 Wn.App. at 368. In other words, regulatory oversight of a utility's parent company, when that review is not "as provided by the public service laws," may not rest upon RCW 80.01.040(3).

Further, a decision by the Commission that it has jurisdiction over transactions between holding companies could call into question the validity of past mergers and transfer of control among such entities which have taken place without Commission review, *see* RCW 80.12.040 (transfers without approval "shall be void and of no effect."), a potential

⁶ See also *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536 (1994) (en banc) ("agency possesses only those powers granted by statute").

problem noted by the court in *Indiana Bell*. See 1999 Ind. LEXIS 548 at *10. Thus, arguments for expansion of the Commission's jurisdiction beyond "public service companies," as defined in RCW 80.12.010, are more properly addressed to the legislature, which has the flexibility to deal with such competing policy concerns -- not to the Commission itself.

E. Precedent Under Section 203 of the Federal Power Act Is Distinguishable

In the *ScottishPower* decision, the Commission also cited precedent under Section 203 of the Federal Power Act, 16 U.S.C. § 824b(a), in support of asserting jurisdiction over that transaction. Section 203 of the Federal Power Act requires FERC approval whenever a public utility seeks to "sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission . . . or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of *any other person*." (emphasis added) The statute also applies if a public utility seeks to "purchase, acquire, or take any security of any other public utility." The statute requires that FERC find "that the proposed disposition, consolidation, acquisition, or *control* will be consistent with the public interest." (emphasis added) FERC precedent suggests that the statute applies whenever there is a *transfer of control* over a utility's facilities, whether achieved through a transfer of stock or sale of assets. See *Central Vermont Public Service Corporation*, 84 PUR4th 213 (1987).

As the Washington Supreme Court held in *Cole*, however, here the Commission must rest its jurisdiction on a specific provision in Title 80. Moreover, the relevant federal and

state statutes are different in material respects.⁷ Section 203, for example, includes a reference to the purchase or acquisition of a public utility's securities and requires FERC to find that the "control" will be consistent with the public interest. The statute as a whole thus allows FERC to consider the transfer of control over a utility's facilities, regardless of how achieved. In contrast, RCW 80.12.020 makes no reference to "control" over a utility's facilities. The acquisition of securities is addressed in another statute, RCW 80.12.040, which is inapplicable because no securities of a public service company are being purchased or acquired in the transaction. The legislature in Washington determined to limit its scope to such acquisitions by other public service companies.

RCW 80.12.020 also refers to a public service company seeking to merge or consolidate, directly or indirectly, with "any other public service company." In contrast to the Federal Power Act, which applies when there is a merger or consolidation with "*any other person*," approval is necessary under RCW 80.12.020 only when the merger or consolidation is with another public service company. Again, neither Qwest Inc. nor U S WEST, Inc. is a public service company. Thus the precedent under Section 203 of the Federal Power Act is inapposite to the Commission's analysis of jurisdiction over this transaction under Washington statutes.

⁷ The Indiana Supreme Court in the *Indiana Bell* decision agreed that FERC's broad application of Section 203 was irrelevant to a state commission's application of a completely different statute:

Because FERC was construing a statute that is not identical to section 83(a), its decision is distinguishable on that ground alone.

1999 Ind. LEXIS 548 at *26.

F. The Qwest Inc. – U S WEST, Inc. Transaction is Distinguishable from the Transaction Over Which the Commission Asserted Jurisdiction in *ScottishPower*.

In *ScottishPower*, the Commission concluded that it had jurisdiction over the acquisition of PacifiCorp by Scottish Power plc. In that case, however, one of the parties to the transaction – PacifiCorp -- was a public service company subject to the Commission's jurisdiction under Chapter 80.12 RCW. As the corporate entity operating as an electrical company within the state of Washington, PacifiCorp could not claim that it was not a "public service company." The other party to the transaction, Scottish Power plc, was not a public service company.

In this application, however, neither party to the transaction – Qwest Inc. or U S WEST, Inc. – is a public service company subject to the Commission's jurisdiction. Just as important, the entities which are subject to the Commission's jurisdiction -- U S WEST and the Qwest operating subsidiaries -- have taken no action to effect the transaction. This is the same factual situation as was present in *Indiana Bell*, where the court observed:

There is no dispute that the effect of the proposed transaction will be to transfer control of Indiana Bell from Ameritech, its current parent, to SBC. *It is equally undisputed that Indiana Bell will do nothing to effect the transaction.*

1999 Ind. LEXIS 548 at *5 (emphasis added). In these circumstances, the transaction falls more closely in line with the facts of a 1949 Attorney General's Opinion concerning the sale of shares in a closely held telephone company, Prescott Telephone Company. In that case, the Attorney General's Opinion recognized the distinction between the acts of a corporation

and the acts of its shareholders. According to the Opinion, the Commission's jurisdiction is over the activities of the public service company, and not over the activities of its shareholders:

[S]ection 10440b [the predecessor to RCW 80.12.020] . . . refers to certain transactions by a "public service company." In our opinion this section confers no authority on the public service commission to approve or disapprove the transaction in question [the sale of a majority interest in a utility by an existing shareholder to a prospective shareholder]. The sales involve only acts by stockholders disposing of their interest in the public service corporation, and do not involve any action by the public service company to "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

The jurisdiction of the public service commission under the statute is over the activities of the public service company and not over the activities of its stockholders. By such act of the stockholders the public service company, the artificial entity, distinct from its stockholders, has not disposed of anything; there has been merely a change in the controlling interest of the public service company.

Wash. Atty. Gen. Opinion, November 25, 1949, p. 3 (emphasis added).

In *ScottishPower*, the Commission distinguished this opinion, stating as follows:

The critically salient fact related by the Attorney General is that, in the case as to which he opined, "the sales involve *only* acts by stockholders disposing of their interest in the public service corporation, and do not involve any action by the public service company[.]" In sharp contrast here, the critical acts upon which the present transaction depends are those of the respective Boards of Directors of PacifiCorp and Scottish Power who conceived this transaction, negotiated its terms, reduced those terms to writing, and put the whole matter before their respective shareholders for majority approval with a recommendation for that approval.

ScottishPower at 11. The same does not hold true in this application, however. The public service companies subject to the Commission's jurisdiction – U S WEST and the Qwest

operating subsidiaries – have done nothing to effect the transaction. It is the actions of their corporate parents – Qwest Inc. and U S WEST, Inc. – which have resulted in the transaction underlying this application. As neither of these entities is a public service company subject to the Commission's jurisdiction, no jurisdiction over the transaction exists.

IV.CONCLUSION

The Commission should conclude that it has no jurisdiction over the Qwest Inc. - U S WEST, Inc. merger. Neither company is a public service company under the laws of the state of Washington. Neither of the specific statutes which arguably could confer jurisdiction - RCW 80.12.020 and –040 – applies to the transaction. As the Washington Supreme Court held, the Commission's general authority to regulate in the public interest under RCW 80.01.040(3) does not confer authority over this transaction beyond that provided by Chapter 80.12 RCW. The *Indiana Bell* decision, involving a nearly identical statutory scheme applied to a nearly identical transaction, provides the correct analysis for the Commission to follow in this case.

The public interest will continue to be served by such a result. Following the transaction, U S WEST will continue to exist and provide service to Washington customers under its established rates, terms and conditions. U S WEST will remain a separate entity, the Commission will continue to exercise its regulatory authority over U S WEST, and U S WEST will continue to meet all its obligations and commitments under the Commission's rules, regulations and decisions.

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DATED: September 23, 1999.
Respectfully submitted,

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