Attachment A

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., Complainant, vs. VERIZON NORTHWEST INC., Respondent.	Docket No. UT-020406 MOTION TO DISMISS

VERIZON'S MOTION TO DISMISS

Verizon Northwest Inc. ("Verizon") moves to dismiss the complaint of AT&T Communications of the Pacific Northwest, Inc. ("AT&T").

I. INTRODUCTION

AT&T's complaint seeks to reduce Verizon's intrastate access charges by more than $50 million per year. The complaint must be dismissed for several reasons:

First, the complaint is nothing more than an improper request for "single issue ratemaking." In 1997, the Commission dismissed a virtually identical complaint brought by MCI, noting that "changes to access rates could have a substantial effect on the company's

overall results of operations and therefore should not be addressed in a single-issue rate proceeding."[1] The Commission's holding in the MCI docket applies with equal force here.

Second, AT&T fails to state a claim under state law. The statute AT&T relies upon – RCW 80.04.110(1) – gives AT&T standing to complain about Verizon's *toll rates*, not Verizon's *access charges*, and thus does not permit the relief AT&T seeks here.

Third, AT&T's complaint conflicts with, and is preempted by, the Commission's 1999 order approving the settlement in the Bell Atlantic-GTE merger. There, Verizon agreed to reduce its access charges by more than $7,000,000. The Commission found that these reductions produce charges that are "just, reasonable, compensatory, and neither unduly preferential nor discriminatory."[2] AT&T's complaint, however, is based on the allegation that Verizon's access charges are *not* "just, reasonable, and nondiscriminatory." AT&T's complaint is nothing more than a collateral attack on the Commission's findings in the merger proceeding.

Fourth, AT&T's claim that switched access charges must equal local interconnection rates under the Telecommunications Act of 1996 ("Act") is plainly wrong. FCC orders and federal court decisions interpreting the Act make clear that access services and local switching services are different and can be priced differently. Indeed, the FCC and the United States Court of Appeals for the Eight Circuit have rejected the very argument AT&T raises here.

Fifth, AT&T's imputation analysis is flawed because it compares artificially inflated access costs to artificially reduced toll revenues. For example, AT&T inflates the cost of access by overstating billing and collection and marketing costs, and AT&T reduces toll revenues by

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[1] MCI Telecommunications Corp. v. GTE Northwest, Docket No. UT-970653, Second Supplemental Order Dismissing Complaint at 5-6 (Oct. 22, 1997). (Attachment 1)

[2] In the Matter of the Application of GTE Corp. and Bell Atlantic Corp., Docket Nos. UT-981367, UT-990672, UT-991164, Fourth Supplemental Order at 26 (Dec. 16, 1999) (*Merger Order*).

failing to include mandatory monthly fees for various toll plans. Also, AT&T's analysis ignores the fact that the Commission has already reviewed Verizon's toll rates to ensure they pass imputation.

Sixth, even assuming Verizon does not satisfy the imputation test, there is no evidence of a "price squeeze"; indeed, AT&T does not even *allege* that it has suffered actual harm.

Finally, AT&T's allegations concerning Verizon Long Distance ("VLD") must be ignored. VLD is not a party to this case, nor is VLD subject to any imputation test.

II. DISCUSSION

A. AT&T's Complaint Requests "Single-Issue Ratemaking"

AT&T wants the Commission to reduce Verizon's access charges.[3] AT&T does *not* want the Commission to raise Verizon's toll rates,[4] nor does AT&T propose raising any other Verizon rate to offset the access reductions.[5] AT&T's request must be rejected because it constitutes single-issue ratemaking.

In 1997, MCI filed a complaint against Verizon (formerly GTE Northwest Incorporated) seeking to reduce Verizon's access charges to "economic cost." The Commission dismissed MCI's complaint, stating that "the Commission generally will not engage in single issue or 'piecemeal' ratemaking."[6] As the Commission explained,

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[3] AT&T Complaint at 15.

[4] *Id.* at 3, ¶4.

[5] Verizon estimates that AT&T's proposal would result in more than a $50 million annual revenue reduction, which equates to an approximately $6.50 per month increase in basic residential rates. Notably, AT&T does not limit the size of its requested relief to an amount sufficient to eliminate the alleged "price squeeze." This disconnect between the alleged problem (toll rates not passing imputation) and the requested relief (reducing access to alleged "cost-based" rates) underscores the fact that AT&T's price squeeze argument is nothing more than window dressing.

[6] MCI Telecommunications Corp. v. GTE Northwest, Docket No. UT-970653, Second Supplemental Order Dismissing Complaint at 5-6 (Oct. 22, 1997).

> 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 access rates could have a substantial effect on the company's overall results of operations and therefore should not be addressed in a single-issue rate proceeding.[7]

The MCI case is directly on point: here, as there, an IXC is asking the Commission to reduce Verizon's access rates; here, as there, the IXC's request constitutes single-issue ratemaking, and therefore the complaint should be dismissed. Furthermore, AT&T was a party to the MCI docket, and therefore AT&T is precluded from raising the same issues in this docket under res judicata and collateral estoppel principles. *Shoemaker v. Bremerton*, 109 Wn.2d 540, 507, 745 P.2d 858 (Wa. 1987); *City of Bremerton v. Sesko*, 100 Wn.App. 158, 163, 995 P.2d 1257 (Wa. 2000) (collateral estoppel principles apply to administrative agency decisions).

In addition, AT&T's testimony in a previous case supports dismissal of AT&T's complaint in this proceeding. In a Pennsylvania access charge investigation, AT&T's Director of Law and Governmental Affairs, Mr. Blaine Darrah, testified that if an incumbent's access charges are reduced, the incumbent is entitled to recoup its lost revenues by raising the rates of other services:

> [L]et's assume we're not in a situation where we've got any over-earnings. We're in a company that's within the regulated base, then I am supportive of revenue neutral changes for the company which would mean one of a couple of things. Either when you lower access, you at the same time receive funds from the universal service which was the example we just talked about or you could also lower access while doing some rate rebalancing in terms of raising residential rates or some other rates within the company. *In other words, we [AT&T] agree that access is an implicit subsidy going to support residential local service. And,*

[7] *Id.* at 6.

> *no, you shouldn't have that taken away and reduce access independently . . . .*[8]

Mr. Darrah's analysis is directly on point; it supports Verizon's position that AT&T's complaint constitutes single-issue ratemaking and should be dismissed.

B. AT&T's Complaint Fails to State a Claim Under State Law

AT&T brings its complaint under RCW 80.04.110(1). Under this statute, a carrier may bring a complaint against the rates of another carrier where (1) the carriers "are engaged in competition" and (2) the complaint alleges that the rates "with or in respect to which the complainant is in competition" are unreasonable.[9]

AT&T does *not* compete with Verizon's switched access rates; rather, AT&T competes with Verizon's intrastate, intraLATA toll service rates. Therefore, under RCW 80.04.110(1), AT&T can only complain about the reasonableness Verizon's toll rates, i.e., "the rates with which [AT&T] is in competition." AT&T's complaint, however, requests changes to Verizon's *access charges*, not Verizon's *toll rates*, and therefore fails to state a claim under RCW 80.04.110(1).

C. AT&T's Complaint Conflicts With The Commission's *Merger Order*

Even if AT&T could state a claim against Verizon's access charges under state law, such a claim would be barred by the Commission's order approving the Bell Atlantic-GTE merger (the *Merger Order*). That order resolved a number of matters, including Staff's investigation of Verizon's earnings (Docket No. UT-991164) and the Commission's access charge complaint

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[8] Testimony of G. Blaine Darrah III, Director--Regulatory, AT&T Law and Government Affairs Division, Tr. 612-13, *In re Generic Investigation of Intrastate Access Charge Reform*, Docket No. I-00960066 (Pa. Pub. Util. Comm'n.) (transcript of Sept. 11, 1997) (emphasis added).

[9] This statute also allows rate complaints to be brought by "not less than twenty-five consumers" or "at least 25 percent of [a company's] consumers." These provisions do not apply to AT&T's complaint.

against Verizon (Docket No. UT-990672). In particular, the Commission's *Merger Order* approved a settlement that (1) reduced Verizon's intrastate switched access charges by more than $7,000,000 per year and (2) reduced Verizon's intrastate toll rates.[10] The Commission found that the resulting access charges "are just, reasonable, and compensatory" and that "the agreed adjustments to [Verizon's] revenues produce fair, just, and compensatory rates and charges for terminating access *and other services*."[11] These "other services" include Verizon's intrastate toll services.

Throughout 2000 and 2001, Verizon made a number of tariff filings to implement the *Merger Order*. For example, on May 26, 2000 Verizon made its "Phase 2" toll rate reductions, and on June 8, 2001 Verizon made its "Phase 4" access charge reductions.[12] The Commission accepted each of Verizon's filings.

AT&T was a party to the merger proceeding and did not oppose the settlement[13] or appeal the *Merger Order*. But it now challenges the very rates and charges that resulted from the *Merger Order*; indeed, AT&T's complaint is based on the allegation that Verizon's toll and access rates are *not* just, reasonable, or nondiscriminatory. Distilled to its essence, AT&T's

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[10] *Merger Order*, Appendix A. In paragraph 20 of its complaint, AT&T suggests that the more than $7 million reductions in access were not enough. This argument, too, is nothing more than an improper collateral attack on the *Merger Order*.

[11] *Merger Order* at 24-25 (emphasis added).

[12] Verizon Advice Letters 922 and 990.

[13] As noted on page 4 of the *Merger Order*, all parties and intervenors "either support or do not oppose" the settlement agreement.

complaint is nothing more than a collateral attack on the Commission's *Merger Order* and the resulting rates and revenues. Accordingly, AT&T's complaint should be dismissed.[14]

D. The Act Does Not Mandate Access Charge Reductions

Perhaps recognizing that it cannot state a claim under Washington law, AT&T makes an alternative claim under federal law. Specifically, AT&T argues that Verizon's intrastate access charges are not "just, reasonable, and nondiscriminatory" under the federal Act because they are not "cost-based."[15] This is the same argument AT&T and other interexchange carriers ("IXCs") have made since the Act was passed, and this is the same argument the FCC and federal courts have repeatedly rejected.

The FCC first addressed this issue in 1996 in its *Local Competition First Report & Order*,[16] where the FCC explained that access and local interconnection are legally distinct services:

> We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge. *We conclude, however, as a legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications.* Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252 (d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. *The Act preserves the legal distinctions between charges for transport and termination of local traffic and*

[14] *See, e.g., St. Joseph Hospital v. Department of Health*, 125 Wn.2d 733, 887 P.2d 891 (Wa. 1995) (when an agency has made a final decision, the decision normally can be challenged only through the appellate process under the principle of res judicata).

[15] AT&T Complaint at 13-15, ¶¶ 32-35.

[16] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition First Report & Order*).

> *interstate and intrastate charges for terminating long-distance traffic.*[17]

This principle was affirmed by the United States Court of Appeals for the Eighth Circuit in *CompTel v. FCC*.[18] There, the IXCs argued that the federal Act requires all access charges to be reduced to the cost-based rates of local interconnection. The Eighth Circuit rejected this argument, holding that the federal Act "plainly preserves certain rate regimes already in place," including the access rate regime.[19] The IXCs also argued that treating access services and interconnection services differently has a "discriminatory impact" because it permits ILECs "to charge different rates for the same service based on whether the carrier who is seeking interconnection and other network services is a long-distance service provider or a local service provider."[20] The Eighth Circuit rejected this argument as well, holding that –

> the two kinds of carriers [IXCs and local providers] are not, in fact, seeking the same services. The IXC is seeking to use the incumbent LEC's network to route long-distance calls and the newcomer LEC seeks use of the incumbent LEC's network in order to offer a competing local service. Obviously the services sought, while they might be technologically identical (a question beyond our expertise), are distinct. And if the IXC wants access in order to offer local service (in other words, wants to become a LEC), then there is no rate differential. In these circumstances, we do not think [there is] a discriminatory impact.[21]

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[17] *Id.* at ¶1033 (emphasis added); *see also* First Report and Order, CC Docket No. 96-325, at ¶1033 ("The [federal] Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.").

[18] 117 F.3d 1068 (8th Cir. 1997).

[19] *Id.* at 1072 (citing section 251(g) of the Act).

[20] *Id.* at 1073.

[21] *Id.*

Finally, the FCC once again rejected the IXCs' arguments in its *CALLS Order,*[22] where the FCC reaffirmed that, as a matter of law, local interconnection services and access services are different:

> Some commenters have argued that the target [access] rates should be lower because, according to state approved interconnection rates, access costs are actually below one half of one cent per minute. The commenters contend that the Commission should reduce access rates to forward-looking costs, like the unbundled network element rates for local transport and termination. *The Commission has recognized that, as a legal matter, transport and termination of local traffic are different services than access service for long-distance telecommunications and therefore are regulated differently.*[23]

In sum, the FCC and the courts have repeatedly rejected AT&T's argument that the Act requires access charges to equal local interconnection rates.[24] The Commission should do the same.[25]

E. AT&T's Imputation Analysis is Flawed

Even if AT&T could make a colorable claim under state or federal law, its imputation analysis is flawed because it compares artificially inflated access costs to artificially reduced toll revenues. First, AT&T inflates the cost of access by using billing and collection (B&C) and marketing costs wholly unrelated to Verizon Northwest's costs. For B&C, AT&T uses $0.0346 per minute, which was the tariffed B&C rate of independent carriers used fourteen years ago in

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[22] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962 (Rel. May 31, 2000) (*CALLS Order*).

[23] *Id.* at ¶178 (emphasis added).

[24] These decisions also trump AT&T's argument in paragraph 15 of its complaint regarding CMRS interconnection rates.

[25] AT&T also argues that Verizon's intrastate access charges must be reduced under *COMSAT Corp. v. FCC*, 250 F.3d 931 (5th Cir. 2001). That decision, however, is inapposite: first, it does not apply to the states – it addresses only the FCC's obligations under the federal Act; second, it does not stand for the proposition that access charges can be reduced via single-issue ratemaking.

an imputation test for a Pacific Northwest Bell toll plan.[26] For marketing, AT&T uses $0.03 per minute, which is a U S WEST witness's estimate in a Minnesota case of AT&T's marketing expense. This marketing cost – an admitted "approximation" – was a blend of national average amounts garnered from four different sources, and was never used for imputation purposes.[27] In contrast, the B&C and marketing costs the Commission approved for Verizon's imputation test in Docket No. UT-970598 are *significantly lower* than AT&T's proposed costs.[28]

Second, AT&T improperly reduces toll revenues by neglecting to include the mandatory monthly fees for various toll plans[29] and by applying an "uncollectibles" factor of -1.3% to every Verizon's toll rate.[30] This analysis conflicts with the imputation test the Commission adopted for Verizon in Docket No. UT-970767. Under that test, monthly fees *are* included in calculating toll revenues and *no* adjustments are made for uncollectibles.

Finally, AT&T's analysis also ignores the fact that Commission Staff has already reviewed Verizon's toll rates to ensure they pass imputation. When the Commission classified Verizon's toll rates as competitive and established its imputation test in Docket No. UT-970767, it held that "Commission Staff must review [future] price list changes to ensure that [Verizon's] prices cover costs consistent with that imputation test."[31] Staff has done so; in every Verizon toll

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[26] WUTC v. Pacific Northwest Bell Telephone Company, Docket U-87-1083-T, Fifth Supplemental Order, May 25, 1988, 93 PUR4th 430, 435.

[27] The affidavit page cited by AT&T is Attachment 2 to this Motion.

[28] In the First Supplemental Order in Docket UT-970767, the Commission adopted the imputation test and cost standards set forth in Docket No. UT-070598. The B&C and marketing costs in that docket are confidential, but they are significantly lower than the costs AT&T proposes here.

[29] For example, Verizon's "Value Cents" plans have a monthly fee of $4.95, but AT&T does not include this revenue in its imputation analysis. *See* Selwyn Affidavit at 27, Table 1.

[30] Selwyn Affidavit at 27, Table 1 and at 28, Table 2.

[31] First Supplemental Order at 13.

filing since 1997, Staff has received information from Verizon to help Staff ensure that Verizon's proposed toll rates meet imputation.

F. AT&T's Complaint Fails To Allege Actual Harm

Although AT&T's complaint speaks of the *theoretical* harm of price squeezes, it does not allege any actual harm. Specifically, there is no allegation that AT&T has been priced out of the toll market in Washington, that it has been unable to match Verizon's toll rates, or that it is operating at a loss in Washington. The lack of such allegations and evidence confirms that AT&T's objective is to reduce Verizon's access charges regardless of the level of Verizon's toll rates.

G. AT&T's Allegations About VLD Are Irrelevant

AT&T's complaint includes a number of allegations against Verizon Long Distance ("VLD"), which is an IXC and a company separate from Verizon. AT&T's complaint, however, fails to point to any order or statute requiring VLD's toll rates to pass an imputation test and names only Verizon as a respondent. Therefore, AT&T's allegations as to Verizon Long Distance are irrelevant to its claim against Verizon and must be ignored.

WHEREFORE, Verizon requests that the Commission dismiss AT&T's complaint.

Respectfully submitted,

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Dated this 24th day of April, 2002.

ATTACHMENT 1

WASHINGTON UTC UTILITIES AND TRANSPORTATION COMMISSION

Online Document

General Info

Document Name: 970653 -- Second Supplemental Order Dismissing Complaint
Description: Order Dismissing Complaint

Body

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MCI TELECOMMUNICATIONS CORPORATION,

Complainant,

v.

GTE NORTHWEST, INC.,

Respondent.

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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, 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. 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.

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. 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 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.

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. 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.

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

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).

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ATTACHMENT 2

(82)

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Jason D. Topp
Attorney

ride the light
Qwest.

January 16, 2002

Mr. Michael Lewis
Office of Administrative Hearings
Suite 1700
100 Washington Square
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Re: In the Matter of a Commission Investigation into Qwest's Compliance with Section 272 of the Telecommunications Act of 1996's Separate Affiliate Requirement
PUC Docket No. P-421/CI-01-1372
OAH Docket No. 12-2500-14487-2

Dear Mr. Lewis:

Enclosed for filing are Qwest Corporation's Motion to Expand AT&T Designated Transcript Excerpt and Surrebuttal Affidavit of Dr. William E. Taylor regarding the above-referenced matter. The original signature page for Dr. Taylor's affidavit will be filed in the near future.

Very truly yours,

Jason D. Topp

JDT/bardm

Enclosures

cc: Service List

BEFORE THE MINNESOTA
PUBLIC UTILITIES COMMISSION

In the Matter of a Commission	)	
Investigation into Qwest's	)	
Compliance with Section 272 of the	)	PUC Docket No. P-421/C1-01-1372
Telecommunications Act of 1996's	)	OAH Docket No. 7-2500-24487-2
Separate Affiliate Requirement	)	

Surrebuttal Affidavit of Dr. William E. Taylor

on behalf of

Qwest Corporation

nera
Consulting Economists

20. For example, consider the interstate toll market, which (despite Dr. Selwyn's views) at least the FCC considers sufficiently competitive to warrant classifying AT&T (and all other suppliers, including RBOCs) as non-dominant. Even in this market, we see market prices far in excess of reasonable estimates of marginal cost. Marginal cost estimates for toll vary between $0.01 to $0.02 per conversation minute (excluding non-incremental costs such as marketing expenses and ignoring carrier access expenses) and $0.05 per minute (including marketing expenses).[33] Switched interstate access charges were about $0.028 per conversation minute in July 1998,[34] which amounts to about $0.06 per conversation minute, including flat-rated access charges. Thus, AT&T's marginal costs of serving residential customers totaled $0.07 to $0.11 cents per conversation minute, depending on whether one counts marketing expenses or not. Those estimates of marginal costs lie significantly below interstate residential long distance prices. Using a public database of telephone bills of a random sample of U.S. residential households, one can show that in July 1998, the average rate paid by AT&T residential customers was about $0.20 per conversation minute. Thus, AT&T's incremental contribution from residential customers was at least $0.09 per minute, even if one includes marketing expenses as an incremental cost.

(...continued)

[32] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756 (1997) (*"LEC Non-Dominant Order"*), at ¶97.

[33] Estimates of toll and access incremental costs are presented in Robert W. Crandall, *After the Breakup: U.S. Telecommunications in a More Competitive Era* (Washington D.C.: The Brookings Institution, 1991), at 138-141; Lewis J. Perl and Jonathan Falk, "The Use of Econometric Analysis in Estimating Marginal Cost," Presented at Bellcore and Bell Canada Industry Forum, San Diego, California (April 6, 1989), Table 2; Robert W. Crandall and Leonard Waverman, *Talk is Cheap: The Promise of Regulatory Reform in North American Telecommunications* (Washington D.C.: The Brookings Institution, 1996); and Paul W. MacAvoy, *The Failure of Antitrust and Regulation to Establish Competition in Long-Distance Telephone Services* (Cambridge, Massachusetts: The MIT Press and Washington D.C.: The AEI Press, 1996). The costs are obviously averages and vary a great deal across jurisdictions, times of day and technologies. Dr. Selwyn suggests even lower incremental costs of toll service may be appropriate (Oral Surrebuttal at 22, line 10).

[34] Federal Communications Commission, "Universal Service Monitoring Report", CC Docket No. 98-202 (September 2000), Table 7.15.