

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In Re Application of U S WEST, Inc.)	
And QWEST COMMUNICATIONS)	
INTERNATIONAL, INC.)	
)	DOCKET NO. UT-991358
For An Order Disclaiming Jurisdiction,)	
or in the Alternative, Approving the U)	THIRD SUPPLEMENTAL
S WEST, INC.--QWEST)	OF REVIEW
COMMUNICATIONS)	
INTERNATIONAL, INC. Merger)	
.....)	
...)	

SUMMARY

PROCEEDINGS: On August 31, 1999, U S WEST, Inc. and Qwest Communications International, Inc., jointly filed an application requesting that the Commission issue an order disclaiming jurisdiction over their proposed merger transaction, or in the alternative, approving the merger. The Commission, on due and proper notice, conducted a prehearing conference on September 23, 1999, before Chairwoman Marilyn Showalter, Commissioner William R. Gillis, and Administrative Law Judge Dennis J. Moss.

COMMISSION: The Commission heard at the prehearing conference, among other things, general statements by the parties regarding what issues should be considered in this proceeding. This Order outlines broadly the issues the Commission will consider to determine whether the proposed transaction should be approved, approved with conditions, or disapproved.

PARTIES: Lisa A. Anderl, Senior Attorney, U S WEST Communications, Inc., Seattle, represents U S WEST, Inc. Gina Spade, Hogan & Hartson L.L.P., Washington, D.C., represents Qwest Communications International, Inc. Dan Waggoner, Davis Wright Tremaine, Seattle, represents AT&T Communications of the Pacific Northwest, Inc. Andrew O. Isar, Director--State Affairs, Telecommunications Resellers Association, represents that organization. Angela Wu, Ater Wynne LLP, Seattle, represents Rhythms Links, Inc. Gregory J. Kopta, Davis Wright Tremaine, Seattle, represents Advanced Telecom Group, Inc., Nextlink Washington, Inc., and Northpoint Communications, Inc. Richard A. Finnigan, Attorney, Olympia, represents the Washington Independent Telephone Association (WITA). Mark P. Trincherro, Davis Wright Tremaine, Portland, Oregon, represents McLeodUSA Telecommunications

Services, Inc. Brooks E. Harlow, Miller, Nash, Wiener, Hager & Carlson LLP, Seattle, represents Covad Communications Company, Northwest Payphone Association, and Metronet Services Corporation. Robert Nichols, Nichols and Associates, Boulder, Colorado, represents Level 3 Communications, Inc. Arthur A. Butler, Ater Wynne LLP, Seattle, represents SBC National, Inc. Simon ffitch, Assistant Attorney General, Seattle, represents the Public Counsel Section, Office of Attorney General. Sally G. Johnston, Assistant Attorney General, Olympia, represents the Commission's regulatory staff (Staff).

MEMORANDUM

Although U S WEST and Qwest, joined by at least one intervenor (WITA), challenge our jurisdiction in this matter, that question is not yet ripe for determination. In the interest of expediting review, we assume for purposes of the present Order that our governing statutes require review of the proposed transaction.

The following statutory provisions and rules apply:

RCW 80.01.040. The utilities and transportation commission shall:

(1) Exercise all the powers and perform all the duties prescribed therefor by this Title . . .

(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 . . .

(4) Make such rules and regulations as may be necessary to carry out its powers and duties.

RCW 80.12.020. 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 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

WAC 480-143-120 Transfers of property. A public service company may not complete a transfer of property necessary or useful to perform its public duties unless the company first applies for, and obtains, commission approval. Transfers include sale, lease, assignment of all or

part of a public service company's property, and merger or consolidation of a public service company's property with another public service company. . . .

WAC 480-143-170 Application in the public interest. If, upon the examination of any application and accompanying exhibits, or upon a hearing concerning the same, the commission finds the proposed transaction is not consistent with the public interest, it shall deny the application. [Note: this section was formerly WAC 480-143-150].

In order to approve the proposed transaction, the Commission must determine whether it is consistent with the public interest. There is no bright line against which to measure whether a particular transaction meets the public interest standard. As we observed in another recent merger case, “the approach for determining what is in the public interest varies with the form of the transaction and the attending circumstances.” *In Re PacifiCorp and Scottish Power PLC*, Docket No. UE-981627, Third Supplemental Order on Prehearing Conference (April 2, 1999), p. 3.

Applicants’ initial burden requires them to produce sufficient evidence to demonstrate no harm will result as a result of the transaction. That is the burden of going forward with the *prima facie* case. Assuming Applicants meet their initial burden, other parties who assert the transaction, as proposed, is inconsistent with the public interest then must offer evidence to support their assertions. If there is evidence to support allegations that the proposed transaction is not consistent with the public interest, the burden then shifts back to the Applicants who bear the ultimate burden of proof.

We afforded the parties an opportunity at the prehearing conference to state their preliminary views regarding the issues in this proceeding. AT&T expressed its view that there are three general categories of issues the Commission should examine in this case: (1) what impact the merger might have on the level of charges under U S WEST’s tariffs and contracts, including interconnection agreements; (2) competitive issues, including the potential impact of certain divestitures of assets and operations planned by Qwest in connection with the proposed merger; and (3) issues related to the Federal Telecommunications Act of 1996 and the Washington State statutory scheme. Many of the other intervenors echoed AT&T’s comments and urge the Commission to inquire into the proposed merger’s potential impact on such matters as the availability of facilities necessary for viable competition in local markets and long distance, operations support system (OSS), existing interconnection agreements with U S WEST, and other matters related to the general categories outlined by AT&T.

Public Counsel also touched on these points and stated that the Commission should be concerned with whether the merger will promote the goal of retail competition, particularly in the residential and small business market sectors. Public Counsel also stated the Commission should consider whether Qwest, which is the surviving corporation under the merger plan, has the technical, managerial, and

financial capability to operate U S WEST. Public Counsel urged the Commission to consider the proposed merger's potential impact on service quality, both at the wholesale and retail levels. Public Counsel also raised the somewhat related question of what impact the proposed merger may have on investment in Washington and the potential for neglect or abandonment of facilities in Washington. Finally, Public Counsel identified the question of how any benefits or synergies arising from the proposed merger should be shared between customers and shareholders.

Staff concurred with Public Counsel's issues and added that the Commission should consider the financial impacts of the proposed merger. In particular, Staff wishes us to inquire into the merger's potential impact on cost of capital, capital structure, and access to financial markets. Staff is concerned generally about the proposed merger's potential impact on rates.

In response to these various points, Applicants took the position that there are few, if any, issues for the Commission to consider. Fundamentally, Applicants challenge the Commission's jurisdiction. Even assuming jurisdiction, Applicants argue there will be no change to the "regulated entity" and, therefore, nothing about which to be concerned. Applicants believe the issues identified by the other parties may be proper subjects for other dockets, but not for the present docket.

We find the issues identified by the intervenors, Public Counsel, and Staff to be proper subjects for inquiry in this proceeding. The parties emphasize the importance of issues related to emerging competition in the telecommunications industry. The impact the proposed transaction may have in this regard is central to the application itself. As Applicants state, "the strategic merger of Qwest Inc. and U S WEST, Inc. will serve the public interest by producing significant procompetitive effects that will lead to substantial benefits for customers in Washington." Application at 2. Later, Applicants assert that "the merger will have no negative impact on competition." Application at 9. Applicants also claim that "the merger will create powerful incentives for post-merger Qwest Inc. to satisfy Section 271 requirements" so that it might "reenter the in-region interLATA market in Washington as soon as possible" after divesting itself of such services in order to obtain approval of the merger. Application at 11.

As in prior merger cases, we must be concerned here with whether the transaction might distort or impair the development of competitive markets where such markets can effectively deliver affordable, efficient, reliable, and available service. Applicants contend through their application and supporting material that the proposed transaction is procompetitive. Parties that oppose the merger, as proposed, should have the opportunity to challenge this assertion and show through the production of evidence either that the proposed transaction should be disapproved, or approved subject to conditions.

Applicants state that the merger will provide "substantial benefits" to Washington consumers. They also claim "[t]he proposed merger will produce economies of scope and scale." Application at 10. It is appropriate to inquire into the

nature and extent of the claimed benefits. As Public Counsel pointed out at the prehearing conference, if the merger is approved, synergies may arise that lead to cost savings and enhanced revenue. Conditions may be required to ensure any such benefits are shared in a fashion that is consistent with the public interest. The transaction should strike a balance among the interests of customers, shareholders, and the broader public that is fair and that preserves affordable, efficient, reliable, and available service.

As discussed above, Public Counsel and Staff wish to inquire into the financial aspects of the proposed transaction and ascertain what, if any, implications the merger might have on rates. These are proper subjects for examination here. Thus, we will consider evidence of the merger's potential impact on cost of capital, capital structure, access to financial markets, and other financial considerations that may affect rates. We emphasize, however, that this is not a general rate case. Our concern in this proceeding is whether the transaction itself has any implications for rates, terms, and conditions of service.

Finally, we will inquire into the effect of the transaction on U S WEST's quality of service. Quality telecommunications service is essential to the public interest presently and on a going-forward basis. We intend to learn whether long-promised but unrealized improvements to U S WEST's systems and operations are more likely, or less likely, if the merger with Qwest is consummated. We will examine what impact the proposed merger may have on investment in Washington and the potential for neglect or abandonment of facilities in Washington. Related to this is our concern over whether Qwest, as the surviving corporation, has the technical, managerial, and financial capability to operate U S WEST.

The Commission previously has entered a prehearing conference order providing for discovery, establishing a procedural schedule, and imposing various procedural requirements. We also entered a protective order to promote the free exchange of information while protecting any confidential documents that are responsive to the parties' discovery requests. This Order provides guidance regarding the scope of our review. The Commission urges the parties to move forward expeditiously with the preparation of their respective cases in accordance with the terms of these Orders.

DATED at Olympia, Washington, and effective this _____ day of October 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner