BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

Pursuant to WAC 480-09-425, AT&T Communications of the Pacific Northwest, Inc. ("AT&T"), provides the following opposition to the Motion to Dismiss ("Motion") filed by Verizon Northwest Inc. ("Verizon"). The Motion fails to identify any legitimate grounds on which the Complaint should be dismissed. Accordingly, the Commission should deny the Motion and establish a schedule to consider the merits of the Complaint.

DISCUSSION

Verizon identifies seven different grounds on which it seeks to have the Commission dismiss the Complaint: (1) single-issue ratemaking; (2) failure to state a claim under state law; (3) preemption by prior Commission order; (4) lack of merit under federal law; (5) flawed imputation analysis; (6) no allegation of actual harm from price squeeze; and (7) Verizon's long distance affiliate is not a party or subject to imputation. The consistent theme of Verizon's motion, however, is that its switched access rates are insulated from challenge by AT&T or any other third party. Neither the statutes nor past Commission decisions and practice support that position.

A. AT&T's Complaint Alleges That Verizon Has Violated State and

Federal Statutes and the Commission's Imputation Requirements and Does Not Request "Single-Issue Ratemaking."

Verizon mischaracterizes AT&T's Complaint as single-issue ratemaking and thus precluded by the Commission's decision dismissing a 1997 complaint brought by MCI challenging Verizon's access rates.[1] While the subject matter of AT&T's Complaint includes Verizon's switched access charges as well as toll rates, AT&T raises entirely different claims with respect to those charges. MCI's complaint alleged only that Verizon's switched access charges were inconsistent with the general requirements in RCW 90.04.110 (complaints) and RCW 80.36.140 (rates and services). The Commission concluded:

> 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.
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> 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.
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> . . . . An appropriate forum for addressing the issues raised by MCI in this filing would be Docket No. UT-970325.

Motion, Attachment 1 (MCI Order) at 5 (emphasis added).

AT&T's Complaint, in sharp contrast to MCI's complaint, alleges that Verizon is in violation of specific state and federal statutes and with the Commission's imputation

[1] *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, Docket No. UT-970653, Second Supp. Order Dismissing Complaint (Oct. 22, 1997) ("MCI Order").

requirements. Complaint at 11-15. AT&T also alleges that Verizon is abusing the structure for intrastate access charges that the Commission established in Docket No. U-85-23 by using excess revenues from those charges to subsidize artificially low toll rates, rather than to fund universal service objectives. AT&T further alleges that including implicit universal service subsidies in access rates is inconsistent with federal law. None of these allegations were before the Commission in the MCI complaint proceeding and none of them can accurately be characterized as "single-issue ratemaking."[2] The legislative authorization of complaints by one competitor against the "***rates, charges***, rules, regulations or practices" of another would be meaningless if any challenge to those rates would be precluded as "single-issue ratemaking." Indeed, the Commission brought its own complaint against Verizon with respect to its access charges, which the Commission never considered "single-issue ratemaking."[3]

Circumstances, moreover, have changed substantially since the Commission entered the MCI Order in October 1997. Most notably since that date, the Commission has undertaken a general rulemaking addressing access charges in Docket No. UT-970325 (referenced in the MCI Order) and promulgated a rule requiring Verizon and other local exchange carriers to

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[2] Verizon also erroneously contends that an AT&T witness' testimony in Pennsylvania in 1997 somehow supports Verizon's arguments. Motion at 4-5. Not only is that testimony taken out of context, but the excerpt Verizon quotes does not address any of the issues that AT&T raises in its Complaint. Nor is AT&T willing to assume that "we're not in a situation where we've got any over-earnings." Verizon and its affiliates' toll pricing below an appropriate imputation floor is *prima facie* evidence that Verizon is over-earning and using those excess revenues in an attempt to monopolize the toll market in Verizon's local service territory in Washington.

[3] *WUTC v. GTE Northwest* Incorporated, Docket No. UT-990672 (consolidated with and resolved via settlement in *In re Application of GTE Corporation and Bell Atlantic Corporation for an Order Disclaiming Jurisdiction or, in the Alternative, Approving the GTE Corporation-Bell Atlantic Merger*, Docket Nos. UT-981387, *et al*., Fourth Supp. Order Approving and Adopting Settlement Agreement (Dec. 16, 1999)).

revise their switched access rates. Verizon appealed that rule, and the court of appeals invalidated it.[4] Specifically in response to the same concerns the Commission expressed in the MCI Order – that switched access revisions should be addressed "in a broader forum in which all carriers affected by a change of policy can participate" – the court concluded,

> From a policy standpoint, the more logical course to avoid piecemeal compliance among the telecommunication companies might be to accomplish the WUTC's goals by rule instead of by adjudication. But the WUTC lacked the authority to limit terminating access rates by rule. An agency may not go beyond its legislative grant, even when doing so is more logical or more convenient . . . .[5]

The court further explained that despite the Commission's obligation to foster the development of effective competition, the Commission "may reduce existing, lawfully filed tariffs only by order after a hearing and a finding that the rate is unjust."[6]

Verizon convinced the Commission to dismiss MCI's complaint and to require MCI to address its concerns with Verizon's switched access rates in a general rulemaking. Verizon then convinced the court of appeals to invalidate the resulting rule and to permit the Commission to reduce tariffed switched access rates only after a complaint proceeding. Now Verizon asks the Commission to dismiss AT&T's Complaint based on the Commission's order dismissing MCI"s complaint. Verizon cannot have it both ways. If the Commission can only act through a complaint proceeding, the Commission should not preclude parties from initiating such a proceeding. Acceptance of Verizon's position would deprive Verizon's competitors of any avenue for redress of their grievances, leaving them with no recourse to paying Verizon's

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[4] *WITA v. WUTC*, 110 Wn. App. 147, ___ P.2d ___ (2002).

[5] *Id*. at 160.

unlawful and unreasonable rates. Such a result flies in the face of fundamental due process and Washington statutes.

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

AT&T has brought its Complaint pursuant to RCW 80.04.110(1), which provides in relevant part as follows:

> PROVIDED, FURTHER, That when two or more public service corporations, . . . are engaged in competition in any locality or localities in the state, either may make complaint against the other or others that ***the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition***, are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint or upon complaint of the commission upon its own motion, the commission shall have the power, after notice and hearings as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal and fair or tending to prevent oppression or monopoly or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state.

(Emphasis added). Verizon proposes to interpret this statutory provision as limiting complaints among competitors only to those *rates* "with or in respect to which the complainant is in competition." Motion at 5. The statutory language is not susceptible to Verizon's interpretation.

The phrase on which Verizon focuses states that a company may bring a complaint

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[6] *Id*. at 160-61.

against one or more other competing companies concerning "the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition." Verizon interprets "with or in respect to which the complainant is in competition" as modifying "rates, charges, rules, regulations or practices." Verizon's proposal reflects poor grammar and worse legislative intent. AT&T is not "in competition" with Verizon's rates, charges, rules, regulations or practices – AT&T is in competition with Verizon. The phrase "with or in respect to which the complainant is in competition" thus modifies "other or others," *i.e.*, the companies against which the complainant is complaining. AT&T competes with Verizon and is complaining about Verizon's rates, charges, rules, regulations or practices that impact AT&T's ability to compete with Verizon. The statute expressly authorizes just such a complaint.

Verizon's interpretation, moreover, would insulate Verizon and other wholesale service providers from any complaints by competitors against actions taken directly against those competitors. Not only would competing local exchange companies ("CLECs"), for example, be barred from complaining about interconnection or unbundled network element rates, but they could never seek Commission relief for poor service quality, lack of access to essential facilities, or discriminatory treatment *vis-a-vis* end user customers because CLECs do not compete with Verizon's wholesale service offerings. Nothing in the statute supports such a limited right to Commission redress. To the contrary, the language broadly authorizes complaints against "rates, charges, rules, regulations or practices" that "are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly." The legislature's obvious

intent was to provide the Commission with broad authority to address competitive injury, regardless of whether the rates or practices resulting in that injury are directed against competitors or provided to end user customers. AT&T's Complaint properly invokes that Commission authority.

C. The Bell Atlantic-GTE Merger Order Does Not Bar AT&T's Complaint.

Verizon erroneously contends that AT&T's Complaint is barred by the Commission's order approving the settlement agreement in the consolidated cases surrounding the merger between Bell Atlantic and GTE.[7] According to Verizon, the Commission's conclusion in 1999 that the rates resulting from the settlement agreement were just, reasonable, and compensatory precludes any challenge to those rates in 2002 – or, presumably, at any other point in the future. Nothing in the Merger Order or applicable law supports Verizon's position.

The Merger Order, like any other Commission order approving rates, was based on the record before the Commission in that particular docket. The Commission's findings necessarily cannot apply to facts the Commission did not consider or to circumstances that have changed since the Commission entered its order. Surely Verizon would not claim that it is forever barred from seeking to alter the rates in the Merger Order simply because the Commission found them to be just, reasonable, and compensatory. Indeed, the settlement agreement itself contemplates that the rates may not continue to be just, reasonable, and compensatory beyond July 1, 2002, by obligating the parties not to challenge or otherwise seek adjustment to those rates only until

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[7] *In re Application of GTE Corporation and Bell Atlantic Corporation for an Order Disclaiming Jurisdiction or, in the Alternative, Approving the GTE Corporation-Bell Atlantic Merger*, Docket Nos. UT-981387, *et al*., Fourth Supp. Order Approving and

that date.[8] The court of appeals, morever, has invalidated the Commission's switched access rule, and the settlement agreement requires that in such circumstances, the access charge reductions in the agreement apply to Verizon's rates in effect prior to enactment of the rule.[9] The Commission never concluded that *those* rates are just, reasonable, and compensatory, much less precluded any future review of, or challenge to, those rates.

As discussed above, the circumstances and environment in which the Commission made its findings in the Merger Order have changed significantly since December 1999. The Merger Order, therefore, does not bar AT&T's Complaint.

D. Federal Law Supports AT&T's Complaint.

AT&T makes two claims under federal law: (1) To the extent that the difference between the forward-looking costs and the price of Verizon's switched access service is intended to support universal service, it is an implicit subsidy prohibited by 47 U.S.C. § 254(e) & (f), *COMSAT Corp. v. FCC*, 250 F.3d 931, 938-40 (5th Cir. 2001); and (2) The price squeeze that Verizon has created with the switched access rates it charges competitors and the toll rates it charges end user customers is a barrier to entry in violation of 47 U.S.C. § 253(a). Complaint at 13-15. Verizon ignores these claims and constructs its own, contending that AT&T is asserting that the Act requires switched access charges to be governed by the same provisions of the Act that are applicable to local interconnection. Motion at 7-9. AT&T is not asking the Commission to reach any such conclusion. Accordingly, Verizon's federal law arguments are irrelevant and do not support dismissal of the Complaint.

Adopting Settlement Agreement (Dec. 16, 1999) ("Merger Order").

[8] *Id.*, Appendix A (Settlement Agreement) at 6.

E. Verizon's Disagreement With AT&T's Imputation Analysis Raises Issues of Disputed Fact Requiring Evidentiary Hearings, Not Dismissal of the Complaint.

The Commission has long embraced the concept of imputing prices for essential facilities and forward-looking additional costs into the rates charged by Verizon and other ILECs, but the Commission has not enacted any rule or otherwise generally defined how imputation should be calculated. AT&T has used an imputation analysis that is consistent with economic theory and practice, as well as the Commission's general imputation requirements and those of other state commissions,[10] and has provided preliminary evidentiary support for its analysis through the affidavit of Dr. Lee L. Selwyn. Verizon contends that this analysis is "flawed" and inconsistent with the imputation test that the Commission has used in other proceedings. Verizon's contention does not support its Motion.

Verizon's disagreement with AT&T's imputation analysis, at best, raises disputed issue of fact, not a basis on which the Commission should dismiss the Complaint. AT&T has used the best information that is publicly available, and a protective order and discovery will be

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[9] *Id*. at 4.

[10] *See, e.g., WUTC v. U S WEST Communications, Inc.*, Docket No. UT-950200, Fifteenth Supp. Order at 96-97 (April 1996); *In re Application of Qwest Corporation for an Increase in Revenues*, Oregon PUC Docket No. UT 125 Phase II, Order No. 01-810 (Sept. 14, 2001); *In re Application of U S WEST Communications, Inc., for the Commission to Open an Investigatory Docket to Eliminate on an Expedited Basis the Requirement That U S WEST Impute Switched Access Rates Into the Price Floor of its IntraLATA Toll Long Distance Service*, Colorado PUC Docket No. 00A-201T, Decision No. C01-288, Decision Denying Exceptions (March 27, 2001); *In re Proposed Revisions of U S WEST Communications, Inc., to its Utah Exchange and Network Services Tariff by Advice*

required before AT&T will have access to, much less the ability to analyze, the confidential data Verizon cites. The imputation test to which Verizon refers similarly is not publicly available but is included in a confidential cost support exhibit that Verizon provided to the Commission with a tariff filing.[11] The Commission cannot give any preclusive effect consistent with fundamental due process to an undisclosed imputation test developed by Verizon to which AT&T or any other affected party has no access, much less the ability to evaluate and challenge.

Finally, Verizon apparently would have the Commission bar AT&T's Complaint because Commission Staff allegedly has reviewed Verizon's toll rate filings and concluded that they satisfy Verizon's proprietary imputation test. While Staff's analysis may be informative, Staff's conclusions do not bind the Commission or preclude AT&T or any other interested party from conducting and seeking to present its own analysis. Any inconsistency between AT&T's imputation analysis and the imputation analysis conducted by Verizon or Commission Staff, therefore, does not provide any basis on which the Commission should dismiss the Complaint.

F. AT&T Has Alleged Sufficient Competitive Harm.

Verizon complains that "[a]lthough AT&T's complaint speaks of the *theoretical* harm of price squeezes, it does not allege any actual harm," including any allegations "that AT&T has been priced out of the toll market in Washington, that it has been unable to match Verizon's toll

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Letter 99-05, Utah PSC Docket No. 99-049-T05, Report and Order (July 28, 2000).

[11] *In re Investigation on the Commission's Own Motion Whether the IntraLATA Toll Services of GTE Northwest Incorporated Should be Classified as a Competitive Telecommunications Service*, Docket No. UT-970767, First Supp. Order at 12 (Sept. 29, 1997).

rates, or that it is operating at a loss in Washington." Motion at 11 (emphasis in original). AT&T is not required to allege any specific harm to itself as a prerequisite to filing a complaint. Taking the allegations in the Complaint as true – as required in any motion to dismiss – Verizon is engaging in a price squeeze, which by definition is harmful to competition. The legislature has expressly authorized complaints seeking to remedy "rates, charges, rules, regulations or practices" that "stifle competition" or "encourage the creation of monopoly." RCW 80.04.110(1). Verizon certainly may attempt to prove in its defense that a price squeeze does not stifle competition, encourage creation of a monopoly, or cause any actual harm to AT&T, but AT&T has alleged sufficient competitive harm to maintain its Complaint.

G. Allegations With Respect to Verizon's Affiliate Further Support the Need for Commission Intervention.

Finally, Verizon claims that any allegations in the Complaint that relate to Verizon's interLATA long distance affiliate are irrelevant because Verizon Long Distance ("VLD") is not a party or subject to any imputation requirement. Motion at 11. Verizon misses the point. AT&T has alleged that Verizon – either directly or through its affiliate – is pricing toll service below a price floor of switched access charges plus forward-looking costs of nonessential facilities. Verizon is using the difference between its costs and prices for switched access to subsidize its intrastate toll offerings – whether provided by Verizon or its affiliate – rather than to support universal service. Verizon thus is the appropriate respondent, and AT&T's allegations with respect to VLD further demonstrate the anticompetitiveness of Verizon's rates and practices.

CONCLUSION

Verizon asks the Commission to shield its toll and switched access rates from scrutiny or challenge by AT&T or any other affected third party. The Commission should deny that request and the Motion, and the Commission should schedule AT&T's Complaint for hearing.

DATED this 13th day of May, 2002.

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