

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

QWEST CORPORATION D/B/A
CENTURLINK QC,

Respondent.

DOCKET UT-171082

COMMISSION STAFF MOTION
FOR PARTIAL SUMMARY
DETERMINATION

I. INTRODUCTION

1 Staff of the Washington Utilities and Transportation Commission (Commission) submits this Motion for Partial Summary Determination pursuant to WAC 480-07-375 and WAC 480-07-380. The foundational issue in this case is the interpretation of the line extension rule, WAC 480-120-071. Further proceedings are not required to interpret the rule, and the Commission can resolve the majority of the allegations in this case by deciding this motion.

II. RELIEF REQUESTED

2 Commission Staff respectfully requests that the Commission grant this motion for partial summary determination and decide, as a matter of law, that the line extension rule (1) requires carriers to extend service to occupied premises regardless of whether the dwelling was, at some point, part of a development; and (2) applies to CenturyLink throughout its service territories, regardless of how and where the federal high-cost support it receives is used.

III. STATEMENT OF FACTS

3 One and a half years ago, a resident of Vancouver, Washington, ordered telephone
service from CenturyLink.¹ The consumer, Mr. Saum, lives in a home that was constructed
as part of a subdivision called Anna Marie Lane.² The subdivision contains approximately
12 homes.³ When the technician arrived to install service, he discovered that CenturyLink
did not have facilities at the property.⁴

4 Mr. Saum identified a CenturyLink pedestal across the street from his home,
approximately 45 feet from his property line.⁵ The line extension rule, WAC 480-120-071,
provides for line extensions up to 1,000 feet at no charge to the consumer. CenturyLink,
however, declined to provide a line extension at no charge, and refused to provide service
unless Mr. Saum provided a conduit under the street between the pedestal and his home.⁶

5 Mr. Saum is a retired CenturyLink employee.⁷ CenturyLink maintains that it is not
obligated to provide a line extension to Mr. Saum at no charge because the line extension
rule excepts extension of service to “developments” from this requirement.⁸ In its prefiled
testimony, CenturyLink also suggests that the line extension rule does not apply to it in the

¹ See Paul, Exh. SP-2 at 3.

² Paul, Exh. SP-2 at 3.

³ *Id.*

⁴ Paul, Exh. SP-2 at 3.

⁵ Paul, Exh. SP-2 at 3; Exh. SP-6.

⁶ Paul, Exh. SP-2 at 13-14.

⁷ Paul, Exh. SP-2 at 5.

⁸ Paul, Exh. SP-2 at 13.

company's Vancouver service territory, where Mr. Saum is located, because CenturyLink does not use federal high-cost universal service support in this location.⁹

IV. STATEMENT OF ISSUES

6 Commission Staff's Motion for Partial Summary Determination raises two issues:

- 1) Whether the term "development," which is defined in the line extension rule at WAC 480-120-071(2), as "land which is divided or proposed to be divided for the purpose of disposition into four or more lots, parcels, or units," includes occupied homes;
- 2) Whether the line extension rule requires CenturyLink, a wire line Eligible Telecommunications Carrier ("ETC") receiving federal high-cost support, to provide line extensions throughout its service territory or only in those select census blocks where it receives federal high-cost support.

V. EVIDENCE RELIED UPON

7 Commission Staff relies on the prefiled testimony of the parties to date as well as the other documents on file in Docket UT-171082; and also on the documents on file in rulemaking dockets UT-073014 and UT-140680. Select documents from the rulemaking dockets are included in this motion as attachments to the Declaration of Elizabeth DeMarco.

VI. STANDARD FOR SUMMARY DETERMINATION

8 Under the Commission's rules a party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. WAC 480-07-380(2). Generally, a party must file any motion for summary determination at least thirty days before the next

⁹ See Grate, Exh. PEG-1T at 19:19 - 20:3.

applicable hearing session. WAC 480-07-380(2)(b). In considering a motion made under this subsection, the Commission considers the standards applicable to a motion made under Civil Rule (CR) 56 of the Washington superior court civil rules.

9 Under CR 56, summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment is designed to do away with unnecessary trials when there is no genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 158 (1975). “A material fact is one upon which the outcome of the litigation depends.” *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

10 Summary judgment is appropriate when the issue to be resolved is a question of law and material facts are not in dispute.¹⁰ Interpretation of an agency regulation is a question of law. *Cobra Roofing Service, Inc. v. Department of Labor and Industries*, 122 Wn. App. 402, 409 (2004) (“[w]e interpret agency regulations as if they were statutes . . . [and] review the . . . interpretation under an error of law standard”).

VII. ARGUMENT

11 In its testimony, CenturyLink contends that the line extension rule does not obligate CenturyLink to provide a 1000-foot allowance at no charge to Mr. Saum because (1) Mr. Saum lives in a development and his home falls under the “development exception” in the rule and (2) although CenturyLink is an ETC and receives federal high-cost support, it does not receive high-cost support for the service area in which Mr. Saum lives and, therefore, the

¹⁰ *E.g., Enterprise Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 551-52 (1999) (“[w]here, as here, the parties do not dispute the material facts, this Court will affirm an order on summary judgment if the moving party is entitled to judgment as a matter of law”); *Clam Shacks of America Inc. v. Skagit County*, 45 Wn. App. 346, 353 (1986) (“the record . . . presented no questions of material fact and posed only a legal question” and “[s]ummary judgment was therefore proper”).

line extension rule should not apply at that location. These are questions of law that can be appropriately resolved on summary determination. They should be resolved to require CenturyLink to extend service with the 1,000-foot allowance, and CenturyLink's interpretations of the rule should be rejected.

A. "Land" Is Not The Same As An Occupied Home.

12 CenturyLink could have installed facilities at Anna Marie Lane when it was being developed but did not do so. Although Mr. Saum lives in a residence that was constructed as part of the Anna Marie Lane development, the construction and development phase is over, and Mr. Saum is now in the position of any other line extension applicant.

13 The Commission's line extension rule requires each wire line ETC to provide an extension of service within its service territory up to one thousand feet at no charge to the applicant. WAC 480-120-071(3). There is an exception to this requirement for extensions of service to developments. WAC 480-120-071(2). "Development" is defined in the rule as "land which is divided or is proposed to be divided for the purpose of disposition into four or more lots, parcels, or units."

14 Under the plain language of the rule, the development exception applies to "land" and not to an occupied home. It is intuitively sensible to place facilities during construction, when land is being developed. Staff does not dispute that an exception to the line extension rule is reasonable for facilities placed during construction and intended to serve multiple lots. Indeed this is the exception that the line extension rule provides. Interpreting development to apply to "land," as stated in the rule, rather than to occupied homes, preserves this exception.

15 Interpreting the rule to exclude line extension allowances in perpetuity for every home that happened to be constructed as part of a development unfairly burdens the

consumer rather than the parties who are responsible for the situation—the developer and the telecommunications carrier. When a carrier has the opportunity to place facilities during development of a property but does not, the carrier should not be heard to complain later that extending service under the line extension rule is expensive and inefficient.

16 The definition of development was adopted in a rulemaking that overhauled the line extension rule and concluded in 2008.¹¹ From the final text of the rules it is clear that the new rule streamlined the line extension exception for developments. The legislative formatting shows that the prior rule contained an entire multi-part subsection devoted to “extensions to developments,” whereas the current rule contains only the one-sentence exception in WAC 480-120-071(2) (provided above) in addition to the definitions of “development” and “developer.”¹²

17 The rulemaking order contains no discussion of the change to the requirements for line extensions to developments. The comment matrix filed with the order similarly contains no reference to the change. Likely this is because there was no opposition to the change among the stakeholders that participated in the rulemaking. Given the dearth of discussion by the Commission, there simply is no information that would not be speculation on the intended meaning of “development” in the rulemaking.

18 CenturyLink raises the specter of the competitive marketplace to argue that it should not be obligated to extend service to Mr. Saum under the line extension rule.¹³ In the 2008 rulemaking order, however, the Commission specifically rejected a proposal for an exception based on the presence of another carrier’s facilities. A coalition of carriers

¹¹ *In Re Amending WAC 480-120-071 and WAC 480-120-103 Relating to Extension of Service and Application for Service*, UT-073014, General Order R-551 (Sept. 3, 2008) (2008 Rulemaking Order).

¹² 2008 Rulemaking Order, Appendix A, “Line Extension Rule Text – Final.”

¹³ *See* Grate, Exh. PEG-1T at 6:1-6 and at 23:1-13.

proposed adding a built-in waiver request to the rule that would explicitly authorize the Commission, when it evaluated the request, to consider the existence of an alternative service provider that is an ETC for the location where an extension of service is requested.

In its order, the Commission responded to the proposal as follows:

The Commission rejects the Industry Coalition's proposed new subsection (3)(d). The rule as drafted achieves a bright line standard for companies concerning the obligation to construct a line extension. Adding a waiver option would detract from this standard. A company may seek a waiver under WAC 480-120-015 whenever it thinks it appropriate and the Commission may consider any pertinent information, including the existence of an ETC alternative, without adding the suggested language.¹⁴

The Commission's decision on this issue in the rulemaking order indicates that the appropriate place for a discussion of competition and alternative service providers is within the scope of a petition for an exemption from the line extension rule filed under WAC 480-120-015. CenturyLink has not filed such a petition or otherwise requested an exemption.

B. CenturyLink Must Extend Service Under the Line Extension Rule Throughout Its Service Territory in Washington Even Though It Does Not Receive High-Cost Federal Funds In Every Service Area.

¹⁹ CenturyLink's response testimony reveals that CenturyLink wishes to restrict application of the line extension rule to only those census blocks for which it receives high-cost support for voice telephony.¹⁵ The Commission already declined to implement such a restriction, however, in the last rulemaking involving the line extension rule. The current rule continues to require ETCs receiving federal high-cost support to meet the requirements of the line extension rule throughout their service territories.

¹⁴ 2008 Rulemaking Order at ¶ 28.

¹⁵ Grate, Exh. PEG-1T at 17:1 - 20:3. Curiously, CenturyLink seems to be advocating for application of the line extension rule only to locations where it receives high-cost support, where it is less likely to be economical to serve.

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The line extension rule “applies to *local exchange companies receiving federal high-cost universal service support*.” WAC 480-120-071(1) (emphasis added). Under the rule, “[e]ach *wire line ETC* must, within seven business days of an applicant's initial request, provide the applicant with an application for extension of service.” WAC 480-120-071(3) (emphasis added). Further, a company “must allow for an extension of service *within its service territory* up to one thousand feet at no charge to the applicant.” WAC 480-120-071(4) (emphasis added). The language of the rule in these sections makes clear who is subject to the rule—wire line ETCs receiving federal high-cost universal service support. And it makes clear that the rule applies “within [a company’s] service territory.” This language does not restrict geographic application of the rule any more granularly than “service territory.”

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There is no dispute that Mr. Saum’s residence is within CenturyLink’s legacy service territory. There is also no dispute that CenturyLink is a wire line ETC receiving federal high-cost universal service support. CenturyLink advances a theory in its response testimony that federal law and policy determining the scope of federal universal service support should dictate the application of Washington’s line extension rule.¹⁶ The line extension rule does

¹⁶ See Grate, Exh. PEG-1T at 19:19 - 20:3; Exh. PEG-10. Note that, in the order that is the foundation for the notice that CenturyLink cites, the FCC states explicitly that its decision does not change state ETC designations or preempt state requirements:

We do not take the further steps suggested by some commenters of reinterpreting section 214(e)(1) to sunset all existing ETC designations and require states to re-designate ETCs so that their service areas include only high-cost funded areas, imposing rules on state ETC designations, adopting a federal process to redefine service areas, or preempting states. . . . Our decision to grant limited forbearance does not redefine price cap carriers’ service areas or revoke price cap carriers’ ETC designations in these areas, and we emphasize that it does not preempt price cap carriers’ obligation to continue to comply with any state requirements, including carrier of last resort obligations to the extent applicable.

In the Matter of Connect America Fund, WC Docket No. 10-90, 29 FCC Red. 15644, DA 14-192, Report and Order, ¶ 67 (rel. Dec. 18, 2014).

not derive from federal regulation, however; rather it implements the state statutory obligation to serve in RCW 80.36.090. Accordingly CenturyLink is subject to the line extension rule because it remains designated as an ETC in the state, and it is obligated to extend service under the rule to its entire service territory, including the service area and census block encompassing Mr. Saum’s residence.

22 In 2015, the Commission concluded a rulemaking that simplified, streamlined, and updated all of the Commission’s telecommunications rules.¹⁷ The line extension rule was included in this proceeding. Since the prior revision of the line extension rule, in 2008, the two largest incumbent carriers in the state had respectively received competitive classification of most services (Frontier, Docket UT-121994) and been granted an AFOR (CenturyLink AFOR, UT-130477) and, throughout the rule, the Commission removed references to “tariff.” The language in WAC 480-120-071(3) that now requires “[e]ach wire line ETC” to provide an application within seven business days was changed from “[e]ach company required to file tariffs.”¹⁸ The Commission added the language in subsection (1) specifying applicability of the rule to “local exchange companies receiving high-cost universal support.” These changes made the rule more competitively neutral and maintained its application to companies like Frontier and CenturyLink that, together, serve the majority of the state but, for the most part, no longer provide service under tariffs.

¹⁷ *In Re Amending, Adopting, and Repealing Rules in WAC 480-120, Telephone Companies, WAC 480-121, Registration and Competitive Classification of Telecommunications Companies, WAC 480-122, Washington Telephone Assistance Program, WAC 480-123 Universal Service, WAC 480-140, Commission General – Budgets, and WAC 480-143, Commission General – Transfers of Property Due to Competitive Changes within the Telecommunications Industry*, Docket UT-140680, General Order R-580 (March 30, 2015) (2015 Rulemaking Order).

Following is subsection (1), which was added to the rule in this rulemaking:

(1) This rule applies to local exchange companies receiving federal high-cost universal service support.

¹⁸ 2015 Rulemaking Order, Appendix B, “UT-140680 - WAC 480-120 Final Rules.”

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The Commission released draft rules May 20, 2014, which updated the rule to apply to ETCs rather than to providers of tariffed service.¹⁹ CenturyLink filed comments June 9, 2014, and proposed that the rule “be clarified so that it is applicable only in the specific geographic area where a company receives universal service support.”²⁰ This is the interpretation of the rule that CenturyLink advocates in the instant case. The final rules, however, do not contain any changes from the May 2014 draft rules that reflect this comment of CenturyLink’s. In fact, the final rules retain the requirement that a company allow an extension of service “within its service territory” of up to one thousand feet. Because the “within its service territory” language was not changed, and because the references to federal support and ETCs in the draft rule were not revised to incorporate CenturyLink’s proposal, there is no indication that the Commission intended the geographical application of the rule to change. Carriers subject to the line extension rule remain obligated to meet the rule’s requirements throughout their respective service territories.

VII. CONCLUSION

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For the foregoing reasons, Commission Staff respectfully requests that the Commission grant its motion for partial summary judgment and issue an order requiring CenturyLink to provide an allowance of 1,000 feet at no charge and to extend service to Mr. Saum.

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¹⁹ Attachment to the Declaration of Elizabeth DeMarco. Although the language in subsection (1) was adjusted slightly in the final rule, the focus on the provider of the service (and not the location of the service) is consistent. The initial draft of subsection (1) stated, “This rule only applies to wire line eligible telecommunications carriers (ETCs) that receive federal high-cost universal service support.” The final rule states, “(1) This rule applies to local exchange companies receiving federal high-cost universal service support.”

²⁰ Attachment to the Declaration of Elizabeth DeMarco.

Dated this 22nd day of June 2018.

Respectfully submitted,

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