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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 TCG SEATTLE, DIGITAL DIRECT OF)
SEATTLE, INC., LAKE TV CABLE,)
4 and WASHINGTON STATE CABLE) DOCKET NO. UT-941523
COMMUNICATIONS ASSOCIATION,)

5) VOLUME 1
Complainants,) PAGES 1 - 52

6)
vs.)

7)
GTE NORTHWEST INCORPORATED and)
8 SNOHOMISH COUNTY PUBLIC UTILITY)
DISTRICT NUMBER 1,)

9 Respondents.)
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12 A hearing in the above matter was held
13 at 9:40 a.m. on February 27, 1995, at 1300 Southwest
14 Evergreen Park Drive, Olympia, Washington before
15 Administrative Law Judge ALICE HAENLE.

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17 The parties were present as follows:

18 GTE NORTHWEST, INC., by RICHARD E.
19 POTTER, Attorney at Law, 1800 41st Street (5LE),
Everett, Washington 98201.

20 WASHINGTON UTILITIES AND TRANSPORTATION
21 COMMISSION STAFF, by JEFFREY GOLTZ, Assistant Attorney
General, 1400 South Evergreen Park Drive Southwest,
Olympia, Washington 98504.

22

23 TCG SEATTLE, WSCCA, LAKE TV CABLE, by
GREGORY J. KOPTA, Attorney at Law, 2600 Century Cable,
1501 Fourth Avenue, Seattle, Washington 98101-1688.

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25 Cheryl Macdonald, CSR
Court Reporter

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APPEARANCES (Cont.)

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SNOHOMISH COUNTY PUD, by ELIZABETH THOMAS,
Attorney at Law, 701 Fifth Avenue, Suite 5000,
3 Seattle, Washington 98104, and KRISTIN HALL, Attorney
at Law, 2320 California Street, Everett, Washington
4 98102.

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1 P R O C E E D I N G S

2 JUDGE HAENLE: The hearing will come to
3 order. The Commission has set for pre-hearing
4 conference at this time and place docket No.
5 UT-941523. That is the complaint of TCG Seattle,
6 Digital Direct of Seattle, Inc., Lake TV Cable and
7 Washington State Cable Communications Association
8 against GTE of the Northwest, Incorporated and the
9 Snohomish County Public Utility District No. 1.

10 The Commission entered its notice of
11 pre-hearing conference on February 2, setting the
12 pre-hearing conference for today which is February 27,
13 1995. The pre-hearing conference is being held before
14 Administrative Law Judge Alice L. Haenle of the Office
15 of Administrative Hearings.

16 I'd like to take appearances at this time,
17 please, beginning with the representative for the
18 complainants, Mr. Kopta.

19 MR. KOPTA: Yes, thank you, Your Honor.
20 Gregory J. Kopta, Davis Wright Tremaine, 2600 Century
21 Square, 1501 Fourth Avenue, Seattle, Washington,
22 98101-1688, appearing on behalf of all of the
23 complainants.

24 JUDGE HAENLE: For the responding parties,
25 Ms. Thomas.

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1 MS. POTTER: Thank you, Judge Haenle. My
2 name is Elizabeth Thomas with the firm of Preston
3 Gates and Ellis, 5000 Columbia Center, 701 Fifth
4 Avenue, Seattle, Washington 98104, appearing on behalf
5 of respondent Snohomish Public Utility District No. 1.

6 JUDGE HAENLE: Thank you, go ahead, please.

7 MS. HALL: Kristin K. Hall at Snohomish
8 County PUD, 2320 California Street, Everett,
9 Washington 98201. I'm appearing on behalf of
10 respondent Snohomish County PUD No. 1.

11 JUDGE HAENLE: And you are counsel for that
12 PUD?

13 MS. HALL: Yes.

14 JUDGE HAENLE: Mr. Potter.

15 MR. POTTER: Richard E. Potter, associate
16 general counsel, GTE Northwest, Incorporated,
17 1800 - 41st Street, Everett, Washington 98201,
18 appearing on behalf of respondent GTE Northwest.

19 JUDGE HAENLE: Mr. Goltz.

20 MR. GOLTZ: Jeffrey D. Goltz, assistant
21 attorney general representing the Commission staff.
22 1400 South Evergreen Park Drive Southwest, Olympia,
23 98504-0128.

24 JUDGE HAENLE: Thank you. Is there anyone
25 present in the hearing room who intends to file a

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1 petition or make a motion to intervene in this matter?

2 The record should reflect there was no
3 response. We have a number of things to cover this
4 morning. We discussed briefly just what those issues
5 would be before we went on the record. They include
6 two motions to dismiss the complaint. They include
7 the appropriate structure of hearings of whatever
8 portion of the complaint is left, if any, after the
9 motions to dismiss. We need to discuss discovery
10 probably and set a hearing schedule again with regard
11 to whatever is left after the motions to dismiss. You
12 also, Ms. Thomas, had an issue to raise regarding
13 Chairman Nelson. Do you want to do that now?.

14 MS. THOMAS: Yes, thank you, Your Honor. I
15 would request that the parties stipulate that none of
16 the parties will object to the participation of
17 Chairman Nelson in the case. I'm making the request
18 because my law partner Tom Allison is married to
19 Chairman Nelson. Mr. Allison will not participate in
20 any way in this matter. He will not be consulted, he
21 will not see any pleadings and he will have no
22 involvement whatsoever. So that the question of
23 whether the chairman should recuse herself does not
24 need to come up, we would request that the parties
25 stipulate they will not object to her participation in

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1 this matter.

2 JUDGE HAENLE: Thank you. Mr. Kopta.

3 MR. KOPTA: No objection. We will so
4 stipulate.

5 JUDGE HAENLE: Ms. Hall?

6 MS. HALL: Fine.

7 JUDGE HAENLE: Mr. Potter.

8 MR. POTTER: Yes.

9 JUDGE HAENLE: Mr. Goltz.

10 MR. GOLTZ: Yes.

11 MS. POTTER: Thank you all. Judge Haenle,
12 one thing, perhaps just to clarify that Mr. manifold
13 on behalf of public counsel has sent a letter to the
14 parties asking to be on the service list, and he has
15 indicated to me on the phone that he could not be here
16 today, and he would want me to give notice to the
17 parties and to you that public counsel does intend to
18 participate but takes no position on the pending
19 motions today.

20 JUDGE HAENLE: Thank you. I did mention
21 that before we went on the record. He phoned my
22 office this morning and gave the same message that he
23 does intend to participate but takes no position on
24 the motions this morning. So I appreciate your
25 reminding me of that. Thank you.

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1 MS. THOMAS: Your Honor, with respect to
2 the stipulation I suggest that I ask Mr. Manifold to
3 indicate by letter that he has no objection to
4 Chairman Nelson's participation.

5 JUDGE HAENLE: That's an excellent idea.
6 Just have him send that to the secretary of the
7 Commission as usual with copies to parties and a
8 courtesy copy to me, please.

9 MS. THOMAS: Very good. Thank you.

10 JUDGE HAENLE: Next are there any things we
11 need to deal with before we take the motions to
12 dismiss? Mr. Potter.

13 MR. POTTER: One question came to mind
14 after we went on the record when you mentioned Digital
15 Direct as one of the parties. I'm curious as to the
16 current status of Digital Direct since the Commission
17 authorized TCG to take them over by their assets or
18 whatever it was. Is Digital Direct still an active
19 company?

20 JUDGE HAENLE: Mr. Kopta.

21 MR. KOPTA: Digital Direct is actually not
22 still providing telecommunications services. We have
23 filed to, on behalf of Digital Direct, to withdraw
24 their tariff and price list and that was effective as
25 of the end of January. They were added on the

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1 complaint which was filed in November simply for the
2 issue of completeness since there was a transition
3 from DDS to TCG Seattle, and so they remain on the
4 complaint, but are not actively a party?

5 JUDGE HAENLE: Well, if they're no longer
6 providing telecommunications services, then are you
7 going to withdraw them as a complaining party.

8 MR. KOPTA: Yes.

9 JUDGE HAENLE: Does anyone have an
10 objection to their being withdrawn as a complaining
11 party?

12 MR. POTTER: No.

13 JUDGE HAENLE: Thank you. That's a good
14 idea, Mr. Potter, to get some of the details worked
15 out. Will that alter the complaint in any way other
16 than removing them as a party, Mr. Kopta?

17 MR. KOPTA: No, it will not.

18 JUDGE HAENLE: Anything else we need to
19 talk about before we deal with the motions to dismiss?

20 All right. This was filed as a complaint,
21 filed on November 22nd. Since that time there have
22 been a number of layers of pleadings including answers
23 and responses to various parties. There has been a
24 motion filed by GTE NW to dismiss itself -- or for
25 the Commission to dismiss GT NW from the complaint

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1 or as a respondent. There's been a similar motion
2 filed by the Snohomish County PUD to have itself
3 dismissed as a responding party. I know the
4 Commission staff filed a response and memorandum.
5 Plaintiffs filed a response. There are several levels
6 of pleadings. Before we began this morning I told you
7 that I had -- I indicated that the last pleading I had
8 received was Mr. Kopta's pleading of February 21
9 entitled Complainant's Response to Memorandum of
10 Commission Staff Regarding Motions to Dismiss. And I
11 asked if anyone had filed anything since then to be
12 sure that I had actually looked at all of the
13 pleadings.

14 MR. POTTER: GTE, it's dated February 21,
15 the response to staff also.

16 JUDGE HAENLE: Yes. I do have that one as
17 well, thank you. That is entitled Response of GTE
18 Northwest, Incorporated to Memorandum of Commission
19 Staff Regarding Motions to Dismiss. Thank you. I had
20 them stapled or I put in order both together. So
21 nothing since February 21 then.

22 Keeping that in mind I asked the parties
23 whether they wanted the opportunity to add anything to
24 their written pleadings understanding that I have read
25 the complaint, the answers and the additional

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1 pleadings. I indicated further that I had some
2 questions in reading through the pleadings and would
3 like the opportunity to ask those questions of counsel
4 about the pleadings. I think the response when we
5 discussed this before we went on the record was that
6 at this point counsel don't need the opportunity to
7 supplement the pleadings, although if my questions
8 raise anything that hasn't been directly addressed
9 that they would like the opportunity to address that.
10 Have I misstated anyone's position?

11 MR. KOPTA: (Shaking head).

12 JUDGE HAENLE: When I put these together I
13 put them together in chronological order and so my
14 questions will be just by the pleadings in
15 chronological order; there's no other reason for the
16 order in which I will take them. Ms. Thomas, in your
17 answer filed December 13 you request that Lake TV
18 Cable or you indicate that as an affirmative defense
19 that Lake TV Cable is estopped for raising claims
20 based on its license agreement. Why is that?.

21 MS. THOMAS: Because it has been accepting
22 benefits under that license agreement. It has been
23 benefitting from its bargain under that license
24 agreement and that should estop it from raising claims
25 that the agreement is unlawful.

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1 JUDGE HAENLE: Mr. Potter, in his pleading
2 entitled Rebuttal of GTE Northwest that was filed on
3 January 10, asserts that there is nothing that the
4 Commission could order GTE to do which would provide
5 complainants with the relief they seek. Mr. Kopta,
6 what is it complainant wants the Commission to order
7 GTE to do?

8 MR. KOPTA: What the complainants would
9 like the Commission to order GTE to do is as in its
10 status as a joint pole owner it is unclear to
11 complainants at this point the degree to which GTE
12 participates in the rates, terms and conditions of
13 jointly owned poles. Therefore, it's unclear at this
14 time whether GTE is taking an active or passive role
15 in setting those rates, terms and conditions. In
16 either event it's complainant's position that the
17 Commission's jurisdiction is over attachments to
18 jointly owned poles and that it can set reasonable
19 rates, terms and conditions to attachments to those
20 poles and that those would apply to both GTE and to
21 the PUD.

22 JUDGE HAENLE: In looking over the
23 memorandum of the Commission staff regarding motions
24 to dismiss that was filed on February 13, at page 5 it
25 suggests that the parties be allowed to present

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1 evidence through the hearing process or through
2 appropriate motions in order to complete the factual
3 record. I asked you before we went on the record, Mr.
4 Goltz, whether the Commission staff was making any
5 particular recommendation with regard to the structure
6 that any portions of the complaint remaining after
7 these motions are decided, what structure any hearings
8 should take. Do you want to repeat your response?

9 MR. GOLTZ: Well, I will try. It just
10 really follows up on the response Mr. Kopta just made.
11 It is somewhat ambiguous from the papers that are in
12 the file as to exactly the degree to which GTE
13 controls rates, terms and conditions for the
14 attachments, and I believe that the complainants have
15 passed the threshold test of whether they can state a
16 claim against GTE, but it may be that GTE through --
17 not through a filing of a motion to dismiss regarding
18 jurisdiction but, in effect, filing a motion for
19 summary judgment with appropriate affidavits, with
20 appropriate factual support, might be able to, in
21 effect, say we in fact do have no control over rates,
22 terms, conditions. That is entirely within the
23 province of Snohomish County PUD, and if they could
24 demonstrate that, that might be appropriate, an
25 appropriate issue for resolution by a motion as

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1 opposed to going through the entire hearing process
2 where we might have a number of other issues.

3 So the suggestion then is that if you are
4 to accept our position, which is the PUD is dismissed
5 but GTE remains as a respondent, then built into the
6 schedule may be a deadline for dispositive motions or
7 issue-limiting motions.

8 JUDGE HAENLE: In asking you that question
9 before we went on the record, I also asked whether the
10 parties had discussed generally among themselves what
11 structure this might take.

12 MR. GOLTZ: The answer to that is no.

13 JUDGE HAENLE: Well, I was going to suggest
14 with whatever is left of this that stipulated facts,
15 that kind of thing, would certainly be appropriate, it
16 seems to me. Thank you, Mr. Goltz. I think that's
17 all the questions I had. Does anyone need to address
18 any of the issues that were raised?.

19 MS. THOMAS: Your Honor, will you be asking
20 each of us to present oral argument or is this in
21 effect the oral argument?

22 JUDGE HAENLE: Well, I was trying to find
23 out earlier whether you intended to present oral
24 argument. If you want to you may have that
25 opportunity. Keep in mind that I have read the

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1 pleadings so you don't need to repeat them, but if you
2 want oral argument we will do that now.

3 MS. THOMAS: Thank you. I had
4 misunderstood the question, and the district would
5 like an opportunity just to provide a bit of
6 background and also some information about legislative
7 history in response to the most recent round of
8 pleadings.

9 JUDGE HAENLE: With response to?.

10 MS. THOMAS: The most recent round of
11 pleadings that were filed.

12 JUDGE HAENLE: All right. Well, I assume
13 that any oral argument would be, again, with the
14 entities that filed the motions to dismiss, so I don't
15 care which one of you goes first.

16 MR. POTTER: I will be happy to go first
17 and just summarize where we are. First of all, GTE
18 Northwest and the PUD have signed what we call a joint
19 pole agreement. It's dated September 1993. A copy is
20 attached to the complaint. That makes GTE and PUD the
21 joint owners of some of the poles that PUD uses. PUD
22 also has poles that it's the sole owner of and GTE has
23 poles that it's the sole owner of. As to the jointly
24 owned poles, the usable space is, generally speaking,
25 divided up into three parts. The lowest most usable

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1 space is allocated for GTE's use; the uppermost space
2 is allocated for the PUD's uses; and in between
3 there's the unallocated buffer, I think it's referred
4 to in the pleadings.

5 Under the joint pole agreement, over the
6 years, GTE and PUD have been signing separate
7 attachment license agreements with third parties most
8 notably cable television companies. An example of one
9 of the PUD agreements is attached to the complaint.
10 The cable TV companies have invariably been attaching
11 in GTE's allocated space. As to those separate
12 agreements, GTE sets the rate or negotiates the rates,
13 terms and conditions for its license agreements. The
14 PUD separately negotiates and sets the rates, terms
15 and conditions for its license agreement. The joint
16 pole agreement uses the phrase "sharing of revenues" I
17 think with regard to those, but the sharing has taken
18 the form over the years of the PUD and the GTE simply
19 charging their separate rates under their separate
20 contracts, doing their own billing and their own
21 collecting, so there's no money that changes hands
22 between GTE and the PUD with regard to those.

23 It does not seem to us on the face of the
24 pleadings that the complainants have any grievance at
25 the moment with GTE's rates, terms or conditions under

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1 those contracts. As to the unallocated buffer, the
2 joint pole agreement clearly provides that the PUD has
3 the exclusive control over third party attachments,
4 and it does provide that GTE would have a share of the
5 net revenues from any such agreements, so that would
6 be net of the PUD's administrative costs, but GTE's a
7 totally passive party with regard to any agreements
8 there, and it's our understanding from the pleadings
9 that the RFP issued by the PUD to which the
10 complainants object is for that unallocated buffer.
11 So it's GT's position that the complaint does not
12 allege any grievance with regard to a GTE license
13 agreement for attachments in its allocated space; that
14 the complaint alleges some grievances with the PUD's
15 RFP, but, since on the face of the joint pole
16 agreement and the RFP GTE has absolutely no control
17 over that activity by the PUD, that there's really no
18 complaint pleaded against GTE, and we do not believe
19 there's any support for the argument that simply
20 because there's a joint pole agreement that that would
21 somehow create jurisdiction over the PUD that would
22 not otherwise exist, and I will defer to the PUD to
23 argue the jurisdictional question.

24 JUDGE HAENLE: Did I understand you to say
25 that it's GT NW's position that it has no control over

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1 the unallocated buffer area?

2 MR. POTTER: That's correct. No control
3 over arrangements for third party attachments. We
4 have some right under the agreement if we need to use
5 some of that space that we can do so if it's
6 available, but as to agreements with third parties to
7 attach, we have no control over that, and of course if
8 we go beyond the motions to dismiss today, we would
9 certainly be willing to put that in affidavit or
10 testimony form.

11 JUDGE HAENLE: And I assume it's negotiated
12 between GT NW and the PUD what amount of revenue --
13 maybe I should say what percentage of revenue GT NW
14 receives.

15 MR. POTTER: Well, the joint pole agreement
16 has a general allocation of 55 percent/45 percent for
17 various cost sharings purposes, and that's the
18 allocation that would be used for any revenues from
19 unallocated buffer.

20 JUDGE HAENLE: And that was negotiated
21 between GT NW and the PUD?

22 MR. POTTER: Right.

23 JUDGE HAENLE: Ms. Thomas.

24 MS. THOMAS: Thank you, Your Honor.

25 Appreciate the opportunity to provide some background

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1 information about the district's activity because
2 public utility districts rarely appear in this forum.
3 The public utility district, like the utilities that
4 are regulated by the Commission, is a utility
5 dedicated to serving its customers, but it's owned by
6 the customers' local government rather than by
7 shareholders. It is governed by its own set of three
8 commissioners who set rates and establish policies.
9 The district commissioners, like the UTC
10 commissioners, adopt policies, including the pole
11 attachment policy, that they believe are designed to
12 promote the interest of ratepayers in reliable utility
13 service, and in having utilities' costs of services
14 allocated fairly.

15 Of course, to provide the electric system,
16 the PUD has to have poles. Poles are expensive and
17 sometimes require permits from the Department of
18 Ecology, from the Army Corps of Engineers. They also
19 have to satisfy stringent safety standards established
20 by the Department of Labor and Industries. These
21 standards go to the amount of space between
22 interconnections, they go to the amount of weight the
23 pole can carry. Physically a pole cannot have an
24 infinite number of attachments. In fact it can have
25 very few without damaging the pole.

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1 Until recently, the district typically
2 found that there were only two other parties
3 interested in attaching to any particular pole. One
4 would be the local phone company and the other would
5 be the local cable company, but with the development
6 in the communications industry interest has been
7 heightened enormously. The district has found that
8 there are new entrants in the existing market who
9 would like to connect. The district has found that
10 existing entrants are seeking attachments for new
11 purposes; rather than just wanting to attach for local
12 distribution to their end use customers some of the
13 third parties would like to attach for, effectively,
14 transmission purposes to carry signals through to
15 another area.

16 The district simply doesn't have enough
17 space on its poles to accommodate everyone who seems
18 to be interested. The district also doesn't have very
19 good information about who is interested in which
20 connections. It finds that from time to time
21 companies, including TCG, just attach without getting
22 any permission at all, although there has been a
23 standard procedure in place for 20 years or so whereby
24 a third party attacher, like a cable TV company, would
25 enter a general license agreement with the district,

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1 like the one that was attached to the complaint, and
2 then get a permit on a pole by pole basis for making
3 the attachment.

4 The district commissioners realize that
5 they didn't have enough space for everyone who was
6 interested and they felt it was beyond the scope of
7 their mission to develop a pole system that was
8 capable of carrying signals for all third parties who
9 were interested regardless of the need for those poles
10 for electric power purposes, so they developed the RFP
11 to create a rational mechanism for allocating the
12 limited space on the existing poles. Part of the
13 purpose of the RFP was to provide the district with
14 better information about who wanted to attach to which
15 poles and how many people were out there.

16 The RFP allows only one attachment per
17 pole, but that's quite different from awarding
18 exclusive routes or, I'm sorry, exclusive territories.
19 Although there's only one attachment per pole, the
20 great number of poles means that there are multiple
21 routes available through most areas. There are a
22 couple of sensitive areas where the environmental
23 factor make it very difficult to erect poles and in
24 those areas there may be very limited access and
25 limited number of poles, but for the most part there

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1 will be multiple routes through the same service
2 areas.

3 In that way the district commissioners
4 tried to assure that all potential users of its poles
5 would have an equal opportunity for access to those
6 poles even in the areas where access is limited.
7 Thus, the RFP was designed to protect the valuable
8 ratepayer asset, the poles, but in a fashion that made
9 them available on an equitable basis to all third
10 parties not just to the third parties who happen to be
11 there first and even put their attachments on without
12 permission. The district would have no role in
13 determining the rate, terms and conditions of service
14 by these third parties to their own customers. In
15 fact, the district's RFP specifies the third parties
16 who want to attach to its poles have to comply with
17 WUTC regulations.

18 Briefly, to summarize our argument, because
19 I know you have read the brief, the complaint asserts
20 two wrongful acts by the district as we read it. One
21 is that the district is regulating telecommunications
22 service in an unauthorized manner; the other is that
23 the rates and conditions for pole attachments are
24 unreasonable. From a substantive standpoint we feel
25 that both assertions are incorrect, but they don't

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1 need to be reached on a substantive basis because the
2 cable companies have chosen the wrong forum to
3 challenge the district's policies. As Commission
4 staff apparently concurred in its brief, the complaint
5 can't be brought under the usual complaint statute RCW
6 80.04.110 because the district is not a public service
7 company. Nor is there jurisdiction under 80.04.015,
8 although that statute does confer jurisdiction on the
9 Commission to determine the scope of its own
10 jurisdiction. As staff points out, that kind of a
11 determination can only be made on the Commission's own
12 motion.

13 Moreover, it requires a belief that someone
14 is conducting businesses subject to regulation under
15 title 80. The district is not conducting business
16 that's subject to regulation under title 80. It's not
17 attempting to regulate the rates, terms and conditions
18 of complainant's service. Rather, it's trying to
19 allocate a scarce resource in a rational fashion, that
20 is, the poles.

21 The Commission does not have jurisdiction
22 over the complainant's complaints on rates and
23 conditions of pole attachment service because the
24 district is not a utility under chapter 80.54. The
25 last time the district made a rate increase in its

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1 pole attachment policy the cable companies took the
2 district to court. That resulted in the Broadview
3 Television decision that's cited in the briefs. They
4 lost in that case and apparently are trying the
5 Commission now hoping that this forum would be a forum
6 where they would find better success. Unfortunately,
7 for them, though, the Commission clearly doesn't have
8 jurisdiction. Even if the district were an agent of
9 General Telephone, the Commission could not regulate
10 the district directly. It could only regulate General
11 Telephone, and the district is not an agent because
12 agency requires an element of control that's lacking
13 here.

14 Although the joint agreement between the
15 district and General Telephone governs some of the
16 district's actions, that doesn't confer control on
17 General Telephone itself over the district.
18 Moreover, the legislative history makes it clear that
19 chapter 80.54 does not confer jurisdiction on the
20 Commission to regulate the district's rates and
21 conditions of service for attachments. As was pointed
22 out, I think, in Mr. Kopta's brief, the statute was
23 amended soon after the Broadview Television decision,
24 but a look at the legislative history of that
25 amendment process in 1979 demonstrates that there was

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1 no intent to allow the UTC to regulate terms and
2 conditions established by the district for attachments
3 to its own poles. And I've made photocopies of some
4 pages from the legislative history for the parties'
5 reference, and for your reference I've marked the
6 pertinent portions of the legislative history. Just
7 to summarize, there was an amendment offered by
8 Senator North, the first area that's marked, that
9 would have given the Commission jurisdiction over,
10 "nonregulated utilities" and those nonregulated
11 utilities were defined to include a PUD. That
12 proposal was voted down and districts were expressly
13 not brought within the Commission's regulatory ambit.
14 On the second page of the handout, there is a comment
15 by Senator Bottiger making clear that the intent was
16 to treat public utility district differently from
17 private utilities, investor-owned utilities.

18 And then finally on the third page of the
19 handout, in the House of Representatives,
20 Representative McCormick noted that the intent was not
21 to authorize the UTC to require a utility to consent
22 to or to make an attachment. And the sense that the
23 district has drawn from the complaint in this action
24 is that in effect the complainants are asking that the
25 UTC order the district to allow third parties, all

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1 third parties, to attach to poles at their own --
2 based on the desire of the third parties.

3 In sum, the relief sought by the cable
4 companies in their complaint is not available from the
5 Utility and Transportation Commission, at least not
6 against Public Utility District No. 1 of Snohomish
7 County. The cable companies have chosen the wrong
8 forum and also lack support for their substantive
9 claims. They have other forums available in which to
10 pursue the claims if they want to. We appreciate the
11 opportunity to provide this additional argument
12 relating to the motion.

13 JUDGE HAENLE: I assume you're speaking
14 both on behalf of yourself and Ms. Hall.

15 MS. THOMAS: Yes, Your Honor. I'm sorry.
16 Ms. Hall wanted to --

17 MS. HALL: Before we finish with our
18 portion I would like to add just a couple of remarks
19 but go ahead and ask Ms. Thomas any questions you had.

20 JUDGE HAENLE: You indicated that because
21 there are so many poles that it's possible to have
22 multiple parallel routes in most areas. Is that what
23 you were saying?.

24 MS. THOMAS: Yes, Your Honor.

25 JUDGE HAENLE: And you do that by skipping

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1 poles or how would you do it?

2 MS. THOMAS: I'll defer to Ms. Hall to
3 explain because she understands it better.

4 MS. HALL: I think the idea is that there
5 are -- the transmission routes that we would foresee
6 awarding would not be limited to the district's
7 transmission poles. They could cover the district's
8 entire service area which is pretty densely populated
9 with distribution and transmission poles, though given
10 the number of poles throughout the district's service
11 area, we would envision that there would be quite
12 a number of both north-south and east-west routes that
13 would be usable for telecommunications transmissions
14 route -- transmission routes throughout the service
15 area.

16 JUDGE HAENLE: Thank you. Go ahead with
17 your statement.

18 MS. HALL: I just wanted to clarify one
19 remark made by Ms. Thomas. She mentioned in her
20 remarks that the RFP allows only one attachment per
21 pole, and just to clarify that a little bit I want to
22 draw your attention to page 1 of the district's RFP, a
23 statement in the third paragraph, the last sentence
24 just a couple of key words. We say, "The district
25 wishes to limit telecommunications transmission

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1 attachments to one per pole in order to promote
2 efficiency," et cetera, so the couple of points I
3 would want to make there are reiterating the point
4 that this RFP was issued to gather information and
5 help us develop a policy that makes sense, and while
6 we stated in the RFP that we wish it would be most
7 desirable to limit transmission attachments to one per
8 pole, that's not necessarily an absolute rule or a
9 policy at this point. The policy would be developed
10 depending on the results of our information gathering,
11 but at this point it seems desirable to limit
12 telecommunications transmission attachments to one per
13 pole in the majority of circumstances unless there are
14 special circumstances.

15 Secondly, to just make the point that the
16 attachment we're talking about limiting to one per
17 pole are transmission attachments, and at this point
18 we're not talking about garden variety cable TV
19 distribution. We're addressing transmission uses
20 which we're loosely defining for these purposes as
21 two-way broad band services delivered to end users
22 outside of the district's service area, so that is
23 what we're focusing on in the RFP.

24 JUDGE HAENLE: Is there a closing date for
25 responses to this RFP?

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1 MS. HALL: Yes. I don't have the
2 information handy, I'm sorry, but I believe it was the
3 end of October or November.

4 MR. KOPTA: November.

5 FROM THE AUDIENCE: November 28.

6 JUDGE HAENLE: Most likely the end of
7 October 1994.

8 MS. HALL: End of November. November 28.

9 JUDGE HAENLE: Thank you. Does that
10 complete your statement?

11 MS. HALL: (Nodding head).

12 JUDGE HAENLE: Mr. Kopta, do you want Mr.
13 Goltz to go before you or --

14 MR. KOPTA: Well, why don't we just have
15 everybody.

16 MR. GOLTZ: I will be happy to go. I think
17 that's the appropriate order in any event. First of
18 all, I just want to say that Ms. Thomas made much of
19 what -- if we were to go a regular oral argument what
20 I would have said. However, I think it should be made
21 very clear, as we try to do in our memorandum, that if
22 the allegations against the PUD in their first claim
23 -- complainant's first claim for relief are true, that
24 would be a very, very serious issue that staff would
25 be interested in resolving and the Commission should

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1 pay very close attention to. And it is with actually
2 some regret that we can't say that that issue ought to
3 be litigated before this Commission now, because if it
4 were and those allegations were true, you likely would
5 not find Commission staff on the same side as the PUD
6 in this proceeding as we actually are in the threshold
7 jurisdictional issue.

8 But what is before the Commission right now
9 is motions to dismiss on jurisdictional grounds and so
10 I don't think it is necessary to get into such factual
11 matters as how many poles are there, do you skip
12 around, are there multiple routes available? It's a
13 relatively straightforward, I believe, analysis of
14 statutory language. The PUD is not a utility under
15 80.54.010. GTE is. 80.54.030 gives the Commission
16 jurisdiction on a complaint by either a utility or a
17 licensee, and that would include the complainants
18 as a licensee, against the utility, which GTE is, and
19 if the complaint properly alleges that the rates
20 -- and I'm reading basically now from 80.54.030 --
21 that rates, terms or conditions are unreasonable and
22 those rates, terms or conditions are either demanded,
23 exacted, charged or collected by GTE, then the
24 Commission has jurisdiction over GTE.

25 I gather what Mr. Potter is suggesting is,

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1 well, we have an agreement, and therefore GTE,
2 although it is a utility and although the attachments
3 are subject to rates, terms or conditions, GTE neither
4 demands, exacts, charges or collects any of those
5 because that's what the PUD does pursuant to their
6 agreement. Well, I think it's fair to say, if we were
7 to hypothesize the situation where the utility, GTE,
8 or Puget Power or U S WEST, or any utility, were to
9 enter into an agreement with a third entity, a
10 nonutility, to in effect be the collection agent, to
11 actually perform the administrative functions of
12 demanding an exacting charge or collecting the
13 attachment rates, they could not, by that agreement,
14 avoid the jurisdiction of the Commission. Ultimately,
15 whether the poles are solely owned or jointly owned,
16 that function of demanding exacting charge and
17 collecting could not be in effect delegated to some
18 nonutility with the result that the Commission
19 lacks jurisdiction.

20 So I believe it would be a better reading
21 of 80.54.030 that GTE, despite the joint ownership
22 agreement, is still engaging in those functions and
23 even pursuant to the agreement is engaging in those
24 functions. Therefore jurisdiction remains with the
25 Commission for the complaint to proceed with GTE.

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1 JUDGE HAENLE: The complaint, Mr. Goltz,
2 also -- the complaint requests a declaratory order
3 from the Commission that the PUD and GT NW are
4 engaging in telecommunications services by these pole
5 attachments. No one addressed specifically in their
6 oral argument, anyway, whether this -- requests for
7 declaratory order is proper in that form. Does the
8 Commission staff take any position on that?

9 MR. GOLTZ: Well, I think that relates to
10 the first claim for relief, and so I would say that
11 would not be before the Commission. I would like it
12 to be before the Commission but I don't think it is.

13 JUDGE HAENLE: Mr. Kopta.

14 MR. KOPTA: Thank you. I think I would
15 like to pick up a little bit on what Mr. Goltz was
16 just saying about GTE and the hypothetical situation
17 in which you have a utility that enters into a joint
18 pole agreement with a nonutility for purposes of
19 attachments. And I think the real concern that we
20 have and the reason that we have advocated the
21 interpretation of 80.54 that we have is that a utility
22 could very easily use that kind of agreement to hide
23 behind another entity to establish its own ability to
24 attach to a pole and then to say, well, I'm sorry, we
25 don't have any control over what this other entity

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1 does and thereby allow others, particularly
2 competitors, to be at a disadvantaged position when it
3 comes to attachment to poles, and, contrary to the
4 PUD's assertions, we are not asking the Commission to
5 order that they allow us to attach to poles. That's
6 not at all what we're asking for. What we're asking
7 for is that attachment policies by the PUD not take
8 into consideration what telecommunications service a
9 particular person is providing in attaching to the
10 pole.

11 There are certain things that the PUD
12 certainly is interested in, the weight on the pole,
13 the safety, those sorts of issues. What the PUD most
14 emphatically is not interested in is what sorts of
15 telecommunications services are being offered by those
16 who attach to district and GTE jointly owned poles,
17 and I think that's the thrust of our complaint is that
18 in attempting to allocate that scarce resource they
19 are saying that it's going to depend on the type of
20 telecommunications service that you offer as to what
21 the rates, terms and conditions of the attachments are
22 going to be. GTE gets a share of ownership in the
23 pole, cable companies may attach under their existing
24 agreement, but they may not provide telecommunications
25 services over those attachments and all others need to

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1 go through an RFP process. It is unclear at this
2 point, based on the face of the RFP itself, as to
3 exactly what rates, terms and conditions are going to
4 be a part of that attachment, but certainly from the
5 face of it there are exclusive elements, whether it's
6 a particular region, whether it's a particular set of
7 poles, but it's all based on the fact that you are
8 offering telecommunications services, and we're not
9 saying that that is putting the PUD and/or GTE into
10 the business of being a telecommunications company.
11 Rather that they are doing the Commission's job in
12 deciding who may and may not provide
13 telecommunications services in Snohomish County, and
14 we certainly agree with the Commission staff that that
15 is something that the Commission itself should be very
16 interested in.

17 One of the public policies that this
18 Commission has been trying to foster recently,
19 certainly with the registration of TCG Seattle and MFS
20 and other competitive local exchange carriers, is
21 competition. And what the PUD and GTE are doing here
22 is throwing a road block up to competition, and that's
23 certainly within the purview of the Commission under
24 the existing statutes to examine and to declare
25 through a declaratory order that the PUD is in effect

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1 regulating the provision of telecommunications
2 services in Snohomish County and that that is within
3 the exclusive jurisdiction of the Commission to do,
4 not the PUD, which is to, under its statutory grant,
5 is to provide electricity and some water services, not
6 to decide who may offer what telecommunications
7 services in Snohomish County and under what
8 circumstances.

9 I have just looked at this legislative
10 history that counsel for the PUD has passed out so I
11 have not had a chance to examine it. It certainly
12 supports their position that they are not a utility
13 within the terms of that statute, but that has not
14 been what we have been advocating. Rather, we
15 believe, as we've discussed in our briefs, that the
16 statute provides for jurisdiction by the Commission
17 over attachments to jointly owned poles or to solely
18 owned poles, but the key is to attachments, and that
19 there are attachments to these poles within the
20 definitions of the statute and that the Commission may
21 set fair, just and reasonable, sufficient rates, terms
22 and conditions for those attachments.

23 Now, the fact that those attachments happen
24 to be also on a pole that's jointly owned by the PUD
25 and by GTE doesn't mean that suddenly it's hands off.

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1 Again, going back to what Mr. Goltz was saying, the
2 concern is to make sure that if a utility receives any
3 benefit from a jointly owned pole or an attachment to
4 a jointly owned pole then that's what gives the
5 Commission jurisdiction over the attachment. And here
6 GTE, at least according to joint pole agreement,
7 receives a proportional part of the rate charged by
8 the PUD for attachment to jointly owned poles in the
9 unallocated buffer, and GTE receives the benefit of
10 ownership whereas others have to take what attachments
11 they can at what rates, terms and conditions the PUD
12 decides they want to impose based on the sort of
13 services that are being offered. So I think within
14 the terms of the statute the Commission has the
15 jurisdiction over the attachments to those jointly
16 owned poles.

17 MR. GOLTZ: May I add one thing?

18 JUDGE HAENLE: If he's done. I'm not sure
19 if he is or not. Mr. Kopta.

20 MR. KOPTA: I believe that addresses most
21 of the concerns that we have except for the allegation
22 that TCG Seattle simply attaches without permission to
23 PUD poles and there's certainly nothing in the record
24 that that is the case. That is not something that the
25 PUD has counterclaimed or alleged and to my knowledge

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1 that is not something that -- an activity in which TCG
2 Seattle is engaging.

3 JUDGE HAENLE: Mr. Goltz.

4 MR. GOLTZ: Just that if we had received
5 the legislative history in advance of today, we could
6 have provided an answer to this question, but it
7 seems to me that on the -- in order to fully
8 understand the argument based on the legislative
9 history one would have to have a copy of the bill,
10 because if you look at -- I'm confused in the first
11 page of the handout, the amendment by Senator North
12 that was rejected, it refers to page 1, line 25, where
13 this would go in, and I can't figure out where that is
14 in the chapter. I believe what that does is it would
15 change the definition of utility in 80.54.010 and add
16 a new sub 4, meaning regulated utility, but I think
17 one needs to look at the bill that was amending in
18 order to fully grasp that.

19 And second, the last, third page, it limits
20 it to requiring it -- giving UTC the power to require
21 a utility to accept attachments, which is a different
22 issue I believe than whether or not rates or charges
23 are fair, just and reasonable. So I would urge,
24 Your Honor, for relying on the legislative history to
25 look at the underlying bill.

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1 JUDGE HAENLE: Any brief response?

2 MR. GOLTZ: Maybe Ms. Thomas has that. I
3 don't know.

4 MS. THOMAS: I'm afraid I don't. I
5 certainly agree with your interpretation of the third
6 page, and my sense of what the first page meant is
7 similar to yours, and I apologize for not having the
8 bill to which it refers.

9 JUDGE HAENLE: Anything else in this
10 regard, Mr. Potter?

11 MR. POTTER: No.

12 JUDGE HAENLE: Ms. Thomas.

13 MS. THOMAS: Three brief points. State law
14 requires that the district establish rates that are
15 nondiscriminatory, fair and reasonable. The three
16 commissioners of the district believe they've done
17 that and certainly we can -- that can be tested in a
18 court. For 20 years or more the district has been
19 handling pole attachments and trying to set rates that
20 in its best judgment are nondiscriminatory, fair and
21 reasonable and best serve the interests of its
22 ratepayers.

23 The second point is that the poles of the
24 public utility district and those that are jointly
25 owned are not the only way that telecommunications

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1 services can be provided in Snohomish County. The
2 district is not attempting to regulate the provision
3 of telecommunications service. It's attempting only
4 to regulate the use of its ratepayer asset, namely the
5 poles.

6 And finally, a close reading of the RFP
7 demonstrates that it is not a policy statement.
8 Rather, it is an explanation of the problem that the
9 district faces with just the multitude of activity in
10 the telecommunications market and the multitude of
11 players who are looking to use the poles and it's a
12 request for information that the district needs in
13 order to address its problem with pole attachments in
14 a rational fashion. Thank you.

15 JUDGE HAENLE: Anything else regarding the
16 motions to dismiss?

17 MS. HALL: I would just also like to
18 respond to one of the statements made by Mr. Kopta
19 that apparently it is the belief of the complainant
20 that the interest of the PUD is in actually regulating
21 the types of service, telecommunications services,
22 provided within their service area, and I would just
23 like to clarify that again by going back to the RFP,
24 the section where we request that information about
25 types of services that are going to be offered by

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1 respondent is introduced by saying that the district
2 is interested in using an information network to
3 enhance its utility organization by providing the
4 capability for interactive two-way connections for
5 delivering utility services such as meter reading and
6 energy management, et cetera, et cetera. Asks about
7 what type of network capacity and features respondents
8 are willing to provide to further that goal. The next
9 section reiterates the district's requests that
10 respondent provide information in as much detail as
11 possible in order to enable the district to select any
12 network services offered by the respondent to the
13 district as part of the respondents proposal. Again,
14 just making the point that we don't have any interest
15 in regulating the types of services as such. What
16 we're interested in is addressing our own internal
17 needs and encouraging respondent's to offer us some
18 capacity to handle our own internal needs in exchange
19 for fees.

20 So, again, in terms of information
21 gathering we're trying to figure out what they might
22 have that we might be able to use, and that's the
23 purpose for which we've requested this information,
24 but we are not anticipating using that information as
25 part of our decision about who gets routes.

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1 JUDGE HAENLE: Anyone else?

2 MR. KOPTA: I would like to make a brief
3 response to the last point. I believe the RFP speaks
4 for itself, and whether or not it's a policy statement
5 or simply a need to gather information, that certainly
6 has not been the experience of the complainants, and
7 as far as not basing decisions on provision of
8 telecommunications, that certainly does not explain
9 why the PUD is interpreting the pole attachment
10 agreement between it and the cable television
11 companies to exclude the provision of
12 telecommunications services. That's a decision based
13 solely on what is being offered over the facility not
14 over -- on the facilities themselves.

15 As far as the fact that the poles are not
16 the only way that telecommunications can be provided,
17 that is literally true, but the alternative is of
18 course erecting poles for each new company that wants
19 to provide telecommunications or digging a trench,
20 both of which are extremely expensive, and, as a
21 practical matter, what happens is that those who are
22 allowed to attach to the pole have a significant
23 competitive advantage over those who, for whatever
24 reason, are not allowed to and that is the key
25 problem, at least as we see it.

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1 JUDGE HAENLE: Anything else?

2 All right. I think this is a good time to
3 take a recess. What I want to go do is take a look at
4 the pleadings, look through my notes. I think I've
5 got a pretty good idea of what the issues are going to
6 be in looking through the pleadings before the
7 pre-hearing conference. I am going to try to put
8 together a ruling on the motion, give it to you
9 orally, plan on following it up in writing within a
10 day or two, assuming I can do that to be sure that the
11 parties, if any that do not agree with that ruling
12 would have the chance to ask the Commission for an
13 interlocutory review if you would intend to do that.
14 So, let's recess at this time, be be back at 10
15 minutes to, please.

16 (Recess.)

17 JUDGE HAENLE: Let's be back on the record.
18 I looked at the complaint which contains two prayers
19 for relief, the first being the request for
20 declaratory order that I indicated earlier and the
21 second prayer requesting the Commission prohibit a
22 restriction, unlawful use, as to which the facilities'
23 attachment to a jointly owned pole may be put and also
24 establish fair, just and reasonable rates for
25 attachment to utility poles jointly owned by the PUD

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1 and by GT NW. I don't feel that a declaratory order
2 is proper in this context. RCW 80.04.015 contains a
3 specific procedure for determining whether a person or
4 corporation is conducting business subject to
5 Commission regulation, and it seems to me that that
6 would include taking any actions to regulate or affect
7 the provision of telecommunications services in
8 Snohomish County. That special proceeding must be
9 instituted by the Commission and the Commission may
10 indeed want to institute such a proceeding with regard
11 to these allegations, but the issue is not properly
12 addressed in this request for a declaratory order.

13 The motions that the PUD and GT NW filed,
14 each filed a motion to dismiss themselves as
15 respondents in this docket, the PUD arguing
16 essentially that it is not a utility subject to the
17 Commission's jurisdiction nor does it intend to
18 regulate telecommunications services, and GT NW
19 arguing that the complaint fails to state a claim
20 against GT NW on which relief could be based. The
21 complainant's first general claim alleges that the PUD
22 is proposing to regulate telecommunications services
23 in a manner that is not authorized by the Commission
24 and that is in fact within the Commission's exclusive
25 jurisdiction and the second claim alleges that the

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1 rates and conditions for space on the jointly owned
2 poles are unjust, unfair and unreasonable in violation
3 of RCW 80.54.020.

4 After reading the pleadings and listening
5 to your oral argument, I feel that the PUD should be
6 dismissed from this matter because the Commission lacks
7 jurisdiction over the PUD. But I do feel that the
8 Commission has jurisdiction to regulate GT NW under
9 RCW 80.54, and to determine whether violations are
10 occurring or have occurred. I think that the claim
11 may properly be brought under RCW 80.54 against GT NW
12 as a regulated utility, and as described by the staff
13 in its response to the motions to dismiss, the claim
14 does raise issues of fact that should be resolved
15 through an adjudicative proceeding, but I don't feel
16 that that can be brought under Commission jurisdiction
17 against the PUD.

18 So I'm going to find that the Commission
19 lacks jurisdiction over the PUD and grant the motion
20 to dismiss the PUD as a respondent, but I'm going to
21 deny the motion to dismiss GT NW because I do feel
22 that the Commission has jurisdiction to regulate GT NW
23 under RCW 80.54. As I indicated earlier, I will
24 follow this up as as soon as possible, as my schedule
25 allows, with a written order. It's my understanding

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1 that orders that affect the status of parties are
2 subject to immediate request to the Commission for an
3 interlocutory review. It is then discretionary with
4 the Commission whether they grant the interlocutory
5 review or not.

6 In the meantime, I think we should press on
7 with establishing a schedule or establishing a
8 framework for this case as it is. Then if the
9 Commission does grant an interlocutory review and
10 change the parties in some other manner, I guess we'll
11 just deal with that when we get to it. Yes, Mr.
12 Potter.

13 MR. POTTER: In the order of the ruling
14 that you're going to put out, are you going to specify
15 what the issues of fact are then that we need to
16 address here? Because I'm still puzzled about what
17 order the Commission could make to GTE that GTE could
18 possibly implement. The complainants are obviously
19 after an order that requires the PUD to do something.
20 You've just ruled, I think, that the Commission cannot
21 directly order the PUD so it sounds like if the
22 complainant were successful in this case the
23 Commission would order GTE to order the PUD to do or
24 not do something.

25 JUDGE HAENLE: I'm not going to in the

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1 order ruling on the motions specify what the issues of
2 fact are. What I want to do now in the pre-hearing
3 conference is to work on setting up what the issues
4 are and how we ought to address those issues, so that
5 won't be a part of the order on the motions, but
6 establishing and narrowing issues to the extent that
7 that can be done is definitely a part of the
8 pre-hearing conference. We will do that next.

9 MR. POTTER: I will wait.

10 JUDGE HAENLE: What I propose that we do is
11 we go off the record for a discussion regarding
12 setting the issues, regarding whether any of this can
13 be done by agreed fact, things like that, what kind
14 of a structure this hearing ought to take and setting
15 a schedule for that structure, and then I propose that
16 we come back on the record after that and repeat any
17 of the pieces that need to be repeated, give you a
18 chance, if there are arguments on anything, to repeat
19 those arguments, but I think it's better done first
20 off the record and then with a chance to repeat what's
21 happened off the record on the record. So let's
22 recess at this time. We'll need to figure out how
23 long we need to take so we can reconvene as soon as
24 we're done with this part.

25 (Recess.)

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1 JUDGE HAENLE: Let's be back on the record.
2 During the time we were off the record we discussed
3 scheduling. We discussed issues. We discussed
4 discovery. What I am going to do is attempt to
5 summarize the results of what we discussed kind of by
6 issue. If there's something that we discussed while
7 we were off the record that you feel is necessary to
8 put on the record, I will stop and give you a chance
9 to do that. I do intend to issue a pre-hearing
10 conference order as a result of this pre-hearing
11 conference. In order to try to get it as
12 expeditiously as possible I'm going to put my written
13 ruling on the two motions also in that pre-hearing
14 conference order. The pre-hearing conference order
15 rule says that if you don't object to a portion of the
16 pre-hearing conference order within 10 days then those
17 are the rules we go under for the case. Remember that
18 in order to request interlocutory review of the ruling
19 on the motion to dismiss you would need to do -- I
20 believe the deadline for that is also 10 days but it's
21 under a totally different rule, so be sure if you're
22 going to write into the Commission you make it clear
23 what it is you want to do.

24 We came to the conclusion, I think, that
25 the discussion of focusing of issues and preparing or

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1 determining what facts could be agreed facts would be
2 better done -- probably wouldn't be accomplished
3 today, that it will be better done between now and the
4 prefiling dates by the parties getting together and
5 discussing issues and conducting discovery, so what we
6 did was include in our schedule for the case a due
7 date for a statement of agreed facts and a statement
8 of the issues distilled down to the extent you can
9 focus them and distill them down. And we have set by
10 agreement of the party the following schedule for this
11 case: That statement of agreed facts and distilled
12 issues is due April 5. We anticipated that discovery
13 would be conducted up through the prefiling days and
14 probably would continue to some extent after the
15 prefiling date; that the parties agreed that we would
16 probably need only one hearing session with the
17 materials all prefiled before that session, and so we
18 set a due date for complainant's prefiled materials --
19 that's testimony and exhibits -- April 19. That the
20 respondent GT NW, the staff, and public counsel would
21 prefile their materials, testimony and exhibits May
22 17, and that the complainants would prefile their
23 rebuttal, testimony and exhibits June 7.

24 We also decided that it might be helpful in
25 terms of determining to what extent settlement could

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1 be accomplished on at least portions of this case to
2 set a settlement conference by telephone conference
3 call during that time. I believe we agreed on May 1
4 at 2:00 in the afternoon for that telephone settlement
5 conference. I will give you the details by a separate
6 letter and the practical information about setting
7 that up, whether you call me or I call you or what.

8 Then we have set for hearings for July 6
9 and 7. I will reserve the hearing room 250 for those
10 days. There's a possibility we may be bumped if
11 there's a larger case but we will assume that it will
12 be 250 at this point anyway. Briefs will be due
13 August 9. I anticipate or I have a target anyway of
14 getting my initial order out within 30 days and
15 generally the Commission has requested 60 days after
16 that before the Commission order would be due. We
17 noted that that would take us outside the 10-month
18 limit that's given to the Commission to act on
19 complaints, and it's my understanding that Mr. Kopta
20 on behalf of the complaining party has agreed to waive
21 the suspension date to November 9. That is, so long
22 as a Commission order is issued on or before November
23 9 that it would be timely. Is that right, Mr. Kopta?

24 MR. KOPTA: That's correct.

25 JUDGE HAENLE: Mr. Goltz also raised the

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1 concern that complaints regarding pole attachments
2 must be resolved within 360 days under a federal
3 statute 47 USC section 224, and we seem to be within
4 that time, although barely. If it turns out that the
5 Commission needs additional time past what we have
6 anticipated because of the heavy workload the
7 Commission anticipates this summer and fall, then I
8 would expect the Commission to ask all of you if it's
9 all right to extend that by whatever amount. I'm not
10 going to set it up assuming that right now they would
11 contact you separately on that.

12 Now, is there anything about the scheduling
13 or the prefiling dates settlement conference, the
14 waiver, anything that we have -- that one of you needs
15 to put on the record?

16 In addition to that, then, I have invoked
17 the discovery rule. That's 480-09-480, I think, the
18 rule regarding providing materials on discovery during
19 case.

20 I indicated to you that the Commission will
21 need an original plus 14 copies of all prefiled
22 testimony and exhibits, and the Commission staff, as I
23 I understand, has requested that prefiled testimony
24 and exhibits, as well as responses to data requests,
25 be also provided in electronic version. It's my

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1 understanding that the parties are not sure whether a
2 protective order would be necessary but that just to
3 be sure that discovery is not held up that they have
4 requested that a protective order issue. I reminded
5 the parties that the Commission would like as little
6 material as possible provided under a confidentiality
7 stamp so that the Commission can use it to the fullest
8 extent possible.

9 I would issue a protective order in the
10 form that we usually use which is one of the Electric
11 Lightwave cases. It's been around for a number of
12 years anyway. Does anyone have an objection to that
13 process?

14 I will ask that the Commission issue that
15 as soon as possible noting that they are gone this
16 week. I will have to get that out as soon as
17 possible.

18 I reminded you that responses to data
19 requests should be sent directly to Mr. Goltz. They
20 should not be sent through -- either to me or through
21 the Commission's secretary. If that did happen they
22 would be distributed and that's not appropriate. So
23 send your responses to data requests directly to Mr.
24 Goltz, but all other case-related materials,
25 correspondence and everything needs to be funneled

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1 through the secretary of the Commission. In my
2 pre-hearing conference order I will remind you to use
3 the Commission's post office box to be sure that
4 material gets here, post office box number as the
5 address. I told you also that I would appreciate a
6 courtesy copy of any prefiled materials and I would
7 put my address in the pre-hearing conference order as
8 well.

9 And I told you to contact each other
10 regarding who wants copies of what data requests.
11 That is, the Commission's general rule is only the
12 requester would get a copy of a response to data
13 request. If you want something other than that you
14 need to let the party providing know.

15 Now, have I left anything out? Mr. Kopta?

16 MR. KOPTA: No, Your Honor.

17 JUDGE HAENLE: Have I left anything out,
18 Mr. Potter?

19 MR. POTTER: I don't believe so.

20 JUDGE HAENLE: Mr. Goltz?

21 MR. GOLTZ: No.

22 JUDGE HAENLE: I will issue that
23 pre-hearing conference order as quickly as I can. I
24 will also ask that the Commission issue a protective
25 order. I would remind you that the order on

00052

1 pre-hearing conference needs to -- your comment, if
2 I've missed anything, needs to be provided within 10
3 days to the Commission but that your request for
4 interlocutory review -- that your request, if any,
5 that the Commission review my order on the motions, my
6 ruling on the motions, needs to be addressed on the
7 Commission's discretionary ability to review
8 interlocutory orders and that's a separate section of
9 the rules, that is, the order on pre-hearing
10 conference comment period. So be sure that you send
11 anything in to the Commission, identify it very
12 clearly as to what it is.

13 All right. I will recess the hearing then
14 and will issue the pre-hearing conference order.
15 Thank you all.

16 (Hearing adjourned at 12:00 p.m.)

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