

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of:
Douglas and Jessica Rupp; Kathie Dunn and
Chris Hall; Michelle Lechuga; Verlin Jacobs;
Anthony Williams; Christine and Samuel
Inman; Robert Jacobs; and Sam Haverkemp and
Chris Portrey,

Petitioners,

vs.

Verizon Communications, Inc.,

Respondent.

) DOCKET NO. UT-050778

) **MOTION TO DISMISS PETITION FOR
ORDER TO EXTEND SERVICE AREA
OF RESPONDENT**

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I. INTRODUCTION

Pursuant to WAC 480-07-380 Verizon Northwest Inc. (“Verizon”) hereby moves to dismiss the Petition for Order to Extend Service Area of Respondent (“Petition”). As explained herein, the Washington Utilities & Transportation Commission (“Commission” or “WUTC”) lacks the jurisdiction to force Verizon to extend service outside of its tariffed service exchange boundaries. Forcing Verizon to incur the considerable expense of the extension requested in this case, without compensation, would also violate the Fifth and Fourteenth Amendments to the United States Constitution as an unconstitutional taking.

II. STATEMENT OF FACTS

This Petition involves a remote portion of Snohomish County, more than 3½ miles from the end of Verizon’s exchange boundary in Index, Washington. It is not clear from the Petition that all petitioners actually live in the area, or merely own properties, or that they comprise a community. Petitioner Rupp’s residence is built across a river accessible only by a cable car. The area between the Petitioners’ properties and the end of Verizon’s serving territory is

primarily National Forest land that will never be developed. Requiring Verizon to provide service to the Petitioners would be extremely costly, by Verizon's ballpark estimate exceeding \$200,000. Verizon would never recover the costs of providing service to the Petitioners out of direct revenues from said Petitioners and would also have to incur considerable costs in order to maintain service to such remote customers.

III. LEGAL ARGUMENT

A. The Petition Fails to State a Claim Upon Which Relief Can Be Granted.

Because the Petitioners can prove "no set of facts in support of [their] claim which would entitle [them] to relief, "the Petition should be dismissed. *Berge v. Gorton*, 88 Wn.2d 156, 759, 567 P.2d 187 (1977). WAC 480-07-380(1)(c) and CR(b)(6) allow for such dismissal. Under *Prescott Tel. & Tel. Co. v. UTC*, 30 Wn. App. 413, 634 P.2d 897 (1981), the Petitioners would have to prove that Verizon has violated the law or that its service area was unreasonable before the Commissioner would entertain a request to alter exchange area boundaries. The Petition does not set forth any facts that show Verizon has violated any legal duty or that its serving area is unreasonable. Indeed, none of the statutes cited by the Petition could be "violated" because they either state matters of policy, or address duties that apply only within a company's dedicated service area per its filed exchange maps. Therefore, the Petition should be dismissed for failure to state a claim.

B. The Commission Does Not Have Jurisdiction to Forcibly Alter Verizon's Exchange Area Boundaries.

The Commission lacks jurisdiction to redraw Verizon's exchange area over Verizon's objection to include new locations not included within Verizon's dedicated serving area and the case should be dismissed pursuant to 12(h)(3). Simply put, the Commission lacks jurisdiction to force Verizon to extend its facilities beyond the area that Verizon has designated as its dedicated serving area. "In dealing with public utilities, regulation of use within the dedicated use is as far

as the police power may be extended and . . . when the regulation exceeds this, it is always void for unreasonableness” *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 680, 137 P. 1119, 50 L.R.A.N.S. 652 (1913).¹ In *California Water & Telephone Co. v. Public Utilities Commission*, 51 Cal. 2d 478, 334 P.2d 887 (1959) the California Supreme Court annulled an order of the California Public Utilities Commission that directed a water utility to extend its mains to a new proposed residential division, on the basis that the statutory power to regulate a utility’s activities does not include the power to force the utility to undertake a new activity, such as providing service in an area the utility had not dedicated itself to serve.

In *Northern Pacific Railroad Co. v. Railroad Commission*, 58 Wash. 360, 108 P. 938 (1910), the court reversed a lower court’s decision that upheld an order of the WUTC’s predecessor requiring a railroad to build a spur for the benefit of a private business (a sawmill). The court rejected the Commission’s claim that it had police power to regulate railroads and therefore could require them to extend their line. Similarly, here the WUTC has no power to require Verizon to extend facilities beyond the area encompassed by its exchange boundaries.

A company is not bound to extend its service outside or beyond the limits in good faith established by it. *Southern Bell Tel. & Tel. Co. v. Town of Calhoun*, 287 F. 381 (1923). The only duty assumed by a public utility is to render service to meet the wants of the community or territory that it undertook to serve. 64 Am. Jur. 2d *Public Utilities* § 36 (2001).

None of the statutes cited by the Petitioner empower the Commission to redraw unilaterally Verizon’s service boundaries. RCW 80.36.230 and 80.36.240 have been interpreted to mean that the Commission prescribes exchange area boundaries when it accepts, according to long-held practice, the tariff maps filed by telecommunication companies that define their

¹ “A corporation becomes a public service corporation, subject to regulation by the department of public service, only when, and to the extent that, its business is dedicated or devoted to public use.” *Inland Empire Rural Electrification, Inc. v. Department of Pub. Serv.*, 199 Wash. 527, 537, 92 P.2d 258 (1939).

selected service territory. A 1956 Attorney General Opinion (AGO_1955-57_No_223) explained the significance of these two statutes:

The foregoing statutes [RCW 80.36.230, .240] were enacted at the 1941 session of our state legislature. The act in question gave recognition to and directly authorized what the commission and its predecessors had been doing for years. As an integral part of its telephone tariff activities both before and after 1941 the commission has, in effect, prescribed exchange area or territorial boundaries through its requirement that each telephone company have on file with the commission a map setting forth the boundaries of the area or areas in which such company is offering telephone service under its filed tariffs, rules and regulations. This requirement was last set forth by an order in Cause No. FH-7778, effective February 1, 1944. The commission may be said to have utilized its tariff functions as the means of making RCW 80.36.230 effective.

Clearly these statutes obligated companies to define their service territories which became “prescribed” when defined by properly filed tariffs.

The only two cases to address RCW 80.36.230 do not support extending jurisdiction to the Commission to force serving difficult and uneconomical areas. In *Prescott Tel. & Tel. Co. v. UTC*, 30 Wn. App. 413, 634 P.2d 897 (1981) the court said the WUTC had no authority to redraw the telephone exchange maps filed by Pacific Northwest Telephone Company (PNB) at the request of another telephone company. The second case, *ELI v. WUTC*, 123 Wn.2d 530, 869 P.2d 1045 (1994), simply held that RCW 80.36.230 does not give the Commission the power to grant monopolies in filed exchange areas.

C. Neither Congress Nor the WUTC Can Order an Unconstitutional Taking.

The Petitioner alleges 47 U.S.C. § 214 a basis for this Commission to require Verizon to extend service to the Petitioners. This fails for several reasons. First, the petition utterly fails to establish that the Petitioners constitute an “unserved community.” Twelve owners of property in a remote forest do not create a community, particularly if several of the properties contain only vacation places.

Second, while Verizon has federal eligible telecommunications carrier (ETC) status in Washington, it does not provide any services that are supported by federal universal support

mechanisms, which is a stated predicate in section 214 for the designation petitioners seek. This condition is not met in Verizon's case because the company receives no federal universal service support at all in Washington. Therefore, 47 U.S.C. § 214(e)(3) simply does not come into play.

Finally, and most important, this statute does not authorize an unconstitutional taking of Verizon's property. Since there is no mechanism for recovery of the significant cost that would be incurred to provide the service, forcing Verizon to build facilities and maintain service in this area would be an unconstitutional uncompensated taking.² WASH. CONST. art. I, § 3, U.S. CONST. amend. V, XIV.

The Fifth Amendment (as applied to the states by the Fourteenth Amendment) mandates that Verizon –like any regulated utility – be permitted an opportunity to recover its costs plus a reasonable return. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310, 109 S. Ct. 609, 102 L.Ed.2d 646 (1989). Requiring Verizon to expend hundreds of thousands of dollars to provide service without any just compensation would cause a clear violation of the Takings Clauses of the State and Federal Constitutions. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310, 109 S. Ct. 609, 102 L.Ed.2d 646 (1989); *Michigan Bell Tele. Co. v. Engler*, 257 F.3d 587 (6th Cir. 2001); *POWER v. WUTC*, 104 Wn.2d 798, 711 P.2d 319 (1985).

Furthermore, forcing Verizon to build out facilities for these private individuals also violates the Fifth Amendment's requirement that the taking of Verizon's private property be for a "public use." A taking for purely private use is unconstitutional even if just compensation is paid. *Armendariz v. Lenman*, 75 F.3d 1311, 1320 (9th Cir. 1996).

D. The Commissioner has no Personal Jurisdiction Over Verizon Communications, Inc.

Pursuant to CR 12(b)(2), the Commission lacks jurisdiction over the named respondent, Verizon Communications, Inc., so the Petition must be dismissed. That corporation is created

² WAC 480-120-071 is inapplicable to areas not covered by a company's tariffs.

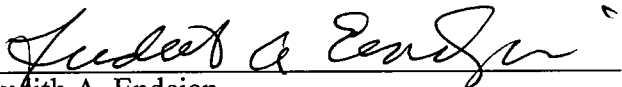
and existing under Delaware law, located at 1095 Avenue of the Americas, New York, N.Y., 10036. It provides no services in Washington and is not a regulated company subject to the Commission's jurisdiction, because it is not a "public service company" under RCW 80.04.110.

IV. CONCLUSION

For the foregoing reasons, the Petition should be dismissed.

DATED this 13th day of June, 2005.

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