BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of VERIZON NORTHWEST, INC. For waiver of WAC 480-120-071(2)(a).	Docket No. UT-011439 OPENING BRIEF OF QWEST CORPORATION

COMES NOW QWEST CORPORATION (hereinafter "Qwest") and submits its opening brief in the above case.

INTRODUCTION

This case began when Verizon filed its petition October 23, 2001, for a waiver of the requirement in WAC 480-120-071 to extend wireline facilities to applicants in its Bridgeport exchange and charge the rates prescribed in WAC 480-120-071(3)(a). The applicants were in two general locations, three residences on Hayes Road in Douglas County and five residences in an area near the Columbia River described as the Timm Ranch in Okanogan County.[1] The Court of Appeals invalidated WAC 480-120-540, to which reference exists in WAC 480-120-071(4) as the means by which an extending LEC may recover a portion of its cost.[2]

The Commission issued a Notice of Prehearing Conference. Shortly after the Commission issued its notice of prehearing conference, Staff moved to join Qwest as a party

[1] Amended Petition, pp. 2, 3. The Timm Ranch locations are generally to the south of the southeastern boundary of Qwest's Omak Exchange, and the closest of the locations to that boundary is some five miles distant. (Ex. 700G; Ex. 61T, p. 3)

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

for the purpose of determining whether Qwest's adjoining Omak exchange boundary should be altered using the power in RCW 80.36.230. Staff stated it might recommend such action to include the locations of the Verizon service applicants who reside on the Timm Ranch in Qwest's Omak exchange.

In support of its request for relief Staff's motion stated that Qwest had a common boundary with Verizon near the Timm Ranch, that Qwest had facilities that were closer to the Timm Ranch than Verizon's facilities and Qwest's cost of extension to the Timm Ranch would likely be less than Verizon's cost.[3] The purpose of such a change in Qwest's boundary ostensibly was either under WAC 480-120-071 or by adjudication under RCW 80.36.090 to compel Qwest to extend wireline service to those occupants.[4] Staff's motion did not say on what grounds Qwest's exchange boundary should be altered in this case. Staff did not file such a motion to join any other company.

Qwest opposed the Staff's motion on several grounds. The Commission granted Staff's motion in the Third Supplemental Order issued May 31, 2002, on the basis that making Qwest a party was necessary under CR 19 to allow Qwest to protect its interest. In granting Staff's motion, the Commission noted in the Third Supplemental Order at ¶28 that it was not clear whether or how the RCW 80.36.230 power should be used in this case. The Commission ordered Qwest to file evidence on Qwest's cost to extend facilities to serve the occupants of the Timm Ranch.

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[2] *Washington Independent Telephone Association v. Washington Utilities and Transportation Commission*, 110 Wn. App. 147, 39 P. 3d 342 (Div. II 2002), *rev. granted* 147 Wn. 2d 1002, 53 P. 3d 1007 (2002).
[3] Staff's Motion to Join Qwest as a Party Respondent, at p. 2.
[4] (Id.)

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

The Notice of Prehearing Conference which was issued January 10, 2002, more than four months before Qwest was made a party, indicated only that the issues were as stated in Verizon's Petition for Waiver. The notice stated that the Commission "may consider" whether to exercise its power to prescribe exchange boundaries under RCW 80.36.230 but it did not state what issues would be involved. Verizon's petition did not seek to alter Qwest's boundary.

At page 42 of the transcript of the prehearing conference held June 17, 2002 Qwest asked that the Commission issue a notice setting out the issues as to which Qwest would have a burden in the case, based on a description at pp. 34-41 of the same transcript showing that no proper notice had been issued and that Qwest was unaware of the issues it would be required to address. The Commission never issued a definite and detailed statement pursuant to RCW 34.05.434(3) in response to this request.

Staff's testimony Ex. 134T stated that "under some circumstances" Qwest should be considered as a required provider of service to occupants of the Timm Ranch.[5] Staff's direct testimony did not say what those circumstances were, nor did Staff in that testimony actually advocate that Qwest's boundary be altered in this case or that Qwest be ordered or adjudicated to extend facilities to serve those occupants. Staff stated that one of the Timm Ranch occupants, Ike Nelson, believed that his request for service might result in a trade of exchange territories between Verizon and Qwest so that Mr. Nelson would be served by Qwest.[6] No such trade of territories occurred. (Hearing Tr. p. 134)

[5] Ex. 134T, p. 8, l. 16
[6] (Id.)

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

On August 14, 2002 RCC Minnesota, Inc., (RCC) a wireless provider of telecommunications, was designated at its own request as an Eligible Telecommunications Carrier (ETC) pursuant to Section 214(e) of the Telecommunications Act of 1996 ("Act"), for the Bridgeport exchange.[7] Verizon is also such an ETC for that exchange.[8] Qwest moved that RCC be joined as a party to determine whether Qwest could have its exchange boundary altered over its objection in this case, in light of the existence of two ETCs which had volunteered to serve the area. The Commission granted the motion in the Fifth Supplemental Order.

Qwest's evidence stated that it would be improper for the Commission to alter Qwest's exchange boundary in this case, and that Qwest objected to such alteration. Qwest's evidence also stated that the cost to Qwest to extend service to the occupants of the Timm Ranch would be only slightly less than the cost Verizon estimated. This cost estimate was not directly comparable to Verizon's estimate because Qwest would use copper rather than fiber. If Qwest were to use fiber, as Verizon estimated, its cost would exceed Verizon's cost.[9] Qwest's evidence showed that Qwest's boundary was integral to its engineering of its network, that Qwest was not an ETC for the Bridgeport exchange, that there are two ETCs for that exchange including Verizon, and that there was no evidence that either or both of these carriers were unwilling or unable to serve the area of the Timm Ranch.[10]

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[7] Docket No. UT-023033, Order Granting Petition for Designation as an Eligible Telecommunications Carrier, Aug. 14, 2002
[8] Dockets Nos. UT-970333 et al., Order Designating Eligible Telecommunications Carriers, Dec. 23, 1997.
[9] Ex. 61T, pp. 5, 6.
[10] Ex. 50T, pp. 11, 12

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

Qwest's evidence showed that Staff had never stated what grounds it might later use to recommend altering Qwest's exchange boundary and neither Staff nor the Commission had stated what standards would be advocated or used to alter Qwest's exchange boundary under RCW 80.36.230.[11] Qwest showed that no complaint had been filed under RCW 80.04.110 against Qwest containing allegations of fact tending to show that the Omak exchange boundary was unreasonable.[12]

Staff's rebuttal evidence did not state that Qwest's exchange boundary should be altered to include the occupants of the Timm Ranch. Staff stated that pending receipt of RCC's evidence, Staff would withhold its "ultimate response" but it might recommend that Qwest's exchange boundary be altered.[13] The reason for such a potential recommendation was Staff's claim that Qwest's cost to extend its facilities from their closest point of approach to the Timm Ranch occupants, was equal to Verizon's cost to extend its facilities to the same point (excluding "reinforcement" costs for Verizon) and that for "minimal" additional cost for a "cross connection facility" Qwest would benefit more existing and future customers than Verizon for spending the same amount of money on the extension.[14]

Qwest responded to this new evidence and new theory with Ex. 69T in which Qwest refuted Staff's claim that the extension it would construct (if ordered) could benefit Qwest's existing customers for "minimal additional cost." RCC submitted testimony that it could, with its existing network, provide acceptable basic stationary wireless service to two of the

[11] (Id. at p. 25)
[12] (Id.)
[13] Ex. 137T, pp. 8-9
[14] Id. at p. 9

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

five residential locations on the Timm Ranch, including the Nelson residence.[15] All of the Timm Ranch residents have Verizon wireless telephone service, but they must drive to suitable reception areas to use this service.[16] External antennas can amplify the signal received by a stationary phone cell unit to allow a wireless service to be used in a similar manner to wireline service, but RCC did not place such devices at any of the locations on the Timm Ranch except the Ike Nelson home, where it performed satisfactorily. (Hearing Tr. pp. 308-310) RCC also did not test connecting the phone cell unit placed at the Ike Nelson home by wire with any of the other residences on the Timm Ranch and it did not test the improvement of the signal which would be received at the residences on the Timm Ranch through use of a repeater. (Hearing Tr. p. 306) The phone cell device costs approximately $1,200.[17]

Staff's testimony after the RCC testimony still did not contain any recommendation that Qwest's boundary be altered in this case.[18] Staff indicated that no resident of the Timm Ranch had asked RCC to provide service and that the government should not select a provider for such residents.[19]

Qwest responded to RCC by stating that RCC made a commitment to the Commission when it sought and obtained ETC status, a commitment of serving throughout its service area.[20] Qwest stated that according to the FCC, an ETC's obligation is to extend its network

[15] Ex. 95T, 91T, p. 9.
[16] Ex. 171D, p. 23
[17] Ex. 91T, p. 11. A repeater is a device which receives, amplifies and retransmits the cellular signal in order to improve reception at points which are remote from the cell site. (Hearing Tr. pp. 305, 306)
[18] Ex. 139T
[19] Id. at p. 23
[20] Ex. 51T, p. 7

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

to serve new customers upon reasonable request.[21] Qwest also stated that the mechanism for recovery by wireline LECs of line extension costs under WAC 480-120-071 was legally in question due to the Court of Appeals' decision which invalidated WAC 480-120-540.[22] Qwest also testified that Staff has imposed onerous unwritten accounting requirements on the process of recovering line extension costs through increased terminating access charges under WAC 480-120-071.[23] Qwest witness Jensen testified that these requirements have had the effect that Qwest has so far not filed to recover any extension costs although it has built extensions which would qualify for cost recovery under the rule.[24]

Hearings were held January 22 through 24, 2003. During the hearing, Verizon's witness Kay Ruosch admitted that CenturyTel has facilities running from its Nespelem Exchange (which is east of Qwest's Omak exchange) to a customer located to the east of the Timm Ranch, approximately three to five miles from the intersection of the Timm Road and the Columbia River Road. (Hearing Tr. p. 179) Mr. Nelson had identified the customer using these facilities as the Faith Frontier Ministries in his deposition.[25] Thus, CenturyTel's closest facilities to the Nelson home were closer to that location than Qwest's closest facilities which were nine miles away. (Ex. 40T, p. 4). Ms. Ruosch stated that it was an oversight that Verizon had not approached CenturyTel about extending to serve the Timm Ranch. (Hearing Tr. p. 181)

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[21] Ex. 81T, p. 4.
[22] (Id. at pp. 2, 3)
[23] Ex. 51T at pp. 4-5
[24] (Id.)
[25] Ex. 171D, pp. 9-10, see also Ex. 539, web site of Faith Frontier Ministries showing address on Omak Lake Road and telephone number.

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

Staff witness Shirley testified that it was possible that CenturyTel was a similarly situated wireline LEC to Qwest *vis a vis* the redrawing of exchange boundaries as a means to provide service to the residents of the Timm Ranch. (Hearing Tr. p. 598) Staff admitted that it had not sought to make CenturyTel a party to the case in the same manner as it did for Qwest solely because Verizon had approached Qwest, not CenturyTel, about extending to serve the Timm Ranch.[26] Staff stated its "ultimate recommendation" at the hearing that the Verizon petition for waiver should be denied, but that if the Commission determined not to place the burden on Verizon to serve the Timm Ranch then something should be changed to "have the Timm Ranch served." (Hearing Tr. p. 682) The specifics of what should be changed under this situation were not provided by Staff in its evidence. Based on this testimony Qwest moved to vacate the Third and Fifth Supplemental Orders. (Hearing Tr. p. 683) The Commission took the motion under advisement. (Id. at p. 684)

STATEMENT OF ISSUES

1. Should the Commission vacate the Third Supplemental Order and dismiss Qwest from the proceeding?

2. Does the Commission have jurisdiction over the subject matter of altering Qwest's Omak exchange boundary in this case?

3. Has the Commission provided Qwest with statutory notice and the opportunity for a fair hearing on the subject of altering Qwest's Omak exchange boundary in this case?

4. Is there substantial evidence to support any finding which would result in an order to alter Qwest's exchange boundary in this case?

[26] Ex. 523

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

5. If Staff's proposal in its testimony during the hearing were interpreted as a proposal that the Commission alter Qwest's exchange boundary, with the objective to require Qwest to extend facilities and offer service in what is now Verizon's exchange, would such action be in excess of the Commission's legal authority?

6. If Staff's proposal in its testimony during the hearing were interpreted as a proposal that Qwest's exchange boundary be altered in order to require Qwest to serve the Timm Ranch, would such action be a violation of Qwest's right to the equal protection of the law?

7. If Staff's proposal during its testimony at the hearing were interpreted as a proposal that Qwest's exchange boundary be altered in order to require Qwest to serve the Timm Ranch, would such action be irrational and arbitrary and capricious?

SUMMARY OF ARGUMENT

The Commission should grant Qwest's motion to vacate the Third Supplemental Order and dismiss Qwest from the proceeding. Qwest opposed Staff's motion to join Qwest as a party on the basis that the Commission could not logically consider whether to alter Qwest's exchange boundary on the apparent basis of the Staff' motion until it had decided Verizon's request for a waiver.[27] Staff's response indicated that the Commission could alter Qwest's boundary even if it denied Verizon's waiver request concerning the Timm Ranch. On the stand during the hearing, Staff repudiated this position, thereby acknowledging that the motion to join Qwest was premature when brought and should not have been granted.

[27] Qwest's Answer to Motion for Joinder and Alternative Objection to Procedural Schedule, at pp. 8, 9.

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

The Commission lacks subject matter jurisdiction over the alteration of Qwest's exchange area boundary. The Commission has not invoked its jurisdiction over that subject matter by filing a complaint and alleging facts tending to show that Qwest's existing exchange boundary is unreasonable.

Under RCW 34.05.434(2)(h), Qwest is entitled to a notice of hearing which contains "a short plain statement of the matters asserted by the agency." If such a statement is not available for the initial notice, a more definite and detailed statement must be furnished later, upon request. RCW 34.05.434(3). Qwest asked for such a statement. The Commission has failed to provide Qwest statutory notice and the opportunity for a fair hearing on the issue of altering Qwest's exchange boundary and adjudicating Qwest's obligation to extend facilities to the occupants of the Timm Ranch. There are no standards in RCW 80.36.230 to guide the exercise of the power to prescribe exchange boundaries. The denial of an opportunity for a fair hearing in this case if the Commission were to enter an order altering Qwest's exchange boundary is quite clear. Any action taken by the Commission on the basis of an unfair hearing in a case where a fair hearing is required is void. *I.C.C. v. Illinois & Nashville R. Co.*, 227 U.S. 88, 91, 57 L.Ed. 431, 33 S. Ct. 185 (1913), *cited with approval in Goldberg v. Kelly*, 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970)

Staff's unclear proposal in its testimony at the hearing, if it were interpreted as a proposal to alter Qwest's boundary is unsupported by substantial evidence because Staff never addressed the existence of two ETCs which had volunteered to serve the area and explained why those ETCs should not be looked to for service, rather than Qwest. None of

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

the various, contradictory and equivocal statements in Staff's testimony about changing Qwest's boundary is supported by substantial evidence.

Staff's apparent proposal is beyond the Commission's legal authority. Under the police power the Commission cannot lawfully compel a utility to extend service into an area in which it has not voluntarily held itself out to the public to serve. Qwest has not held itself out to serve the residents of the Timm Ranch.

Staff's apparent proposal unfairly singles out Qwest among all providers of intrastate service including two carriers who have voluntarily, and for compensation, undertaken to serve the occupants of the Timm Ranch as ETCs under the Act. Also the Commission did not join as a party CenturyTel, which as a neighboring LEC to Verizon with facilities located closer to the applicants as to which Verizon sought a waiver of the line extension rule, is similarly situated to Qwest. This denies Qwest the equal protection of the law and discriminates against Qwest.

Staff's apparent proposal is irrational and arbitrary and capricious. The evidence shows that RCC can provide stationary service to two of the five locations on the Timm Ranch, and did not test whether the phone cell device with its signal amplification would produce acceptable stationary service if connected by cable to the other locations. Staff did not explain why the Commission should "consider" Qwest but should not "consider" RCC Minnesota to provide service, assuming some provider other than Verizon is to be required to serve. There is no legal or factual basis on which the Staff's apparent proposal could be granted. The Court of Appeals invalidated WAC 480-120-540 on the basis that in that rule the Commission had unlawfully made rates without filing a complaint and providing a hearing

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

as to the reasonableness of existing tariffs. The same feature exists in WAC 480-120-071. The fact that the Court of Appeals decision is on appeal and has not been stayed means that the Court of Appeals' ruling is the law. Staff's apparent proposal is also in violation of the prohibition against discriminatory funding of universal service by fewer than all providers of intrastate telecommunications service.

ARGUMENT

1. The Commission should vacate the Third Supplemental Order and dismiss Qwest from the proceeding.

The Commission granted Staff's motion to join Qwest as a party respondent expressly to protect Qwest's interests under CR 19.[28] The only risk to Qwest's interest which requires protection is the alteration of its Omak exchange boundary to include undefined areas known as the Timm Ranch, over Qwest's objection.[29] The second reason the Commission gave for joining Qwest in ¶29 of the Third Supplemental Order was that in order to discharge its responsibility to regulate in the public interest, it required a full record and argument from Qwest in order to determine whether it should alter exchange boundaries to facilitate service to remote areas of Washington.

Throughout the case, up to and including the last day of the hearing, Staff did not clearly state whether and on what grounds it believed that Qwest's boundary should be altered in this case. In Ex. 137T, at page 8, Staff indicated that it would withhold its "ultimate response" on this issue pending receipt of evidence from RCC. In Ex. 139T, Staff, then in

[28] Third Supplemental Order, at ¶28.
[29] Staff, the only proponent of altering Qwest's exchange boundary, did not introduce in evidence Qwest's existing Omak exchange map, nor did it introduce a proposed revision to that map, either in graphic form or a metes and bounds description.

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

possession of RCC's evidence, did not address the "ultimate response" to the issue of altering Qwest's boundary.

Staff's eleventh hour recommendation, offered late on the last day of the hearing was that Verizon's waiver request be denied and Verizon should negotiate with neighboring companies to attempt to obtain voluntary cross boundary extensions by them, and if the Commission determines not to "put the burden on Verizon," Staff recommended action which did not clearly include altering Qwest's boundary. (Hearing Tr. p. 682)

Staff's actual testimony at this point in response to the Chairwoman was:

> Q. So aren't we all – it sounded to me as if we're now agreed that we would not, in this proceeding, based on anyone's recommendation, anyway, come out with a boundary line change for Qwest?
>
> A. I guess I would say, and I know you're not going to do this, if for some reason you didn't want to put the burden on Verizon, we would say, Well then, please change the –in other words, have the Timm Ranch served. I understand that that's not going to happen and that – that is, that I don't think the Commission is going to do that.
>
> (Hearing Tr. p. 682)

No clear recommendation to change Qwest's boundary could be gleaned from this testimony, from Staff's prefiled testimony, nor from the responses to data requests which asked Staff's possible grounds to recommend changing Qwest's boundary, and which were made exhibits.[30] Staff's testimony does not support a finding of fact that would justify

[30] See, Ex. 502-520; 522-535.

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

changing Qwest's boundary in this case.[31] Staff did not even state what reasons might justify the Commission in finding that it would not "put the burden" on Verizon to provide service or negotiate with neighboring companies for cross boundary service.

Staff has now implicitly acknowledged that the Commission cannot properly decide any issue about altering Qwest's boundary with the objective of forcing an extension to the Timm Ranch without first deciding Verizon's waiver request. Therefore, both of the reasons the Commission gave in the Third Supplemental Order for joining Qwest as a party are now without support. The question of exercising the power under RCW 80.36.230 to prescribe exchange boundaries is not ripe because the issue which would apparently be addressed by such prescription is not yet certain, namely the lack of wireline or other telecommunications service at the Timm Ranch. Similarly, the issue of how to use the power to alter exchange boundaries as a means to provide service to remote areas in Washington involves the same unripe issue. The Commission should vacate the Third Supplemental Order and dismiss Qwest as a party from this proceeding.

2. The Commission lacks jurisdiction over the subject matter of altering Qwest's exchange boundary in this case.

Qwest's exchange boundary is contained in its filed and effective local exchange tariff in the form of an exchange map in the rules section of the tariff, as required by law.[32] The filed and effective tariff of a utility is part of the law of the state. *General Tel. of the Northwest v. Bothell,* 105 Wn. 2d 579, 716 P. 2d 879 (1986).

[31] At Hearing Tr. p. 605, Mr. Shirley stated that the "ultimate recommendation" could have CenturyTel serving Timm Ranch.
[32] WAC 480-80-102(5)(b)(i)(D)

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

This case raises the issue of under what procedures does the Commission acquire jurisdiction to change a utility's filed and effective tariff? Filing a complaint under RCW 80.04.110 is the only means by which a party other than the utility, including the Commission itself, confers jurisdiction on the Commission over the tariff for purposes of changing that tariff.

Because the Commission is an agency of limited statutory power, nothing is presumed in favor of the Commission's jurisdiction to issue an order, and all necessary jurisdictional prerequisites must appear in the record. *Puget Sound Nav. Co. v. Dept. of Pub. Works,* 152 Wash. 417, 278 P. 189 (1929). In *Puget Sound Navigation,* the court reversed a decision of the Commission's predecessor which had issued a ferry certificate on the basis that the agency had not decided that the area involved was not already served by a certificate holder and that such a decision was necessary to the agency's jurisdiction to order the issuance of the new certificate.

RCW 80.04.110 is explicit on the procedure for the Commission to obtain jurisdiction to change an existing tariff providing rates and practices. It provides, in part:

> Complaint may be made by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, or by the public counsel section of the office of the attorney general, or its successor, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission..

That this language applies to filed tariffs is clearly stated by the first and second provisos which restrict complaints against the reasonableness of tariffs to those filed by certain types of parties only. RCW 80.04.120 gives the Commission the power to "make and

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

render findings concerning the subject matter and enter its order based thereon," at the conclusion of the hearing "mentioned in RCW 80.04.110." Thus according to RCW 80.04.110 the power to enter an order on the subject matter of the reasonableness of an existing tariff is invoked by complaint by the Commission on its own motion, by a complaint from the public counsel section of the attorney general's office, by a complaint signed by the mayor or other elected executive of a city or town or no fewer than twenty-five consumers or twenty five percent of the consumers, or by a complaint filed by a competing public service company.

The only other statute to address the subject of the Commission's power to determine just, reasonable and sufficient rates and practices of telecommunications utilities is RCW 80.36.140. That statute confers power to determine just and reasonable rates and practices of telecommunications companies and fix the same by order on the holding of a hearing "had upon its own motion or upon complaint." When the two statutes, RCW 80.04.110 and RCW 80.36.140, are construed *in pari materia*, it is clear that the phrase "on its own motion" in the latter section means an action initiated by the Commission, but there must still be a complaint filed to vest jurisdiction over an existing tariff in the Commission. Even when a tariff change is filed by a utility, the Commission's practice if it wants to conduct a hearing which might result in rejection or modification of that tariff filing is to suspend the filing and file a complaint naming the utility as respondent and indicating that the justness and reasonableness of the tariff is the subject of the proceeding.

The Supreme Court has repeatedly held that a complaint is necessary to invoke the Commission's power to determine that existing tariffs are not fair, just and reasonable, even

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

where the Commission is the entity which initiates the proceeding. In *State ex rel. Great Northern Ry. Co. v. Railroad Comm.*, 47 Wash. 627, 92 P. 457 (1907), the court, considering the Railroad Commission's power under Acts of 1905, p. 147, Chapter 81 which was similar to RCW 80.04.110, held:

> Manifestly the express power to fix and establish rates conferred on the commission by the language here quoted is power only to fix and establish rates found by the commission, after notice and full hearing, to be unreasonable or unjustly discriminatory. It does not expressly empower the commission, on complaint that particular rates are unreasonable or unjustly discriminatory, to establish or correct rates elsewhere *against which no complaint is made*, …[47 Wash. at p. 632] (emphasis added)

The court continued:

> Of course, the commission may find the complaint not well founded, and may fix the existing rate as the future rate to be maintained, in which case the railroad would be without power to change it without consent of the commission, but, as the law existed when the hearing here complained of was had, *the only power to fix permanent rates conferred on the commission was in cases where a complaint was made in some form, charging the existing rate to be unreasonable or unjustly discriminatory, and the railroads given an opportunity to be heard thereon*. [Id. at p. 634] (emphasis added)

In *Great Northern Railway Co.*, the court upheld a decision of the superior court which had invalidated a portion of the Commission's order which had directed that as to rates other than those included in the complaint, the railroads should make no changes without the permission of the agency. The statutes at the time did not forbid regulated carriers from changing tariffs as to which no Commission review had occurred, without the consent of the Commission. Thus the court held that the power to enter any order which would affect existing tariffs did not exist where those tariffs were not included in the complaint which the Commission had made.

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

In *State ex rel. Northern Pac. Ry. Co. v. Railroad Comm.*, 52 Wash. 440, 100 P. 987 (1909) the court relied on *Great Northern, supra,* in holding that a Commission complaint against existing joint rates on wheat from Eastern Washington points to Puget Sound points did not confer any jurisdiction on the Commission to issue an order changing existing rates for other commodities such as hay, oats, barley and mill feed. The Supreme Court upheld the superior court's decision voiding that portion of the Commission's order which purported to affect existing rates for these commodities.

In *North Pacific Public Service Co. v. Kuykendall*, 127 Wash. 73, 219 P. 834 (1923) the court reversed a decision of the superior court which had upheld an order of the Department of Public Works. The Department had issued an order against a water utility requiring it to install expensive meters and an expensive settling basin in a case initiated by a complaint which raised only the issue of the adequacy of the distribution system. The Commission had ruled that the meters would help diminish waste and that the settling basin would improve the supply of water. The Supreme Court held that the issues of installing meters and a settling basin were not raised by the Department's complaint and the Department's order was "clearly improper" for this reason. [127 Wash. at pp. 75, 76]

In summary, the rules according to the Supreme Court are that nothing is presumed in favor of the Commission's jurisdiction to issue an order, all elements necessary for jurisdiction must appear in the record, and a complaint is necessary to invoke the Commission's jurisdiction to change an existing tariff on the grounds that the rates or practices are not just, reasonable or sufficient (unless the utility invokes jurisdiction by filing

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

a tariff amendment). By force of the Commission's own rule, WAC 480-80-102(5)(b)(i)(D), Qwest's Omak exchange boundary is part of its tariff.

The record of this case shows that neither the Commission nor any party has filed a complaint alleging facts tending to show that Qwest's existing tariff for the Omak exchange boundary is unreasonable. (Ex. 50T, p. 25) Chairwoman Showalter asked repeatedly during the hearing January 24, 2003 that Mr. Shirley identify the pleading which brought Qwest's Omak exchange boundary in issue in this case. (Hearing Tr. pp. 647-649, 674, 676) Staff failed to identify such a pleading because there is none. Commissioner Hemstad also indicated that he was not aware of the existence of a pleading which conferred jurisdiction over Qwest's boundary. (Id. at pp. 667, 668). Therefore Qwest is entitled to a finding that no complaint tending to show that Qwest's existing tariff for its Omak exchange boundary is unreasonable, has been filed. Based on such a finding, the Commission under the authorities cited, should conclude that it lacks jurisdiction to issue any order changing Qwest's Omak exchange boundary in this case.

Qwest anticipates that Staff will argue that its motion to join Qwest is sufficient to give the Commission jurisdiction, that RCW 80.36.230 is an independent source of jurisdiction to alter Qwest's exchange boundaries and that Qwest had notice of the issues and that is all that is required.[33] This argument should clearly fail. The fact that the Commission has the statutory power generally to prescribe exchange boundaries under RCW 80.36.230 does not mean that it has the jurisdiction to do so in this case where the existing Qwest tariff

[33] Staff argued in colloquy that the motion to join Qwest as a party respondent was a sufficient pleading to bring Qwest's existing exchange boundary in issue in this case. (Hearing Tr. 672, 676, 677)

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

containing an existing boundary has not been properly brought in issue before the Commission through the filing of a complaint against that tariff. The Commission did not file any complaint. Staff's motion to join Qwest was not denominated a complaint and it did not contain any clear statement of claims tending to show that Qwest's existing tariff is unreasonable.

The fact that evidence may have been received during the hearing on this issue is not determinative on whether jurisdiction exists. In *Northern Pac. Ry. Co., supra*, the court noted that the Commission took evidence "on many questions." The court still found that the Commission lacked jurisdiction to enter an order to change existing tariffs which were not mentioned in a complaint.

The expected Staff argument that RCW 80.36.230 stands alone as a source of jurisdiction which may be invoked by Staff's filing of a motion to join Qwest as a party in an unrelated proceeding such as Verizon's waiver request is fatally flawed. This argument ignores the fact that the Commission has acted by adopting WAC 480-80-102(5)(b)(i)(D) to require exchange maps to be part of the utility's filed tariffs. A complaint might not be necessary where no existing exchange map in an existing tariff must be changed for prescription of exchange boundaries under RCW 80.36.230 to occur, but that possibility does not apply to this case.

Under Commission rule, the exchange map is a part of the tariff. Therefore, the exercise of the authority under RCW 80.36.230 to prescribe exchange boundaries is subject to the complaint requirements described above for changing an existing exchange map, as part of an existing tariff. Nothing in this interpretation in any way limits the Commission's

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

authority under RCW 80.36.230. The law is simply that to change an existing tariff over the utility's objection a complaint is required, and since the exchange map is part of an existing tariff, a complaint is required to change such an exchange map. This interpretation is consistent with the Court of Appeals' construction of RCW 80.36.230 in *Prescott Tel. & Tel. Co. v. Wash. Util. & Transp. Comm.*, 30 Wn. App. 413, 634 P. 2d 897 (Div. III 1981), that a neighboring company's "only challenge" to a company's filed exchange area maps to obtain a boundary change "is under RCW 80.04.110." [30 Wn. App. at p. 418].

Since neither a party nor the Commission itself filed a complaint alleging facts tending to show that the exchange map in Qwest's tariff for the Omak exchange is not just and reasonable, the Commission lacks jurisdiction over the subject matter of any change in Qwest's exchange boundary. When a tribunal lacks jurisdiction over the subject matter, it should dismiss the proceeding. CR 12(h)(3).

3. The Commission has not provided Qwest with statutorily required notice or the opportunity for a fair hearing on the issue of the possible alteration of Qwest's exchange boundary in this case.

The advance written notice which the Commission is required to provide to a party in this proceeding is set forth in RCW 34.05.434. That section, in RCW 34.05.434(2)(h) requires the notice to include "a short and plain statement of the matters asserted by the agency." In subsection RCW 34.05.434(3), the law provides:

> If the agency is unable to state the matters required by subsection (2)(h) of this section at the time the notice is served, the initial notice may be limited to a statement of the issues involved. If the proceeding is initiated by a person other than the agency, the initial notice may be limited to the inclusion of a copy of the initiating document. Thereafter, upon request, a more definite and detailed statement shall be furnished.

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

These sections impose specific requirements on the Commission. The agency must provide a short and plain statement of the matters asserted by the agency, or if the agency is unable to do so at the time the notice is served, the initial notice may be limited to a statement of the issues involved. If the proceeding was initiated by a party other than the agency, the initial notice may be limited to inclusion of a copy of the initiating document. But thereafter, upon request, a more definite and detailed statement *shall be furnished.* This is mandatory language. Qwest in fact requested a more definite and detailed statement of issues.

The record in this case demonstrates that no notice of hearing was ever issued by the Commission. Instead a Notice of Prehearing Conference was issued four months before Qwest was made a party, which stated only that the issues involved were Verizon's request for waiver of WAC 480-120-071(2)(a) for two extensions in its Bridgeport exchange in Okanogan and Douglas counties and as stated in Verizon's petition. Verizon's petition does not seek alteration of Qwest's exchange boundary.

The Notice of Prehearing Conference states that the Commission may consider whether to exercise its authority to prescribe exchange area boundaries pursuant to RCW 80.36.230 and 80.36.240 but no companies other than Verizon are named in that notice and no indication of the facts which would justify such prescription appears in the notice. No statement of matters asserted by the Commission was ever served on Qwest.[34]

[34] A party brought into contest with the government is entitled to know the claims of its opponent and have a reasonable opportunity to meet those claims with evidence. *Morgan v. United States*, 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 999 (1938) Clearly Qwest was brought into contest with Staff, which is an arm of the government, and Qwest apparently faces possible adverse action in the form of an order by the Commission to alter Qwest's exchange boundary. Qwest was legally entitled to know the claims of its opponent in time to meet those claims with evidence. The Commission did not provide this opportunity.

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

Staff's motion to join Qwest as a party failed to state the issues involved in altering Qwest's exchange boundary. The Third Supplemental Order which made Qwest a party over Qwest's objection failed to state the matters asserted by the Commission. For example, the Third Supplemental Order ruled that Qwest should be made a party to protect its interests under CR 19 but it failed to state what risk to those interests existed or what facts would have to be shown to invoke that outcome. In ¶28 of the order, the Commission stated that it was not clear whether or how RCW 80.36.230 should be invoked. Finally, after Qwest was made a party, it made exhaustive, on the record requests to the Commission for "a more definite and detailed statement," which is mandatory pursuant to RCW 34.05.434 but no such statement was ever furnished to Qwest by the Commission.[35]

The Commission has failed the mandatory duty to provide statutorily required notice to Qwest, if it intends to alter Qwest's exchange boundary in this case. While no reported case has been decided under RCW 34.05.434 on the impact of an agency's failure to provide required notice, in *Morgan, supra,* the court held that where the hearing in a rate setting case by the Secretary of Agriculture was inadequate because of a lack of notice given to the regulated stockyards by the agency of what action the agency proposed and its reasons at any time before the agency's final order, the rate setting order was invalid. (304 U. S. at p. 22) The Legislature stated in RCW 34.05.001 its intent that courts interpret the provisions of Chapter 34.05 consistently with decisions of other courts interpreting similar provisions of other states and the federal government.

[35] Transcript of June 17, 2002 prehearing conference, at pp. 34-42. The only information Qwest received was Staff's direct testimony which, as discussed below, failed to state the grounds on which Staff would argue to

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

In addition to the lack of statutory notice, the Commission has not provided sufficient notice to Qwest to meet due process requirements. The Third Supplemental Order stated only that Qwest should be a party to protect Qwest's interest under CR 19 and that Qwest was necessary as a party to make a record on whether exchange boundaries should be altered as a means to provide service to remote areas. Nothing about these statements informs Qwest of what claims it must meet in this proceeding in order to avoid having its boundary altered.

This Commission has acknowledged its responsibility to provide adequate notice to satisfy due process concerns and to give a fair hearing. *Tel West Comm., L.L.C. v. Qwest Corp. Inc.*, Docket No. UT-013097, Commission Decision Affirming in Part and Reversing in Part, May 23, 2002. In that case, in ¶24, the Commission cited *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1101 (1970) as standing for the proposition that "It is a fundamental tenet of due process of law that the parties to an administrative proceeding must have notice of the contentions that they must face." In *Tel West*, the Commission reversed a portion of a recommended decision which had imposed sanctions for alleged bad faith in negotiations where the pleadings and the Commission's notices of hearing made no mention of bad faith negotiations, of the sources of the law prohibiting bad faith negotiations or the potential consequences for negotiation in bad faith.

The remedy which the Commission fashioned in *Tel West* is appropriate for the instant proceeding. The Commission in ¶30 of the *Tel West* order refused to consider the questions of a finding of bad faith negotiations or consequences for such a finding. Similarly the Commission should refuse even to consider the question of altering Qwest's exchange

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change Qwest's boundary.

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

boundary in this case because as in the case of *Tel West* "it therefore would violate a fundamental provision of law for [the Commission] to consider the merits of the matter."[36]

The Commission held in *Tel West* that the fact that parties introduced evidence which might have some relation to the issue did not correct the defect in notice. The same is true in this case. Staff was the only party other than Qwest to address Qwest's exchange boundary with evidence, but Staff failed to provide proper notice to Qwest of any action it proposed the Commission take to satisfy due process requirements.

A review of the record shows that Staff's evidence on the issue of Qwest's exchange boundary is contradictory and equivocal. Never did Staff clearly state a claim that Qwest's boundary should be changed and introduce in evidence the facts justifying such a change. In Ex. 134T, Staff first discussed the issue and stated at p. 8 that it "suggested" that "in some circumstances it might be in the public interest for the Commission to consider that a boundary line should not be the determining factor in a decision about providing service," and Staff then asked the "Commission to consider requiring Qwest to extend its Omak exchange boundary." In response to a data request to specify the "circumstances" which Staff believed justified this suggestion, Staff cryptically replied in Ex. 503 that "the current circumstances may be such a case." This is clearly inadequate notice of a claim on which Qwest must defend to avoid having its boundary changed.

It appears from Ex. 134T at p. 6 that Staff at one time believed it would only cost Qwest $150,000 to extend to the Timm Ranch while it would cost Verizon a multiple of that

[36] *Tel West Comm.,L.L.C. v. Qwest Corp., Inc.,* Docket No. UT-013097 Commission Decision at ¶30.

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Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

amount, and that this relative cost was a "factor" Staff believed should be considered in deciding whether Qwest's boundary should be changed. It also appears at the same reference that Staff advocated considering on this question the relative exposure of Verizon and Qwest to increased maintenance costs and Mr. Ike Nelson's "community of interest," although Staff again cryptically noted that there could be "other considerations." When Qwest filed Ex. 61T, that showed it would cost Qwest approximately the same amount to extend to Timm Ranch as it would cost Verizon, Staff in Ex. 137T abandoned its earlier testimony and agreed that Qwest's extension costs would be equal to Verizon's. However Staff then announced an additional factor in Ex. 137T at pp. 2, 8 and 9 which could, pending receipt of evidence from RCC, justify altering Qwest's exchange. This was the "relative number of existing and future customers benefited for spending the same amount of money and after adding a cross connection facility for minimal additional cost" factor.

Staff applied its "relative number of existing and future customers benefited" standard inconsistently between Qwest and Verizon to form a basis for a possible recommendation to alter Qwest's boundary. Staff stated that Qwest would benefit more existing and customers for spending the same amount of money (after adding a "cross connection facility") by referring specifically to the customers along the existing cable route which Qwest would have to overbuild in order to serve residents at the Timm Ranch. (Ex. 524) Staff stated that Verizon would not benefit as many existing and future customers because its extension would run for twenty miles without passing any existing customers and would extend mostly through Qwest's exchange. (Ex. 533) This clearly compares the overbuild portion of the Qwest construction with the portion of the Verizon construction that extends from the end of

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

the Verizon existing network. Staff admitted that it did not know how many existing customers existed along the Verizon route to the Timm Ranch. (Ex. 532) Yet Staff considered a portion of the Verizon total cost to be "reinforcement" along the existing route, and that term could only refer to the portion of the total construction between the Brewster central office and the Monse site at the end of Verizon's network. (Ex. 4)

Staff also never, once RCC had provided its evidence on its ability to serve the residents of the Timm Ranch, stated clearly whether that evidence led it to support or not to support altering Qwest's exchange boundary. Staff's affirmative case to change Qwest's boundary is thus at best equivocal.

Staff's testimony did not put Qwest on notice of what standards the Commission would use to alter Qwest's exchange boundary in this case. Staff testified that the Commission should not order RCC to build facilities to serve the Timm Ranch because no one there had requested service from RCC. (Ex. 139T, p. 5) Staff established through Ms. Kohler's testimony that it was indeed true that none of the residents of Timm Ranch had requested regular paying service from RCC. (Hearing Tr. pp. 320, 321) Ms. Kohler testified that she understood by this question that Staff meant that no resident had directly requested service from RCC. (Id. at p. 322) Yet it is also true that none of the Timm Ranch residents has requested service directly from Qwest. (Hearing Tr. p. 428; Ex. 515, Ex. 540, p. 4) It is impossible to discern from Staff's testimony why it may believe the Commission should change Qwest's boundary and order Qwest to build but not RCC, if construction is necessary to provide service to the Timm Ranch residents, under these circumstances.

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Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

Staff acknowledged under cross examination that Qwest and CenturyTel are possibly similarly situated with regard to the criteria Staff had described to justify altering Qwest's boundary. (Hearing Tr. p. 598). However, Staff did not move either to dismiss Qwest or to join CenturyTel to the case.

These points all show that Staff's evidence has not remedied the lack of proper notice in this case, it has instead exacerbated the lack of proper notice. Based on the demonstration above that the Commission has not met statutory notice requirements or minimal requirements of due process notice for Qwest concerning any alteration of the Omak exchange boundary, Qwest submits that the Commission should not consider any such alteration in this case.

4. There is no substantial evidence to support any alteration of Qwest's exchange boundary in this case.

This issue presents the question of what evidence supports the alteration of Qwest's exchange boundary in this case. This question in turn depends on what standards would be used to judge the sufficiency of the evidence on the point. As discussed above, neither Staff nor the Commission has provided notice to Qwest of such standards. Such standards could include a specific description of the circumstances that must exist for a prospective customer who is located in one wireline LEC's exchange to be reasonably entitled to wireline service from another wireline LEC, when the second company objects to building an extension to serve the customer, and when wireless ETC service is available to the customer. While Qwest is not, as discussed above, on notice of the claims Staff may make in its brief to support altering Qwest's exchange boundary, Qwest submits that there is no substantial evidence to

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

support the claims Staff has made on the record. There is on the other hand substantial evidence that there is no need to change Qwest's boundary in order that the residents of the Timm Ranch have telephone service. Therefore the Commission should not enter any order altering Qwest's exchange boundary in this case.

a. The Timm Ranch residents already have service available to them.

The most salient facts which contradict the existence of any substantial evidence to support an alteration of Qwest's exchange boundary in this case are (1) the existence of two Eligible Telecommunications Carriers (ETCs), namely Verizon and RCC, which have, for valuable consideration, agreed to serve the Bridgeport exchange, and (2) the existing service the Timm Ranch residents enjoy or have available, including seven wireless companies such as Verizon Wireless and RCC, farmer line and satellite services.[37] (Ex. 171D, pp. 23, 25, Ex. 1T, pp. 11, 12) The Commission should find that Qwest should not be required to spend vast sums of money to build wireline facilities to the Timm Ranch in light of these facts. (Hearing Tr. p. 286)

There cannot be any proper finding that regulation in the public interest requires alteration of Qwest's exchange boundary because the residents of the Timm Ranch already enjoy telecommunications service. All of the residents have Verizon wireless telephones. (Ex. 171D, p. 23) Ike Nelson has a "farmer line" which connects across the Columbia River to Qwest's Coulee Dam exchange.[38] The fact that this farmer line does not function perfectly one hundred percent of the time is not remarkable. It is provided by the customer himself in a

[37] Staff has not investigated the quality of satellite services at the Timm Ranch. (Ex. 513)
[38] See, WAC 480-120-010 definition of farmer line and Ex. 171D, pp. 24, 25.

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Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

remote and primitive area, much in the same way that roads are primitive and are not always maintained by the county in severe weather, and Mr. Nelson himself sometimes maintains his own road. (Ex. 544; Ex. 171D, p. 8) Satellite service is available at the Timm Ranch. (Ex. 1T, p. 12) Thus there is no need to alter Qwest's boundary to provide a means to get service to the Timm Ranch residents.

b. RCC's wireless service is available.

Qwest submits that if the Commission determines that some telecommunications company in Washington other than Verizon is to be required to provide service in addition to what the Timm Ranch residents already have and that Qwest should not be dismissed from this case, it should find that the promises of RCC, a company which has volunteered to the Commission that it would serve the area as an ETC, should obviate any Commission consideration of altering Qwest's exchange boundary. (Ex. 50T, at pp. 22, 23) Qwest is not an ETC either for the Bridgeport exchange or for its own Omak exchange. (Ex. 81T at p. 3)

This case presents the issue whether the Commission should find that the existence of an ETC wireless carrier which has committed to expand its network to reach "dead spots" but without a timetable for doing so, should preclude any finding that there is need to alter Qwest's exchange boundary in this case as a means to compel Qwest to extend wireline facilities to residents of what may be a wireless ETC's "dead spot," which residents have not requested service either from the wireless ETC or Qwest. Ms. Kohler agreed that RCC had committed to build its network to reach "dead spots" as part of its ETC designation and that

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

the Timm Ranch residences were included in what RCC had meant by "dead spots." (Hearing Tr. pp. 323, 324)

Staff's evidence does not directly address this point. Staff's testimony uses the existence of wireless "dead spots" in the areas of the residences on the Timm Ranch as a basis to argue that Verizon's waiver request should be denied because wireless service is not available *at the residence locations*, and thus is not "reasonably comparable" to wireline service the residents would receive if they lived in an urban area. (Ex. 131T, pp. 19-21)

The evidence from RCC is that RCC's signal is strong enough to meet industry standards for call completion with a "phone cell" device at the Ike Nelson and Bob Timm residences on the Timm Ranch. (Ex. 91T, p. 9) The phone cell device is a stationary, externally powered unit which costs approximately $1,200 and which emulates a wireline calling procedure for wireless service. (Ex. 91T, p. 11; Hearing Tr. p. 307) RCC did not test the alternative of using a cable to connect phone cell devices located at the strong signal residences with the residences at weak or no signal locations. (Hearing Tr. p. 310) The phone cell device uses AC power, which is available at the Nelson residence. (Ex. 171D, p. 15)

Thus the evidence is that for two of five Timm Ranch applicants in this case including Ike Nelson, RCC service is available at the residences in a form that is reasonably comparable to wireline service, without any construction besides placement of a phone cell device. It is unknown whether a "dead spot" actually exists for the remaining three residence locations if the alternative of connecting a phone cell device using a cable to a strong signal residence were used, because RCC did not test that alternative. The evidence is that if Verizon or

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

Qwest were required to extend to the Timm Ranch, both would have to install cable past the Nelson residence to reach the remaining residences. (Ex. 4; Ex. 41T, p 5)

The Fifth Supplemental Order recognized in ¶22 that wireless service is an alternative the Commission can consider in deciding whether to require wireline carriers to build facilities under WAC 480-120-071. The Fifth Supplemental Order directed RCC to file testimony on its ability to serve the applicants in this case. Based on the above evidence, the Commission should determine that there is wireless service available which is reasonably comparable to wireline service to two of five applicants at the Timm Ranch, and that there is no evidence that any "dead spot" at the remaining three locations is substantial enough that wireless service which is reasonably comparable to wireline service is not available at those locations as well. The Commission should conclude from this finding that there is no reason to alter Qwest's exchange boundary in this case.

Under the alternative assumption that substantial "dead spots" do exist at the three residences other than Ike Nelson and Bob Timm, the Commission should still find that there is no reason to alter Qwest's boundary. Staff's testimony is that the existence of "dead spots" does not negate a wireless ETC's status of complying with its duty to offer service throughout its service territory. (Ex. 139T at p. 6) Staff argues that over an indefinite time, the spending of federal USF dollars by RCC on its infrastructure will produce the goal of service "throughout" the service area. (Id.) Staff relies on FCC orders which apply a presumption that a wireless carrier serves its area despite the existence of "dead spots." (Id. at p. 7)

Symmetry requires that if "service is presumed" for a wireless ETC in the face of the existence of dead spots in its coverage, consumers must be presumed to have that service

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

available to them, even if it means that they must sometimes move a distance from a specific location (in a dead spot) in order to receive a signal. Either way, the existence of RCC as an ETC which has volunteered to serve the Timm Ranch should preclude any proper finding that there is any need to alter Qwest's exchange boundary in order to provide the residents of the Timm Ranch with telecommunications service.

c. Staff's claims in its testimony concerning Qwest's boundary are unsupported.

In addition to the above evidence, Qwest has disproved all of the Staff's claims in its testimony which relate to the issue of altering Qwest's boundary. The first claim Staff made in Ex. 134T at p. 6 to support a possible recommendation to alter Qwest's exchange boundary is that it would cost Qwest $150,000 to extend to the Timm Ranch but it would cost Verizon $400,000. Staff stated that relative cost was not the only factor and it should be balanced with other considerations. (Id.) Staff's figures were unsupported by any engineering data, Ex. 504, 505, and were based on use of Verizon's aerial average historic cost per mile for copper cable to estimate a cost for Qwest, and on Staff's estimates of the relative distances between the two companies' closest facilities and the Nelson home at the Timm Ranch. (Id.) Qwest introduced Ex. 69T which showed that Qwest would incur estimated costs of approximately $738,000 to build an extension only to the Ike Nelson residence, and that building to the points beyond that residence would cost more. In rebuttal testimony, Ex. 137T, Staff abandoned the claim that there was a difference in cost between Qwest and Verizon to extend to the Timm Ranch.

Even if Staff had not abandoned this claim, there is a distinct gap in Staff's evidence which it offered to support its recommendation that Qwest's exchange boundary be altered. Mr. Shirley admitted on the stand during the hearing that CenturyTel's closest facilities could

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

be three miles down the Columbia River Road from the Timm Road, which is closer to the Nelson home even than Qwest's facilities. (Hearing Tr. p. 597) Yet Staff did not move to join CenturyTel and it obtained no information on CenturyTel's cost to extend to the Timm Ranch. Based on Ike Nelson's deposition testimony, Ex. 171D, p. 10, and Ex. 76, the closest neighbor to the Nelson residence with telephone service is just five miles away.[39] This is just more than half the distance between the Nelson residence and Qwest's closest facilities. (Ex. 61T, p. 4) CenturyTel's Nespelem central office is one third closer to the Nelson residence than is Qwest's Omak central office. (Id. at pp. 6, 7) If relative distance were an indicator of expected relative construction cost, there is record evidence that the least cost to build may be CenturyTel's cost, and if that were the deciding factor on ordering an exchange boundary change, Staff's case to change Qwest's boundary should fail for this reason alone.[40]

Staff witness Spinks sought to minimize the significance of Qwest's extension cost estimate by comparing it on a per mile basis with Qwest's historical construction cost for plant in Account 2423, buried metallic cable. (Ex. 113T, pp. 1, 2; Hearing Tr. p. 463) Clearly even a multimillion dollar extension for a single customer could be analyzed in this way, but the comparison says nothing about the policy issue which the evidence presents in this case. The average historic cost of construction per mile for Account 2423 includes interoffice facilities as well as loop plant. (Hearing Tr. p. 463) The cables on average which were used

[39] This distance is the sum of the length of the Timm Road between the Nelson residence and the Columbia River Road, some two miles, and the three miles along the Columbia River Road to the Faith Frontier Ministries location.

[40] Qwest does not intend to suggest that the Commission should change CenturyTel's boundary over its objection any more than it should change Qwest's boundary. Qwest simply submits that Staff's evidence which it offered to support its apparent recommendation to change Qwest's boundary, does not on its own terms support that recommendation.

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Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

in that computation are considerably larger in size than the twenty-five pair cable which Qwest would have to place to serve the Timm Ranch. (Id. at p. 466) Many more customers per mile are served by those larger cables than would be served with this extension. (Id.) The more telling comparison is the cost of this extension, approximately $738,000, with the average of all extensions Qwest built under WAC 480-120-071 in 2001, which was approximately $18,000. (Ex. 75; Hearing Tr. p. 715) Even if the comparison is to the twelve longest extensions built in 2001 and 2002 the average is only approximately $36,000. (Ex. 821, resp. 3-36S3, average of amounts in "total cost" column).

The second claim Staff made in Ex. 134T at p. 6 to support a possible recommendation to alter Qwest's exchange boundary was the supposition that Verizon would face increased maintenance costs to extend to the Timm Ranch which perhaps Qwest would not face. This supposition is contrary to the evidence. Qwest introduced Ex. 61T which showed at p. 12 that Qwest would indeed face increased maintenance costs to overbuild its existing facility and extend across country and along county roads which are not maintained in the winter to the Timm Ranch.

Staff's response testimony by Mr. Shirley, Ex. 137T, at p. 3 disagreed that Qwest should have to build across country or face any increased maintenance expense because it would parallel an existing facility. Staff's witness on this point Mr. Shirley admitted that he was not an engineer and had never designed or operated a telephone network. (Hearing Tr. p. 583) Mr. Shirley testified that he had no evidence to contradict Mr. Hubbard's testimony that Qwest would have to build across country to extend to the Timm Ranch. (Id. p. 608) Mr. Shirley also admitted that placing a second cable in the ground parallel to the first would

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

increase the possibility of needing maintenance compared to the situation which would exist if no second cable were placed. (Id. pp. 608, 609)

Mr. Williamson, who is an engineer but who is not an outside plant engineer, testified that Qwest would enjoy reduced maintenance cost if it migrated customers from the existing cable to the new cable, (Ex. 160T Substitute, pp. 1, 2) but he did not quantify the reduction and did not compare it to the increase in maintenance cost which would result from placing a second cable alongside the first.

Qwest's witness Mr. Hubbard is an engineer and has worked in designing and planning networks including outside plant. (Ex. 61T, p. 1) Staff did not counter Mr. Hubbard's engineering evidence on maintenance expense with any qualified engineering witness. There is no substantial evidence to support any Staff argument that Qwest's exchange boundary should be altered because Qwest would not suffer increased maintenance cost if it were required to extend to the Timm Ranch, but Verizon would suffer such increased maintenance cost.

The third claim Staff made in Ex. 134T at p. 6 to justify a possible recommendation to alter Qwest's exchange boundary is that Mr. Ike Nelson, alone of the five Verizon applicants for service at the Timm Ranch, actually desires Qwest's service rather than Verizon's because of his alleged community of interest with Omak and Okanogan, calls to which would be toll free if he were served from Qwest's Omak exchange. Those communities would be a toll call from Verizon's Brewster exchange. Staff argued in this connection that "customer choice is part of universal service."

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

There is no substantial evidence to support this Staff claim. First, all of the Timm Ranch residents have Verizon wireless service and presumably have access to wireless toll free calling. (Ex. 171D, p. 23; Ex. 50T, p. 20) Staff did not introduce evidence that if Verizon were required to extend wireline service to Mr. Nelson's home he would discontinue his Verizon wireless service. Therefore the claim that Mr. Nelson's community of interest and desire for toll free calling to that community justifies altering Qwest's exchange is unsupported because there is no evidence that if he were a Verizon wireline customer he would pay any toll charges to call Omak or Okanogan in any event.

Second, the claim that Mr. Nelson desires Qwest's service was Mr. Shirley's conclusion based on a hearsay statement Mr. Nelson allegedly made to Mr. Shirley about a possible trade of territory between Qwest and Verizon.(Ex. 134T, p. 3) Mr. Nelson did not seek to testify in these proceedings and he did not state during his deposition that he actually desired Qwest's service instead of Verizon's service. (Ex. 171D) The fact is that Mr. Nelson applied for Verizon's service. Mr. Nelson has not filed a petition asking the Commission to change Qwest's boundary. (Hearing Tr. p. 596)

Third, as Ms. Jensen testified, the fact that universal service encourages the development of competition in order to give customers choices does not mean that carriers can or should be conscripted in the name of universal service customer choice to extend to areas which they have not volunteered to serve. (Ex. 50T, p. 21) Also use of such a standard would make administration of telecommunications impossible because many people within a single exchange can have differing communities of interest. (Id. at p. 20) Finally there is no evidence that Mr. Nelson has used other means which are available to address his community

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

of interest concerns, including optional calling plans or foreign exchange service. (Ex. 50T, at pp. 20, 21)

The fourth claim Staff made to support an alteration of Qwest's exchange boundary was that for the same amount of expenditure as Verizon, and "minimal additional cost," Qwest could place "a cross connect facility" which would allow the cable which would be placed for the extension to benefit more of Qwest's existing and future customers than would Verizon's extension to the Timm Ranch. (Ex. 137T, pp. 2, 8, 9) Qwest introduced engineering testimony that a new cable would be necessary for the extension because the new digital carrier system could not operate on the existing air core cable and the two spare pairs on that cable were needed for maintenance. (Ex. 61T, p. 4) Qwest also introduced Ex. 69T which rebutted the claim that for "minimal additional cost" Qwest could benefit existing customers with the new cable.

Staff disagreed with Qwest's evidence that the existing analog carrier system which serves the portion of the Omak exchange closest to the Timm Ranch could not coexist in a single cable sheath with the GoDigital digital carrier system which Qwest would deploy if it were ordered to extend service to the Timm Ranch. (Ex. 160T –Substitute) Therefore, Staff argued that Qwest would benefit existing customers by migrating them to the new cable but *still using the analog carrier system.* (Hearing Tr. 512) Staff admitted that existing customers would perceive little, if any, improvement in service if Qwest were to do this, that it would benefit Qwest little and Staff admitted that it did not know if this would be Qwest's "plan." (Id. at p. 512-514) Staff has not explained why it would be good engineering to deploy a known disturber of the digital system that would be placed to serve the Timm Ranch residents

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

in order to secure imperceptible benefits to existing customers who are served by an analog carrier system. The FCC has determined that analog carrier systems are a "known disturber" of DSL technology such as the GoDigital system when in the same cable sheath.[41] Binder group management separates groups of cable pairs in the same cable sheath in order to alleviate the disturbance effects of "known disturbers." (Hearing Tr. p. 401) A binder group is a group of one hundred pairs. (Id.) Clearly even if binder group management in larger cables could allow analog carrier and digital carrier to coexist in the same cable sheath, there is no basis to find that this would be possible on a cable of only twenty-five pairs such as would be deployed to provide service to the residents of the Timm Ranch.

Staff also argued that Qwest would use the new cable to serve existing customers and thereby benefit such customers because it would retire the existing air core cable within ten years. (Ex. 95T, p. 5). There is no substantial evidence to support this claim. Mr. Spinks admitted under cross examination that his estimate is based on the average life of all facilities in the buried metallic cable account. (Hearing Tr. pp. 463, 468) Mr. Spinks also admitted that it is impossible to predict the retirement of a specific cable facility, such as the existing cable which serves to a point nine miles from the Nelson home, by looking at the average remaining life of all assets in the buried metallic cable account. (Id. at p. 468) Qwest has not determined to retire the existing cable, and there is no basis to change Qwest's boundary on such a speculative development as the retirement of that cable at some time in the future.

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[41] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dockets Nos. 98-147 et al., FCC 99-355, Third Report and Order et al., December 9, 1999 at ¶217; *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 99-48, Third Report and Order on Reconsideration, March 31, 1999 at ¶74.

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

Qwest introduced evidence that it has no need for additional capacity to serve the existing Qwest customers who are served by the existing cable. (Ex. 69T, p. 8). This evidence is unrebutted, and Staff did not cross examine Mr. Hubbard on this testimony. Growth is stagnant and there is now twenty-five percent spare circuit capacity on the route. (Id.) There is no evidence that the service quality on the existing air core cable is below applicable standards so as to require replacement for reliability purposes. (Hearing Tr. p. 510)

In sum, the evidence shows that there are two ETCs which have volunteered to serve the Timm Ranch and the residents there already have telecommunications service. There is evidence that Qwest's facilities are not the closest wireline facilities to the Nelson home, and that CenturyTel's facilities are closer. Qwest's cost to extend is only slightly less than Verizon's cost, and if according to Mr. Shirley's approach Verizon's reinforcement cost is excluded, Qwest's cost is actually higher than Verizon's cost to extend. (Ex. 69T) Qwest would not benefit its existing customers at minimal additional cost by being compelled to extend to serve the Timm Ranch, and it has no need of the additional capacity which would be generated by that extension. Based on the above argument, the Commission should not find that there is any substantial evidence, on any theory, to support the alteration of Qwest's exchange boundary in this case.

5. It would be beyond the Commission's legal authority to alter Qwest's exchange boundary for the purpose of imposing on Qwest the obligation to serve residents of the Timm Ranch.

This issue presents the question whether the Commission can legally compel a utility to hold itself out to provide service to the public in a geographic area in which the company

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

has not itself ever offered to provide service. The law of public utilities is clear that a regulatory commission's power to compel the extension of service by a utility is limited by the geographic extent of the utility's dedication of its property to public use. *California Water & Telephone Co. v. Pub. Util. Comm.,* 334 P.2d 887, 51 Cal.2d 478, 27 P.U.R.3d 423 (1959).[42] Beyond this limit a commission's order to extend facilities is void as an unconstitutional deprivation of due process. *Southern Bell Tel. v. Town of Calhoun,* 287 F. 381 (D. W. D. S. C. 1923); *Interstate Commerce Comm. v. Oregon-Washington R. & Nav. Co.,* 288 U. S. 14, 77 L. Ed. 588, 53 S. Ct. 246 (1933).

In *Southern Bell, supra,* the court struck down a joint resolution of the South Carolina Legislature which purported to compel a telephone company to extend service into an area in which it had not professed to serve. The court held:

> The act in question can in no sense be termed, nor indeed does it purport to be, an act merely to regulate the business of the plaintiff, nor a taxing, nor a police measure. It is a bald attempt to require plaintiff to enter a new field of operation to establish a business in a new territory which it has not heretofore entered or sought to enter, to invest its capital at places and under conditions, which neither its own desire nor the requirements of its charter, franchises, or contractual obligations in any way require. If such a principle could prevail, the plaintiff could be forced to maintain its exchanges on every hill and every mountain top in the state, however remote from the activities of business, and however ruinous to its enterprise. The power to regulate in proper cases must not be confounded with the power arbitrarily to destroy. It would be hard to conceive of anything more destructive of business enterprise and progress, or more calculated to disturb the confidence of the individual in the security of his property and in the equal protection of the laws than to sustain such legislation. 287 F. at p. 389

[42] "The commission may properly regulate the terms on which extensions into new areas may be voluntarily made and it may regulate the service which must be given within an area to which the utility is dedicated. But this is not to say that the commission may compel a water utility to extend its mains into a wholly new, proposed residential community to be created by a subdivision in non-dedicated territory, on terms other than those agreed to by the utility. It cannot." *California Water & Telephone Co., supra,* 334 P. 2d at p. 901.

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

In Washington, the geographic extent of the telecommunications utility's dedication of its property to public use is in its filed and effective exchange map as a part of its tariff. (Ex. 541, p. 7)[43] The evidence is undisputed that Qwest has not dedicated its property to public use outside of its filed exchange boundary in the tariff for the Omak exchange. (Ex. 134T, p. 12; Ex. 50T, pp. 24, 25) Qwest has not dedicated its property for use by the residents of the Timm Ranch. (Id.) Staff has offered no evidence to support alteration of the Qwest boundary. Instead Staff has made vague "suggestions" that in undefined circumstances "it might be in the public interest" for the existing boundary not to be the determining factor of which company should serve in light of the difference in the direction of the major road compared to the boundary and Staff's supposition that there would be a "substantial cost differential" between Qwest and Verizon for the extension based on the distance to their respective closest facilities. (Ex. 134T, pp. 8-9)

These "suggestions" attempt to mask the issue by implying that there is no legal significance to whether or not a company has dedicated its property for public use in an area. The suggestions would lead the Commission into error. It is necessary, because of the difference between regulation, which is permissible for the Commission, and management of a utility, which is not permissible, to decide clearly where the utility has dedicated its property to public use.

[43] There has not been any case law on the constitutionality of Section 214(e)(3) of the Act with regard to the power of a state commission to designate an involuntary ETC and order it to serve an unserved community or portion thereof, if that area is outside of the area in which the carrier has dedicated its property for public use. This issue does not apply to the instant case because two common carriers are ETCs for the area and are therefore willing to serve the Timm Ranch, if that were deemed a community or portion thereof.

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Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

Staff's memorandum of May 1, 1998 is clearly on point. (Ex. 541) That memorandum states that RCW 80.36.230 does not give the Commission power to order extensions by telecommunications utilities beyond their filed exchange boundaries. There is extensive citation of case law to support the conclusion in the memorandum. *A fortiori,* RCW 80.36.230 does not give the Commission power to alter a company's filed boundary over its objection to export from one company to another, the obligation to serve specific applicants.

Mr. Shirley stated that he no longer agreed with the memorandum but the only case he could identify which was contrary to its conclusion was an interlocutory ruling by an ALJ in the *Thompson v. U S WEST* proceeding, Docket No. UT-991878. (Hearing Tr. pp. 606, 607). This decision is not controlling for several reasons. First, an interlocutory ALJ's decision does not bind the Commission or a court. Second, the order denied a motion to dismiss for failure to state a claim for relief before any evidence was heard, and it denied the motion on the basis that Staff alleged that Qwest had in fact dedicated its property to public use outside of its filed exchange boundary in that case. Staff specifically testified that it has no such evidence in the instant case. (Ex. 134T at p. 12). Third, the case was settled without any boundary change before evidence was introduced at a hearing and so the interlocutory decision in the proceeding is not binding precedent. Because the settlement was not adverse to U S WEST, U S WEST would not have been able to appeal the interlocutory ruling.

The fact that the Commission lacks power under the constitution to expand a utility's area in which its facilities are dedicated to public use does not depend on whether the utility would receive compensation for the cost of the specific facility extension involved. RCC made much during the hearing of the difference in cost recovery which would occur between

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Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

RCC and Qwest, should either be ordered build facilities to serve the Timm Ranch. (Hearing Tr. pp. 615, 616) This comparison is not germane because RCC has already dedicated its facilities to public use by customers in the Bridgeport Exchange including the Timm Ranch, while Qwest has not.

6. Staff's proposal would deny Qwest the equal protection of the law.

During the hearing Staff stated its "final" proposal that Verizon's waiver request be denied and Verizon have the burden to negotiate with neighboring companies to provide cross boundary service to the Timm Ranch but that if the Commission determined "not to put the burden on Verizon," then something should be changed so that the Timm Ranch could be served. (Hearing Tr. p. 682) If this unclear statement were interpreted as meaning that Qwest's boundary is the "something," then the issue this recommendation presents is whether Commission action to alter Qwest's exchange to add to it the Timm Ranch area would deny Qwest the equal protection of the law.

Staff agreed that the Commission should treat similarly situated LECs in the same way. (Hearing Tr. p. 596) Staff admitted that with regard to the criteria Staff identified for changing exchange boundaries as a means to obtain wireline service for the residents of the Timm Ranch, it was possible that CenturyTel was similarly situated to Qwest. (Id.) Yet Staff did not move to have the two companies treated in the same way, either by dismissing Qwest as a party or making CenturyTel a party. If the Commission were to act on Staff's possible recommendation to change Qwest's boundary this would violate Qwest's right to equal protection.

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Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

While economic regulation is subject to a lesser level of equal protection scrutiny than other types, it still must not be arbitrary in order to be consistent with constitutional guarantees. *American Network, Inc. v. Wash. Util. & Transp. Comm.*, 113 Wn. 2d 59, 76 P. 2d 950 (1989) Staff identified Qwest as a possible subject of a boundary adjustment on the basis that Verizon approached Qwest and asked it to extend voluntarily to the Timm Ranch. (Ex. 523). It turns out that Verizon did not approach CenturyTel on this subject only by mistake. (Hearing Tr. p. 181) For the Commission to act now to change Qwest's boundary on the basis of Staff's reliance on Verizon's mistake would clearly be arbitrary.

Staff's possible proposal also would be arbitrary in that it fails to recognize the significance of the existence of a wireless ETC which has committed to provide service to the Bridgeport exchange. As discussed above, the evidence is that RCC's service is available to at least two of the five applicants at the Timm Ranch at their residences. None of the applicants has asked RCC for service; none has asked Qwest for service. Staff advocates that the lack of a request by any of the named applicants to RCC means that the Commission should not "choose a provider" for the applicants by directing RCC to build facilities to serve them. (Ex. 139T, p. 5) Staff has not explained why application of this same standard to Qwest does not also mean that Qwest's boundary should not be changed and no order adjudicating any applicant as "reasonably entitled" to service *from Qwest* should be entered.

Staff's possible proposal fails even the reduced scrutiny for economic regulation under the equal protection clause. Staff would have Qwest's exchange boundary altered if Verizon's waiver request is granted, on a basis which cannot be discerned from the record. In Ex. 503, Staff would only say that the "current circumstances" might be circumstances

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

justifying the alteration of Qwest's boundary. Nothing in Staff's proposal explains why another provider of intrastate telecommunications, namely RCC, should not be required to serve, if the Commission grants Verizon's waiver request but determines that the residents of the Timm Ranch are "reasonably entitled" to service. RCC has already volunteered to serve the area, as has Verizon, but Qwest has never volunteered to serve the area. It must be acknowledged that Staff's hypothetical proposal in the event the Commission determines not to "put the burden" on Verizon must be related to the evidence of the cost Verizon would incur to extend facilities. The Qwest cost to extend is similar to Verizon's cost, yet Staff's apparent proposal would relieve Verizon of the burden and place it on Qwest, without explanation. There is no indication in Staff's possible proposal why the residents of the Timm Ranch are reasonably entitled under RCW 80.36.090 to service from Qwest.

7. Staff's proposal is irrational and if adopted would result in an arbitrary and capricious decision.

The record is clear as discussed above that Staff's possible proposal to change Qwest's boundary is unsupported by substantial evidence. The Court of Appeals has invalidated WAC 480-120-540 on the basis that it unlawfully made rates. *WITA v. WUTC, supra*. The same feature inheres in WAC 480-120-071. Thus it is likely that the rule's required refiling of Qwest's line extension tariffs was beyond the Commission's authority, as was the required refiling of the terminating access tariffs. Also, WAC 480-120-071(4)(a) provides that a company with a terminating access tariff under WAC 480-120-540 and a line extension tariff under WAC 480-120-071 may file terminating access tariffs to recover a portion of its line extension cost. There is now no antecedent for the reference in WAC 480-120-071(4)(a) to

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

terminating access tariffs "under WAC 480-120-540" for recovery of line extension costs. Staff's proposal which is based on recovery of Qwest's compelled line extension costs through terminating access tariffs rather than from the Timm Ranch residents is therefore irrational, and would produce an arbitrary and capricious decision.

The Commission stated in the Third Supplemental Order at ¶30 that if WAC 480-120-071 were deemed invalid because of the Court of Appeals' decision on WAC 480-120-540, the Commission could still proceed on the basis of adjudication to determine the proper cost and allocation of cost for extension. Adjudication requires evidence to support findings of fact. There is no evidence to support findings on this issue. No evidence was introduced on the proper allocation of cost for extension, in the event Qwest's exchange boundary were changed and in a subsequent proceeding Qwest were ordered to extend service to the Timm Ranch. No party introduced evidence that Qwest's current line extension tariff reflects the maximum reasonable rate that an end user should pay for a line extension of extraordinary length, such as the extension Qwest would have to build to the Timm Ranch. Therefore, a decision by the Commission to alter Qwest's exchange boundary as the result of an adjudication intended to allocate cost to extend, without any evidence on which to base the necessary findings of fact, would be beyond the Commission's power. *I.C.C. v. Illinois & Nashville, supra,* 227 U. S. at p. 93.

Staff's possible proposal is expressly based on the argument that universal service support requires the extension of wireline facilities to the residents of the Timm Ranch. (Ex. 512) Section 254 of the Act requires all intrastate providers to contribute on a nondiscriminatory basis to such support. Staff admits that providers of intrastate

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

telecommunications which pay no Qwest intrastate terminating access charges will not contribute to this extension. (Ex. 508) Such providers include CLECs, interexchange carriers who deliver minutes and originate minutes from CLECs, and independent ILECs which are not also interexchange carriers. Also, even if some providers other than Qwest will pay through terminating access charges for the cost of the extension, Qwest alone will bear the increase in ongoing maintenance costs to serve Timm Ranch, if it is ordered to extend. It is clear that Staff's possible proposal fails the Section 254 test of nondiscriminatory support of state measures to advance universal service.

Conclusion

There are several alternatives which the Commission can use to address the issues instead of altering Qwest's exchange boundary. As Dr. Danner testified, the Commission could grant Verizon a conditional waiver, with the condition being that the residents of the Timm Ranch pay Verizon a greater proportion of the cost to serve them than the amount prescribed in WAC 480-120-071. (Hearing Tr. pp. 269, 270)[44] Another alternative would be a temporary waiver for Verizon and no action on Qwest's boundary. Dr. Danner testified that engineers of RCC indicated the technology was almost available to enhance the wireless signal with phone cell devices to the point that acceptable basic wireless service would be provided at certain residences at issue. (Hearing Tr. p. 271) The residents of the Timm Ranch have prospered for twenty years without wireline service. The Commission could grant Verizon a waiver and not adjust Qwest's boundary, while it waits for technology to provide a

[44] Qwest has previously noted that WAC 480-120-071 conflicts with RCW 80.36.130 that requires only tariffed rates be charged.

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

low cost solution. In light of these reasonable alternatives which are supported by the evidence, and the above argument a decision to alter Qwest's boundary in this case would be unlawful and arbitrary and capricious.

Respectfully submitted this 6th day of March, 2003.

QWEST CORPORATION

LAW OFFICES OF DOUGLAS N. OWENS

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Douglas N. Owens (WSBA 641)
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Tel: (206) 748-0367

Lisa A. Anderl (WSBA 13236)
Qwest Corporation
Corporate Counsel
1600 Seventh Ave., Room 3206
Seattle, WA 98191
Tel: (206) 345-1574

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing document on all parties to this proceeding by depositing copies of the said petition in the United States mail, properly addressed and with postage prepaid.

Dated March 6, 2003.

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Douglas N. Owens

Mr. Gregory J. Trautman
Assistant Attorney General
1400 S. Evergreen Park Dr. SW
P.O. Box 47250
Olympia, WA 98504-0128

Ms. Judith Endejan
Attorney at Law
Graham and Dunn
1420 Fifth Ave., 33rd Floor
Seattle, WA 98101

Brooks Harlow
Attorney at Law
Miller Nash LLP
601 Union Street, Suite 4400
Seattle, WA 98101

Mr. Robert Cromwell
Assistant Attorney General
900 Fourth Ave., Suite 2000
Seattle, WA 98164-1012

Law Offices of
Douglas N. Owens
1325 Fourth Avenue
Suite 940
Seattle, WA 98101
Tel: (206) 748-0367