BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of: Douglas and Jessica Rupp; Kathie Dunn and Chris Hall; Melinda Inman; Verlin Jacobs; Anthony Williams; Christine and Samuel Inman; Robert Jacobs; and Sam Haverkemp and Chris Portrey, Petitioners v. Verizon Northwest, Inc., Respondent.	**NO. UT-050778** SUPPLEMENTAL RESPONSE TO MOTION TO DISMISS PETITION

I. INTRODUCTION

The original filing for this proceeding was a Petition not, a Complaint. A Petition is defined by the Merriam-Webster dictionary as an "earnest request". A Complaint is defined as "a formal allegation against a party". This Petition is called a Complaint on the Washington Utilities and Transportation Commission (WUTC or the Commission) website and in various documents. It is not a Complaint, but Petitioners are being treated as Complainants which apparently burdens them with proving Respondent broke the law and involving them as parties in a process which requires formal legal training to navigate successfully. This is manifestly unfair because citizens who are without telephone service are also most likely those least able to afford legal representation to navigate the WUTC formal complaint process. Regardless of how the pleadings in this

matter are characterized, the Petitioners only seek to have telephone service extended to their community.

The plain meaning of 47 U.S.C. §214 (e) (3) is for a community to make a request (e.g. petition) for telephone service and for the Commission to order that service be provided (assuming the requestor meets the community prerequisite). There's nothing in the statute about having to prove that a service provider broke the law. There's also nothing in the statute requiring the requestor to do anything more than make the request. In fact there's nothing in the statute that requires the petitioners to even be a "party" to the proceeding. The Commission, Commission Staff, and Office of the Attorney General, and ultimately the telephone company most suited to provide service, in this case arguably Verizon, should be the only "parties" to a Petition made under 47 U.S.C. §214 (e) (3).

That being said, Petitioners will attempt to continue in the proceeding as it is now constituted and rebut Respondents arguments as best they can. Petitioners hope that the Commission sees the truth of the above argument and characterizes this proceeding in the appropriate manner in order to grant the relief sought by the Petitioners.

II. ARGUMENT

A. The Petition States a Claim Upon Which Relief Can Be Granted

1. In support of its assertion that the Petition fails to state a claim upon which relief can be granted, Respondent cites *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977) and

says "Petitioner can prove “no set of facts in support of [their] claim, which would entitle [them] to relief.”" Respondent Motion to Dismiss, p. 2.

Rebuttal:

Respondent has taken that quotation from the *Berge* case out of context. The full quote is from another cite which shows that the standard for dismissal is extremely high: "No dismissal for failure to state a claim should be granted unless it appears, beyond doubt, that the plaintiff can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Sherwood v. Moxee School Dist. 90*, 58 Wn.2d 351, 363 P.2d 138 (1961). While Respondent disputes the facts, as may well be expected, they are certainly not on their face unprovable beyond doubt. Petitioners are confident that the stated facts can and will be proven when they are given the opportunity.

2. Respondent cites *Prescott Tel & Tel Co. v. UTC*, 30 Wn. App. 413, 634 P.2d 897 (1981) in support of its argument ". . . that Petitioners would have to prove that Verizon has violated the law or that its service area was unreasonable before the Commission would entertain a request to alter exchange area boundaries." Respondent Motion to Dismiss, p. 2.

Rebuttal:

The *Prescott Tel* case cited by Respondent was a dispute between two telephone companies. Pacific Northwest Bell (PNB) had a certain area within its boundaries that Prescott wanted. Prescott asked the UTC to reassign it. The court held that the area could not be taken away over PNB's objection and awarded to Prescott unless PNB could be shown to have been deficient in its service or equipment (which they were not).

It seems clear that the UTC can't take an area away from Verizon without cause. However, that is not the case here, since Petitioners are seeking to give an area to Verizon, and there is cause, as stated in the Petition under several statutes, for ordering Verizon to extend service to an unserved community.

B. <u>The Commission Has Jurisdiction to Expand Verizon's Exchange Area.</u>

1. In arguing that the Commission should not order an expansion of its exchange area, Respondent cites *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal 640, 137 P. 1119 (1913) for the proposition that "In dealing with public utilities, regulation of use within the dedicated use is as far as the police power may be extended and . . . When the regulation exceeds this, it is always void for unreasonableness . . . ". *Id.* at 680.

Rebuttal:

Respondent seems to be implying that the Commission has no authority to expand Verizon's exchange area, that its "dedicated use" is its exchange area as currently bounded, and that it is immutable. *Pacific Telephone & Telegraph Co. v. Eshleman* is interesting California law, but it is clearly inapplicable to this proceeding in light of RCW 80.36.230, .240, which grants the WUTC sweeping power to prescribe telecommunication exchange area and/or territorial boundaries, and to expand such boundaries when warranted. The holding in *Pacific Telephone & Telegraph Co. v. Eshleman* is simply inapposite.

2. Respondent cites *California Water & Telephone Co. v. Public Utilities Commission*, 51 Cal 2d 478, 334 P.2d 887 (1959) , and argues ". . . that the California Supreme Court annulled an order of the California Public Utilities Commission that directed a water utility to extend its mains to a new proposed residential division . . .". Respondent Motion to Dismiss, p. 3.

Rebuttal:

In *California Water & Telephone Co. v. Public Utilities Commission*, the Commission had modified a contract between a utility and a developer directing the utility to provide service to a previously undedicated service area. 51 Cal. 2d at 488. The court found that the Commission did not have the authority to modify the private contract. However, the court also held that the Commission did have the authority to regulate the utility and to compel it to serve the developer. *Id*. at 489. That was the conclusion of the California Public Utilities Commission in its Decision 02-08-076 at p. 13. Based on these facts, this ruling is inapposite for the matter under consideration in this case.

3. Respondent cites *Northern Pacific Railroad Co. v Railroad Commission*, 58 Wash. 360, 108 P. 938 (1910), and asserts that ". . . the court reversed a lower court's decision that upheld an order of the WUTC's predecessor requiring a railroad spur for the benefit of a private business (a sawmill)." Respondent Motion to Dismiss, p.3.

Rebuttal:

This case is not on point because it is about a railway. Courts have long recognized the difference between a railroad, and such basic utility service providers as

water, gas electric and telephone utilities. As the court stated in *California Water & Telephone Co. v. Public Utilities Commission,* ". . . a fundamental distinction exists between railway companies and other utilities such as water, gas, electric power and telephone companies. This distinction stems from the fact that the latter utilities normally extend their lines to their customers, whereas a railway company's customers bring themselves to the utility." *Id.* at 492. Reliance on a decision from a railroad case is clearly misplaced.

4. Respondent cites *Southern Bell Tel. & Tel. Co. v. Town of Calhoun*, 287 F. 381 (1923) for the proposition that " . . . a company is not bound to extend its service beyond the limits in good faith establish by it."

Rebuttal:

The holding in *Southern Bell Tel. & Tel. Co. v. Town of Calhoun* is whether an unconstitutional "taking" has occurred, and does not address whether a regulatory commission, such as the WUTC, has jurisdiction to grant the relief requested. The issue of taking without just compensation is discussed in the next section.

5. Respondent cites 64 *Am. Jur*. 2d Public Utilities 36, and says that this establishes that the only duty assumed by a public utility is to render service to meet the wants of the community or territory that it undertook to serve.

Rebuttal:

Generally, citation to a legal encyclopedia such as American Jurisprudence is considered neither precedential nor persuasive. The cited section of American

Jurisprudence does state, however, that ". . . where a public utility accepts a franchise to serve the public, it assumes a public duty of providing a service system that will . . . keep pace with the growth of the community . . . and gradually extend its system as the reasonable wants of the community . . . may require." 64 Am. Jur. 2d Public Utilities § 36. However, this statement of general utility law lends support to the position of the Petitioner's that a reasonable expansion of a service territory is within the authority of a utility commission to order.

6. Respondent cites Attorney General Opinion (AGO_1955_57_No_223) and based on this opinion concludes ". . . that clearly these statutes [speaking of RCW 80.36.230, .240] obligated companies to define their service territories which became "prescribed" when defined by properly filed tariffs." Respondent Motion to Dismiss, p. 4.

Rebuttal:

The opinion cited by Respondent cites *Clyde Telephone Co. vs. Prescott Telephone & Telegraph Co.*, Cause No. U-8296 (1950), where the Commission entered an order declaring a portion of respondent's alleged exchange area open territory to be served by any one desiring to render telephone service therein. This action by the Commission was a clear recognition and use of its authority to prescribe exchange area boundaries involuntarily, as contemplated in RCW 80.36.230, .240.

7. Respondent again cites *Prescott Tel & Tel Co. v. UTC*, 30 Wn. App. 413, 634 P.2d 897 (1981) and argues that " . . . the court said the WUTC had no authority to redraw the

exchange area maps filed by Pacific Northwest Bell (PNB) at the request of another telephone company." Respondent Motion to Dismiss, p. 4.

Rebuttal:

As stated above, this case is *not* about an attempt by an interloping utility to deprive a utility of a portion of its service area. Rather, it is about a request by unserved customers to *expand* the service area of a telephone utility that is already conducting telephone business under the regulation of the Commission. The holding cited by Respondent from the *Prescott Tel & Tel Co. v. UTC* is once again inapplicable to the matter.

8. Respondent cites *ELI v. WUTC*, 123 Wn.2d 530, 869 P.2d 1045 (1994) to support the idea ". . . that RCW 80.36.230 does not give the Commission the power to grant monopolies in filed exchange areas." Respondent Motion to Dismiss, p. 4.

Rebuttal:

This argument is a *non sequitur.* Extending service to Petitioners' community would not make the proposed expanded exchange area anymore of a monopoly than it is already.

C. **<u>The Requested Action Is Not an Unconstitutional Taking.</u>**

1. Respondent suggests that ". . . the petition utterly fails to establish that the Petitioner's constitute an "unserved community". Respondent Motion to Dismiss, p. 4.

Rebuttal:

Proof that the Petitioners are a community under 47 U.S.C. §214 is not required to be provided in the Petition, it only needs to be asserted. Proof that the Petitioners constitute a community will be forthcoming in testimony provided to the Commission at the hearing stage, and after the pending motion has been disposed of by the Commission. Petitioners are confident that they can demonstrate that they are a community under the aforementioned law.

2. Respondent claims that ". . . the company [Verizon] receives no federal universal service support at all in Washington. Therefore, 47 U.S.C. §214 (e) (3) simply does not come into play." Respondent Motion to Dismiss, p. 5.

Rebuttal:

This assertion by Respondent was shown to be false in Petitioner's original response. As set forth in that pleading, Verizon received $22,244,193 in 2003, the last year for which filing information is available (see WUTC Docket No. UT-043067 – WAC 480-120-311(2) Compliance Filing for Verizon). In fact the amount of money received by Verizon out of the federal universal service fund is one of the largest amounts of any carrier operating in Washington, according to the filings.

Respondent may claim in their rebuttal to this Supplemental Response that what they really meant to say was that they accept no High Cost Loop ("HCL") federal universal service support. This may be the case in Washington. However, Verizon does collect HCL support in Idaho and undoubtedly would try to collect it in Washington if the Petition were granted.

3. Respondent alleges that the statute does not authorize an unconstitutional taking of Verizon's property, and claims there would be no mechanism for recovery of cost.

Rebuttal:

Respondent is in error that there would be no mechanism for cost recovery. That mechanism is the federal universal service fund. A second mechanism would be a special tariff for the exchange area expansion. So the question it comes down to is the compensation "just", considering the fact the Verizon is public utility.

4. Respondent cites *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 109 S.Ct. 609, 102 L.Ed.2d 646 (1989) for support of the notion that ". . . Verizon - like any regulated utility - be permitted an opportunity to recover its costs plus a reasonable return". Respondent Motion to Dismiss, p. 5.

Rebuttal:

What *Duquesne Light Co. v. Barasch* really says is ". . . that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory." *Id.* at 488 U.S. 307. As a consequence, so long as the compensation available to Verizon is not confiscatory, it passes constitutional muster. And Verizon has made no showing that the federal funding available to it will be so unjust as to be confiscatory.

5. Respondent cites *Duquesne Light; Michigan Bell Tele. Co. v. Engler*, 257 F.3d 587 (6th Cir. 2001) and *POWER v. WUTC*, 104 Wn.2d 798, 711 P.2d 319 (1985) to support

its argument that "Requiring Verizon to expend hundreds of thousands of dollars without any just compensation would cause a clear violation of the Takings Clause of the State and Federal Constitutions." Respondent Motion to Dismiss, p. 5.

Rebuttal:

Petitioners have shown that compensation will be available to Verizon from the federal universal service fund, (deemed just by an act of Congress) if service is extended as requested by Petitioner. It is implausible that this compensation program would have been established by Congress if the payments available under it were legally "confiscatory".

6. Respondent cites *Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir. 1996) and says that " . . . forcing Verizon to build out facilities for these private individuals also violates the Fifth Amendment's requirement that the taking of Verizon's private property be for a "public use". Respondent Motion to Dismiss, p. 5.

Rebuttal:

The *Armendariz v. Penman* case is about evicting poor people from their homes due to vague housing code violations. The notion that this case is in any way applicable to the extension of service by a regulated telephone utility already providing service makes no sense at all. The *Armendariz v. Penman* case is distinguishable from the instant proceeding on both the facts and the law.

The state has a legitimate interest in providing a means for its citizens to summon emergency medical assistance. Some petitioners are in poor health and the difference in the amount of time for assistance to arrive when summoned by 911 vs. driving into town

could be the difference between life and death, not to mention being able to stay with the afflicted person and in conversation with trained emergency personnel.

Weekend cabins in the Skyko 2 area are trashed on a regular basis and illegal dumping occurs in environmentally sensitive areas all because the neighborhood watch can't summon law enforcement assistance by telephone. Furthermore the so-called "information age" is upon us and to deprive Petitioners access to the World Wide Web is like locking them up in prison. Petitioners have a right to participate in the free exchange of ideas and access to information available to most of the rest of the country's citizens.

D. **Commission Lacks Personal Jurisdiction Over Verizon Communications, Inc.**

Rebuttal:

Petitioners concede this and this unintentional error was dealt with at the prehearing where Petitioner's motion was granted to make Verizon Northwest, Inc., the Respondent to the Petition.

III. CONCLUSION

For the foregoing reasons, the Petition should not be dismissed.

DATED this 2nd day of August, 2005.

The facts alleged in this supplemental response are true and correct to best of my belief.

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