BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

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

1. Response to Staff.

a. Staff's "alternative request for relief" is not supported by any competent record evidence.

At p. 5 of Staff's Opening Brief, for the first time in this case, Staff states its "alternative request for relief" as follows:

> Staff's alternative request for relief (in the event that Verizon's request for waiver is granted) is that the Commission determine that the evidence of record supports an adjustment to the boundary line between the Qwest and Verizon exchanges to include the Timm Ranch within the Qwest Omak exchange.[1]

[1] At Hearing Tr. p. 682 Staff stated that if the Commission decided not to "put the burden" on Verizon then something should be changed so that the Timm Ranch could be served, but it did not at that time state that it was Qwest's boundary that should be changed. At page 605 of the transcript, Staff stated that its "ultimate



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Aside from its discussion of the issue of whether or not Qwest had notice that its boundary might be altered in this case, which Qwest responds to below, this is the only time that Staff's brief mentions Qwest's boundary or changes to it. Staff's brief does not identify the particular "evidence of record" which Staff argues supports an adjustment in Qwest's boundary, nor does it cite legal authority for such relief.[2] The only place in the remainder of Staff's brief which even addresses Qwest is at pages 22 through 24, concerning what Qwest's "direct cost" to extend service to the Timm Ranch would be. Most of this discussion is devoted to disputing Qwest's position that all of its estimated $811,920 cost to extend is direct cost because none of the construction which parallels the existing route would be used to serve existing Qwest customers.[3] But whether Qwest's "direct cost" is $811,920 as Qwest maintains or $435,364 as Staff's brief erroneously claims, there is nothing in Staff's entire brief or testimony which explains why Staff's view on this issue means that Qwest's boundary should be altered.

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recommendation" would "perhaps result in as likelihood of CenturyTel or Qwest serving or not serving the Timm Ranch."

[2] WAC 480-09-770 requires that briefs "set out the leading facts and conclusions that the evidence tends to prove, point out the particular evidence relied upon to support the conclusions urged, and cite legal authority."

[3] Staff's dispute on the characterization of this investment is baseless. Staff did not challenge Qwest's evidence that there is twenty-five percent spare circuit capacity on the existing route, and that there is no growth in demand. (Ex. 69T, p. 8) There is no indication that service on the route is substandard because of the older equipment. (Hearing Tr. p. 610) Staff's brief argues that the existing cable was placed twenty years ago and the analog carrier system is obsolete, and that Qwest's predecessor aggressively replaced these systems. U S WEST's 1997 annual report did not refer to such replacement. (Hearing Tr. p. 467) There is no evidence that Qwest is pursuing such replacement. (Hearing Tr. pp. 467, 468) Staff's brief also at p. 23 incorrectly relied on Mr. Spinks' misinterpretation of Mr. Hubbard's testimony to conclude that "the air-core cable is problematic." Mr. Hubbard testified that the existing air-core cable could not accommodate both the existing analog carrier system and the new digital carrier system because those systems are incompatible with one another. (Hearing Tr. p. 400) That does not mean the existing air-core cable is "problematic" for continued use by existing customers with the existing analog carrier system.



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Qwest pointed out in its opening brief that there is no substantial evidence on any theory to support altering Qwest's boundary and Qwest will not reiterate that argument. The fact is that now, almost one year after Qwest was made a party to this case at the request of Staff, Qwest still does not know what evidence Staff believes supports the "alternative request for relief" because Staff has never identified that evidence.[4] Staff has also never identified any generally applicable principle or legal authority which would, on any evidence, justify the "alternative request for relief." Normally a request for relief is part of a pleading, submitted at an early stage of the proceeding, not in a party's brief after the record is closed. Staff has failed to show any justification for waiting until its opening brief to deliver its request for relief against Qwest.

Staff's "alternative request for relief" to alter Qwest's boundary is improper based on the Administrative Law Judge's ruling at Hearing Tr. pp. 355, 356. Qwest therefore asks the Commission to disregard it. At pages 355 and 356 of the hearing transcript the ALJ sustained Qwest's objection to questioning by Staff of Ms. Jensen on matters pertaining to a hypothetical trade of exchanges. The ALJ ruled on Staff's request for clarification of the ruling on the objection as follows:

> I think that we regard this case as *what's been noticed, which is our request by Verizon for a waiver to extend service to the Timm Ranch and Taylor location,* and the main purpose of the proceeding is to come to that determination. (emphasis added)

[4] In Ex. 137T at pp. 8, 9 Staff testified that it would withhold its "ultimate response" to the question whether Qwest's boundary should be altered until RCC's testimony had been provided, but that based on the "relative benefits to existing and future customers from spending the same amount of money after adding a cross-connect facility" factor, if the choice were between providing cost recovery for Verizon or Qwest, it would be reasonable to choose Qwest. Nothing in this statement which is the only Staff evidence on the issue, states why changing Qwest's boundary is a "second best" choice to denying Verizon's request for waiver.



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Thus under the law of the case doctrine, Staff's "alternative request for relief" is outside the scope of this proceeding and it would be improper for the Commission to consider that request. It was clear at p. 355 of the hearing transcript that the ALJ ruled against Staff's contention that a change in Qwest's boundary was an "active issue" in this proceeding.

> b. Staff has never alleged facts which stated a claim why Qwest's exchange boundary should be altered, the Commission has not stated such reasons and Qwest therefore has not received proper notice.

Staff's opening brief sets up at page 6 a straw man argument concerning Qwest's objections during the hearing to the lack of notice in this proceeding, and then attacks that straw man in the next four pages. Staff's argument in its brief is irrelevant to the notice issues in this case. Staff's brief claims, without a record citation, that "Qwest contended during the hearings that it did not have adequate notice *that one possible outcome of the present proceedings could be a decision to alter the exchange boundary and move the Timm Ranch within Qwest's Omak exchange.*"(emphasis added)[5] This claim is wrong. What Qwest actually said during the hearing on this issue is set forth at pages 670 and 671 of the hearing transcript:

> Well, Qwest's position is that there has not been a pleading sufficient to give you jurisdiction to change Qwest's boundary, *and Qwest hasn't received notice of any allegations of facts that would put Qwest on notice of the claims it's required to defend against in order to avoid such a change in its boundary*. (emphasis added)[6]

Thus Staff's brief responds to a claim which Qwest never made. It is clear that Qwest stated that it knew that it had been made an involuntary party to a case in which a possible

[5] In one limited sense it is true that Qwest has not been given notice of this possibility, namely the sense that even today Qwest has not been provided any description of the precise geographic area Staff proposes to include in the Omak exchange. But Staff's description of Qwest's objection to lack of notice is generally off the mark.
[6] Qwest had also stated these points earlier during the June 17, 2002 prehearing conference at pp. 34-42.



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outcome was a Commission order which would purport to change its boundary. (Ex. 50T, p. 3) There is obviously a difference between knowing that an agency is contemplating a change in a company's exchange boundary over the company's objection, and knowing what facts and principles the agency would rely on to actually make such a change. Qwest pointed out that RCW 80.36.230 contains no standards for the exercise of the exchange boundary prescription power and that in light of that "there has to be some notice of the grounds on which [the Commission] would exercise that power for [Qwest] to respond."[7] Qwest stated precisely the notice issue in this case, and it is not whether Qwest had notice that the Commission might decide to change Qwest's Omak exchange boundary, but rather on what basis such a decision might be made.

Having responded to a claim Qwest did not make during the hearing, Staff's brief has failed to respond to the objections about lack of notice which Qwest actually did make on the record during this case. Qwest said on the record that neither Staff nor Commission had stated clearly reasons why Qwest's boundary should be changed.[8] Staff's brief is silent with respect to identifying claims that Staff made in its evidence or Commission rules or orders or notices to show the reason why Qwest's boundary should be altered.[9] Qwest said on the record that the Commission's notice did not comply with the APA.[10] Staff's brief is also

[7] (Hearing Tr. p. 678)
[8] (Hearing Tr. pp. 677, 678)
[9] It is on brief that Staff identified for the first time, altering Qwest's boundary as a "second best" proposal to be adopted only if Verizon's request for waiver is granted. Nothing in Staff's brief or evidence explains why this is a proper thing to do, namely to export the financial burden of serving people in extremely high cost locations in Verizon's exchange to Qwest, if the Commission determines to grant Verizon's request for waiver of WAC 480-120-071. The Third Supplemental Order specifically found at ¶28 that it was unclear whether or how the statutory power to alter exchange boundaries should be exercised in this case.
[10] (Prehearing Conf. 6/17/02 Tr. p. 33)



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silent with regard to identifying any notice issued by the Commission which complies with RCW 34.05.434(2)(h). Qwest said on the record of the hearing that Qwest was legally entitled to notice of the grounds on which the Commission would decide to change Qwest's boundary.[11] Staff's brief is also silent with regard to attempting to demonstrate that notice of the grounds on which an agency proposes to take a certain action against a party is not part of statutory or due process notice to which Qwest was entitled in this case.

Staff's brief at pp. 11-13 inconsistently challenges the notice afforded to Staff by Verizon's petition and the Commission's Notice of Prehearing Conference on the subject of what relief Verizon actually requested. Staff's brief argues at p. 12 that because of inadequacies in Verizon's petition and the Commission's notice "neither the public nor the parties were put on notice concerning *what issues or facts would warrant a WAC 480-120-015 exemption."* (emphasis added) Staff's brief argues that if Staff had received notice of Verizon's reasons for seeking a WAC 480-120-015 exemption, *"Staff may have put on a different case."* (Staff Opening Brief p. 13, n. 9; emphasis added) Staff's brief asks for the same thing Qwest has been asking for with regard to any change in Qwest's boundary. Staff's brief, despite its apparent opposition, actually supports Qwest's position on this point.

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2. Response to RCC.

[11] (Hearing Tr. p. 678)



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a. RCC has failed to address issues raised by RCW 80.36.090, and seeks relief that is broader than necessary.

Qwest moved to vacate the Fifth Supplemental Order and the Third Supplemental Order after Staff testified that only if the Commission determined not to "put the burden" on Verizon, should "something" be changed so that the Timm Ranch could be served. The Commission took that motion under advisement. If the Commission grants the motion, then RCC's arguments and Qwest's response to those arguments will be moot. Notwithstanding, Qwest responds to RCC's arguments.

RCC has analyzed only the provisions of WAC 480-120-071 and has sought to demonstrate that the line extension rule cannot be the basis of an order requiring RCC to build facilities to provide service. RCC has used this argument to ask that the Commission in this case determine that in any future case for a waiver of WAC 480-120-071, no wireless company may be made an involuntary party. It would be facile for Qwest to note that just as the rule does not contemplate ordering wireless companies to build facilities when a wireline company asks for a waiver, it does not contemplate changing boundaries of neighboring wireline companies in such conditions and ask that the Commission rule for that reason that in future no neighboring wireline company be made an involuntary party to such a proceeding, either. RCC argues that the line extension rule contemplates a voluntary, not a mandatory role for wireless carriers. The same is true for neighboring wireline carriers such as Qwest under the rule. See, WAC 480-120-071(5).

In fact Qwest was made a party pursuant to CR 19 because Staff argued that RCW 80.36.230 could result in a change of Qwest's exchange to put residents of Verizon's



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exchange within Qwest's exchange boundary, and also because supposedly Qwest could be adjudicated to be required to extend facilities as a telecommunications company under RCW 80.36.090. RCC is also a telecommunications company. Qwest submits that no record exists in this case to adjudicate that Qwest is required to build facilities to serve the Timm Ranch under RCW 80.36.090. The Commission made RCC a party on Qwest' s motion. Qwest did not ask either in its motion or in testimony for the Commission to order RCC to build facilities. However it is necessary that RCC be a party to a case which investigates RCC's plans to build facilities pursuant to its ETC obligation which the Commission held in the Fifth Supplemental Order was an issue properly raised in a case which sought a waiver of WAC 480-120-071.

The relief which RCC seeks, of an order in this case which would effectively prejudge the facts in all future cases involving requests for waivers of WAC 480-120-071, is inappropriate. The Commission granted Qwest's motion to join RCC which argued that if need for telecommunications service was to be a factual issue involved in the possible alteration of Qwest's boundary, the existence of RCC as an ETC in the area meant that the adequacy of RCC's service must be evaluated before the existence of such need could be established. RCC's brief says at p. 4 that the Commission must evaluate the adequacy of RCC's service. The adequacy or inadequacy of a regulated carrier's service is a question which requires that such a carrier be a party to the adjudication.

RCC asks that this case set a precedent against any wireless carrier being a party to similar future proceedings. RCC has not identified any authority that supports this position. RCC's brief argues that the only role of a wireless carrier under WAC 480-120-071 is as a



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voluntary provider of service under agreement with the wireline carrier which is subject to the rule. Qwest submits that this is too narrow a view and that the Commission's decision in the Fifth Supplemental Order correctly determined that a wireless ETC's plans and schedules to build facilities could inform the Commission's decision whether or not to grant a waiver to the applicant in the case, Verizon. The evidence is that RCC has no plans to build facilities to serve the Timm Ranch locations in this case. (Ex. 403) That may not be true in all future proceedings for all wireless ETCs.

b. RCC's comparison of purported subsidies between itself and Qwest is erroneous.

At page 11 of its brief, RCC argues based on Hearing Tr. pp. 612-613 that Qwest receives "$23 million in high cost subsidies for the state of Washington." RCC concludes that this means on a statewide annual basis "Qwest and Verizon receive over 20 to 30 times the amount of high cost subsidies that RCC receives."

This argument is based on the Commission-required labeling of a portion of Qwest's terminating access charge as universal service support in WAC 480-120-540.[12] The testimony on which RCC relies in this connection is that of Mr. Shirley. Mr. Shirley admitted that he did not know whether what he characterized as state high cost support was simply a portion of preexisting terminating access charges which the Commission by rule required to be called universal service support. (Hearing Tr. pp. 602-603) Ms. Jensen testified that such was indeed the case. (Hearing Tr. p. 657) In contrast, RCC will receive approximately $1.1 million in federal universal service support in 2003 for the state of Washington because of its



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ETC status, but it has no specific plans on how the money will be spent. (Ex. 54; Hearing Tr. p. 328)

c. RCC's continued status as a party, assuming that the Commission does not grant Qwest's motion to vacate the Third and Fifth Supplemental Orders, does serve a purpose.

RCC's brief cites Ex. 51T at p. 11 as an instance in which Qwest appeared to ask the Commission to enter an order directing RCC to provide service in lieu of an order against Qwest. No such request appears at that reference.

RCC's brief at page 16 also cites Ex. 51T, p. 10 as an instance in which Qwest attempts to confuse the distinction between the obligation of an ETC to serve an entire "area" with the obligation to serve a specific location. RCC's brief is incorrect. The obligation to serve throughout the service area which the ETC, in this case RCC, voluntarily undertook, comes from federal law and with regard to all customers, the obligation comes from this Commission's order, not from Qwest's testimony. 47 U.S.C. §214(e)(1); *In the Matter of Designation of Eligible Telecommunications Carriers,* Dockets Nos. UT-970333-54, 56, at n. 11.

RCC's brief states at page 16 that Qwest's opening brief may clarify Qwest's position on what relief if any it recommends against RCC. Qwest has not recommended relief against RCC. Qwest has pointed out that RCC volunteered to serve the Bridgeport exchange as an ETC in exchange for federal USF dollars, and RCC can currently provide stationary service to two Timm Ranch residences and RCC represented to the Commission that it would build out

[12] Qwest notes that on March 6, 2003 the Supreme Court reversed the Court of Appeals and reinstated WAC 480-120-540 in *Washington Independent Telephone Association, et al. v. Washington Utilities and Transportation Commission,* Wn. 2d , P. 3d , 2003 WASH LEXIS 147.



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its network to serve known "dead spots" which included other Timm Ranch residences. Qwest argued that in light of these facts it would be inappropriate to conclude that there is any reason to change Qwest's exchange boundary to include the Timm Ranch residences.

RCC's brief states at page 17 that RCC has received no request to serve the Timm Ranch residents and that if a request had been received it would not be reasonable for RCC to provide service because RCC would not recover its cost to extend service. Qwest agrees that neither RCC nor Qwest has received a request for service from the Timm Ranch residents and neither should be required to build to serve those residents without, at a minimum, a request for service. Qwest agrees, based on its motion to vacate the Third and Fifth Supplemental Orders, that neither Qwest nor RCC should remain parties to this case. If the Commission denies that motion and retains Qwest as a party, then RCC's continued party status does serve a purpose, namely determining the adequacy of RCC's service in connection with Staff's alternative request for relief of changing Qwest's boundary, unless the Commission disregards that request for the reasons stated previously in this brief.

RCC's brief does not address the issue Qwest's testimony raised, which is as follows: if there are multiple carriers (Verizon and RCC) which are obligated by multiple legal requirements (including WAC 480-120-071 and RCW 80.36.090 for Verizon and 47 U.S.C. §214(e)(1) for both Verizon and RCC) to provide service in the Bridgeport exchange, but neither wants to extend service or build facilities to serve the Timm Ranch residents, what showing should be required for a third carrier, Qwest, to have its exchange boundary modified over its objection to include the area, none of whose residents have asked for service from



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either RCC or Qwest?[13] (Ex. 50T, p. 23) In the absence of a notice of hearing which states the issues, Qwest submits that the evidence must show that the service which is or could be provided by either of the ETCs is inadequate before any consideration could be given to changing Qwest's boundary. There is no such evidence. RCC can currently provide the equivalent of wireline service to two of the five residences on the Timm Ranch. (Ex. 91T, p. 9) RCC did not test whether it could connect the remaining three residences to an adequate signal by use of cables. (Hearing Tr. p. 310)

RCC notes Qwest's agreement that a request for service from a wireless ETC must be reasonable in order to trigger an obligation of that ETC to build to provide service. However, RCC attempts to contrast that principle with what it calls the "carrier of last resort" obligation on the purported basis of a difference in the mechanism for cost recovery. The so-called "carrier of last resort" obligation is in RCW 80.36.090 and it also contains the qualifier that the request for service must be reasonable. So there is no difference with respect to whether a request for service must be reasonable in order to trigger an obligation to build for an ETC which is not a wireline carrier on the one hand and a wireline carrier on the other.

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## Conclusion

[13] Verizon did not petition for an adjudication that the Timm Ranch residents are not reasonably entitled to service from Verizon under RCW 80.36.090.



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Based on the foregoing argument the Commission should grant Qwest's motion to vacate the Third Supplemental Order, disregard Staff's alternative request for relief and refuse to consider any change in Qwest's boundary in this case.

Respectfully submitted this 27th day of March, 2003.

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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 27, 2003.

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