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August 17, 2005

Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P. O. Box 47250
Olympia, Washington 98504-7250

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Re: *In the Matter of the Petition of Douglas and Jessica Rupp, et al.*
Docket No. UT-050788

Dear Ms. Washburn:

Enclosed for filing in the above-referenced docket are the original and seven copies of Staff's Response to Verizon's Motion to Dismiss, and Certificate of Service.

Sincerely,

SHANNON E. SMITH
Assistant Attorney General

SES/emd
Enclosure
cc: Parties



BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of
DOUGLAS and JESSICA RUPP, et al.,

Petitioners,

v.

VERIZON NORTHWEST, INC.,

Respondent.

NO. UT-050788

STAFF'S RESPONSE TO
VERIZON'S MOTION TO
DISMISS

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1 The Washington Utilities and Transportation Commission (Commission) Staff
(Staff) responds to the motion to dismiss filed by Verizon Northwest, Inc. (Verizon). As
set forth below, the Commission has jurisdiction to prescribe a change to Verizon's
exchange area over the subject matter of the petition.

I. BACKGROUND

2 On or about May 17, 2005, a group of property owners,¹ led by Douglas Rupp,
petitioned the Commission for an order extending the exchange area boundary of
Verizon's exchange near Index, Washington, to include their properties. The petitioners
currently do not have wireline telephone service.

¹ The petitioners are Douglas and Jessica Rupp, Kathie Dunn and Chris Hall, Melinda Inman, Verlin Jacobs, Anthony Williams, Christie and Samuel Inman, Robert Jacobs, Sam Haverkemp and Chris Portrey. For ease of reference, Staff collectively refers to them as "Petitioners."

3 On June 13, 2005, Verizon filed an answer to the petition and also filed a motion
to dismiss the petition. In its motion, Verizon contends that the Commission must
dismiss the petition because (1) the petitioners cannot prove Verizon violated any law
or legal duty; (2) the Commission has no jurisdiction to change Verizon's exchange area
boundary; and (3) neither Congress nor the Commission can authorize an
unconstitutional taking of Verizon's property.²

4 The Commission commenced a prehearing conference on July 20, 2005, at which
time the Commission Staff intervened to address policy issues.³ The Commission Staff
also addresses the issues raised by Verizon's motion to dismiss.

II. ARGUMENT

A. The Commission Need Not Find That Verizon Violated Any Law Or Legal Duty To Grant The Relief Requested.

5 In its motion, Verizon contends that the petition should be dismissed because the
petition does not allege that Verizon violated any law or legal duty with respect to its
exchange area boundary.⁴ The public service laws do not require the Commission to
find that a public service company violated the law or a legal duty before the

² See Verizon's Motion to Dismiss Petition for Order to Extend Service Area of Respondent.

³ *In the Matter of the Petition of Douglas and Jessica Rupp, et al. v. Verizon Northwest, Inc.*, Docket No. UT-050778, Order No. 1, Prehearing Conference Order, ¶ 7 (Aug. 4, 2005).

⁴ Verizon's Mot. at 2.

Commission can exercise its jurisdiction to enforce the public service laws. Verizon's reliance on *Prescott Tel. & Tel. v. WUTC*⁵ in support of such a requirement is misplaced.

6 The *Prescott* case did not involve the issue of whether the Commission has jurisdiction to change a carrier's exchange area boundary. The *Prescott* case addressed the issue of whether the Commission properly declined to order the transfer of territory in one carrier's exchange area to another carrier's exchange area or, in the alternative, that the territory be declared open.⁶ The *Prescott* case is about removing area from a company's exchange area, not adding territory.

7 In *Prescott*, Prescott Telephone and Telegraph Company (Prescott) had petitioned the Commission to remove territory from Pacific Northwest Bell's (PNB) service area and include it within Prescott's service area or declare the territory open, despite the fact that the area had been included in PNB's exchange area maps for at least 20 years.⁷ Prescott contended that because the Commission had not prescribed PNB's exchange area pursuant to RCW 80.36.230, PNB's exchange area was not lawfully prescribed and PNB had no claim to that area. The Court rejected this argument because PNB had followed the Commission's procedures to prescribe its exchange area.⁸

⁵ 30 Wn. App. 413, 634 P.2d 897 (1981). See also Verizon's Mot. at 2.

⁶ *Prescott*, 30 Wn. App at 414.

⁷ *Id.*

⁸ *Id.* at 416-17.

8 Prescott also had argued that because PNB had not installed facilities in the area, PNB was in violation of RCW 80.36.080 and, therefore, subject to a complaint pursuant to RCW 80.04.110, which allows complaints of any act taken by a public service company in violation of the law. The Court held that PNB did not violate RCW 80.36.080, but instead was ready to provide service if requested.⁹ Therefore, the Court held that the WUTC had properly dismissed Prescott's complaint.

9 Plainly, the *Prescott* case does not stand for a rule of law that the Commission is without power to regulate public service companies except where a company is alleged to have violated a law or legal duty. The Commission should reject Verizon's argument that the Commission cannot grant the relief requested in the petition because there is no allegation that Verizon violated any statute or legal duty.

B. The Commission Has Jurisdiction To Alter Verizon's Exchange Area Boundaries.

10 Verizon contends that the Commission has no jurisdiction to "force" Verizon to alter its exchange area boundaries.¹⁰ Verizon's contention is contrary to the plain language of RCW 80.36.230, which provides:

The commission is hereby granted the power to prescribe exchange area boundaries and/or territorial boundaries for telecommunications companies.

⁹ *Id.* at 418.

¹⁰ Verizon's Mot., at 3.

The Commission's express authority to prescribe a telecommunication company's exchange area or territorial boundaries is further confirmed in RCW 80.36.240, which provides:

The commission in conducting hearings, promulgating rules, and otherwise proceeding to make effective the provisions of RCW 80.26.230 and 80.26.240, shall be governed by, and shall have the powers provided in this title, as amended; all provisions as to review of the commission's orders and appeals to the supreme court or the court of appeals contained in said title, as amended, shall be available to all companies and parties affected by the commission's orders issues under authority of RCW 80.36.230 and 80.36.240.

Despite the plain language of RCW 80.36.230 and 80.36.240, Verizon contends that these statutes have been interpreted to mean that the Commission prescribes exchange area boundaries only by accepting tariff maps filed by telecommunications companies.¹¹ Verizon is wrong.

¹¹ In *Prescott*, the Commission had argued that when a telecommunications company filed its exchange map as part of its tariff filing, that filing was sufficient to prescribe the exchange area. The Court rejected that argument and held that "if the WUTC is to establish any *new* exchange areas, we hold it must do so by issuance of an order, not by mere acceptance of tariffs."¹²

¹¹ *Id.* at 3-4.

¹² *Prescott Tel.*, 30 Wn. App. at 417.

12

Contrary to Verizon's argument, the *Prescott* Court did not hold that the Commission has no authority to alter exchange area boundaries at the request of another telephone company.¹³ Rather, the Court held that the Commission's decision to dismiss a complaint by one company to include within its exchange area boundary territory that already was included in the exchange area of another company was neither erroneous nor arbitrary and capricious.¹⁴

13

Verizon also cites a 1957 opinion by the Attorney General as support for its argument that the Commission has no jurisdiction to alter its exchange area boundary. This Attorney General Opinion is not on point. The opinion simply recognizes the Commission's practice of using its tariff functions (*i.e.*, filing a map along with tariffs) as a means to effectuate RCW 80.36.230.¹⁵ Nothing in that opinion suggests that the Commission has no jurisdiction to alter exchange area boundaries pursuant to RCW 80.36.230.

¹³ Verizon's Motion, at 4.

¹⁴ The *Prescott* case was decided before the Washington Supreme Court held in *Electric Lightwave Inc. v. Washington Utils. & Transp. Comm'n*, 123 Wn.2d 530, 536-37, 869 P.2d 1045 (1994) (ELI) that the Commission does not have authority to grant a telecommunications company the *exclusive* right to provide service in a specific geographic area. It appears that the *Prescott* Court assumed that a carrier had an exclusive right to its service area. *Prescott Tel.*, 30 Wn. App. at 418.

In *ELI*, the Court held that the Commission could exercise its authority pursuant to RCW 80.36.230 without the power to grant monopolies or exclusive rights. *ELI*, 123 Wn.2d at 537.

¹⁵ In *Prescott*, the Court held that new service territories cannot be prescribed simply by filing a map along with a tariff. *Id.* The Court further noted that prior to 1969, the Commission had "prescribed" service areas by accepting maps with tariff filings. *Id.*

14

Verizon also contends that a 95 year-old decision of the Washington Supreme Court in *Northern Pac. R. Co. v. Railroad Comm'n*,¹⁶ supports its argument. It does not. In *Northern Pacific*, the Court held that the Railroad Commission did not have the authority to order a railroad to extend its tracks – without compensation – to serve a private sawmill.¹⁷ The Court held that the Railroad Commission's decision resulted in a taking of the railroad company's property without due process of law and, therefore, reversed the decision.¹⁸ Obviously, the case does not address this Commission's authority set forth in RCW 80.36.230 and 80.36.240. In addition, as argued below, because Verizon has not shown that altering its service area will result in noncompensatory rates, this ancient case is not on point.¹⁹

15

Despite the plain language of RCW 80.36.230 and 80.36.240, Verizon contends that the Commission should rely on decades-old decisions from other jurisdictions, which do not address statutory provisions similar to RCW 80.36.230 and 80.36.240. The Commission should decline to do so and instead should look to Washington law for the source and scope of its jurisdiction.

¹⁶ 58 Wash. 360, 108 Pac. 938 (1910). *See also* Verizon's Motion, at 3.

¹⁷ *Northern Pac. R. Co.*, 58 Wash. at 362-63.

¹⁸ *Id.* at 363.

¹⁹ *See infra*. ¶¶ 21-22.

16 Verizon's citation to *Pacific Tel. & Tel. v. Eschelman*²⁰ is not persuasive. The language Verizon quotes from that 1913 case is dicta from the Court's discussion distinguishing an agency's exercise of its police and eminent domain powers.²¹ This discussion was helpful (but not critical) to the California Supreme Court's conclusion that the California Railroad Commission's order directing Pacific Telephone and Telegraph Company to connect its telephone lines with the telephone lines of two other telecommunications companies, without compensation, was an unconstitutional taking.²²

17 Likewise, the California Supreme Court's decision in *California Water & Tel. Co. v. Public Utils. Comm'n*,²³ also is not on point. That case did not interpret statutory provisions similar to RCW 80.36.230 and 80.36.240. Verizon's reliance on that case is misplaced.

18 Verizon also contends that a 1923 federal district court decision from western South Carolina supports its argument that the Commission has no jurisdiction to alter

²⁰ 166 Cal. 640, 137 P. 1119 (1913).

²¹ *Id.* at 680.

²² *Id.* at 686. This case was decided prior to the United States Supreme Court's decisions in *Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944) and *Duquesne Light Co. v. Barash*, 488 U.S. 299, 109 S. Ct. 609, 102 L. Ed. 2d 646 (1989).

²³ 51 Cal.2d 478, 334 P.2d 887 (1959). *See also* Verizon's Motion, at 3.

its exchange area boundary.²⁴ However, like the other cases upon which Verizon relies, this case is distinguishable from the issue raised by the petition.

19 In *Southern Bell Tel. & Tel. Co. v. Town of Calhoun*,²⁵ the South Carolina legislature had enacted special legislation directing Southern Bell Telephone to furnish and maintain a telephone exchange for local and long distance calling in and between two towns and the area surrounding them.²⁶ The district court found that the state legislature had acted unlawfully by singling out Southern Bell and subjecting that company to burdens and liabilities that were not imposed on other similarly situated companies.²⁷ The court also determined that the legislation did not lawfully compensate Southern Bell and therefore was an unconstitutional taking.²⁸ This case does not address the question of whether a state commission has jurisdiction to alter a telecommunications company's exchange area boundary.

20 Finally, Verizon relies on a brief, general discussion of public utility law set forth in *American Jurisprudence*.²⁹ Even assuming that this legal resource constitutes legal

²⁴ Verizon's Mot. at 3 (citing *Southern Bell Tel. Tel. Co. v. Town of Calhoun*, 287 F. 381 (1923)).

²⁵ 287 F. 381, 382 (W.D.S.C. 1923).

²⁶ *Id.* at 382.

²⁷ *Id.* at 386.

²⁸ *Id.* at 387.

²⁹ See Verizon's Mot., at 3 (citing 64 Am. Jur. 2d *Public Utilities* § 36 (2001)).

precedent, which it does not, the discussion stands for nothing more than the axiom that when a public utility accepts a franchise to serve the public, it is expected to serve all members of the public reasonably entitled to service. It does not discuss any limits on a state commission's jurisdiction to alter service area boundaries.³⁰

C. There Is No Constitutional Barrier To The Commission's Exercise Of Its Authority To Alter Exchange Area Boundaries Pursuant To RCW 80.36.230 And 80.36.240.

21 Verizon contends that the Commission is precluded from exercising its jurisdiction to alter Verizon's exchange area boundary because doing so would result in an "unconstitutional taking."³¹ Verizon provides no analysis in support of its constitutional claim, and would have the Commission dismiss the petition on the basis of its recitation of the broad constitutional principle that Verizon is entitled to compensatory rates.³²

22 In the context of regulated utilities, the relevant inquiry under the takings clause is whether regulatory action results in rates that are "so unjust as to be confiscatory."³³ Confiscatory rates are "'so unjust as to destroy the value of [the] property for all the purposes for which it was acquired,' and in so doing 'practically deprive[s] the owner

³⁰ 64 Am. Jur. 2d *Public Utilities* § 36 (2001).

³¹ Verizon's Mot., at 5.

³² *Id.*

³³ *Duquesne Light Co. v. Barash*, 488 U.S. 299, 307, 109 S. Ct. 609, 102 L. Ed. 2d 646 (1989) (citations omitted).

of property without due process of law’[.]”³⁴ Verizon has alleged no facts in this case that would support a conclusion that if the Commission were to alter its exchange area boundary, Verizon’s revenues would fall below a constitutionally sufficient amount.³⁵ Nor has Verizon alleged that the total effect of such a decision would result in unreasonable rates.³⁶ Verizon simply states that it would be expensive to extend its facilities and assumes it would not be compensated for doing so,³⁷ but the Commission has not yet determined either of these elements. Therefore, the specter of confiscation conjured by Verizon is no barrier to the Commission’s jurisdiction to alter Verizon’s exchange area boundaries pursuant to RCW 80.36.230 and 80.36.240.

D. The Commission Has Jurisdiction To Investigate Whether The Petition Raises An Issue For Resolution Pursuant To 47 U.S.C. § 214.

23 Verizon claims that the Commission must dismiss the petition because the petitioners do not constitute an “unserved community,” pursuant to 47 U.S.C. §

³⁴ *Id.* at 307-08 (quoting *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597, 17 S. Ct. 198, 41 L. Ed. 560 (1896)).

³⁵ *See* Verizon’s Mot., at 4-5. Verizon also contends that an alteration of its exchange area boundary would constitute a “private use.” *Id.* at 5. Verizon is wrong. If the Commission were to alter Verizon’s exchange area boundary, the company’s service to that area would be a public service subject to regulation under Title 80 RCW.

³⁶ *See Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602, 64 S. Ct. 281, 88 L. Ed. 333 (1944).

³⁷ Verizon’s Mot., at 5.

214(e)(3).³⁸ Verizon's motion is premature at best. The Commission is authorized by 47

U.S.C. § 214(e)(3) to:

determine which carrier or carriers are best able to provide [the services supported by federal universal service support mechanisms] to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof.³⁹

Plainly, the Commission has discretion to commence a proceeding under 47 U.S.C. § 214(e)(3) to consider the issues raised by the petition.⁴⁰

24 If the Commission were to consider this petition pursuant to 47 U.S.C. § 214(e)(3), then the issue of whether the petitioners constitute an "unserved community" would be a factual determination for the Commission. Therefore, the Commission should not dismiss this petition on Verizon's unproven contention that "twelve owners of property in remote forest do not create a community."⁴¹

³⁸ Verizon's Motion, at 4.

³⁹ 47 U.S.C. § 214(e)(3).

⁴⁰ Staff offers no opinion at this time regarding whether the Commission should commence a proceeding under 47 U.S.C. § 214(e)(3) or what process that statute contemplates.

⁴¹ Verizon's Motion, at 4.

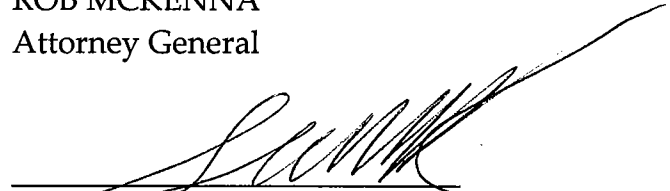
III. CONCLUSION

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As argued above, the Commission has jurisdiction to consider the matters raised by the petition. If the Commission decides that it is in the public interest to alter Verizon's exchange area boundaries, then Verizon must provide service as contemplated by Title 80 RCW, subject to all of the conditions and limitations of service set forth in chapters 80.04 and 80.36 RCW, and chapter 480-120 WAC.⁴² Accordingly, the Commission should deny Verizon's motion to dismiss.

Dated: August 17, 2005.

ROB MCKENNA
Attorney General



SHANNON E. SMITH
Assistant Attorney General
Counsel for Commission Staff

⁴² At this time, Staff takes no position as to whether the Commission should order Verizon to extend service to the petitioners under the provisions of chapters 80.04 and 80.36 RCW or 480-120 WAC.