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**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of  
VERIZON NORTHWEST, INC.,  
For Waiver of WAC 480-120-071(2)(a)

Docket No. UT-011439  
RESPONSIVE POST-HEARING BRIEF  
OF RCC MINNESOTA, INC.

**I. INTRODUCTION**

It is now apparent that no other party in this case holds the position that RCC should be ordered to do anything at the conclusion of the case. The Staff’s position is unequivocal: “Staff does not believe that the Commission should require RCC Minnesota (RCC) to provide service to either location.” Staff Opening Brief, ¶ 11. Verizon makes no recommendation whatsoever regarding RCC. Verizon Opening Brief. Verizon merely requests the waiver for which it petitioned. *Id.* at 24. Even Qwest, the party that sought RCC’s joinder in this case, requests no affirmative relief against RCC. Qwest Opening Brief at 48-49. RCC should be dismissed from this case, since no relief is sought and no relief could be granted against RCC.<sup>1</sup>

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<sup>1</sup> RCC further notes that Qwest’s argument under RCW 34.05.434(2)(h), regarding entitlement to a notice of hearing which contains “a short plain statement of the matters asserted by the agency” applies equally to RCC. RCC would prefer to be dismissed based on sound reasons of public policy and public interest under the substantive facts and law involved in the case. However,  
(FOOTNOTE CONT’D)

1 **II. DISCUSSION**

2 While Qwest merely seeks to be excused from providing service to Verizon’s  
3 applicants, it continues to base its arguments on the assertion that the Commission should look to  
4 RCC first for any such extended service. RCC has no objection to parties pointing to RCC’s  
5 existing service as a factor to consider in applying WAC 480-120-071 to the wireline carriers.<sup>2</sup>  
6 However, Qwest takes its assertions unacceptably far. For example, Qwest references RCC’s  
7 “promises” to serve in connection with its application for ETC designation. Further, Qwest  
8 states:

9 [T]he existence of RCC as an ETC which has volunteered to serve the Timm  
10 Ranch should preclude any proper finding that there is any need to alter Qwest’s  
11 exchange boundary in order to provide the residents of the Timm Ranch with  
12 telecommunications service.

13 Qwest Opening Brief at 33 (emphasis added). RCC never “volunteered to serve the Timm  
14 Ranch.” RCC merely sought ETC status for an area that included the Timm Ranch, along with  
15 thousands of square miles of mostly uninhabited area. Some, but not all, of the Timm Ranch  
16 residences are in RCC’s “dead spots.” Tr. at 323-24. See generally, Exhibit 91T. There is no  
17 evidence that RCC has ever “promised” or “volunteered” to serve every single dead spot in its  
18 ETC areas. Nor is it required to do so under applicable federal law.

19 The FCC has held several times that the existence of dead spots does not preclude  
20 a wireless carrier from receiving ETC designation. For example:

21 [T]he Commission’s rules acknowledge the existence of dead spots. “Dead spots”  
22 are defined as “[s]mall areas within a service area where the field strength is  
23 lower than the minimum level for reliable service.” Section 22.99 of the  
24 Commission’s rules states that “[s]ervice within dead spots is presumed.”  
25 Additionally, the Commission’s rules provide that “cellular service is considered  
26 to be provided in all areas, including dead spots . . . .” Because “dead spots” are

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28 RCC does not waive any defense to affirmative relief against it based on lack of notice that such  
29 relief could be sought in the docket. No such notice has been given to RCC.

30 <sup>2</sup> Indeed, it is mentioned in the rule as a specific factor to consider in determining waiver  
31 requests. WAC 480-120-071(7)(b)(ii)(c).

1 acknowledged by the Commission's rules, we are not persuaded by the Alabama  
2 Rural LECs that the possibility of dead spots demonstrates that Cellular South is  
not willing or capable of providing acceptable levels of service throughout its  
3 service area.

4 Memorandum Opinion and Order, Cellular South License, Inc., DA 02-3317, ¶ 18 (W.C.B. rel.  
5 Dec. 4, 2002); see also, Id., ¶ 17 and Memorandum Opinion and Order, RCC Holdings, Inc.,  
6 DA 02-3181 at ¶¶ 19, 20 (W.C.B. rel. Nov. 27, 2002). "Throughout the service area" as used in  
7 Section 214 has never been held to require service to every single location in a service area.

8 In effect, Qwest's argument boils down to an assertion that RCC might be  
9 required to serve the Timm ranch residences because they fall within a map that RCC filed,  
10 while Qwest cannot be required to serve them because they fall outside of the map Qwest filed.  
11 Yet, by their very nature, service boundary maps are somewhat arbitrary, and particularly so in  
12 rural areas, where much of the maps are "white areas" with no wireline facilities and spotty  
13 wireless coverage.<sup>3</sup>

14 As this case amply demonstrates, the lines on the maps bear little or no  
15 relationship to the costs of a particular carrier to service a specific spot on the map. RCC takes  
16 no position on Qwest's legal arguments about the significance of its exchange area maps.<sup>4</sup>  
17 However, as a matter of public interest, rather than legal technicalities, the maps should not be  
18 given the weight that Qwest suggests. RCC has not committed to serve every single person and  
19 location in its ETC areas any more than Qwest has made such a commitment within its exchange  
20 area boundaries. RCC's and Qwest's commitments to serve are essentially the same. They are  
21 both limited to "reasonable" requests. The source of Qwest's obligation is generally state law,  
22 under RCW 80.36.090. The source of RCC's obligation is Federal, under 47 U.S.C. § 214 and  
23 FCC orders and rules interpreting Section 214.

24 <sup>3</sup> RCC's ETC boundary map is particularly arbitrary, given that it was developed in a wireline  
25 world, without regard to efficient wireless network design. The ETC scheme, however,  
generally requires RCC to follow existing wireline "study area" maps. 47 U.S.C. § 214(e)(5).

26 <sup>4</sup> Likewise, Qwest has not yet taken a position on RCC's jurisdictional arguments.

1           The term “reasonable” inherently implies a policy or public interest based  
2 decision. Assuming for the sake of argument that as a matter of law the Commission were  
3 equally unfettered to act against either Qwest or RCC, then there is a powerful public policy  
4 reason that it should not act against RCC. RCC could recover almost none of its costs if ordered  
5 to build facilities for better service at the Timm Ranch. In contrast, Qwest could recover all or  
6 almost all of its costs. The main basis for Qwest’s argument on cost recovery was based on a  
7 Court of Appeals decision that the Washington Supreme Court reversed on the very day Qwest  
8 filed its Opening Brief.<sup>5</sup> See Washington Independent Telephone Association v. WUTC,  
9 \_\_\_ Wn.2d \_\_\_ (Docket Number 72330-3, filed March 6, 2003).

10           Qwest argues that RCC’s comparison of relative cost recovery possibilities “is not  
11 germane because RCC has already dedicated its facilities to public use by customers in the  
12 Bridgeport Exchange including the Timm Ranch, while Qwest has not.” Cost recovery  
13 mechanisms may not be germane to the constitutional barriers, as Qwest asserts.<sup>6</sup> However, they  
14 are certainly germane to the question of whether it is “reasonable” or in the public interest to  
15 order RCC or any wireless carrier to incur over a million dollars in construction costs while  
16 excusing wireline carriers with comparable costs. First, the phrase “dedicated facilities to public  
17 use” was coined in the context of monopoly utilities. Second, it is a meaningless platitude in any  
18 event. Such concepts have never been absolute, even in the traditional wireline world. For  
19 example, dedication does not permit “confiscation” of a utility’s property without compensation.  
20 Duquesne Light Co. v. Barasch, 488 U.S. 299, 307-08 (1989). Thus, in deciding this case

21 consistent with what is “reasonable” and in the public interest, the Commission should certainly  
22 give great weight to the fact of which of the carriers that might be ordered to incur costs can

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24 <sup>5</sup> RCC assumes that Qwest was not aware of the Supreme Court opinion when it finalized its  
opening brief.

25 <sup>6</sup> RCC does not take a position on Qwest’s arguments that the Commission is barred from  
26 ordering Qwest to serve the Timm Ranch as a matter of law.

1 recover them. Qwest cannot reasonably dispute that wireless carriers have much more limited  
2 cost recovery mechanisms than do wireline carriers.

3 It cannot be in the public interest to order the carrier with no cost recovery  
4 possibility to extend service when there are other carriers that do have cost recovery  
5 mechanisms. The long term effect of such an approach can only be to discourage carriers  
6 from coming to this state, drive existing carriers out of the state, and potentially drive carriers out  
7 of business.

8 Finally, the possibility of running wireline service from a Phonedcell base station  
9 to other nearby residences is speculation, at best, based on the record in the case.<sup>7</sup> Even if it  
10 were technically feasible, there are significant practical and legal issues with placing telephone  
11 plant used by other members of the public in a private residence. The Commission should avoid  
12 basing anything in decision on an assumption that such a technical solution is or might soon  
13 become possible.

### 14 **III. CONCLUSION**

15 If the Commission finds it in the public interest to order a carrier to extend service  
16 to the Timm Ranch it should find that based on both strong public interest and jurisdictional  
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22 <sup>7</sup> Qwest's statement that, "Dr. Danner testified that engineers of RCC indicated the technology  
23 was almost available" (Qwest Opening Brief at 48) is not supported by the record. What the  
24 witness actually said was, "The problem is getting an antenna up there and wiring it back down  
25 to the homes, and I guess as far as we could tell and RCC could tell, there aren't phone cell units  
26 now that quite do that." Tr. at 271. The witness did not state that such technology was close at  
hand or even under development.

1 reasons the carrier should be a wireline carrier. For the foregoing reasons and the reasons set  
2 forth in RCC's Opening Brief, RCC should be dismissed from this proceeding.

3 Respectfully submitted this 26<sup>th</sup> day of March, 2003.

4 MILLER NASH LLP

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