

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	)	DOCKET NO. UT-050778
	)	
DOUGLAS AND JESSICA RUPP,	)	
KATHIE DUNN AND CHRIS HALL,	)	ORDER NO. 02
MELINDA INMAN; VERLIN	)	
JACOBS, ANTHONY WILLIAMS,	)	
CHRISTINE AND SAMUEL	)	ORDER DENYING MOTION TO
INMAN, ROBERT JACOBS, AND	)	DISMISS
SAM HAVERKEMP AND CHRIS	)	
PORTREY,	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	
VERIZON NORTHWEST INC.,	)	
	)	
Respondent.	)	
.....	)	

*Synopsis: This order denies Verizon’s motion to dismiss, finding that Petitioners have alleged facts which, if proven, could support their request for an order directing Verizon to extend its territory to serve Petitioners’ properties.*

**MEMORANDUM**

- 1 **Nature of Proceeding.** Docket No. UT-050778 is a petition by persons in eight households near Index, Washington requesting the Commission to direct Verizon to expand its service territory to include petitioners’ properties.
  
- 2 **Appearances.** Petitioners Douglas Rupp, Jessica Rupp, Kristen Bell, Anthony Williams, Verlin Jacobs, Melinda Inman, Christine Inman, Kathie Dunn, James Hall, Chris Portrey, and Sam Haverkemp, Index, Washington, appeared *pro se*.

Judith A. Endejan, Graham & Dunn, Seattle, Washington, represents Verizon Northwest, Inc. Lisa W. Gafken, Assistant Attorney General, represents the Commission's regulatory staff (Commission Staff or Staff).

3 **Procedural History.** On May 20, 2005, a group of property owners petitioned the Commission for an order extending the exchange area boundary of Verizon's exchange near Index, Washington, to include their properties. Petitioners currently do not have wireline telephone service. On June 13, 2005, Verizon answered the petition and moved to dismiss the petition.

4 The Commission convened a prehearing conference on July 20, 2005, before Administrative Law Judge Karen M. Caillé, at which, among other things, it set a pleading schedule to address the motion to dismiss, set a schedule for filing testimony, hearing dates, and granted motions to amend the petition. Counsel for Commission Staff stated that Staff's participation would be limited to policy issues, but volunteered to address the question of the Commission's jurisdiction in this proceeding.

5 **Motion to Dismiss Petition.** Petitioners filed a Response to Verizon's motion to dismiss on June 24, 2005. According to the schedule set forth in Order No. 01—Prehearing Conference Order, Petitioners filed a Supplemental Response to the motion on August 3, 2005, Commission Staff filed a Response to the motion to dismiss on August 17, 2005, and Verizon filed a Reply to Petitioners' Supplemental Response.

6 **Applicable Rules and Statutes.** WAC 480-07-380(1) (Motion to dismiss), Washington Superior Court Civil Rule 12(b) and (c), RCW 80.36.230 (Exchange areas for telecommunications companies), RCW 80.36.240 (Exchange areas for telephone companies—Procedure to establish), and 47 U.S.C. § 214(e)(3) are set forth in Attachment A to this Order.

## DISCUSSION AND DECISION

7 This Order addresses a procedural motion filed by Verizon, a Motion to Dismiss. The Order does not address the substance of the Petition.

8 **Standard of Review.** WAC 480-07-380 (1) (a) provides that a party may move to dismiss another party's claim or case on the asserted basis that the opposing party's pleading fails to state a claim on which the Commission may grant relief. In considering a motion made under WAC 480-07-380 (1) (a), the Commission will consider the standards applicable to a motion made under Civil Rule (CR) 12 (b) (6) and 12 (c) of the Civil Rules for Superior courts. No dismissal for failure to state a claim should be granted unless it appears, beyond doubt, that Petitioners can prove no set of facts in support of their claim that would entitle them to relief.<sup>1</sup>

9 **Motion to Dismiss.** 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.

(1) *Petitioners cannot prove Verizon violated any law or legal duty*

10 Verizon contends that under *Prescott Tel. & Tel. Co. v. UTC*<sup>2</sup> 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.<sup>3</sup> Verizon argues that the petition does not set forth any facts

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<sup>1</sup> *Berge v. Gorton*, 88 Wn.2d 756, 759 (1977).

<sup>2</sup> 30 Wn. App. 413 (1981).

<sup>3</sup> Verizon Motion to Dismiss at 2.

that show it has violated any legal duty or that its serving area is unreasonable, therefore, the petition should be dismissed for failure to state a claim.<sup>4</sup>

11 In response, Staff and Petitioners challenge Verizon's reliance on *Prescott* to support a requirement that Petitioners must demonstrate that Verizon has violated the law or a legal duty for the Commission to consider Petitioners' request to extend Verizon's service territory. They argue that *Prescott* 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. Thus, the *Prescott* case is about removing area from a company's exchange area, not adding territory.<sup>5</sup>

12 Staff notes that a second argument raised by Prescott complained that Pacific Northwest Bell (PNB) had not installed facilities in the area, and that 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.<sup>6</sup> Staff reports that the Court held PNB did not violate RCW 80.36.080, because PNB was ready to provide service if requested. The Court determined that the Commission properly dismissed Prescott's complaint.

13 **Conclusion.** This Order rejects 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. 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 duty. Moreover, the public service laws do not require the Commission to find that a

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<sup>4</sup> *Id.*

<sup>5</sup> Staff Resp.at 3; Petitioners' Supp. Resp. at 3-4.

<sup>6</sup> Staff Resp. at 4.

public service company violated the law or a legal duty before the Commission can exercise its jurisdiction to enforce the public service laws.

*(2) The WUTC has no jurisdiction to change Verizon's exchange area boundary*

14 Verizon contends that no state law or federal law provides the Commission with authority to order Verizon to extend its exchange area boundaries to serve the Petitioners.<sup>7</sup> Verizon argues that Petitioners misconstrue RCW 80.36.230 (Exchange areas for telecommunications companies) and RCW 80.36.240 (Exchange areas for telephone companies—Procedure to establish) as granting the Commission power to prescribe telecommunication exchange areas and to expand such boundaries when warranted. According to Verizon, the language in these statutes cannot be read to give the Commission the authority to force a company to serve beyond its dedicated service area.<sup>8</sup>

15 Verizon interprets the act of “prescription” in RCW 80.36.230 to mean “to set up rules that allow telecommunications companies to define the limits of where they are willing to serve.”<sup>9</sup> Verizon cites the *Prescott* case as support for its position that RCW 80.36.230 does not give the Commission substantive power to impose new geographical service obligations. According to Verizon, it has complied with the appropriate tariff regulations at issue under *Prescott* because it has on file tariff exchange area maps according to WAC 480-80-102(5)(b); therefore, Verizon’s local exchange areas defined in its tariffs may not be changed.<sup>10</sup>

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<sup>7</sup> Verizon Reply at 1-5.

<sup>8</sup> *Id.*

<sup>9</sup> Verizon Reply at 2.

<sup>10</sup> *Id.*

16 Verizon cites *Electric Lightwave Inc. (ELI) v. WUTC*<sup>11</sup> and a Commission decision concerning waiver of a service extension rule<sup>12</sup> in further support of its claim that RCW 80.36.230 was not intended as a grant of authority to the Commission to expand a carrier's service obligations. Verizon also references decisions from other jurisdictions and decisions relating to other industries which do not address statutory provisions similar to RCW 80.36.230 and RCW 80.36.240.<sup>13</sup>

17 Verizon disputes Petitioners claim that 47 U.S.C. § 214(e)(3) requires Verizon to provide them with telecommunications service. Verizon argues that the statute only applies where services are supported by federal universal service support mechanisms under 47 U.S.C. § 254(c). According to Verizon, it has no Washington intrastate services that are supported by federal universal service support mechanisms. Therefore, the provisions of § 214(e)(3) do not come into play.<sup>14</sup>

18 Verizon also argues that the petition fails to establish that Petitioners constitute an "unserved community" under 47 U.S.C. § 214(e)(3). Verizon contends that twelve owners of property in a remote forest do not create a community, particularly if several of the properties contain only vacation places.<sup>15</sup>

19 Staff and Petitioners insist that the Commission has jurisdiction to order Verizon to alter its exchange area boundaries based on the plain language of RCW 80.36.230. They assert that the Commission's express authority to prescribe a telecommunication company's exchange area or territorial boundaries is further confirmed in RCW 80.36.240.<sup>16</sup>

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<sup>11</sup> 123 Wn.2d 530 (1994)

<sup>12</sup> *In the Matter of the Petition of Verizon Northwest, Inc. for Waiver of WAC 480-120-071(2)(a)*, Docket No. UT-011439 (April 23, 2003).

<sup>13</sup> Verizon Motion to Dismiss at 3-4.

<sup>14</sup> Verizon Motion to Dismiss at 4; Verizon Reply at 4-5.

<sup>15</sup> Verizon Motion to dismiss at 4.

<sup>16</sup> Staff Resp. at 4-5; Petitioners' Supp. Resp. at 7-8.

20 Staff and Petitioners contend that Verizon's reliance on *Prescott* as interpreting RCW 80.36.230 and 80.36.240 to mean that the Commission prescribes exchange area boundaries only by accepting tariff maps filed by telecommunications companies is misplaced. Instead, the Court in *Prescott* rejected the argument that a telecommunications company's filing of an exchange map as part of its tariff filing is sufficient to prescribe the exchange area.<sup>17</sup> The Court held that "if the WUTC is to establish any *new* exchange areas, we hold it must do so by issuance of an order, not be mere acceptance of tariffs."<sup>18</sup>

21 Staff and Petitioners observe that Verizon mistakenly relies on *ELI v. WUTC* to support its position that RCW 80.36.230 was not intended as a grant of authority to the Commission to expand a carrier's service obligations.<sup>19</sup> Rather, the Court in *ELI* held that the Commission does not have authority to grant a telecommunications company the *exclusive* right to provide service in a specific geographic area.<sup>20</sup> Staff and Petitioners both distinguish the other cases cited by Verizon in its motion to dismiss, noting that many of the cases are old, from other jurisdictions, refer to different industries, pre-date the Telecommunications Act of 1996, and do not address statutory provisions similar to RCW 80.36.230.<sup>21</sup>

22 Staff and Petitioners contend that the Commission has jurisdiction to investigate whether the petition raises an issue for resolution pursuant to 47 U.S.C. § 214(e)(3). They claim that Verizon's motion is premature at best. They observe that 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.<sup>22</sup>

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<sup>17</sup> Staff Resp. at 5; Petitioners' Supp. Resp. at 7-8.

<sup>18</sup> *Prescott*, 30 Wn. App. at 417.

<sup>19</sup> Staff Resp. at 6, fn 14; Petitioners' Supp. Resp. at 8.

<sup>20</sup> 123 Wn 2d at 536-37.

<sup>21</sup> Staff Resp. at 6-10; Petitioners' Supp. Resp. at 4-7.

<sup>22</sup> Staff Resp. at 11-12; Petitioners' Supp. Resp. at 8-9.

23 **Conclusion.** The Commission has jurisdiction under RCW 80.36.230 and RCW 80.36.240 to consider Petitioners request that the Commission order Verizon to expend its service territory to include Petitioners' properties. RCW 80.36.230 provides:

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

24 This express authority to prescribe a telecommunication company's exchange area or territorial boundaries is further confirmed in RCW 80.36.240. Likewise, 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.

Thus, under the state and federal authority referenced above, the Commission has the authority to consider the issue raised by the petition.

***(3) Neither Congress nor the Commission can authorize an unconstitutional taking of Verizon's property.***

25 Verizon claims 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." Verizon alleges that since there is no mechanism for recovery of the significant cost that would be incurred to provide the service,



forcing Verizon to build facilities and maintain service in this area would be an unconstitutional uncompensated taking.<sup>23</sup>

26 Staff argues that 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. Staff observes that Verizon provides no analysis in support of its constitutional claims. Staff explains that 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."<sup>24</sup> Confiscatory rates are "'so unjust as to destroy the value of [the] property for all purposes for which it was acquired,' and in so doing 'practically deprive[s] the owner of property without due process of law'["<sup>25</sup> Staff and Petitioners point out that 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.<sup>26</sup> Staff notes that the Commission has not yet made a determination of whether Verizon must extend its facilities, and if so, whether it would be compensated for doing so. Accordingly, Verizon's confiscation arguments are not a barrier to the Commission's jurisdiction to alter Verizon's exchange area boundaries pursuant to RCW 80.36.230 and RCW 80.36.240.

27 **Conclusion.** This Order finds Staff's and Petitioners' arguments persuasive and determines that 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 RCW 80.36.240.

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<sup>23</sup> Verizon Motion to Dismiss at 4-5.

<sup>24</sup> *Duquesne Light Co. v. Barash*, 488 U.S. 299, 307, 109 S. Ct. 609, 102 L. Ed. 2d 646 (1989)(citations omitted).

<sup>25</sup> *Id.* at 307-308 (quoting *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578,597, 17 S. Ct. 198, 41 L.Ed 560 (1896)

<sup>26</sup> Staff Resp. at 11; Petitioners' Supp. Resp. at 13.

28 **Decision.** Based on the pleadings and the discussion above, it appears that Petitioners have alleged facts which, if proven, could support their request under RCW 80.36.230, RCW 80.36.240, and 47 U.S.C. § 214(e)(3) for an order directing Verizon to expand its territory to service Petitioners' properties. Accordingly, Verizon's motion to dismiss the petition is denied.

Dated at Olympia, Washington, and effective this 13th day of September, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

KAREN M. CAILLÉ  
Administrative Law Judge

**NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.**

## Attachment A

### APPLICABLE RULES

**WAC 480-07-380(1) Motion to dismiss. (a) General.** A party may move to dismiss another party's claim or case on the asserted basis that the opposing party's pleading fails to state a claim on which the commission may grant relief. The commission will consider the standards applicable to a motion made under CR 12 (b)(6) and 12(c) of the Washington superior court's civil rules in ruling on a motion made under this subsection. If a party presents an affidavit or other material in support of its motion to dismiss, and the material is not excluded by the commission, the commission will treat the motion as one for summary determination as provided in subsections (2) and (3) of this section.

**CR 12 (b) How presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being jointed with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

**CR 12(c) Motion for Judgment of the Pleadings.** After the pleadings are closed by within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

**APPLICABLE STATUTES**

**RCW 80.36.230 Exchange Areas for telecommunications companies.**  
The Commission is hereby granted the power to prescribe exchange area boundaries and/or territorial boundaries for telecommunications companies.

**RCW 80.36.240 Exchange areas for telephone companies— Procedure to establish.** The commission in conducting hearings, promulgating rules, and otherwise proceeding to make effective the provisions of RCW 80.36.230 and 80.36.240, 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 issued under authority of RCW 80.36.230 and 80.36.240.

**47 USC 214 (e) (3) Designation of eligible telecommunications carriers for unserved areas.** If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) of this title to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service 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. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.