BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

COMES NOW QWEST CORPORATION ("Qwest") and submits its reply to Staff's response brief on the issues of notice and jurisdiction in the above case.

1. Staff's Response Brief highlights the lack of notice of issues Qwest received.

In four paragraphs of its response brief, paragraphs 23 through 26, Staff sought to respond to Qwest's demonstration in its opening brief that Qwest had not received timely notice of Staff's claims on which it would rely to advocate changing Qwest's boundary. Staff's brief has failed to rebut Qwest's argument. In ¶23, Staff argues that Qwest ignored Mr. Shirley's testimony in Ex. 134T that the Commission "could look at differences in relative cost…possible differences in maintenance costs, and in a non-cost factor, the

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community of interest of Mr. Nelson and the Timm Ranch." Staff's response brief also notes that Mr. Shirley said Staff lacked information that only Qwest could provide.

Qwest showed in its opening brief that when Qwest provided its cost information in Ex. 60T, Staff abandoned the claim that there was a "difference in relative cost" for Qwest to serve Timm Ranch compared to Verizon.[1] Staff's response brief fails to explain how a claim of a possible difference in cost which Staff abandoned is notice of claims on which Staff actually relies. Similarly, Qwest showed in its opening brief that Staff never established the facts to support its second hypothetical reason in this paragraph of Staff's response brief, namely a *possible* difference in maintenance costs. Staff has not shown in its brief how it did establish and quantify this maintenance cost difference and why a hypothetical cost difference which was never established by Staff with evidence is notice to Qwest. Finally Staff failed to explain why the "non-cost factor" of the alleged community of interest of Mr. Nelson is notice to Qwest that Qwest's boundary should be changed as a second best solution if the Commission denies Verizon's request for waiver. Staff's response brief is silent on this issue, and on its face the alleged community of interest does not relate to Staff's recommendation.

The next paragraph of Staff's response brief, ¶24, cites Mr. Spinks' Ex. 113T on the issue that Qwest's construction would benefit Qwest's existing customers and Mr. Shirley's Ex. 137T that pending receipt of RCC's testimony he could not make a definitive recommendation but that it would be reasonable to conclude Qwest's construction would assertedly benefit more existing customers than Verizon's. Staff's response brief fails to

[1] See, Ex. 137T, p. 2: "Qwest's cost estimate is …..essentially the same as Verizon's estimate of $737,672 (this amount does not include reinforcement)." (Shirley)

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indicate how this hypothetical testimony notified Qwest of on what claims Staff would rely to recommend that Qwest's boundary be changed as a second best alternative to denying Verizon's waiver request and why this testimony supports that recommendation, in light of Mr. Williamson's testimony that the benefit which existing customers would perceive of being migrated to the overbuilt cable was "slight" if any. (Hearing Tr. p. 512)

Paragraph 25 of Staff's response brief cites Mr. Spinks' Ex. 114T that the so called "nonreinforcement" (or direct) cost for Qwest to extend to serve the Timm Ranch was approximately $300,000 less than Verizon's nonreinforcement cost, as evidence that Qwest knew on what claims Staff would rely to advocate changing Qwest's boundary. Staff argues that this is the "significant difference in relative cost" which Staff had hypothesized in Ex. 134T as a basis for adjusting Qwest's boundary, and of which Qwest was therefore aware. But Staff does not reconcile this claim with its testimony in Ex. 137T, p. 2, as cited above, that the two companies' cost estimates were "essentially the same." Staff does not explain why Qwest should have known that this difference in "nonreinforcement cost" under Staff's view of what that term meant, was a reason on which Staff would rely to recommend changing Qwest's boundary.[2] This is especially true since Mr. Spinks, on whom Staff relies here, was unaware that Mr. Shirley concluded that the two companies' cost estimates were "essentially the same" by excluding reinforcement cost from Verizon's estimate but not from Qwest's estimate. (Hearing Tr. p. 461; Ex. 137T, p. 3, ln. 11) Indeed until ¶25 of the Staff's

[2] Exhibit 611 is a more recent version of the data request response on which Mr. Spinks relied and which does not support the characterization that any of Qwest's estimated extension cost is "reinforcement." Therefore the evidentiary basis for Staff's argument in its response brief is equivocal at best.

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response brief, the claim that "nonreinforcement cost" differences meant Qwest's boundary should be changed had never been made by Staff.

The only significance of the term "reinforcement" under WAC 480-120-071 is that costs so labeled by Staff are not eligible for recovery in access charges. Yet Mr. Shirley testified during the hearing that all of Qwest's costs, including what Staff called reinforcement, should be eligible for recovery in access charges. (Hearing Tr. p. 615) Staff's response brief does not explain why Qwest should have known that the difference in "nonreinforcement" costs between Qwest and Verizon was a reason Staff believed justified changing Qwest's boundary, when Staff advocated no different treatment for Qwest's "nonreinforcement" and "reinforcement" costs and Staff had testified that Qwest's costs were "essentially the same" as Verizon's costs.

Finally, staff relies in ¶26 of its response brief on the fact that Qwest provided testimony on why the boundary should not be changed, as evidence that Qwest knew of the bases on which Staff "might rely" for changing the boundary. Review of Qwest's testimony shows that this argument is erroneous. In Ex. 50T at p. 25, Ms. Jensen testified that Qwest was without notice of the basis on which Staff would recommend that Qwest's boundary be redrawn. Staff did not cross examine Ms. Jensen on this testimony. In fact even as of the writing of this reply brief, Staff has yet to provide a coherent rationale for its "second best" recommendation to alter Qwest's boundary.

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2. Staff's response brief failed to show that the Commission has jurisdiction of the subject matter of changing Qwest's boundary.

Qwest's demonstration that the Commission lacks subject matter jurisdiction does not depend on reading language into RCW 80.36.230, as Staff erroneously claims. Staff's response brief argues at p. 16 that Qwest's jurisdictional challenge requires the Commission to read language into RCW 80.36.230 relating to the necessity to file a complaint under RCW 80.04.110 in order to change an existing exchange boundary that is contained in an existing tariff, and that *State v. Moses*, 145 Wn. 2d 370, 37 P. 3d 1216 (2002) is authority that courts will not read words into statutes. Staff's argument is misplaced. There is explicit language in RCW 80.36.240 which Staff's brief did not analyze, and which demonstrates that Staff's argument is without merit.

The procedure for exercising the power granted in RCW 80.36.230 is addressed in RCW 80.36.240, which provides in part:

> 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*; [emphasis added]

It is without question that RCW 80.04.110 and 80.04.120 are part of the same title in which RCW 80.36.240 is codified. Thus there is an internal reference within RCW 80.36.240 by which the Legislature commanded that proceedings under RCW 80.36.230 would be governed by provisions in Title 80 RCW, which must include RCW 80.04.110. RCW 80.36.230 and RCW 80.36.240 must be construed *in pari materia* because the latter section refers specifically to the former. It is not necessary for Qwest's argument that the

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Commission read into RCW 80.36.230 words which the Legislature omitted, as Staff maintains.

Qwest relies on the clear language which the Legislature used, and Qwest's argument does not involve any issue which was presented to the court in *State v. Moses*. In *Moses, supra,* the court held that Indian tribes were not included within the meaning of the statutory phrase "another state or country" in RCW 10.43.040, the double jeopardy statute. The court held that tribal prosecutions would not have double jeopardy effect in state courts in light of several facts: (1) at the time that statute was enacted in 1909 it was impossible for Washington to have shared concurrent jurisdiction over crimes with an Indian tribe; (2) a 1984 Washington Supreme Court decision holding legislative silence on the subject of including tribes within the statutory definition of "jurisdiction" in another statute meant that they were not included; and (3) legislative inaction since that case to amend RCW 10.43.040. None of these issues applies to the instant case. In *Moses,* there was no statute similar to RCW 80.36.240 which directed that interpretation of the statute which was presented in that case be governed by provisions of any other statute.

In fact it is Staff's position which requires that words be read into a statute. Staff's argument would require an exception to be inserted into RCW 80.04.110 for existing tariffs consisting of exchange boundary maps. According to Staff's position such tariffs may be modified on motion of Staff by invoking RCW 80.36.230 in an unrelated case of a company other than the tariff issuer in which no complaint has been filed. This conflicts with RCW 80.04.110.

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Staff's attempt to distinguish *Prescott Telephone & Telegraph Co. v. Wash. Util. & Transp. Comm.*, 30 Wn. App. 413, 634 P. 2d 897 (1981) is inconsistent with the case's holding. The court in that case stated that it considered two issues: "first, whether the WUTC properly prescribed the exchange areas, and second, whether the WUTC ought to have declared the North Easton Ridge area open." (30 Wn. App. at p. 415) The court resolved the first issue by holding that although WAC 480-80-270(1) provided that filing of tariffs did not imply that the tariff provisions were approved and that any new exchange areas must be prescribed by issuance of an order, the Commission's historic practice of accepting tariff filings as an exercise of the RCW 80.36.230 prescription power meant that PNB had the right to provide service if the need arose. (30 Wn. App. at p. 417) The court thus resolved the first question that the WUTC did properly prescribe the area.

The only issue remaining was the second issue, namely whether the WUTC ought to have declared the area open. The court applied to that question the rule that "Therefore, Prescott's only challenge to PNB's exchange areas is under RCW 80.04.110.." (30 Wn. App. at p. 418) The court reviewed the evidence under the standard in that statute and upheld the Commission's refusal to change the boundary on the facts. The same issue was presented in that case as in the instant case, namely whether a third party could obtain an order changing Qwest's predecessor's boundary over its objection, without demonstrating facts justifying such relief under RCW 80.04.110. In *Prescott*, the party seeking the boundary change did actually file a complaint and introduce evidence to attempt to establish one of the grounds for relief in RCW 80.04.110, albeit unsuccessfully.

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Staff's argument in the instant case is at odds with the Commission's decision in *Prescott* which the court upheld. The court upheld the Commission's refusal to change PNB's boundary because of a failure of proof by Prescott in the complaint case that any of the reasons for changing a tariff in RCW 80.04.110 existed. The Commission in *Prescott* did not take the position that RCW 80.36.230 was a broad, standardless grant of power to alter existing tariffed exchange boundaries which was distinct from the power to change a tariff on complaint under RCW 80.04.110. Qwest's argument does comport with *Prescott*, since the Commission would issue an order to prescribe a boundary in response to a complaint under RCW 80.04.110.

Conclusion

Based on the foregoing argument the Commission should not change Qwest's boundary in this case.

Respectfully submitted this 3rd day of April, 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 April 3, 2003.

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