BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re:	**Docket No. UT-990146**
Rulemaking	**COMMENTS OF VERIZON NORTHWEST INC. IN SUPPORT OF RETENTION OF WAC 480-120-500(3)**

I. INTRODUCTION

Verizon Northwest Inc. hereby responds to staff member Bob Shirley's e-mail dated May 10, 2001. There, Mr. Shirley asked the parties to address whether WAC 480-120-500(3) which provides that the Commissioner's Service Quality Rules "are not intended to establish a standard of care owed by a telecommunications company to any consumer(s) or subscriber(s)" should be retained:

As discussed in detail below, this language should be retained for two principal reasons. First, it reflects the well-established legal principle that rules protecting the general public interest – such as the Commission's service quality rules – do not and cannot create a duty owed to a specific individual. Second, retaining the language will not impair the existing rights of any

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party (or the Commission) to seek appropriate relief when any carrier fails to meet its obligations.

II. DISCUSSION

A. The Commission's Technical Rules Do Not Create a Duty Owed to an Individual and WAC 480-120-500(3) Reflects This Principle.

RCW 80.04.160 authorizes the Commission to "adopt, promulgate and issue rules and regulations covering the transmission and delivery of messages and conversations . . . and generally such rules as pertain to the comfort and convenience of the public concerning the subjects treated of in this title." (Emphasis supplied.) Moreover, the Washington Administrative Procedure Act defines rules as "any agency order, directive, or regulation of general applicability." RCW 34.05.010(5). This definition of a rule does not include orders or acts that are limited in their applicability to a specific person or persons. See Washington Administrative Law Practice Manual Section §7.02(B).

Rules that protect the general public interest do not create a duty owed to private persons. This legal principle is reflected in Section 288 of the Restatement (Second) of Torts (1965), which provides, in part, that "[t]he court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively . . . (b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as member of the publics." The Official Comments to this section of the Restatement distinguish between regulations that protect the public and those that are intended to protect individuals. The former type of regulation does not create a duty of care owed to an individual.[1]

[1] Mr. Shirley discussed RCW 5.40.050 in his memo. That statute suggests that a rule violation alone could be deemed negligence per se. However, that statute becomes relevant only where a plaintiff alleges a breach of duty. Here, Commission rules do not create any duty to an individual plaintiff.

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The Commission's technical service quality rules fall under the criteria of Section 288(b) because they are designed to govern the provision of telephone services to the public in general. WAC 480-120-500(3) reflects this principle, and therefore should be retained.

Moreover, if WAC 480-120-500(3) is not retained, unnecessary and costly litigation may ensue. Under general rules of statutory construction, when an administrative rule is materially changed a court will presume that the rulemaking body intended to change a legal right. State v. Dubois, 58 Wn. App. 299, 303, 793 P.2d 439 (1996). Here, the elimination of WAC 480-120-500(3) could be construed as a material change, i.e. the removal of subsection (3) might suggest that the Commission intended to create an individualized duty of care. As noted above, however, the creation of such a duty is not a proper purpose for a Commission rulemaking. Thus, the current language should be maintained to avoid confusion and needless litigation.[2]

Finally, if the Commission believes that WAC 480-120-500(3) should be clarified, then it should consider amending it to read: "These rules are for general application only[3] and are not intended to give rise to a duty owed by a telecommunication company to any individual consumer(s) or subscriber(s)." This proposed language would be consistent with the law and a clearer statement of the Commission's purpose to regulate in the public interest.

B. Retaining WAC 480-120-500(3) Will Not Affect Existing Rights of Consumers

Retaining WAC 480-120-500(3) will not affect existing rights of consumers who retain their rights to complain to the Commission about service quality issues and to the appropriate

[2] Ms. Shirley states that the Commission refused to add language somewhat similar to WAC 480-120-500(3) to a rule for water companies, and therefore the rule for telecommunications companies should be stricken. But the pertinent rule for water companies' service responsibilities, WAC 480-110-076, never contained language similar to WAC 480-120-500(3). Therefore, the Commission's refusal to amend the water company rule does not mean that WAC 480-120-500(3) is improper or somehow contrary to Commission policy. See Green River College v. HEP Board, 25 Wn. App. 370, 375, 604 P.2d 539 (1979).

[3] Similar language is contained in WAC 480-14-020(2) (Motor Carriers, Excluding Household Goods Carriers and Common Carrier Brokers) and WAC 480-70-410 (Solid Waste and/or Refuse Collection Companies).

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credits provided by company tariffs. The Commissioner has several existing regulatory sanctions for penalizing companies which violate service quality rules such as the ability to assess penalties. See RCW 80.04.380. "The Commission can adjust rates of return for service quality failures." See i.e., U.S. West v. WUTC, 134 Wn.2d 74, 119, 949 P.2d 1337 (1997). With existing ample regulatory tools, there is no harm to consumers by retaining WAC 480-120-500(3) and predictable harm to utilities by eliminating this rule. Stating that general rules do not create a private duty provides important protection for utilities which might be sued otherwise by plaintiffs claiming a breach of duty, whether in tort or in contract.

C. Retention of WAC 480.120.500(3) Is Not Contrary to RCW 80.04.440

Mr. Shirley called for discussion of RCW 80.04.0440 in his e-mail. This statute provides that utilities are liable for damages for doing "any act, matter or thing prohibited, forbidden or declared to be unlawful . . . either by any law of this state, by this title or by any order or rule of the Commission." It was enacted in 1911, has seldom been invoked and never been fully interpreted.

Retention of WAC 480-120-500(3) is not contrary to RCW 80.04.440. This rule is not like the ordinance at issue in Employco Personnel Services, Inc. v. City of Seattle, 117 Wn.2d 606, 817 P.2d 1373 (1991). There the Court invalidated a Seattle City ordinance which provided blanket immunity from liability to Seattle City Light for any damage resulting from the interruption of electrical service from any cause.

WAC 480-120-500(3) does not create such an immunity. It simply clarifies that no individualized duty is created by general service quality rules. This rule does not establish any standard of care — that must always be determined by a trier of fact in a negligence action. Moore v. Pacific Northwest Bell, 34 Wn. App. 448, 452, 662 P.2d 398 (1983). Nor does the rule forbid or prohibit what a statute (RCW 80.04.440) permits. Thus, under Employco, (which

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really rests upon a preemption analysis) WAC 480-120-500(3) would not be invalid. See 117 Wn.2d at 618.[4]

Further, the court relied upon RCW Ch. 19.122.040 which imposes upon the City the duty to mark its underground utilities, as well as RCW 80.04.440 in finding that state law preempted a municipal ordinance. It also found that cities were not immune from suit under Washington law. The court certainly did not hold that RCW 80.04.440 precludes any limitation of liability by a utility.

Employco does not resolve whether RCW 80.04.440 preempts the ability of a utility to limit its liability for negligence by tariff. In any event, retention of WAC 480-120-500(3) does not involve a limitation of liability because there is no liability for negligence where there is no duty, which is what this rule establishes.

Mr. Shirley asked for an explanation of the amicus brief filed by GTE Northwest Incorporated in Employco. The amicus briefs pointed out the difference between blanket immunity law and a tariffed limitation – not total absolution – of liability contained in a tariff which limits the amount a customer can get from a company for service failures. GTE supported the right to, and the need to, limit liability for negligence by tariff for public policy reasons.

The second case of interest to Mr. Shirley is National Union Ins. Co. of Pittsburgh v. Puget Sound Power & Light, 94 Wn. App. 163, 972 P.2d 481 (1999), which also does not deal with the issue raised by retaining WAC 480-120-500(3). Rather, National Union dealt with the issue of tariff construction where two interpretations were possible – one that limited liability and one that did not. Puget Sound Power & Light ("PSP") had been sued for failing to provide backup energy service to The Boeing Company. PSP had relied upon its continuity of service

[4] The Commission had no jurisdiction over the Seattle City ordinance which was preempted. The Commission does not regulate municipal utilities under RCW 80.04.500. Why RCW 80.04.440 would apply to Seattle City Light was not explained in Employco.

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tariff to argue that it should not be held liable for service interruption damages resulting from a cause beyond its reasonable control. National Union, the insurer, argued that Puget Sound Power should be held liable for service interruptions that are concurrently caused by circumstances beyond its reasonable control and its own negligence. The court applied principles of statutory construction and found that the WUTC, when it approved this particular tariff, did not intend to absolve PSP from liability. The holding of National Illinois is narrow and has no relevance to retention of WAC 480-120-500(3):

> Therefore, we hold that Puget Power's continuity of service tariff does not absolve it from liability for service interruptions that it could have controlled or mitigated but for its unreasonable or unexplained failure to utilize available backup equipment in order to reestablish service with a minimum of delay while storm damage to regular equipment is being prepared.

94 Wn. App. at 175.

The court did not invalidate the tariff at issue, or find that limitation of liability tariffs are unlawful. Indeed, it noted that "limitation of liability provisions are an inherent part of the ratemaking process," citing Lee v. Consolidated Edison Co., 98 Misc. 2d 304, 413 N.Y.S.2d 826, 828 (N.Y. Sup. App. 1978). 94 Wn. App. at 170. The court did not discuss, let alone overrule, the case of Allen v. General Tel. Co. of the Northwest Inc., 20 Wn. App. 144, 578 P.2d 1333 (1978), which sustained the company's tariff provision limiting its liability for damages arising from errors in, or omission of, directory listings for which there is no charge. The court found these tariffs are binding law of the State of Washington upon approval by the Commission. These tariffs precluded the plaintiff's claims for lost business profits due to the negligent listing.

In sum, neither Employco, National Union nor Moore v. Pacific Northwest Bell, 34 Wn. App. 448, 662 P.2d 398 (1983) compel the conclusion that WAC 480-120-500(3) should be eliminated, which is not a limitation of liability provision like a tariff. Employco and National Union dealt with cases where the utilities violated a law or rule and Moore dealt with the jurisdiction of courts to address common law negligence claims.

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To determine whether to keep WAC 840-120-500(3), the Commission does not have to address any limitation of liability clauses in utility tariffs, which is implied in Mr. Shirley's e-mail.

This Commission continues to sustain use of limitation of liability tariff provisions. In Witco v. U.S. WEST Communications Inc., Docket No. UT-970766 (1998), Wash. UTC Lexis 42 (January 15, 1998), the Commission stated:

> We are concerned that premature abandonment of the limitation on liability might merely become charges to be passed along to captive customers.[5]

Retaining WAC 480-120-500(3) does not mean that companies will receive unjust limitations on their liabilities, which other competitors or utilities do not receive. All competitors subject to the service quality rules of WAC Ch. 480-120 will be treated the same. If other utilities (i.e., gas and electric) do not have language similar to WAC 480-120-500(3) in the rules which apply to them, perhaps the Commission should add this language to their rules. If the Commission rejects this idea, it should still keep WAC 480-120-500(3). There are too many differences between the statutory and regulatory rules which apply to different industries to argue that deletion of WAC 480-120-500(3) is needed to promote consistency.[6]

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[5] Many valid public policy reasons exist for retaining limitation of liability provisions in utility tariffs. In one case, Simpson v. Phone Directories Co., 82 Or. App. 582, 729 P.2d 578 (1986), the court said:

> The overall statutory scheme inextricably links rates and service levels, and the limitation of liability for erroneous directory listings and service failures is an integral part of the rate structure. If a telephone company were exposed to almost unlimited liability, the cost of providing telephone service might increase, and rates would as a consequence also increase. Tariff regulations, therefore, "lie at the core of the PUC's authority to set service levels and establish reasonable rates therefore . . . We conclude that, because the Legislature has seen fit to provide such an extensive statutory scheme to regulate rates charged by public utilities and because the limitation is an inherent part of the rate, the PUC tariff regulations are effective.
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Id. at 586.

[6] See i.e., RCW 80.28.010. "Duties as to rates, services, and facilities – limitations on termination of utility service for residential heating." This statute has no parallel in RCW CH. 80.36 which governs telecommunications.

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III. SUMMARY

Retention of WAC 480-120-500(3) involves the determination of a duty, which must precede any action for negligence. For the reasons previously set forth, the Commission's rules should not be used to establish a duty cognizable in tort or contract actions. There is no harm to consumers, and much benefit to retaining WAC 480-120-500(3) because it expresses the well-settled legal and regulatory principle that rules are intended for the benefit of the public – not private interests..

RESPECTFULLY SUBMITTED this _____ day of June, 2001.

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