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 COMMISSION STAFF'S REPLY TO QWEST'S ANSWER TO MOTION FOR JOINDER AND ALTERNATIVE OBJECTION TO PROCEDURAL SCHEDULE

Qwest's Answer to Motion for Joinder and Alternative Objection to Procedural Schedule, filed February 22, 2002, opposes the motion of Commission Staff to join Qwest as a party respondent in this proceeding. Staff replies to Qwest's Answer as set forth below.

A. Qwest's arguments contesting the Commission's jurisdiction under RCW 80.36.230

First, Qwest alleges that the Commission lacks jurisdiction to consider "the redrawing of Qwest's exchange area over Qwest's objection to include locations in Verizon's filed exchange area." Qwest Answer at page 2. This is simply incorrect. RCW 80.36.230 plainly states, "The commission is hereby granted the power to prescribe exchange area boundaries and/or territorial boundaries for telecommunications companies." To prescribe such a boundary is to delineate the area within which a company has an obligation to serve. The State Supreme Court recognized this authority in *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 537, 869 P.2d 1045 (1994), when it stated that "[o]ur interpretation of RCW 80.36.230 enables the Commission to define the geographical limits of a company's obligation to provide service on demand[.]"

Qwest first contends that any objection it may raise concerning any alteration in its exchange boundaries creates an absolute barrier to Commission action. Qwest would rewrite

RCW 80.36.230 to say that the Commission may prescribe exchange area boundaries, but only on condition that it first obtain the permission of Qwest before it does so. The statute says no such thing. Nor does Commission regulation prescribing exchange boundaries cast the Commission in the position of arrogating "ownership" powers to itself. (Qwest's citation to the 92-year old case of *Northern Pac. Ry. Co. v. Railroad* Comm'n, 58 Wash. 360, 108 P. 318 (1910), where the court reversed a commission decision requiring a railroad to build a spur for the benefit of a private sawmill, is not on point, and the case has no relevance here.) The Commission here is simply doing what the Legislature has authorized it to do.

Qwest also argues that because RCW 80.36.230 does not mention the relative cost to adjoining companies of extending facilities to a location, the Commission may not rely on this statute as a basis to alter exchange boundaries over a company's objection. But this argument cannot possibly be correct. RCW 80.36.230 does not list any specific factors that the Commission must rely upon in prescribing exchange boundaries -- although RCW 80.36.240 clearly recognizes the Commission's powers under Title 80 RCW in "conducting hearings, promulgating rules, and otherwise proceeding to make effective the provisions of RCW 80.36.230[.]" This does not mean that the Commission cannot act. Indeed, the more reasonable interpretation is that the Legislature has left the implementation of RCW 80.36.230, and the appropriate factors to consider, to the informed discretion of the Commission. If Qwest's argument were accepted, then the Commission could *never* take action to prescribe exchange boundaries, and the statute would become meaningless. The Commission should reject this interpretation of RCW 80.36.230.

Qwest also contends that the Commission did not decide the jurisdictional issue in the *Petition of Thompson* proceedings (Docket No. UT-991878). Again, this is simply not the case.

See Petition of Thompson, Prehearing Conference Order at pages 5-6, ¶¶ 28-35 (attached as Appendix B to Commission Staff's Motion to Join Qwest as a Party Respondent). The Commission may read the Order for itself. The Commission *did* squarely address the question of its jurisdiction under RCW 80.36.230 to alter exchange boundaries over the objection of Qwest's predecessor, and it *did* find that it had jurisdiction to do so, relying in part upon the State Supreme Court decision in *In re Electric Lightwave, supra.* The Commission further held that "whether the respective costs of service connection between CenturyTel and US West is a reasonable basis for the Commission to alter the exchange boundaries is an issue to be explored at the evidentiary stage." The Commission did not base its decision solely on Staff's additional contention that US West had voluntarily extended its facilities beyond its service territories. To the contrary, the jurisdictional decision in *Petition of Thompson*, to which Qwest's predecessor was a party, directly addressed the issue presented here. The fact that Qwest later reached a settlement in *Petition of Thompson* (thus averting the need for a hearing on the particular facts of that case) is not relevant.

B. Qwest's argument that the Motion for Joinder is "premature."

Commission Staff disagrees with Qwest's contention that the motion for joinder is premature. Verizon has petitioned for a waiver of its obligation to provide service under the line extension rule, WAC 480-120-071. Given the close proximity of the Nelson property and other nearby properties ("Nelson properties") to Qwest's exchange, and the fact that those properties are significantly closer to Qwest's facilities than to Verizon's, it is entirely appropriate to join Qwest for the purpose of determining whether the Commission should alter the exchange boundaries pursuant to RCW 80.36.230. Contrary to Qwest's argument, it is not necessary to determine whether Verizon should be granted a waiver of its obligation to serve prior to

considering this issue. Assuming that (as Staff believes) Verizon is not able to show that it should be granted a waiver under the standards governing an exemption from WAC 480-120-071, the Commission may still find that it is more reasonable, under the facts of this case, to require that Qwest provide service to the Nelson properties. Qwest's argument that a decision on Staff's motion for joinder should be postponed as "premature" is without merit. Qwest's suggestion would merely lengthen and delay the proceedings, and should be rejected by the Commission.

C. Qwest's arguments concerning the alleged invalidity of WAC 480-120-071

Qwest argues that it should not be joined as a party respondent, and possibly be required to provide a line extension to the Nelson properties, because the Commission's line extension rule is unlawful. Qwest's argument is based on the recent ruling of Division II of the Court of Appeals which invalidated WAC 480-120-540, the Commission's access charge reform rule. *Washington Independent Telephone Ass'n v. Washington Util. & Transp. Comm'n*, ___ Wn. App. ___, 39 P.3d 342 (February 1, 2002). The Court of Appeals held that the access charge reform rule constituted unlawful ratemaking by rule. Qwest contends that under the court's reasoning, the line extension rule (WAC 480-120-071) is also invalid, because it required companies to change their previously existing line extension tariffs to comply with the rule. Therefore, Qwest argues that it cannot be required to provide a line extension to the Nelson properties.

In response, Staff first notes that the Commission has filed a petition for review of the Court of Appeals decision with the State Supreme Court. That petition was filed on March 1, 2002. The Court should indicate whether it will accept review of the case by late spring or early summer; if review is accepted, the Court's ultimate decision on the validity of the rule would

likely not come until next year. If the Supreme Court were to reverse the Court of Appeals and reinstate the access charge reform rule, then Qwest's arguments that are premised upon the invalidity of that rule would, of course, be rendered moot. Thus, one option for the Commission here would be to stay this matter until the result of the State Supreme Court proceedings are known. However, Staff does not recommend a stay.

A stay would not resolve the issues for the eight households that are the subject of this case and, as shown below, these issues can be resolved without reliance on the line extension rule, if Qwest or Verizon declares that it does not want to proceed under the rule. Whatever the effect of *WITA v. WUTC*, that decision did not find fault with the Commission's policy regarding the provision of service and line extensions.

Further, a stay may invite Verizon, Qwest, and possibly others, to take steps to cease work on line extensions. The Commission should not let the result of an appellate decision on the access charge reform rule unnecessarily stand in the way of the companies' service obligations. Whether the Commission proceeds under pre-rule tariffs, or the current, post-rule tariffs, or some other tariff yet to be put forward by Qwest or Verizon, the eight households and all others who may request extensions need not wait for a final determination in *WITA v. WUTC*.

A stay is *not* the only option, contrary to the suggestion of Qwest. Even assuming, solely for the sake of argument, that the Court of Appeals' reasoning and decision in *WITA v. WUTC* applied to the line extension rule, the Court there invalidated the access charge reform rule for *procedural*, not *substantive* reasons. In other words, even if the Commission were precluded from proceeding by rule, it is not precluded from proceeding entirely by adjudication. Qwest cannot have it both ways: it cannot argue that the Commission is forbidden to rely on a rule in determining whether Qwest must provide service to the Nelson properties, but is also forbidden

to rely on an adjudicative hearing, focused on the specific facts of this case, to make that same determination.

Thus, the Commission might opt, in light of the uncertainty created by the *WITA v. WUTC* decision, to proceed here entirely by adjudication. Under this scenario, the parties would use expert testimony in this docket to address both the issues and concerns that were raised in the line extension rulemaking, as well as matters particularly related to the facts of this case. Staff believes this would likely require an extension of the current schedule, to allow for the additional testimony that would need to be filed. Nevertheless, Staff prefers this option to the alternative of simply delaying this docket indefinitely, as Qwest proposes.

Staff has an additional concern that should be resolved in connection with Qwest's contentions based on *WITA v. WUTC*. Currently, both Qwest and Verizon have line extension tariffs on file that comply with WAC 480-120-071. Qwest suggests that it might want to rely on its previous line extension tariff, but it has not taken definitive steps to do so (such as by asking to withdraw its current line extension tariff and refiling its old tariff). Nor has Verizon done anything, to this point, that would indicate that it intends to make any challenge to the validity of WAC 480-120-071. (Staff finds this latter point noteworthy especially in light of the fact that in *WITA v. WUTC*—despite the case's title—Verizon was the only remaining appellant challenging the Commission's access charge reform rule at the time the Court of Appeals issued its decision.) The Commission should direct both Verizon and Qwest to definitively state now whether they intend to abide by the line extension rule and the tariffs the companies filed in compliance with the rule (unless, of course, the Commission were to grant a waiver of the rule under the criteria set forth in the rule).

Qwest finally argues that requiring it to provide service is somehow "counter to the policy the Commission established" in the line extension rulemaking. Qwest Answer at 11. This argument is incorrect. The situation to which Qwest refers involves a carrier that *is willing* to serve a company located in another company's territory. It does not cover the situation here, the prescribing of exchange boundaries pursuant to RCW 80.36.230. Nor would the Commission's taking action pursuant to this statute serve only "the private interest of a commercial business." Qwest Answer at 12. The prescribing of exchange boundaries, as authorized by statute, serves the public interest.

D. Qwest's arguments concerning its "alternative objection to the procedural schedule."

Qwest argues that the procedural schedule was "apparently adopted by agreement between Staff and Verizon at a prehearing conference at which Qwest was not a party and was not given notice to appear." Qwest Answer at 13. Staff takes some issue with this allegation. While Staff agrees that Qwest was not formally served with the prehearing notice, Staff counsel did informally notify counsel for Qwest of the prehearing conference well in advance (an affidavit to this effect can be provided if the Commission so requests) and Qwest, in fact, did have actual notice—as illustrated by the fact that Theresa Jensen of Qwest was present on the conference bridge line during the prehearing conference. Transcript, volume 1; page 8, line 16 through page 9, line 19. Thus, for Qwest to claim surprise about this matter is inaccurate, and in itself surprising.

Nevertheless, Staff agrees that if its motion to join Qwest as a party respondent is granted, then the procedural schedule in this case will need to be extended, both to allow for discovery and testimony relevant to Qwest, and possibly to allow for testimony concerning issues covered in the rulemaking for WAC 480-120-071 (if the Commission elects to proceed

entirely by adjudication and not under the rule). In any event, the Commission already has stated in its Notice of Time to Reply to Answer that, "If Qwest Corporation is joined as a party, then a procedural schedule including its participation will be addressed."

E. Conclusion

Staff requests that its motion to join Qwest as a party respondent be granted, and that the Commission proceed as set forth above.

Respectfully submitted this 13th day of March, 2002.

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