

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

In the Matter of the Petition of	)	
	)	DOCKET NO. UT-011439
	)	
VERIZON NORTHWEST, INC.,	)	THIRD SUPPLEMENTAL ORDER
	)	
For Waiver of WAC 480-120-071(2)(a).	)	ORDER GRANTING MOTION TO
	)	JOIN QWEST AS A PARTY
.....	)	RESPONDENT; ORDER
	)	ESTABLISHING PROCEDURES
	)	AND SCHEDULE FOR HEARING
	)	

***Synopsis:** The Commission grants Commission Staff's motion to join Qwest as a party to this proceeding. The Commission responds to Verizon's motion requesting the Commissioners to preside at the hearing and sets a schedule of proceedings for the remainder of the case.*

- 1     **Proceedings:** Docket No. UT-011439 is a petition by Verizon Northwest Inc. (Verizon), seeking a waiver or an exemption from WAC 480-120-071 regarding extending service to two separate locations in Verizon's Bridgeport exchange in Okanogan and Douglas Counties. On January 22, 2002, the Commission convened a prehearing conference in this docket at Olympia, Washington before Administrative Law Judge Marjorie R. Schaer. The parties agreed to a schedule of proceedings that allowed them to address the question of whether or not Qwest should be made a party as well as a schedule for evidentiary hearings.
- 2     On February 1, 2002, Commission Staff filed a Motion to Join Qwest as a Party Respondent. On February 22, 2002, Qwest filed an Answer to the Staff Motion. Both Staff and Verizon filed Replies to Qwest's Answer on March 13, 2002. Subsequent to these filings, Administrative Law Judge Theodora M. Mace replaced Judge Schaer as the presiding officer.
- 3     **Appearances.** Judith Endejan, Graham & Dunn, Seattle, Washington, represents Verizon Northwest Inc. Gregory Trautman, Assistant Attorney General, Olympia, Washington, represents staff of the Washington Utilities and Transportation Commission (Commission Staff or Staff). Since the prehearing conference, Douglas N. Owens has entered a special appearance on behalf of Qwest Corporation

**MEMORANDUM**

- 4     **Background.** There are two issues in this case: (1) whether and under what factual circumstances the grant of a waiver of the line extension rule is warranted; (2) whether the Commission should redraw exchange boundaries to allow another adjacent carrier to provide the requested service if the cost to build the extension would be less than for the original exchange carrier.
- 5     Verizon's waiver application requests that the company be relieved from providing service extensions to two different locations within its service territory. The first location is in Verizon's Bridgeport Exchange in Douglas County to three houses along Hayes Road, approximately 14 miles outside of the town of Bridgeport. This will be referred to hereinafter as the Taylor location because Kay Taylor was the first person to explore whether Verizon could provide a service extension here. Verizon asserts it would have to construct over 17 miles of new facilities to provide service to this location.
- 6     The second location consists of five residences along Timm Road on the Timm Ranch, in the portion of the Bridgeport exchange located in Okanogan County. Although Staff refers to this as the Nelson location based on the fact that Ike Nelson of Bridgeport initiated the first service request here, we will refer to this service location as the Timm Ranch because it reflects that there are several residents of the Timm Ranch area who are now requesting service there, including Mr. Nelson. Verizon states it would have to construct approximately 30 miles of fiber cable to serve this location.
- 7     Verizon estimates that the cost to provide service to the Taylor location would be \$329,839 and the cost to serve the Timm Ranch location would be \$881,497 for a total cost of \$1,211,336.
- 8     Staff's estimate of the length of cable or fiber that would have to be used to provide service to these locations varies somewhat from Verizon's, but both Staff and Verizon agree that although both locations are within the boundaries of Verizon's service territory, other telecommunications providers are physically nearer to each location. CenturyTel is closer to the Taylor location than Verizon. Qwest is closer to the Timm Ranch location than Verizon. However, both CenturyTel and Qwest refused Verizon's requests that they provide service to these respective locations instead of Verizon.
- 9     The line extension rule, WAC 480-120-071, requires a telecommunications carrier to extend service to applicants for service within its service territory, according to a time schedule set out in the rule. The rule also provides for the method of allocating costs between the applicant for service and the carrier, as well as for permitting the carrier

to request a waiver of the requirement to extend service depending on several factors for consideration listed in the rule.

- 10 **Staff’s Motion.** Commission Staff seeks to join Qwest as a party because Qwest’s facilities are nearer the Timm Ranch than Verizon’s facilities. Staff contends that it makes sense to join Qwest as a party at this point because, if Verizon is granted a waiver, the Commission would immediately be able to examine whether Qwest would more appropriately serve the Timm Ranch and to determine whether the exchange boundaries between Verizon and Qwest would need to be redrawn.
- 11 Commission Staff argues that under RCW 80.36.230, the Commission has the authority to alter exchange area boundaries. RCW 80.36.230 reads: “The commission is hereby granted the power to prescribe exchange area boundaries and/or territorial boundaries for telecommunications companies.” Staff cites as support for this argument the State Supreme Court decision in *In re Electric Lightwave, Inc.*, 123 Wn. 2d 530, 537, 869 P.2d 1045 (1994)(*Electric Lightwave*), where the Court stated: “Our interpretation of RCW 80.36.230 enables the Commission to define the geographical limits of a company’s obligation to provide service on demand and to delineate the boundaries between local and long distance calling.”
- 12 Commission Staff further argues that the issue in this proceeding is the same as that raised in *In the Matter of the Petition of Mr. And Mrs. Neil Thompson for a Boundary Change and Designation of a Telecommunications Common Carrier (Thompson Petition)*, Docket No. UT-991878. Here, the Thompson’s requested the Commission to adjust exchange boundaries so that they could receive service from U.S. West, even though their property was located within a CenturyTel exchange. In a prehearing conference order in the Thompson Petition, the Administrative Law Judge ruled that as recognized in the *Electric Lightwave* case, the Commission had the statutory authority under RCW 80.36.230 to define the geographical limits of a company’s obligation to provide service on demand. *Thompson Petition, Prehearing Conference Order Granting Leave to Reply; Denying Motion to Dismiss; Denying Motion to Strike on condition; Granting Request to Amend Petition; Notice of Hearing* (June 19, 2000) at pages 5-6, ¶¶ 28-35.
- 13 Commission Staff also contends that in the *Thompson Petition*, the Commission held that the cost difference for providing service as between two telecommunications companies may be a legitimate issue in prescribing their exchange area boundaries. *Thompson Petition, Prehearing Conference Order Supra* at page 6, ¶ 35.
- 14 Finally, Commission Staff asserts that Washington Superior Court Civil Rule 19, entitled Joinder of Persons Needed for Just Adjudication provides guidance to the Commission in addressing Staff’s motion. That rule reads in part:

- (a) **Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest.

Staff states that Qwest's absence from the proceeding may prevent complete relief from being accorded to the existing parties in a timely way.

15 **Qwest's Answer to Commission Staff's Motion.** Qwest objects to being joined as a party to this proceeding. Qwest disagrees with Commission Staff's contention that the Commission has jurisdiction to alter exchange area boundaries. Qwest argues that no one has filed a complaint or petition asserting that Qwest's filed exchange area maps are unjust or unreasonable. Furthermore, nothing in RCW 80.36.230 mentions the use of relative cost to adjoining companies of extending facilities as a criterion in determining whether to adjust exchange boundaries. Qwest suggests that Staff's position, if adopted, would strip Qwest of the power to manage where it holds itself out to provide service to the public on demand and would exceed the Commission's lawful regulatory authority.

16 In support of its argument Qwest cites *Northern Pac. Ry. v. Railroad Comm.*, 58 Wash 360,108 P. 938 (1910), where the Court reversed a lower court decision upholding a decision of the Railroad Commission, the WUTC's predecessor, requiring a railroad to build a spur for the benefit of a private business. The Court rejected the Railroad Commission's argument that its decision was properly based on the police power to regulate railroads.

17 Qwest also disagrees with Commission Staff's interpretation of the *Electric Lightwave* case. Qwest argues that in that case, the court held that the Commission had no power under RCW 80.36.230 to prescribe exclusive exchange areas. The Court's interpretation of the statute as giving the Commission the power to define the geographical limits of a carrier's exchange area was dicta. Also, the Court did not discuss whether the Commission can expand a carrier's obligation to serve locations where it has not dedicated its property to public use. Qwest contends that adoption of Staff's position would mean that in any situation a carrier can be forced to service an applicant outside its filed service boundary. In effect, this would render service boundaries meaningless and RCW 80.36.230 superfluous.

18 Qwest also disputes Staff's claim that the Commission settled the issue in this proceeding in the *Thompson Petition*. Qwest points out that the Commission decision in that case was actually only a prehearing conference order entered by an

Administrative Law Judge; that the decision was premised on the fact that U.S. West, had already extended its service into the area in question rather than on the Commission's authority to redraw exchange boundaries; and, that, in any event, the *Thompson Petition* ended up being settled before any evidence was heard. Thus none of the issues regarding the proper carrier to serve were actually litigated or decided in a final Commission order.

19 Qwest further argues that Staff's motion is premature because the commission may find that Verizon is required to provide service to the applicants involved in this proceeding.

20 In addition, Qwest asserts that even if the Commission possesses authority under RCW 80.36.230 to reconfigure exchange boundaries in this case, the rule pertaining to service extensions, WAC 480-120-071, which contains the waiver provision that is the subject of this proceeding, is invalid and the proceeding should be stayed. Qwest argues that under a recent Washington State Court of Appeals decision in *Washington Independent Telephone Association v. Washington Utilities and Transportation Commission*, \_\_\_ Wn.App. \_\_\_, 39 P.3d 342 (Div. II 2002)(WITA) the Court held that the Commission cannot set access charge rates in a rulemaking proceeding. Since the same types of ratemaking features at issue in that case are apparent in WAC 480-120-71, the latter rule must be found invalid and these proceedings stayed while the Commission reevaluates the line extension rule in view of the Court's decision on the access charge rule.

21 Qwest also argues that the Commission stated in General Order No. R-474 at page 8, ¶ 46 that a carrier who has designated a territory as its service territory is obligated to provide service in that territory unless another carrier wishes to provide cross-boundary service and the first carrier consents. Thus the Commission has recognized the validity of exchange areas. It would not be in the public interest to redraw exchange boundaries merely to serve a private interest such as the Timm Ranch that is requesting service in this case.

22 Qwest asks that if the Commission should decide to join Qwest as party to the proceeding that the Commission also change the procedural schedule set at the prehearing conference to accommodate Qwest's participation.

23 **Commission Staff's Reply.** Commission Staff reasserts its position that the Commission possesses the authority under RCW 80.36.230 to prescribe exchange boundaries, whether Qwest gives its assent or not; that the Northern Pacific Railway case Qwest relies on is inapposite because it required the railroad to build a spur to a private business, rather than to provide service to members of the public, which is the situation in this case; that it is proper to consider relative cost to provide service under RCW 80.36.230 because otherwise the statute would be rendered meaningless; that the Commission squarely addressed the issue of its jurisdiction to alter exchange

boundaries in the *Thompson Petition* and that whether the *Thompson Petition* was settled or not is immaterial; and, that the request to join Qwest in this proceeding is not premature but rather that a denial of the request would serve only to unnecessarily lengthen the proceedings, especially if Verizon is granted a waiver.

- 24 Staff also rejects Qwest's analysis of the effect of the *WITA* decision on this proceeding. Staff argues that the *WITA* decision is on appeal, and in any event, did not invalidate the requirement that carriers provide line extensions. Staying the proceedings would delay service to the applicants in this case, and might have an adverse impact on other applicants seeking line extensions. Furthermore, the Commission could proceed in this case on the basis of an adjudication of the proper means of extending service to these applicants in order to avoid the implication of the rule's possible invalidity.
- 25 **Verizon's Reply.** Verizon responds that the only issue raised in its Amended Petition is whether Verizon should be required to assume the cost burden of providing service to the eight applicants in this proceeding. Verizon contends that Staff has provided no provision of statute or rule that allows the Commission to compare the costs of other adjacent telephone companies in order to force any of those companies to provide service in lieu of the carrier whose service territory is involved. Finally, Verizon contends that adding Qwest as a party would delay the proceedings and prejudice Verizon's ability to get a timely decision on the waiver request. Verizon requests the Commission to move ahead as expeditiously as possible.
- 26 **Verizon's Request that the Commissioners Preside at the Hearing.** On May 6, 2002, Verizon filed a Motion that Commissioners Preside at the Hearing. Verizon requests the Commissioners hear the evidence in this case because this is the first waiver request the Commission has received under the new line extension rule, WAC 480-120-071. The question to be decided in this case is one the Commission did not address when promulgating the rule: how to determine when the cost of providing a line extension was high enough to merit a waiver of the rule. Verizon has taken the position that the \$1.2 million it would cost to construct a line to serve eight customers in two remote locations would impose an extraordinary burden on the carrier and its other customers. Staff has taken the position that universal service concerns require that telephone service be extended to these customers. Verizon indicates it needs a decision as soon as possible in order to meet the construction deadline imposed by WAC 480-120-07(2)(a). If the waiver is not granted and Verizon is required to serve it will have to construct the line extensions before the end of the 2002 construction season this fall. Thus it would be beneficial to have a final order promptly after the conclusion of this case.
- 27 Finally, Verizon contends that hearing this case should not unduly burden the Commissioners' schedules. Unless Qwest is joined as a party, only five witnesses are

involved and Staff and Verizon agree that they could complete cross examination in one day, July 2, 2002.

### **Discussion and Decision.**

28 **Joining Qwest as a Party.** The Commission agrees that Qwest should be joined as a party to this proceeding. The Commission has authority under RCW 80.36.230 to prescribe exchange area boundaries for telecommunications companies. While it is not clear whether and how this authority should be invoked in this proceeding, Qwest has a significant stake in the outcome since it bears a common exchange boundary with Verizon near the Timm Ranch, its facilities are closer to the Timm Ranch than Verizon's and Staff alleges that Qwest's costs to extend service to the Timm Ranch would be less than Verizon's. Thus, to protect its interests under Civil Rule 19, *supra*, Qwest is properly made a party to this proceeding.

29 Furthermore, the Commission must act so as to promote the public interest and to determine fair, just, reasonable and sufficient rates and practices for regulated utilities. *RCW 80.01.040*. In order for us to best exercise our general regulatory authority in the context of deciding issues related to provision of telephone service to remote areas of Washington and determining whether we should alter exchange boundaries to facilitate that service requires the formation of a complete factual record as well as legal argument from all interested persons, including Qwest.

30 Qwest's argument that the *WITA* decision requires the Commission to stay this proceeding is not persuasive. Arguably the *WITA* case does not apply to line extensions per se. Even if it did, the *WITA* case is on appeal and no stay of proceedings has been entered for this case. In any event, the Commission can proceed on an adjudicatory basis to determine the proper cost and allocation of cost for provision of service in this case, or, in the alternative, can grant a waiver of the line extension requirement, if the evidence supports it.

31 For these reasons, the Commission grants Staff's motion to join Qwest as a party to this proceeding.

32 **Procedural Issues.** The Commission recognizes that this is a matter of first impression and desires to be directly involved in the proceedings in this case. Furthermore, the Commission is concerned that this proceeding be finalized, if possible, so that if service is to be provided, construction can occur prior to the end of the 2002 construction season. We believe that it is possible and necessary, even though Qwest is now joined as a party, to hold evidentiary hearings close to the time originally agreed to by the parties. However, the current schedule of proceedings before the Commission during the months of July and August may make it impossible for Commissioners to preside. Nevertheless, if our hearing schedule permits it, we will preside. If not, we will read the record and hear oral argument after submission

of briefs so that we may enter a final order as soon as possible after evidentiary proceedings are concluded. Thus the schedule of proceedings will be as follows:

Qwest filing testimony (addressing issues discussed in this order, including Qwest's cost to serve the Timm Ranch applicants)	June 14, 2002
Staff and Verizon response	June 25, 2002
Prehearing Conference	July 1, 2002 1:30 p.m.
Evidentiary Hearing	July 8-9, 2002
Simultaneous Briefs	July 30, 2002
Oral argument	August 2 or August 20, 2002 (depending on Commissioners' availability)
Final Order	August 30, 2002

DATED at Olympia, Washington, and effective this \_\_\_\_ day of May, 2002

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner