

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET NO. UT-040788
TRANSPORTATION COMMISSION,)	
)	ORDER NO. 05
Complainant,)	
)	
v.)	
)	
VERIZON NORTHWEST INC.,)	ORDER DENYING MOTION TO
)	DISMISS INTERIM RATE CASE
Respondent.)	
.....)	

1 **Synopsis:** *The Commission denies a motion seeking dismissal of Verizon’s request for interim rate relief of \$29.6 million. Verizon has presented a prima facie case that, when viewed most favorably to the Company, could support a remedy of interim rate relief.*

2 **Petition for Interim Relief.** On April 30, 2004, Verizon Northwest Inc. filed a “Petition of Verizon Northwest Inc. Seeking Interim Rate Increase” with the Commission, with tariff revisions designed to effect an interim increase in its rates for telecommunication services in this state of approximately \$29.7 million. The Company’s request for interim rate relief is related to, and dependent upon, the Company’s request to pursue total general rate relief of approximately \$240 million.

3 **Motion to Dismiss.** All parties to the docket, other than Verizon,¹ collaborated to file a joint motion to dismiss Verizon’s request for interim rate relief. They allege that, under the view of Verizon’s proposed evidence in support of the

¹ The moving parties are Commission Staff, Public Counsel, and intervenors Washington Electronic Business and Telecommunications Coalition (“WeBTEC”), Citizens' Utility Alliance of Washington, American Association of Retired Persons, Northwest Public Communications Council (NPCC), AT&T Communications of the Pacific Northwest, Inc. (AT&T), and The United States Department of Defense. For convenience, we will refer to them as the “joint parties,” reflecting that they join in challenging Verizon’s interim request.

proposal most favorable to Verizon, the Company fails to meet the criteria for interim relief and its request should therefore be dismissed.

I. MEMORANDUM

A. Interim Relief.

4 The Commission has considered applications for interim rate relief on some twenty occasions. To review such requests, the Commission has often considered six factors that it first articulated in *WUTC v. PNB*, Cause No. U-72-30.² These factors are: an opportunity for adequate hearing, a demonstration that an actual emergency exists or that interim rates are necessary to prevent gross hardship or gross inequity (the failure to earn the authorized rate of return is not sufficient, standing alone, to justify the grant of interim relief), examination of key financial indices, jeopardy to the utility or detriment to ratepayers, and whether the relief is in the public interest.

5 Verizon argues that it has presented information sufficient to pass the test of a motion to dismiss. It contends that the Company's distress results from a factor over which it had no control, *i.e.*, the Commission's decision in Docket No. UT-020406 that the level of access charges that Verizon imposed on intrastate interexchange messages were impermissibly high and required reductions. Verizon has filed evidence that it contends supports the request. The evidence consists of the testimony of Steven Banta, which explains the consequences if interim relief is not granted and describes Verizon's proposed rate design for the interim increases; testimony of Nancy Heuring, which sets forth Verizon's current intrastate rate of return; and testimony of Dr. James H. Vander Weide,

² Second Supplemental Order (Oct. 10, 1972). *See also Avista Corporation d/b/a/Avista Utilities, Request Regarding the Recovery of Power Costs Through the Deferral Mechanism*, Docket No. UE-010395 (WUTC Sept. 24, 2001). They are set out in full in Appendix A.

which explains how Verizon NW's intrastate financial ratios were calculated and what these ratios show.

1. The Motion to Dismiss.

6 The joint parties ask the Commission to dismiss the petition for interim relief. They argue that Verizon so completely fails to make a case for interim rate relief, no purpose is served by going forward on its Petition.

7 The joint parties argue that Verizon's petition and supporting materials fail to demonstrate 1) that it has immediate needs for financing to allow it to meet its public service obligations; 2) how the grant or denial of interim relief will allow the company to meet those needs, and 3) whether the company can wait until completion of its general rate case request to satisfy those needs. Their principal argument, however, appears to be that because Verizon's petition is insufficient because Verizon supports it with Washington intrastate data and does not demonstrate that the company will be unable to secure financing for essential purposes.

8 Verizon answers the motion, arguing that it is unlawful for the Commission to rely on non-jurisdictional revenues, that it has demonstrated sufficient need to pass the test of a motion to dismiss, and that it is entitled to proceed to hearing on the interim request.

9 The joint parties reply, restating and amplifying their positions.

2. Commission Discussion and Decision.

10 For purposes of dispositive motions, the Commission applies, by analogy, Civil Rule 56. The Commission decides "whether, putting the prefiled evidence in the

light most favorable to the Company, the Commission would grant the requested relief.”³

11 We emphasize that our decision in this order merely examines Verizon’s contentions *in the light most favorable to Verizon*. Our ruling is that Verizon has demonstrated enough of a *prima facie* case to allow it to proceed to hearing—sufficient evidence that, if true in the perspective most favorable to Verizon, the facts could support some level of interim rates. If Verizon fails to carry its burden fully at hearing, it may receive less than the requested amount, or no relief at all.⁴

B. Interim Rate Relief.

12 The joint parties point out that the Commission has dealt with the issue of interim rate relief at least twenty times since the 1972 PNB decision. The small number of interim rate proceedings over the past 32 years—less than one per year—shows how unusual the remedy is. All parties acknowledge that interim rates are granted in unusual circumstances, when the requesting company has an unexpected or unusual need, and when the equities of the situation militate against waiting for any rate relief until the conclusion of the regular general rate case process.

13 Verizon’s petition correctly identifies the Commission’s view of the six “PNB” factors: “The Commission is not bound by any specific criteria for granting interim relief . . .”⁵ While it has identified six factors that are appropriate to discuss, “The Commission has made clear that these factors are not ‘standards’ to

³ *WUTC v. Puget Sound Energy Co.*, Docket Nos. UE-011163 & 011170, Sixth Supplemental Order (2001) paragraph 16.

⁴ See, e.g., *Washington Utilities and Transportation Commission v. Olympic Pipe Line Company*, Docket No. TO-011472, Third Supplemental Order, Order Granting Interim Relief, In Part (January 31, 2002).

⁵ Petition for Interim Rate Relief, paragraph 6.

be mechanically applied, and that not all factors are applicable to all companies.”⁶ The caution against a formulaic approach is common to several recent orders.⁷

1. Jurisdictional Considerations.

- 14 Verizon has supported its interim request on a foundation of intrastate separated results. It acknowledges that Verizon Northwest, Inc., on a company-wide basis, does not face severe financial distress. Verizon contends that if Verizon’s Washington operations were a separate company, however, it would be facing financial problems sufficient to support interim rates, and that this constitutes a gross inequity. The joint parties argue that Verizon fails to qualify for interim relief because it fails to prove that the *company* (as opposed to the Washington intrastate operations) has no ability to secure financing for its essential operations. They cite to several interim rate proceedings in which the Commission analyzes a *company’s* ability to finance its needs, as opposed to the jurisdictionally separated operations of a company.
- 15 Verizon answers that in the Olympic Pipe Line interim order,⁸ the Commission specifically referred to its analysis of the company’s need on intrastate jurisdictionally separated basis. The joint parties reply that Olympic in fact demonstrated overwhelming need, resulting from an explosion, that affected both interstate and intrastate traffic, and that the company was already collecting interim rates on the interstate portion of its business.
- 16 This issue should be determined on a case-by-case basis upon review of all the relevant circumstances. The Commission would certainly look with dismay on a

⁶ WUTC v. *Olympic Pipe Line Co.*, Docket No. TO-011472, Third Supplemental Order at 11, n.6.

⁷ *Avista*, footnote 2, above; *Puget Sound Energy Co.*, footnote 3, above; and *Olympic Pipe Line Co.*, footnote 5, above.

⁸ WUTC v. *Olympic Pipe Line Co.*, Docket No. TO-011472, Third Supplemental Order

situation in which the roles were reversed, and Verizon sought interim relief from the Commission while it was earning its rate of return on intrastate operations because its non-jurisdictional revenues were doing so poorly that it could not finance needed services.

17 The “PNB factors” were first articulated more than 30 years ago in a different regulatory era, when regulated utilities faced different circumstances. There is an increasing trend of utility mergers, and intrastate operations in some instances are becoming relatively smaller portions of companies’ overall business. We must recognize the realities of today’s regulated businesses when examining need for an interim rate increase. It is inappropriate to demand that a small piece of a large company cause the overall business to fall into jeopardy as a minimum criterion for a grant of interim rates.

18 Further, it is important to remember that case law is not the same as a statute or rule. A statute or rule may set out minimum criteria that must be met for a particular remedy. Holdings in adjudications are persuasive in later adjudications only to the extent that the later facts and circumstances fall within the purview of the earlier cases. New facts and circumstances often require further evolution, expansion, or refinement of earlier doctrine.

19 In the present situation, Verizon's Washington intrastate operations are a small portion of a broader business. Its intrastate operations have been subjected to a significant precipitating factor⁹— the access charge decision, which is totally intrastate in nature. There is a marked difference, according to Verizon's version of the facts, in performance between the company as a whole and Verizon’s Washington intrastate operations, so looking to the broader company operations would shift a burden of support away from intrastate ratepayers to the other customers of the Company.

⁹ We note that the access charge decision forms only about one-eighth of Verizon’s claimed need.

20 We conclude that it would be inappropriate to say, as the joint parties seem to argue, that Verizon should be ineligible for interim rate relief because the non-jurisdictional operations are sufficiently healthy that intrastate customers should not bear the responsibility to sustain their own capital needs in the same way they would if the company operated in a single jurisdiction. We find it appropriate to consider the Company's need for interim rate relief based on a Washington intrastate basis only,¹⁰ and to determine whether the level of its intrastate revenues constitutes a "gross inequity" justifying interim relief.

2. Evidence Supporting the Interim Request.

21 Verizon's petition cites evidence that it contends supports a specific need for interim funding. Verizon contends in its petition for interim relief that its current intrastate overall return is a negative 0.47%, which is far below its current authorized rate of return of 9.76%. It argues that, as a result, Verizon's current financial condition for its intrastate operations in Washington is such that (1) Verizon's earnings are insufficient to allow Verizon NW to pay the interest and principal on its debt, (2) Verizon's earnings are insufficient to allow Verizon NW to continue to invest in its network in Washington, (3) Verizon's key financial ratios indicate a bond rating of BB, which is *below* investment grade, and (4) Verizon NW is not earning a return that is commensurate with a return on other investments of the same risk. The joint parties challenge Verizon's contentions, saying that it has not described any specific needs for financing that require an infusion of temporary interim funds.

22 We believe that Verizon's evidence sufficiently supports its request. We have reviewed the evidence supporting the request and find the following elements that provide varying degrees of support for interim rate relief.

¹⁰ Of course, non-jurisdictional activities must be considered to the extent necessary to determine the appropriate separations that define the intrastate jurisdictional activities.

Witness	Page	Line	Claim
Banta (Interim)	2	14-20	UTC reduced intrastate access charges by \$29.7 million in UT-020406
	6	footnote 5	Verizon plans \$112.5 million in construction for 2004.
	6	19-21	Without revenues that cover costs, Verizon will defer or forego capital expenditures
	6, 7	21, 1	Maintenance and repair will be cut back
	7	2-3	Internal service quality standards will suffer
Heuring (Interim)	3, NWH-8	1-2, page 1 col d	Current unadjusted intrastate return is a negative 0.47%
	4, NWH-8	6-7, page 2 col c	Verizon needs \$159 million to earn its authorized return
	5	1-4	Return < 2.5% since early 2002, worsening after access charges reduced
	5	8-9	Revenues fell by \$30 million per year beginning in 1999
Vander Weide (Interim)	9	17-21	Verizon can't pay interest on its debt from stand-alone intrastate earnings
	4	20-21	EBIT fell from \$159.2 million in 1999 to <i>negative</i> \$12.4 million for the year ended 9-2003
	9	Table 1	EBIT Interest Coverage fell from 5.5 in 1999 to an adjusted <i>negative</i> 0.7 in 2003
	9	Table 1	EBITDA Interest Coverage fell from 9.4 in 1999 to an adjusted 4.8 in 2003
	9	Table 1	FFO to Total Debt fell from 57.6% in 1999 to an adjusted 29.9% in 2003
	12	13-17	EBIT Interest Coverage is the most meaningful of the 3 financial ratios because it shows an ability to make additional investments
	12	17-19	Key financial ratios for Verizon WA have declined since 1999

23 Taken together, the picture that these asserted facts paint is of a company¹¹ in circumstances so negative that, if independent, it would have great difficulty supporting its basic needs for the provision of jurisdictional telecommunications service. If these facts are proved true, the Washington portion of Verizon NW may have been supported by its non-jurisdictional operations. Under a stand-alone analysis it would appear to face a “gross inequity” that could render interim rates consistent with the public interest.

24 The Joint Parties point out that Verizon’s evidence may not quite connect the dots with specific information supporting its contentions. The presence of that information would make our decision much easier, but the issues will be resolved for or against the company during the ensuing interim (and ultimately, the general) rate case. We noted in the *Olympic* decision on interim rates¹² that Olympic’s interim presentation raised questions as well as answers, which at first blush may be true for Verizon. The *Olympic* proceeding also demonstrates¹³ that even the authorization of interim rates does not imply that a company is entitled to a general rate increase of the same or a larger magnitude.

3. The Access Fee Reduction and the Equities for Interim Rates.

25 We noted at the outset of this order that the ultimate question for us to decide is whether—given the nature of any decision regarding interim rates—Verizon has demonstrated that its filing, if viewed in its most positive light, could support a finding that interim rates are consistent with the public interest.

26 One element frequently cited by Verizon is the Commission’s decision in *AT&T v. Verizon*, Docket NO. UT-020406, cited above. There, the Commission required

¹¹ Here, a jurisdictionally separated operation within a company.

¹² WUTC v. *Olympic Pipe Line Co.*, Docket No. TO-011472, Third Supplemental Order, Jan. 31, 2002

¹³ *Washington Utilities and Transportation Commission v. Olympic Pipe Line Company*, Docket No. TO-011472, Twentieth Supplemental Order, Order Rejecting Proposed Tariffs; Authorizing and Requiring Refiling, Ordering Refunds of Excess Interim Rate Collections (September 27, 2002).

Verizon to reduce its access charges by approximately \$30 million¹⁴ in an order served August 12, 2003. Verizon strenuously contended in that proceeding that the Company was entitled as a matter of law to an equal and immediate increase in other rates (“rebalancing”) to offset the reduction. Although the Commission ruled that Verizon was wrong in this contention, the order recognized the magnitude of the decision on Verizon and it made accommodations to Verizon’s asserted need for increased rates. We suspended the effect of the Commission order for two months to allow Verizon time to prepare and file a request for a rate increase, so (if a need for interim or emergency rates were proved) Verizon’s revenue stream would be uninterrupted. Verizon has appealed the decision, which is pending on judicial review, and it filed its request for rate relief more than eight months after the date of the order.

27 A regulated company is not entitled to offsetting revenue when a rate decrease is ordered. Instead, it is entitled to a process by which it has the opportunity to prove its need by recognized, consistently-applied principles under the public service laws of the state.

28 The access charge reduction, however, is a matter of substantial effect. Verizon was entitled to contest the complaint calling for the reduction, and could not control our decision in that matter. It qualifies as a factor, among the others that we have mentioned, to consider when deciding whether Verizon has made a *prima facie* showing that it requires interim rate relief.

29 An additional factor in our decision is Verizon’s proposal that interim rates be subject to refund. Refunds are not a perfect remedy.¹⁵ However, the prospect of refunds, if the thorough analysis in the general phase of the proceeding requires them, does work to ameliorate to some extent our concerns that the relatively

¹⁴ The order did not specify a dollar amount of necessary reductions, but specified the level of rates to be achieved.

¹⁵ See, Order No. 04 in this docket, at paragraph 33.

swift and truncated review of a request for interim rates could pose an irreversible hardship on consumers.

4. Conclusion.

30 The ultimate test in determining whether to grant interim rates is whether this interim relief is sufficiently necessary to be consistent with the public interest. The test that the Joint Parties propose demands a showing of company-wide financial distress that interferes with the ability of an applicant for interim rates to maintain operations.

31 We have repeatedly cautioned against using each PNB factor as a mandatory element necessary for relief.¹⁶ We again emphasize that our inquiry is whether interim rates are in the public interest, *considering* (not requiring dispositive proof of) *all* relevant factors. Financial distress is one factor to consider, but so is gross inequity based on a review of intrastate operations of an interstate company.

32 Verizon has made a *prima facie* showing, in light of all relevant circumstances when seen a light most favorable to Verizon, that its circumstances could constitute a gross inequity that renders interim rates consistent with the public interest. The motion to dismiss should be denied and the issue of interim rates should proceed to hearing.

33 In the interim proceeding, now scheduled for August 13 through 13, 2004, Verizon must meet its burden to demonstrate need not in a light most favorable to it, but in the light of cross-examination and answering testimony.

¹⁶See the citations above at footnote 7.

5. An Administrative Concern.

34 Verizon's legal representatives are zealous advocates. Zealous advocacy is consistent with conscientious, vigorous representation of a client's interests. A direct order of the Commission, however, fixes the limit of proper advocacy. Once the Commission has issued a final ruling on a matter, the recourse of zealous counsel is to challenge the ruling on appeal, as Verizon is doing with respect to our Access Charge Order. Verizon's statement on brief here, that the Commission in the Access Charge Order "took \$30 million from Verizon . . . in order to force it to beg for necessary rate relief," is a gross mischaracterization of that two-year proceeding and of the Commission's motives. It is also inadvisable to speculate on what was in "the Commission's mind" or that the "Commission knew it was causing Verizon significant harm." If there is significant harm, the upcoming proceedings are the place to demonstrate it.

35 As Commissioners, we make decisions solely on the basis of our sworn duty to uphold the laws of the state. Verizon would be well-served by focusing on the same.

II. ORDER

36 The Commission denies the dispositive motion of Joint parties, Public Counsel, and intervenors Washington Electronic Business and Telecommunications Coalition, Citizens' Utility Alliance of Washington, American Association of Retired Persons, Northwest Public Communications Council, AT&T

Communications of the Pacific Northwest, Inc., and The United States
Department of Defense to dismiss Verizon's interim rate request in this docket.

DATED at Olympia, Washington and effective this 2nd day of July, 2004

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

Appendix A

The factors are:¹⁷

First, the Commission should exercise its authority to grant interim rate relief only after an opportunity for an adequate hearing.

Second, an interim increase is one sort of extraordinary remedy, and “should be granted only where *an actual emergency exists* or where *necessary to prevent gross hardship or gross inequity*.”

Third, the mere failure of the currently realized rate of return to equal that approved as adequate is not sufficient, standing alone, to justify the granting of interim relief.”

Fourth, The Commission should review all financial indices as they concern the applicant, including rate of return, interest coverage, earnings coverage, and the growth, stability, or deterioration of each, together with the immediate and short-term demands for new financing and whether the grant or failure to grant interim relief will have such an effect on financing demands as to substantially affect the public interest.

Fifth, In the current economic climate the financial health of a utility may decline very swiftly. Interim relief stands as a useful tool in an appropriate case to stave off impending disaster. However, this tool must be used with caution, and must be applied only in a case where not to grant would cause clear jeopardy to the utility and detriment to its ratepayers and stockholders. That is not to say that interim relief

¹⁷ These factors are from the Commission’s PNB Order, *WUTC v. Pacific Northwest Bell*, Docket No. U-72-30, Second Supplemental Order at 13.

should be granted only after disaster has struck or is imminent, but neither should it be granted in any case where full hearing can be had and the general case resolved without clear detriment to the utility.

Sixth, as in all matters, we must reach our conclusion with the statutory charge to the Commission in mind, that is, to “Regulate in the public interest.” (RCW 80.01.040) This is our ultimate responsibility, and a reasoned judgment must give appropriate weight to all salient factors.”