

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the)	
)	DOCKET NO. UT-051291
Request of Sprint Nextel Corporation)	
for an Order Declining to Assert)	
Jurisdiction Over or, in the)	ORDER NO. 05
Alternative, Application of Sprint)	
Nextel Corporation for Approval of)	
the Transfer of Control of United)	DENYING PETITION FOR REVIEW
Telephone Company of the Northwest)	OF INTERLOCUTORY ORDER;
and Sprint Long Distance, Inc. From)	ESTABLISHING REQUIREMENT
Sprint Nextel Corporation to LTD)	FOR PREHEARING BRIEFS
Holding Company.)	
.....)	

1 **PROCEEDINGS:** On August 26, 2005, Sprint Nextel Corporation (Sprint) filed with the Commission a request for an order declining to assert jurisdiction over or, in the alternative, an application for approval of the transfer of control of United Telephone Company of the Northwest and Sprint Long Distance, Inc., from Sprint Nextel Corporation to LTD Holding Company. Sprint proposes to separate its wireline local service operation into an independent, stand-alone company. Sprint requests that we either decline to assert our jurisdiction over the proposed transfer under chapter 80.12 RCW, or expeditiously approve it under RCW 80.12.040.

2 **PARTY REPRESENTATIVES:** Tre Hendricks, III, attorney, Sprint Corporation, Hood River, Oregon, and Gregory J. Kopta, Davis Wright Tremaine L.L.P., Seattle, Washington, represent Sprint Nextel. Robert Cromwell, Assistant Attorney General, Seattle, Washington, represents the Public Counsel Section of the Washington Office of Attorney General. Gregory J. Trautman, Assistant

Attorney General, Olympia, Washington, represents the Commission's regulatory staff ("Commission Staff" or "Staff").

3 **PROCEDURAL HISTORY; PETITION FOR REVIEW OF INTERLOCUTORY ORDER:** The specific matter before us is Public Counsel's "Motion for Reconsideration" of an interlocutory order entered by the presiding Administrative Law Judge. The order denied Public Counsel's request for leave to file cross-rebuttal testimony. We relate the procedural history of this matter to provide context and clarity.

4 The Commission conducted a prehearing conference on October 7, 2005, before Administrative Law Judge (ALJ) Dennis J. Moss, and entered its Order No. 01 Prehearing Conference Order on October 12, 2005. Order No. 01 included a procedural schedule, based on discussions during the prehearing conference. The schedule included, among other things, dates for an evidentiary hearing.

5 On October 21, 2005, Public Counsel filed its Petition for Interlocutory Review of Order No. 01 Regarding the Hearing Dates. Public Counsel asserted that the hearing dates established by Order No. 01 would cause prejudice because Public Counsel has obligations in other proceedings immediately before and immediately after the week set aside for hearing in this proceeding, January 23 – 27, 2006. Public Counsel requested that the hearing be moved to February 14 – 17, 2006.

6 The Commission entered Order No. 03 denying Public Counsel's Petition for Interlocutory Review as being premature. Order No. 03 states:

The parties will be better informed concerning potential conflicts in hearing and briefing obligations later this year, or early in 2006. Public Counsel can consider renewing its request for a continuance of the hearing dates and, if appropriate, other process changes (*e.g.*,

one round of briefs instead of two) closer in time to the currently scheduled hearing dates.

7 Staff and Public Counsel filed their response testimonies on November 30, 2005. On December 8, 2005, Public Counsel filed its Renewed Motion for Continuance and Motion for Leave to File Cross-Rebuttal. Public Counsel requested that the date for initiating the evidentiary hearing be continued 30 days, to February 23, 2006, or to another date convenient to the Commission. Public Counsel also requested that the Commission continue the December 28, 2005 date set for filing rebuttal testimony to January 6, 2005.

8 Sprint responded on December 13, 2005, opposing both of Public Counsel's requests. Sprint argued that if the Commission decided to continue the hearing dates, it also should make other adjustments to the procedural schedule.

9 The Commission entered Order No. 04 on December 13, 2005, granting a two week continuance of the hearing dates to the week of February 6, 2006, and granting continuance of the date for filing rebuttal testimony to January 6, 2006. The Commission also changed the briefing dates.

10 The Commission denied Public Counsel's request for leave to file cross-rebuttal testimony for three reasons:

- Public Counsel knew from its participation at the prehearing conference that Staff intended to raise this issue and had its opportunity to develop and prefile testimony on the subject at the response testimony deadline, just as Staff did, yet let that opportunity pass.
- If Public Counsel opposes Staff's proposals concerning rate rebalancing, its due process rights are adequately preserved by the opportunity for cross-examination of Staff's witnesses and the opportunity to present argument on brief.

- If Public Counsel wants to file cross-rebuttal testimony that proposes some alternative form of rate rebalancing, this almost certainly would lead to a request from Staff or Sprint for leave to file surrebuttal testimony.

11 On December 16, 2005, Public Counsel filed what it captioned as a “Motion for Reconsideration” of the Commission’s cross-rebuttal determination. Public Counsel stated its motion was made “pursuant to WAC 480-07-375,” our general rule on motions. Public Counsel did not invoke our procedural rule that specifically allows parties to file a petition for review of an interlocutory order, WAC 480-07-810.

12 WAC 480-07-810 provides in relevant parts:

(2) Interlocutory review is discretionary with the commission. The commission may accept review of interim or interlocutory orders in adjudicative proceedings if it finds that:

...

(b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or

(c) A review could save the commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review.

13 WAC 480-07-395 (4) provides that the Commission will liberally construe pleadings and motions and disregard errors or defects that do not affect the substantial rights of parties. Accordingly, we treat Public Counsel’s “motion for reconsideration” as a petition for review of interlocutory order as provided under WAC 480-07-810.

- 14 **PREHEARING BRIEFS:** Before turning to the arguments concerning the presiding ALJ's determination that Public Counsel's request for leave to file cross-rebuttal should be denied, we address arguments concerning the scope of this proceeding. Sprint and Public Counsel argue that rate rebalancing is not an issue properly before us in this case. Sprint also challenges whether issues concerning imputation of revenues and other matters related to directory publishing are properly before us. Considering that this is a transfer of property case under chapter 80.12 RCW, and not a rate proceeding, it is obvious that we will be asked to determine at some point whether these questions related to rates are relevant to our consideration of Sprint's Application.
- 15 Whether these challenged issues are relevant is a question that should be decided before we conduct evidentiary hearings. This will promote the most efficient use of the parties' and the Commission's resources. Accordingly, we require the parties to file prehearing briefs by January 25, 2006. The prehearing briefs must state each parties' positions and arguments concerning whether these issues, and any other issues suggested by the response testimony filed on November 30, 2005, should be considered in this proceeding.
- 16 **PUBLIC COUNSELS' ARGUMENT:** Public Counsel argues as follows that we should reverse the presiding Administrative Law Judge's denial of Public Counsel's request for leave to file cross-rebuttal testimony:

This Motion arises from what may have been a misunderstanding regarding the reason Public Counsel did not file direct testimony on the rate-rebalancing issue. Public Counsel does not disagree that Staff addressed rate-rebalancing in the prehearing conference. Nor did we mean to imply that we were surprised when Staff filed direct testimony on that subject. Our point is that rate-rebalancing is not a standard issue in a transfer of control case. Public Counsel's understanding was that if the issue was going to be brought forward at all, it would be brought forward by Staff as a proposal or recommendation. In other words, Staff would take the

posture of being the proponent of this issue and Public Counsel would respond to it. Indeed, absent a Staff recommendation on this issue, there would be no rate-rebalancing issue to address.

In good faith and with an eye towards efficient use of resources, Public Counsel expected to file testimony in response to the Staff proposal if and when it was made, including only addressing specific issues raised by Staff. In retrospect, Public Counsel acknowledges that the procedure to make this possible was not addressed in the prehearing conference and should have been. For instance, Public Counsel could have requested a cross-answer to Staff's testimony or clarified that the rebuttal could be used for this purpose.

However, prior Public Counsel attorney, Robert Cromwell, Jr., believed that the original rebuttal date adopted in Order No. 1 included, by implication, permission to file cross-rebuttal of Staff's testimony. After Mr. Cromwell's departure, Public Counsel made the motion for leave to file cross-rebuttal testimony because it was unclear whether such an opportunity existed.

Public Counsel's concern is that it be allowed to address an issue of significant financial importance to ratepayers. Given that the other parties to the case will have prefiled testimony on this issue, we believe that the record should also include Public Counsel's prefiled testimony since the Commission is best served by a complete record. We also believe that Public Counsel can be accommodated without prejudice to the other parties.

- 17 Public Counsel also states that it consulted with Staff and Sprint, and both agree that there is room in the procedural schedule to allow for surrebuttal testimony by Staff and "sursurrebuttal testimony" by Sprint, if cross-rebuttal is allowed, without disturbing the scheduled start of the evidentiary hearing on February 6, 2006.

18 **SPRINT RESPONSE:** Sprint states that it agrees with Public Counsel that rate-rebalancing is not a standard issue in a transfer of control case and should not be considered in this proceeding. Sprint argues this is equally true with respect to other issues Staff stated at prehearing that it would pursue, including issues related to the possible imputation of Yellow Pages revenues and the treatment of the gain on sale Sprint realized when it sold its directory publishing business.

19 Sprint states that “Public Counsel . . . devoted a substantial portion of its [response] testimony to the directory issues while completely ignoring the rate rebalancing issues.” Sprint continues:

Public Counsel attempts to justify this discrepancy by explaining that it did not have a rate rebalancing proposal and thus anticipated responding to Staff’s proposal. Public Counsel candidly acknowledges that it should have sought to incorporate this understanding into the schedule at the prehearing conference but did not do so. Public Counsel does not acknowledge, however, that it has consistently opposed any rate rebalancing outside of a rate case that would result in an increase in local rates for residential and small business customers. There is no legitimate reason why Public Counsel could not have included testimony setting forth and supporting this position when all parties were aware that Staff would be presenting just such a proposal.

20 Sprint states its concern that if Public Counsel is permitted to file cross-rebuttal testimony on an issue that neither Public Counsel nor Sprint apparently regard as being appropriate for consideration in this proceeding this will unnecessarily complicate the proceeding, require expenditure of additional resources, and possibly delay the Commission’s ultimate decision. Sprint argues that “[a]dditional rounds of testimony, particularly within an abbreviated time frame, will serve only to distract and unnecessarily burden the parties’ and the Commission’s review of the transaction and timely address the legitimate issues presented for Commission determination.”

- 21 **COMMISSION DETERMINATION:** While it is not uncommon for us to grant a request for cross-rebuttal when we first set a procedural schedule, it is not automatic. In general, it is appropriate to establish the opportunity for cross-rebuttal when the issues are ill-defined, or not fully defined at the early stages of a proceeding. One of the purposes for the prehearing conference, stated in every notice of prehearing conference, is “to consider formulating the issues in the proceeding.” Thus, we usually have some sense by the end of the first prehearing conference of what subject matter will be addressed in subsequent rounds of the testimony. Another key purpose of the prehearing conference is to establish the process that will be followed, including what opportunities the parties will have to prefile testimony, and the dates for each process step.
- 22 When a party first requests leave to file cross-rebuttal after the response testimony is filed, the usual argument is that the response testimony has raised an issue that was not reasonably anticipated at the outset of the proceeding. We sometimes find this argument persuasive and grant the opportunity for cross-rebuttal.
- 23 The situation here is distinguished from the “usual” circumstances in that Staff made clear at the prehearing conference that it intended to pursue the rate-rebalancing issue. Public Counsel now acknowledges Staff raising this issue at prehearing and states that it was not “surprised when Staff filed direct testimony on that subject.” Public Counsel knew rate rebalancing would be an issue in the case and could have requested the opportunity for cross-rebuttal at the prehearing conference. Public Counsel did not do so. Nevertheless, Public Counsel had the same opportunity as Staff to file testimony concerning rate rebalancing, but let that opportunity pass.
- 24 According to its “motion” now before us, Public Counsel let pass its opportunity at prehearing to request process that would have permitted it to file cross-rebuttal testimony because counsel “believed” that the Commission “by

implication” established such an opportunity by setting a date for Sprint to file rebuttal testimony. It undermines our interest in conducting fair, orderly, and efficient proceedings for parties to conduct themselves on the basis of their unspoken assumption that one process implies another. Were we to accept this idea we could face endless rounds of testimony; if rebuttal implies the right to cross-rebuttal, cross-rebuttal must imply the right to surrebuttal, surrebuttal would imply the right to sursurrebuttal, and so forth. Indeed, we see evidence of this in Public Counsel’s request for interlocutory review, which includes suggested dates for such subsequent rounds of testimony.

25 Turning to Public Counsel’s assertion that it would suffer substantial prejudice if not permitted to file cross-rebuttal, we do not agree. While Public Counsel does not state its position on rate rebalancing as plainly as it could, Public Counsel does remark that “rate-rebalancing is not a standard issue in a transfer of control case” and notes that “[t]he logical nexus between the Company’s petition and Staff’s proposal remains to be established.” In addition, Public Counsel states: “Indeed, absent a Staff recommendation on this issue, there would be no rate-rebalancing issue to address.”

26 It appears from these statements that Public Counsel opposes Staff’s rate rebalancing proposal and challenges the propriety of it being considered in this proceeding. If so, Public Counsel’s due process rights are adequately protected by the opportunity it will have to brief that question prior to hearing.

27 If we find prior to the hearing that rate rebalancing is an issue properly before us, Public Counsel will have the opportunity to cross-examine Staff’s witnesses and present argument opposing Staff’s rate-rebalancing proposal. These rights are sufficient to protect Public Counsel from suffering prejudice.

ORDER

THE COMMISSION ORDERS That

- 28 Public Counsel's "Motion for Reconsideration of Order No. 04 Denying Public Counsel's Motion for Leave to File Cross-Rebuttal Testimony," is denied.
- 29 The parties are required to file prehearing briefs on January 25, 2006, presenting their arguments concerning whether issues concerning rate rebalancing, Yellow Pages imputation, Sprint's sale of its directory publishing business, and any other issues raised by the response testimony filed on November 30, 2005, are properly before the Commission in this proceeding.

DATED at Olympia, Washington, and effective this 23rd day of December, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner