BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T Communications of the Pacific Northwest, Inc. **v.** **Verizon Northwest, Inc.**	**DOCKET NO. UT-020406** MOTION TO STRIKE TESTIMONY AND IN LIMINE TO LIMIT HEARINGS

I. MOTION

The Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) requests an order of the Washington State Utilities and Transportation Commission (Commission) finding rate-rebalancing remedies unavailable in this proceeding as a matter of law, striking the testimony of witnesses, and limiting the evidentiary hearings regarding such remedies.

Public Counsel respectfully requests a decision on this motion, if possible, prior to the prehearing conference scheduled on February 24th, 2003, for the marking of exhibits. Public Counsel further requests that the commission set a schedule for responses as soon as possible.

II. BACKGROUND

On April 3, 2002, AT&T Communications of the Pacific Northwest, Inc. (AT&T) filed a complaint against Verizon Northwest, Inc. (Verizon) with the Commission alleging that Verizon's switched access charges are in excess of the actual cost of providing switched access. On April 11, 2002, Verizon answered AT&T's complaint denying the allegations contained therein and also moving for dismissal on several grounds. On July 16, 2002, the Commission issued an order denying Verizon's motion to dismiss and determining that "… this matter should proceed to hearing. The issues framed are complex and material. There are factual disputes

relevant to the legal issues." *Second Supplemental Order – Order Denying Motion to Dismiss, p. 8.*

On September 30, 2002 testimony was filed on behalf of AT&T by Dr. Lee L. Selwyn and on behalf of Washington Utilities and Transportation Commission Staff (Commission Staff) by Dr. Glenn Blackmon and Mr. Tim Zawislak. On December 3, 2002 testimony was filed on behalf of Verizon by Orville D. Fulp, Nancy Heuring, James H. Vander Weide, Carl R. Danner, Terry R. Dye, and David G. Tucek. A significant portion of the testimony filed in September and December relates to a possible remedy of rate rebalancing. See Attachment A to this motion for tables identifying the portions of the testimony filed which this motion seeks to strike.

III. MEMORANDUM

"The Company's remedy for failure to meet authorized rate of return is to file a general rate case."[1]

A. The Doctrine of Single Issue Ratemaking Prohibits Rate Rebalancing in this proceeding.

Allowing a rate-rebalancing remedy in this docket would violate the prohibition against single issue ratemaking.

> Single-issue ratemaking is prohibited because it considers changes in isolation, thereby ignoring potentially offsetting considerations and risking understatement or overstatement of the overall revenue requirement. *City of Chicago v. Ill. Commerce Commn.*, 281 Ill.App.3d 617, 627 (1996)[2]

[1] *WUTC v. US West Communications, Inc.*, UT-970766, 14th Supplemental Order: Commission Order on Reconsideration Service Quality and Directory Assistance Revenue Issues, p. 6 (March 24, 1998) commonly referred to as the US West "make whole" case. The order rejects a request by Qwest to seek revenue increases at a later date if current directory assistance revenue estimates are not met.

[2] See also 8 Am. Jur. 2d, Public Utilities § 118.

In the matter now before the Commission, Verizon has proposed to rebalance its general rates in an amount equal to any ordered decrease in access charges. See Attachment A to this motion. This is impermissible.

> The Commission generally will not engage in single issue or "piecemeal" ratemaking… The Commission has consistently held that these questions are resolved by a comprehensive review of the company's rate base and operating expenses, determining a proper rate of return, and allocating rate changes equitably among customers. *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, UT-970653, Second Supplemental Order Dismissing Complaint, p. 5 (October 22, 1997).[3]

By seeking to rebalance rates (if the Commission decides to lower Verizon's access charges) Verizon has sought to present just the type of limited rate case the Commission has condemned. "Such limited rate cases likely would result in unfair and unequal allocation of rates among the company's ratepayers, and would not be a productive use of the Commission's resources." *Id.* at 6. The proper context for consideration of cost shifting, rate spread and similar issues is in a general rate case where all revenues and costs are before the Commission.

The Commission should focus its efforts in this docket on the gravamen of AT&T's complaint, namely whether Verizon's access charges exceed its costs. Verizon is free to file a general rate case at a later time if it believes it will be under-earning on its allowed rate of return as a result of any decrease in access charge rates. It should not be allowed to rebalance rates in this docket.

The Commission has faced a strikingly similar problem before and concluded that associated revenue deficiencies should be addressed in a separate proceeding. *WUTC v. US West Communications, Inc.* UT-980340, Commission Order Granting Summary Determination;

[3] MCI's complaint was dismissed for failure to state a claim against GTE. The Commission's decision was affirmed in an unpublished opinion by Div. 1 of the court of appeals. The court adopted the Commission's analysis and the above cited language. *US West Comm., Inc. v. Washington Utils. And Transp. Commission*, 2001 WL 783746 (2001).

Ordering Implementation of 1+ Toll Dialing Parity, p. 11 (October 14, 1998). In that case the Commission Staff brought a complaint seeking determination of whether US West should be ordered to provide intraLATA 1+ toll dialing parity. US West argued against dialing parity until it was either granted §271 relief or it was allowed to concurrently rebalance existing rates to compensate it for revenue losses resulting from implementation of dialing parity. The Commission granted Commission Staff's motion seeking summary determination and ordered US West to implement dialing parity without the requested rate rebalancing. We believe that same analysis should be applied by the Commission in this proceeding.

The rate-rebalancing remedies proposed by Verizon (and in the alternative by Commission Staff) would redistribute costs from access charges to other Verizon services outside of a general rate case examination of Verizon's costs and revenues and a review of appropriate rate design and rate spread among customer classes.

The present motion is distinguishable from that brought by Verizon last summer. Verizon's motion to dismiss sought to foreclose AT&T's access to the Commission to seek access charge reductions. By contrast, the present motion seeks to properly limit the testimony and subject matter of the hearing to those remedies appropriate to the subject matter of the complaint, namely Verizon's access charges. In denying Verizon's motion the Commission did not rule that this docket was a general rate case with the attendant notice requirements. *Second Supplemental Order*.

It is Public Counsel's position that any rate-rebalancing in response to access charge reductions would constitute single issue ratemaking that is impermissible outside the context of a general rate case. *If* the Commission grants the relief sought by AT&T then it would be permissible for Verizon to file a rate case wherein it could present evidence supporting any assertion of under-earning and seek changes to general rates. In any such general rate

proceeding all of Verizon's costs and revenues would be properly under consideration by the Commission.

B. Due Process Requires Notice and an Opportunity to be heard prior to a Commission Decision.

Verizon's ratepayers who would be affected by any rate rebalancing remedy have a statutory right to notice, predicated upon their constitutional right to due process. Due process requires notice of a claim, and an opportunity to be heard at a meaningful time and in a meaningful manner. *Morgan v. United States*, 304 U.S. 1, 18-19 (1938); *Mathews v. Eldridge*, 442 U.S 319, 333, 96 S. Ct. 893, 902 (1976). The Washington state legislature has empowered the Commission to determine whether the rates a regulated utility proposes are fair, just, reasonable, and sufficient. RCW 80.36.080. The legislature has also required that notice of rate changes be provided to the Commission and the public. RWC 80.36.100 and .110. It is clear that the legislature's intent was to provide notice to ratepayers when they face a possible rate increase.

The Commission's rules also implement the legislature's intent in this matter. WAC 480-80-125 requires notice to utility customers when their utility proposes a rate increase so that customers can make a reasoned decision regarding their participation in the docket.[4] The notices issued by the Commission to date in this docket do not meet the requirements of WAC 480-80-125 to provide notice to the public of the potential for general rate increases. *Notice of Prehearing Conference* (June 12, 2002). Verizon should not be permitted to propose through responsive testimony, rate increases which could not be proposed in a case in chief without compliance with the state law and agency rules.

[4] For example, various customer groups such as AARP, Dept. of Defense, WeBTEC, and other potential intervenors who have participated in other rate case dockets before the Commission may have sought to participate in this docket had they been on notice of the potential increase in general rates.

Testimony filed by Verizon and Commission Staff has raised the specter of a general rate increase without proper notice to the ratepayers who would be affected. The lack of notice to ratepayers is underscored by the fact that the pleadings in the case provide no notice that rate relief will be requested, and the relief itself is only proposed in responsive testimony by Verizon, and suggested in the alternative by Commission Staff.

The Commission's own rules recognize this important principle by establishing special filing requirements when a company seeks an increase of three percent or more from any customer class. Under WAC 480-09-310(1)(b) the rate-rebalancing remedy requested by Verizon, and suggested in the alternative by Staff, constitute a "general rate increase filing." Verizon proposes to increase residential rates (and residential rates alone) by 35% "from about $13.00 to $17.56 per month." *Direct Testimony of Orville D. Fulp*, p. 20 (Exhibit No. _____ (ODF-1T)).

It may be argued that WAC 480-09-310 is inapplicable in this proceeding because the remedy is requested not through a tariff as contemplated by the rule, but rather through testimony suggesting an appropriate remedy. This distinction of form over substance makes little difference to those from whom the increase is requested. It is clear that the Commission's intent in adopting WAC 480-09-300 through 480-09-335 was to provide for proper notice to the Commission and to the ratepayers at risk of higher rates. Verizon and Staff have proposed rate-rebalancing increases which would have an effect that is indistinguishable from a general rate increase. It is also clear from the filings to date that the requirements of WAC 480-09-300 through 480-09-335 have not been met.

The court of appeals has described the proper process for a telecommunications company seeking to raise rates, including notice. *Washington Independent Telephone Assoc. v.*

Washington Utils. And Transp. Commission, 110 Wn. App. 147, 156-157, 39 P.3d 342, 347 (2002).[5]

It may be argued that if the Commission grants the requested rate rebalancing remedy that notice could be provided at that time. Public Counsel would submit that such after-the-fact notice would be a sham and contrary to the legislature's intent. The Commission, as the finder of fact, would already have determined that the rates were fair, just, reasonable, and sufficient, thereby vitiating the purpose of the notice requirements, an opportunity to be apprised of the matter and to participate and be heard in a meaningful way and at a meaningful time.

It is equally inappropriate for the Commission to allow as a remedy a general rate increase without proper notice and due process for ratepayers as it would be were the request made directly in a general rate case filing where no proper notice had occurred.

IV. CONCLUSION

For the foregoing reasons Public Counsel requests that the Commission issue an order limiting the remedies available in this proceeding to the subject of the Petition, changes in Verizon's access charges. Any rate-rebalancing that Verizon believes to be appropriate should be dealt with in the context of a subsequent general rate case filing. In such a proceeding Verizon would be required to file all requisite evidence supporting a general rate increase (WAC 480-09-300), all aspects of Verizon's costs and revenues would then be examined, there would be proper notice to customers, an opportunity for intervention by interested parties, and an opportunity to be heard prior to a determination by the Commission regarding whether Verizon's current rates continue to be just, fair, reasonable, and sufficient. For these reasons Public

[5] This opinion is currently on appeal to the Washington state Supreme Court and a decision is pending. Due to the currently uncertain legal status of WAC 480-120-540 (access charges) we have not addressed issues relating to it in this motion.

Counsel requests that the Commission issue an order finding rate-rebalancing unavailable in this proceeding as a matter of law, striking those portions of witness testimony relating to rate-rebalancing remedies, and order the subject of the evidentiary hearings to be limited to the proper level of Verizon's access charges.

DATED this 4th day of February, 2003.

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