

[Service Date December 17, 2002]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

)	
In the Matter of the Petition of)	DOCKET NO. UT-011439
)	
)	TENTH SUPPLEMENTAL
VERIZON NORTHWEST, INC.,)	ORDER: ORDER DENYING
)	COMMISSION STAFF'S
)	PETITION FOR
For Waiver of WAC 480-120-)	ADMINISTRATIVE REVIEW OF
071(2)(a).)	ORDER STRIKING STAFF
)	TESTIMONY
.....)	

1 **Synopsis:** *The Commission denies Commission Staff's Petition for Administrative Review.*

I. INTRODUCTION

2 **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.

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). Robert Cromwell, Attorney, represents the Office of Public Counsel. Douglas N. Owens represents Qwest Corporation (Qwest). Brooks Harlow and Richard Busch represent RCC.

- 4 **Procedural Background:** This proceeding commenced in October 2001 when Verizon filed its application for a waiver of the requirement that it serve applicants for line extensions under WAC 480-120-071. The original schedule of proceedings required Verizon to file direct testimony on March 6, 2002, Staff to file answering testimony on April 17, 2002 and Verizon to reply to Staff on May 15, 2002. Verizon and Staff filed testimony in accord with this schedule.
- 5 On May 31, 2002, the Commission entered an order granting Commission Staff's motion to join Qwest as a party to this proceeding. On June 7, 2002, a new schedule was established requiring Staff to file direct testimony regarding Qwest's ability to serve the underlying applicants for line extensions. Qwest and Verizon were provided an opportunity to file answering testimony and then Staff would have the opportunity to reply to the answering testimony.
- 6 Before the date arrived for Staff to file a reply to Qwest and Verizon, RCC was joined as a party by Commission Order dated July 10, 2002. The prior schedule was suspended. Subsequently, on July 19, 2002, in the Sixth Supplemental Order in this case, the Commission approved a revised schedule of proceedings which was developed in consultation with the parties at a prehearing conference on July 17, 2002. That schedule required Staff to file a reply to Qwest on September 20, 2002. RCC was then to file direct testimony on November 6, 2002. The parties were permitted to file answers to the RCC filing on December 18, 2002.
- 7 On September 20, 2002, Commission Staff filed the reply testimony of three witnesses: Robert T. Williamson, Thomas L. Spinks, and Robert B. Shirley.
- 8 On October 4, 2002, Verizon filed a motion to strike the portions of the reply testimony of Mr. Shirley pertaining to Verizon's Cedar Ponds line extension in the Sultan exchange. On October 23, 2002, Commission Staff filed its response to Verizon's motion.

9 On November 1, 2002, the Commission entered its Ninth Supplemental Order Granting Motion to Strike Reply testimony of Robert B. Shirley (“Ninth Supplemental Order”).

10 On November 12, 2002, Commission Staff filed a Petition for Administrative Review of the Ninth Supplemental Order.¹ On November 22, 2002, Verizon filed its Response to Staff’s petition.

II. MEMORANDUM

A. BACKGROUND

11 Verizon’s Motion to Strike Staff Testimony addressed the reply testimony of Staff witness Robert B. Shirley filed on September 20, 2002. Mr. Shirley’s testimony consisted of fifteen pages and purported to address the testimony of Qwest witnesses, Mr. Robert J. Hubbard and Ms. Teresa A. Jensen. It also purported to address the testimony of Verizon witness Dr. Carl R. Danner. All these witnesses filed testimony on the July 5, 2002, in accord with the schedule of proceedings established on June 7, 2002.

12 The portion of Mr. Shirley’s testimony that Verizon moved to strike was the reply to Dr. Danner’s testimony. Dr. Danner’s testimony addressed the implications of a Commission grant of eligible telecommunications carrier (ETC) status to RCC Minnesota, Inc. (RCC). The Commission approved RCC’s ETC application on June 14, 2002. RCC was subsequently made a party to this proceeding. The chief topic of Mr. Shirley’s reply to Dr. Danner’s testimony was Verizon’s 1999-2000 construction of the Cedar Ponds extension in Verizon’s Sultan exchange, as well as Verizon’s May 2, 2002 application for Commission

¹ The petition is denominated a petition for administrative review. Because the order of which review is sought is not an initial order under RCW 34.05.461 or WAC 480-09-780, administrative review is not available. However, in footnote 1 to the petition, Staff appears to indicate it is seeking review of an interlocutory order under the standards set out at WAC 480-09-760.

approval of a tariff that shifted the cost burden for that extension to Verizon ratepayers.

- 13 In the Ninth Supplemental Order entered on November 1, 2002, the Commission's presiding officer in this proceeding granted Verizon's motion to strike portions of Mr. Shirley's reply testimony. The motion was granted on the basis that Staff did not request leave to file additional testimony on September 20, 2002 responding to Verizon and that Staff could have filed information about the Verizon Cedar Ponds line extension in its April 2002 direct testimony. Staff filed its Petition for Administrative Review on November 12, 2002.
- 14 Commission Staff seeks, by its petition for administrative review, to have the Commission reverse the presiding officer's decision to strike Mr. Shirley's testimony pursuant to WAC 480-09-760, which addresses review of interlocutory orders.
- 15 In its petition, Staff contends that the presiding officer failed to recognize the true significance of Verizon's May 2, 2002 application to recover from ratepayers the costs of the Cedar Ponds extension: that Verizon had thereby violated an agreement² with the Commission not to seek recovery of those costs. Because the issue in this case is whether or not Verizon should be allowed to recover line extension costs from ratepayers under the new line extension rule, Staff contends the Cedar Ponds extension was not an issue until May 2, 2002. Prior to that, Verizon's shareholders would have covered the cost of construction. Any effort by Staff to include testimony about Cedar Ponds before May 2, 2002 would likely have been found speculative.

² This agreement, dated December 3, 1999, is attached as an exhibit to Mr. Shirley's reply testimony. It consists of a letter from Verizon's Director of Regulatory and Governmental Affairs to the Commission's Executive Secretary. The agreement basically states that Verizon will construct the Cedar Ponds extension and will allow pooling of the one-half mile free line extension allowances which existed under the line extension rule in effect at that time.

- 16 Staff also argues that Verizon prevented Staff from learning of Verizon's intention to obtain ratepayer coverage of its Cedar Ponds extension during the discovery phase of this case and, that if the order striking Mr. Shirley's testimony is upheld, Verizon's July 5, 2002 testimony will go unrebutted.
- 17 Verizon argues that Staff knew long before either the May 2, 2002 application date, or Staff's April 2002 filing date that Verizon might seek recovery from ratepayers for the Cedar Ponds extension. In any event, Verizon points out that the Cedar Ponds project is not relevant or significant to the issue presented by Verizon's petition in this case – under the new line extension rule, when is it proper for the Commission to waive the requirement to construct a line extension because of the magnitude of cost that might be borne by ratepayers and/or the company? Verizon argues that since Cedar Ponds was not constructed under the new line extension rule, costs attendant upon its construction are not relevant in this proceeding.
- 18 Verizon further responds that because the Cedar Ponds extension was not constructed under the new line extension rule, it was not proper to include it in the response to Staff's discovery request. Thus Verizon did not attempt to hide information from Staff about the prospect of filing for ratepayer recovery on May 2, 2002.
- 19 Verizon also contends that the stricken testimony was not responsive to Dr. Danner's testimony in the first place and that, in the second place, Staff admitted in its Motion to Compel responses that it would have to seek leave to file testimony related to Cedar Ponds. Finally, Verizon points out that Staff agreed to the July 17, 2002 schedule of proceedings which called for Staff to file a reply only to Qwest's testimony on September 20, 2002. Staff never objected to the Sixth Supplemental Order's outline of the schedule which contained the limitation on Staff's September 20, 2002 filing.

B. STANDARDS FOR REVIEW OF INTERLOCUTORY ORDER

20 The Commission may review interlocutory orders under WAC 480-09-760 if: a) a party's participation is terminated by a ruling; b) review is necessary to prevent substantial prejudice to a party which could not be remedied by post-hearing review; and, c) review could save the Commission and parties substantial effort or expense, or there is some other factor that outweighs the costs in time and delay of exercising review. Any aggrieved party may seek review of an interlocutory order within ten days after entry of the order.³

21 It is clear that the first standard for review is not at issue here because the Ninth Supplemental Order did not terminate any party's participation in this case. The remaining two standards are addressed below.

1. Prevention of substantial prejudice not remedied by post hearing review.

22 In its petition, Staff does not address this criterion, nor attempt to tie its arguments to the standards contained in the rule regarding interlocutory review. However, Staff does argue that if the presiding officer's ruling to strike Mr. Shirley's testimony is allowed to stand, it means that Verizon's July 5, 2002 testimony will go un rebutted.

23 Staff argues that the Ninth Supplemental Order incorrectly presumed that the September 20, 2002 filing deadline was limited to responses to Qwest. Staff argues that its September 20, 2002 response testimony properly included both a response to Qwest's and to Verizon's testimony filed on July 5, 2002.

24 Staff asserts that an earlier iteration of the schedule established in this case permitted Staff to respond to both Verizon and Qwest on July 11, 2002.⁴

³ Staff's petition was timely filed on November 12, 2002. Verizon does not contest this.

⁴ See *Fourth Supplemental Order*, June 19, 2002, p. 2.

However, when RCC was joined as a party to the case, the schedule changed. In the Sixth Supplemental Order, entered July 19, 2002, the Commission established a schedule indicating that Staff should file only a reply to Qwest's July 5, 2002 testimony on September 20, 2002. Staff argues that this notation was incorrect because it signified that Staff thus would be deprived of an opportunity to reply to Verizon's July 5th filing. Staff contends that fairness requires it should have a chance to reply to Verizon's July 5th testimony and that it could not have filed reply testimony prior to May 2, 2002.

25 The reasons Staff advances for its inability to file responsive testimony prior to May 2, 2002 are twofold: 1) Staff did not know that Verizon would violate its agreement with the Commission not to seek a ratepayer contribution toward the construction costs for the Cedar Ponds line extension; and, 2) Verizon's discovery responses during this proceeding masked Verizon's intent to request ratepayer contribution until it was too late for Staff to respond in its initial response testimony.

26 Verizon counters that the stricken testimony does not rebut the July 5th testimony of Dr. Danner. Dr. Danner did not discuss the Cedar Ponds project, but rather stated that the extensions at issue in this case were too expensive. Verizon further argues that Staff knew Verizon would need to seek leave of the Commission to file supplemental testimony regarding the Cedar Ponds project because it so stated in its Motion to Compel Responses by Verizon, filed July 3, 2002.⁵ Verizon points out that Staff agreed to the schedule calling for Staff to file a reply only to Qwest on September 20, 2002.

27 With regard to Verizon's agreement not to seek ratepayer contribution toward the cost of the Cedar Ponds extension, Verizon asserts that not only did Staff know that Verizon would seek such a contribution, but that Mr. Shirley himself advised Verizon that Staff would not oppose such a request once the project

⁵ Commission Staff Motion to Compel Responses by Verizon, fn. 2 and p. 5

was completed and the new line extension rule had been promulgated. Verizon further asserted that the discovery request proposed by Staff asked for all projects constructed under the new line extension rule. Since Cedar Ponds was not constructed under the new rule, Verizon did not include it in the answer to Staff's discovery question.

- 28 **Discussion and decision.** The scheduling history of this case is complicated. An earlier iteration of the schedule indicated that Staff would be able to reply to both Qwest's and Verizon's July 5th testimony. However, the September 20, 2002 filing date was a part of an agreed schedule designed to address the effect of Qwest and RCC being made parties to the case. Staff did not timely object to that schedule and was long aware that the schedule allowed Staff to reply only to Qwest on September 20, 2002. Furthermore, Staff's own Motion to Compel indicated that Staff would need to seek leave to file additional testimony if it wanted to introduce information about the Cedar Ponds extension into the record. Staff cites no reason at all why it could not have sought that leave.
- 29 In addition, a review of Dr. Danner's testimony shows that Staff's reply did not rebut Dr. Danner, but rather sought to use the occasion of Dr. Danner's testimony to insert information into the record about a subject he did not address. We cannot conclude from this that Staff would be substantially prejudiced if Mr. Shirley's reply testimony was excluded because Dr. Danner's testimony would not be effectively rebutted by that reply testimony in the first place.
- 30 Furthermore, we disagree with Staff's characterization of the December 3, 1999 letter from Verizon to the Commission's Executive Secretary as a "settlement." The terms of the letter were never approved by Commission order after a settlement hearing. At best, the terms of the letter can be characterized as an unapproved agreement between Staff and Verizon, but these terms have no precedential value in this proceeding.

31 Verizon and Staff obviously have two completely divergent views of the events surrounding Verizon's May 2, 2002 tariff application. Nevertheless, the issue of whether or not Staff suggested the company file for ratepayer contribution, or knew that Verizon was going to make such a filing, has no, or no substantial, bearing on the application before us now. On this basis Staff's petition does not meet the standard of review set out at WAC 480-09-760(1)(b) or any of the basis that Staff cites.

2. Saving Substantial Effort or Expense, or Some Other Factor that Outweighs Burden to Commission of Review

32 Staff's petition does not address this standard for granting interlocutory review. Staff's arguments do not indicate whether the Commission or the parties would be saved substantial effort or expense if interlocutory review was granted. However, Staff appears to argue that Verizon's alleged violation of the December 3, 1999 agreement and Verizon's purported failure to provide adequate responses to Staff discovery requests, should not be rewarded by preventing Staff from presenting testimony about the Cedar Ponds line extension. Thus, Verizon's supposed obfuscation may constitute an "other factor" that outweighs the burden to the Commission of reviewing this interlocutory appeal and granting Staff the relief it seeks.

33 **Discussion and decision.** As we indicated above, the December 3, 1999 agreement is not a settlement agreement that was reviewed and approved by the Commission. Thus it has no precedential effect in this proceeding. Furthermore, the facts surrounding whether or not Verizon should or would request ratepayer assistance in covering the cost of the Cedar Ponds extension are murky at best. The fact that Staff claims Verizon violated the purported December 3, 1999 agreement under the circumstances outlined in the parties' pleadings is not sufficient to constitute an "other factor" supporting interlocutory relief.

34 We also find Verizon's supposed failure to answer Staff's discovery questions an insufficient "other factor" that would cause us to grant interlocutory relief. The discovery question Staff posed to Verizon on March 12, 2002 reads as follows:

In response to DR 17, Verizon stated that it has computed an average cost for extensions since WAC 480-120-071 became effective. For all of its Washington districts, please list the location, length, cost of reinforcement, cost of extension, and number of households served for extensions constructed under Verizon's line extension tariff currently in effect.
(emphasis added)

35 The affidavits of Ms. Joan Gage attached to Verizon's Motion to Strike and Verizon's answer to Staff's Petition for Administrative Review make clear that the Cedar Ponds line extension was commenced some time in late 1999, well before WAC 480-120-071 became effective in January 2001. Thus, Verizon's initial failure to list the Cedar Pond extension as an "extension constructed under Verizon's line extension currently in effect" cannot be viewed as an effort to hide something from Staff and thus prevent Staff from responding to it in this case in a timely way. In any event, Staff could easily have asked leave to file information about the Cedar Pond extension upon its later receipt of information pursuant to this discovery request, if it believed it necessary, especially in view of Staff's recognition of the need to request leave to make such a filing and the fact that the July 19 schedule clearly indicated that the Staff's September 20, 2002 filing date limited Staff's filing to responding to Qwest. Again, Staff has failed to show any "other factor" that would prompt the Commission to grant its request for interlocutory review.

III. CONCLUSION

36 We affirm the Ninth Supplemental Order granting Verizon's Motion to Strike the Reply Testimony of Robert B. Shirley and deny Staff's Petition for Administrative Review. As we discuss above, Staff did not specifically address the standards for interlocutory review set forth in WAC 480-09-760. Our review of the pleadings and arguments leads us to conclude that Staff has failed to meet those standards. Staff has not shown that interlocutory review of the Ninth Supplemental Order is necessary to prevent substantial prejudice which could not be remedied by post-hearing review. Furthermore, Staff has not shown that review would save substantial effort or expense or that there is some other factor that requires review.

IV. ORDER

37 The Commission affirms its decision in the Ninth Supplemental Order and strikes the portions of Mr. Shirley's reply testimony found at page 2, lines 1-4; page 10, lines 18-22; pages 11-14; and, page 15, lines 1-13.

DATED at Olympia, Washington and effective this ____ day of December, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

This is a final order on interlocutory review by the Commission. No further judicial or administrative relief is available until the Commission enters a final order at the conclusion of the evidentiary proceeding in this case. The parties will be advised of further relief available to them at that time.