

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.)	
)	
Complainant,)	Docket No. UT-020406
)	
v.)	AT&T RESPONSE TO VERIZON
)	FIRST MOTION TO STRIKE
VERIZON NORTHWEST INC.,)	AND FOR SUMMARY
)	DETERMINATION
Respondent.)	
<hr style="width: 100%;"/>)	

AT&T Communications of the Pacific Northwest, Inc. (“AT&T”) hereby responds to the first motion of Verizon Northwest Inc. (“Verizon”) to strike certain testimony filed by Commission Staff and AT&T and for summary determination (“Verizon First Motion”). The Verizon First Motion states no grounds on which Verizon is entitled to strike testimony or to summary determination on any issue in this proceeding. AT&T, therefore, recommends that the Commission deny the motion.

DISCUSSION

1. The Commission Should Deny Verizon’s Motion to Strike Testimony.

Verizon seeks to strike any and all testimony that discusses those portions of Verizon’s costs or earnings that Verizon has assigned to its interstate services for accounting purposes. This includes testimony from Commission Staff that the Commission should adjust Verizon’s figures to more properly account for costs and earnings associated with Internet usage, as well as testimony from Dr. Selwyn on behalf of AT&T that the Commission should consider Verizon’s entire earnings from both intrastate and interstate operations before concluding that

any reduction in Verizon's access charges without a corresponding increase in other rates could be considered confiscatory or a regulatory taking. Verizon does not contend that this testimony is not responsive to the issues raised in Verizon's testimony or that it is outside the scope of this proceeding. Rather, Verizon contends that the testimony should be stricken because Verizon asserts that it is inconsistent with federal law.

The Commission has never adopted such a standard for striking testimony in a regulatory proceeding. The Commission has always adhered to the practice of evaluating a party's legal arguments in briefs *after* the conclusion of the evidentiary hearings, not prior to the hearings as part of a motion to strike testimony. Indeed, were the standards as Verizon suggests, much of the testimony that Verizon files in cost dockets and arbitrations under the federal Telecommunications Act of 1996 would be subject to motions to strike on the grounds that it is inconsistent with federal law. The Commission has never entertained – and should never seriously consider – motions to strike testimony on such grounds. The Verizon First Motion is not only procedurally improper, it is a needless waste of party and Commission resources.

Even if the Commission were inclined to evaluate Verizon's legal arguments at this point in the proceedings, the Commission should deny Verizon's motion. As Dr. Selwyn has observed, the Supreme Court has consistently concluded that courts (and the Commission) consider a company's entire operations before concluding that rates for any one service are confiscatory. *E.g., Puget Sound Traction, Light & Power Co. v. Reynolds*, 244 U.S. 574, 579-81, 61 L. Ed. 1325, 1330-31 (1916). The Washington Supreme Court has interpreted

U.S. Supreme Court cases to authorize review of both intrastate and interstate operations when undertaking such a review:

The rule to be derived from these cases is that a segregation of intrastate and interstate properties, expenses, and revenues is not necessary in all cases. A state regulatory commission can legally consider the entire operation of a utility where it is an integrated system with its intrastate and interstate business intimately bound together, provided that the commission restricts itself to the fixing of rates over which it has jurisdiction without interfering with Federal authority.

State ex rel. Allied Daily Newspapers of Washington v. Washington Public Service Commission, 44 Wn.2d 1, 14, 265 P.2d 270 (1953).

The testimony Verizon seeks to strike is fully consistent with this law. Verizon cites a Ninth Circuit case that Verizon asserts supports its position, but at best, Verizon has presented a dispute over the proper interpretation of the law and Commission authority – a dispute that is best presented to, and resolved by, the Commission based on a complete evidentiary record. The Commission, therefore, should deny Verizon’s motion to strike Commission Staff’s and AT&T’s testimony.

2. Verizon Is Not Entitled to Summary Determination on the Issue of Its Earnings.

Verizon predicates its motion for summary determination on its motion to strike. Verizon First Motion at 4. If the Commission denies Verizon's motion to strike, therefore, Verizon's motion for summary determination similarly must be denied. Regardless of whether the Commission grants Verizon's motion to strike Staff's and AT&T's testimony, however, Verizon is not entitled to summary determination on the issue of its earnings. With the exception of imputation of Yellow Pages revenues, Staff and AT&T have proposed different adjustments to the minimal earnings information that Verizon has presented. Even excluding Staff's proposed adjustment that Verizon has moved to strike, the combination of adjustments that Staff and AT&T have proposed would result in intrastate earnings for Verizon of 10.33%, which exceeds Verizon's authorized rate of return of 9.76%. The Commission thus cannot conclude based on the prefiled testimony filed to date that Verizon is not over earning.

Neither Staff nor AT&T, moreover, have represented that the adjustments they have proposed constitute the total number and amount of adjustments that would be appropriate had Verizon filed comprehensive earnings information or a rate case. Nor has Verizon's witness who sponsors Verizon's earnings information been subject to cross-examination, either through deposition or hearings, which would enable Staff and AT&T to test the sufficiency and accuracy of Verizon's information or the credibility of Verizon's testimony. Indeed, Verizon's prefiled testimony is just that – prefiled testimony, not a sworn statement or any other evidence on which the Commission could rely to resolve a contested issue of fact. Summary determination simply is not appropriate under these circumstances.

CONCLUSION

Verizon has stated no basis on which the Commission should strike any portion of the testimony filed by Commission Staff or AT&T or on which the Commission should grant summary determination of any contested issue in this proceeding. Accordingly, the Commission should deny the Verizon First Motion.

DATED this 20th day of February, 2003.

DAVIS WRIGHT TREMAINE LLP
Attorneys for AT&T Communications of the
Pacific Northwest, Inc.

By _____
Gregory J. Kopta
WSBA No. 20519