

[Service Date February 21, 2003]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

AT&T COMMUNICATIONS OF)	
THE PACIFIC NORTHWEST,)	DOCKET NO. UT-020406
INC.,)	
)	FIFTH SUPPLEMENTAL ORDER
Complainant,)	
v.)	PREHEARING ORDER SETTING
)	SCOPE OF PROCEEDING; RULING
VERIZON NORTHWEST, INC.,)	ON MOTIONS
)	
Respondent.)	
.....		

1 **Synopsis:** *The Commission limits the scope of the upcoming hearings in this proceeding (March 3 – 11, 2003) to an examination of Verizon's costs in relation to its switched access charges and to its prices for intrastate toll services. The issue of the need to balance Verizon's retail rates is not within the scope of this stage of this proceeding. The Commission strikes testimony and limit evidentiary hearings accordingly.*

2 *Consistent with this determination, the Commission grants Public Counsel's Motion to Strike and in Limine, and Verizon's First Motion to Strike, which address proposed testimony and evidence that is outside the scope of this hearing. The Commission denies Verizon's Second Motion to Strike, which seeks to exclude proposed testimony and evidence that appear to be relevant and material. The Commission denies both of Verizon's motions for summary judgment because they address issues that are not relevant and material to determining the issues within the scope of the March hearings. The Commission grants (in part) interlocutory review to AT&T and reverses an order requiring it to provide information on AT&T's costs. The Commission allows Verizon to file surrebuttal testimony by February 24, 2003, that fits within the scope of the March hearings. The Commission denies a request for a continuance in the hearing schedule.*

3 **PROCEEDINGS:** On April 3, 2002, AT&T Communications of the Pacific Northwest, Inc. (AT&T) filed with the Commission a complaint against Verizon Northwest, Inc. (Verizon). The complaint alleges that Verizon's switched access charges far exceed Verizon's cost of providing that access. The complaint further alleges that Verizon is charging prices below its cost floor to its affiliates and itself. AT&T claims that the gap between Verizon's excessive intrastate switched access rates and predatory pricing of toll services produces a "price squeeze" on Verizon's competitors in toll markets in Washington.

4 **PARTIES:** Gregory J. Kopta, attorney, Seattle, and Letty Friesen, attorney, Denver Colorado represent AT&T; Judith Endejan, attorney, Seattle, and Charles Carrathers, Vice President and General Counsel, Irving, Texas, represent Verizon; Michel Singer-Nelson, attorney, Denver, Colorado, represents WorldCom and its regulated subsidiaries (WorldCom); Shannon Smith, assistant attorney general, Olympia, represents the staff of the Washington Utilities and Transportation Commission (Commission Staff); Robert W. Cromwell, Jr., assistant attorney general, Seattle, appears as Public Counsel.

I. MEMORANDUM

A. PROCEDURAL HISTORY

5 On April 3, 2002, AT&T filed its complaint against Verizon. On April 11, 2003, Verizon answered AT&T's complaint denying the allegations. On April 11, 2002, Verizon also filed with the Commission a motion to dismiss the complaint. Answers opposing the motion to dismiss were filed by AT&T on May 13, 2002, and by Commission Staff on May 17, 2002. Verizon was permitted to file a reply to the answers, and filed it on May 24, 2002. WorldCom filed an answer to the motion to dismiss on June 19, 2002 (after it intervened at the first prehearing conference), and Verizon replied to the answer on June 27, 2002. On June 24, 2002, AT&T and Verizon filed Issues Statements. On July 16, 2002, the

Commission entered its Second Supplemental Order denying Verizon's motion to dismiss and holding that AT&T's complaint should proceed to hearing.

- 6 A prehearing conference regarding scheduling was held on August 27, 2002. On September 4, 2002, the Fourth Supplemental Order was entered. That order includes a schedule a schedule jointly proposed by the parties that has governed this proceeding.
- 7 On September 30, 2002, Dr. Lee L. Selwyn filed testimony on behalf of AT&T and Dr. Glenn Blackmon and Mr. Tim Zawislak filed testimony on behalf of Commission Staff. On December 3, 2002, Orville D. Fulp, Nancy Heuring,
- 8 James H. VanderWeide, Carl R. Danner, Terry R. Dye and David G. Tucek filed testimony on behalf of Verizon. Portions of the testimony filed by these witnesses address the possible remedy of rate rebalancing.
- 9 On January 24, 2003, Commission Staff filed a request to continue the filing date for rebuttal testimony until February 7, 2003. The Commission extended the filing date for rebuttal to February 7. On January 28, 2003, Verizon filed with the Commission a request that the filing date extension apply only to Commission Staff testimony, and not to that of other parties. The Verizon letter indicates that Verizon did not oppose extending the filing date for Commission Staff testimony. During a discovery hearing on January 28, 2003, AT&T agreed to file its rebuttal testimony on the original filing date of January 31, 2003.
- 10 On January 31, 2003, Dr. Lee L. Selwyn filed rebuttal testimony on behalf of AT&T. On February 7, 2003, Dr. Glenn Blackmon, Mr. Tim Zawislak and Ms. Betty Erdahl filed testimony rebuttal testimony on behalf of Commission Staff.

B. PENDING MOTIONS

11 On February 3, 2003, Public Counsel filed its Motion to Strike Testimony and In Limine to Limit Hearings. On February 7, 2003, AT&T filed a Petition for Commission Review of Interlocutory Ruling Compelling AT&T to Respond to Verizon Data Requests. On February 12, 2003, Verizon filed its Motion to Continue Hearing, Determine Scope, and File Additional Testimony. On February 13, 2003, Verizon filed its First Motion to Strike and for Summary Determination to Limit Hearings. On February 14, 2003, Verizon filed its Second Motion to Strike and for Summary Determination. On February 19, 2003, Verizon filed its Motion For Leave to File Reply to Oppositions to Motion to Continue Hearings, Determine Scope and to File Additional Testimony.¹

12 The Commission rules on these motions in this Fifth Supplemental Order. First, we determine the scope of the proceeding, as Verizon asks us to do. With the scope established, we rule on the three motions to strike and motions in limine.

13 Following these decisions, we rule on Verizon's motions for summary determination, on AT&T's petition for interlocutory review, and on Verizon's motion to file additional testimony. Finally, we rule on Verizon's motion to continue hearings.

C. RELEVANT STATUTES

RCW 80.36.180 Rate discrimination prohibited. No telecommunications company shall, directly or indirectly, or by any special rate, rebate, drawback or other device or method, unduly or unreasonably charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to communication by telecommunications or in connection therewith, except as authorized in this title or Title 81 RCW than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to communication by

¹ Verizon's February 19, 2003, Motion for Leave to File Reply to Oppositions to Motion to Continue Hearings, Determine Scope and to File Additional Testimony is granted. A copy of the reply is attached to the motion.

telecommunications under the same or substantially the same circumstances and conditions. The Commission shall have primary jurisdiction to determine whether any rate, regulation, or practice of a telecommunications company violates this section. This section shall not apply to contracts offered by a telecommunications company classified as competitive or to contracts for services classified as competitive under RCW 80.36.320 or 80.36.330.

RCW 80.36.186 Pricing of or access to noncompetitive services-- Unreasonable preference or advantage prohibited.

Notwithstanding any other provision of this chapter, no telecommunications company providing noncompetitive services shall, as to the pricing of or access to noncompetitive services, make or grant any undue or unreasonable preference or advantage to itself or to any other person providing telecommunications service, nor subject any telecommunications company to any undue or unreasonable prejudice or competitive disadvantage. The Commission shall have primary jurisdiction to determine whether any rate, regulation, or practice of a telecommunications company violates this section.

RCW 80.04.110 Complaints--Hearings--Water systems not meeting board of health standards--Drinking water standards-- Nonmunicipal water systems audits. (1) Complaint may be made

by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, or by the public counsel section of the office of the attorney general, or its successor, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission: PROVIDED, That no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any gas company, electrical company, water company, or telecommunications company, unless the same be signed by the mayor, council or commission of the city or town in which the

company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such gas, electricity, water or telecommunications service, or at least twenty-five percent of the consumers or purchasers of the company's service: PROVIDED, FURTHER, That when two or more public service corporations, (meaning to exclude municipal and other public corporations) are engaged in competition in any locality or localities in the state, either may make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint or upon complaint of the commission upon its own motion, the commission shall have power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent oppression or monopoly or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state.

D. DISCUSSION AND DECISIONS

1. What is the appropriate scope of this proceeding?

14 Verizon has asked the Commission to determine the scope of this proceeding.² Verizon argues that the case has been underway for more than ten months, and

² Verizon's February 12, 2003 Motion to Continue Hearings, Determine Scope and to File Additional Testimony at 2 – 3.

yet the parties do not agree on the scope of the proceeding and Verizon's right to proffer testimony. In support of its request, Verizon complains about Public Counsel's Motion to Strike Testimony and In Limine to Limit Hearings. Verizon argues that Public Counsel's position conflicts with the position Commission Staff took in May 2002 when it opposed Verizon's motion to dismiss.

- 15 Verizon also claims that the rebuttal testimony of Commission Staff and AT&T raises significant questions about the scope of this proceeding. These include whether Verizon must file a separate rate case to seek to raise local rates, and whether the Commission must consider Verizon's interstate earnings in determining whether access charges should be reduced.
- 16 AT&T argues that the scope of this proceeding is well-established, claiming that its complaint is, and always has been, about two issues: (1) whether Verizon's intrastate switched access charges are excessive, negatively affect Washington toll markets and thus are not fair just, and reasonable; and (2) whether Verizon prices its intrastate toll services at levels that do not exceed an appropriately calculated cost floor. It argues that evidence of Verizon's overall earnings may be germane to the issues of the reasonableness of Verizon's switched access and toll rates, but that this case is not, and never has been, about rate rebalancing of Verizon's intrastate services. AT&T notes that Verizon has already submitted the testimony that Public Counsel seeks to strike, and that AT&T has no reason to believe that Public Counsel's motion will not be resolved prior to the hearings.
- 17 AT&T argues that Verizon raised the issue of rates in its testimony, and that AT&T has responded with testimony arguing that the Commission cannot focus solely on intrastate earnings. AT&T claims that the testimony that it and Commission Staff have offered is directly responsive to Verizon's testimony on its earnings and does not expand the issues presented to the Commission.
- 18 Public Counsel argues that Verizon's assertion of prejudice is not ripe. It also argues that its motion, if granted, does not prejudice Verizon, and that all Public

Counsel seeks is a limitation on the remedies available to Verizon (rate rebalancing) in the event that the Commission determines that Verizon's access charges are too high.

- 19 Commission Staff argues that there is no need for the Commission to decide the scope of the proceeding. It claims that the scope of this docket is defined by the complaint and the evidence filed by the parties. Staff argues that Public Counsel's motion, if granted, would narrow the scope of the docket, and that Verizon will not, in that case, need to file additional testimony or prepare additional evidence. Staff also argues that all parties in this case know the issues.

Commission Discussion and Decision

- 20 At this stage of the proceeding, testimony and exhibits have been prefiled. No evidence, however, has been admitted into the record. Objections to the relevance of testimony and exhibits to the issues before the Commission can be made at the time they are offered. It is also appropriate at this stage of a proceeding for parties to seek to exclude testimony and exhibits, or to seek to limit the purposes for which they can be considered.
- 21 Washington is a notice pleading state.³ In the usual case, the issues are determined by the scope of the pleadings. The scope may be broadened if parties offer, and the Commission admits, evidence that goes beyond the pleadings, but this expansion can be stopped by timely motions seeking to exclude evidence, or to limit the purposes for which it is admitted. The Commission does not agree with Commission Staff that the scope of this hearing is governed by testimony and exhibits that have been prefiled, but not admitted.
- 22 The broader scope of this proceeding has already been set out in the issues statements of the parties and the Second Supplemental Order. In that order the Commission determined that factual disputes regarding the issues raised by the

³ Wash. Super. Ct. Civ. R. 8(a); see also *Dean v. Lehman*, 143 Wn.2d 12, 36; 18 P.3d 523 (2001) and *Waller v. State*, 64 Wn. App. 318, 337; 824 P. 1225 (1992).

complaint needed to be resolved, and that AT&T's complaint should be set for hearing. Several of the motions discussed below seek to limit the scope of the hearing. The Commission will grant Verizon's request to spell out the scope of this hearing with specificity, and the decisions on the remaining motions will flow from this determination.

23 If the Commission determines either Verizon's access charges are higher than Verizon's costs, and by how much, and/or that the amounts Verizon charges itself and its affiliates for access are lower than the imputation floor for this cost, then the Commission will need to determine how it will implement any changes required by such findings. The size of any possible adjustments may be a relevant factor in determining how remedies will be implemented.⁴

24 If Verizon believes that changes in its rates may be necessitated by the outcome of the complaint it has options regarding how it may choose to proceed. It may seek to negotiate an implementation plan with the parties. It may ask the Commission to hold a second stage of hearings in which it determines implementation issues. If Verizon wants to obtain the earliest possible resolution of any "rate leveling" issues, it may file a general rate increase request at any time. Such a filing would provide due process notice to persons effected by rate changes, and would allow Verizon's rate tariffs to be modified, if justified by the evidence.

25 Having determined that the scope of this hearing should be limited to the questions raised by AT&T's complaint, the only issues before the Commission at this stage of the proceeding relate to Verizon's costs and prices: (1) are Verizon's access charges higher than Verizon's costs and, if yes, by how much, and (2) are the amounts Verizon charges itself and its affiliates for access lower than the

⁴ Verizon's Issues Statement filed with the Commission on June 24, 2002, breaks out its Remedy section from its issues regarding the substantive complaint. Only if the Commission determines that there is a need for potential remedies, and what their scope is, should we proceed to a remedy phase of the proceedings.

imputation floor for this cost. No rate issues are presented, and none will be addressed. Also, the only relevant costs to examine are Verizon's costs. Once access charges and the imputation floor are established, other carriers paying access charges to Verizon will have to rely on those costs, no matter what their competitive positions are.

2. Should the Commission Grant the Public Counsel and Verizon Motions to Strike and the Public Counsel Motion in Limine to Limit Hearings?

26 Public Counsel asks the Commission to strike certain testimony and exhibits that relate to "rate rebalancing" in order to limit the hearings to the issues raised by AT&T's complaint. A table attached to the motion specifically identifies the portions of prefiled testimony and exhibits that Public Counsel asks to be stricken. Verizon's First Motion to Strike asks the Commission to strike Ms. Erdahl's rebuttal testimony advocating "re-allocating" costs from the intrastate to interstate jurisdiction, and Dr. Selwyn's rebuttal on Verizon's interstate operations. Attachment B to the motion specifically identifies the portions of pre-filed testimony and exhibits that Verizon seeks to strike. Verizon's Second Motion to Strike asks the Commission to strike portions of Dr. Selwyn's testimony that (1) address the retailing, marketing, and other costs of Verizon Northwest's affiliate Verizon Long Distance, and (2) propose an imputation test that differs from the Commission's existing test. Attachment A to the motion specifically identifies the portions of Dr. Selwyn's prefiled testimony and exhibits that Verizon seeks to strike.

27 The Commission has determined the scope of this complaint case, and will limit its analysis to determining Verizon's costs for providing access service and the price floor above which Verizon must price access service to itself and its affiliates in order to avoid predatory pricing.

- 28 Public Counsel asks the Commission to strike or limit the testimony of Verizon's witnesses by which the company seeks to rebalance its general rates in an amount equal to any ordered decrease in access charges. Public Counsel also asks the Commission to strike portions of Commission Staff's testimony offering alternative rate rebalancing remedies.
- 29 Public Counsel argues that the doctrine of single-issue ratemaking prohibits implementation of any rate rebalancing proposals in this proceeding. Public Counsel contends that Commission precedent prohibits single issue or "piecemeal" ratemaking. Public Counsel contends that Verizon's and Staff's proposals seek to raise other rates to accommodate the decreased revenue Verizon would experience if the Commission decides to lower access charges pursuant to AT&T's complaint. This would be an appropriate forum because the proposal affects rates other than access charge customers (IXCs) i.e. it affects local ratepayers. Public Counsel argues that the Commission should focus on the complaint at hand. If, as a result of the Commission's decision on the complaint case, Verizon's access charges must be lowered, Verizon may seek relief in a properly noticed rate case.
- 30 Public Counsel further argues that its motion is different from Verizon's Motion to Dismiss filed earlier in this proceeding. Public Counsel suggests that Verizon's motion sought to foreclose AT&T's access to the Commission regarding its claims about Verizon's access charges. According to Public Counsel its present motion seeks only to limit the testimony and scope of the hearing to those remedies appropriate to AT&T's complaint.
- 31 Verizon's First Motion to Strike asks the Commission not to admit testimony by Betty Erdahl that, Verizon claims, proposes to adjust Verizon's earnings by reallocating costs from the intrastate to the interstate jurisdiction. Verizon argues that Ms. Erdahl's testimony on this point must be stricken because it ignores an FCC "separations freeze." Verizon also seeks to have stricken Dr. Selwyn's

rebuttal testimony concerning Verizon Long Distance, and adjustments to Verizon's imputation methodology.

- 32 AT&T argues that the Commission should deny Verizon's Motion to Strike testimony. AT&T contends that 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. Thus AT&T concludes that Verizon's first motion to strike is not only procedurally improper, it is a needless waste of party and Commission resources.
- 33 AT&T also opposes Verizon's Second Motion to Strike testimony. According to AT&T, Verizon seeks to strike portions of the testimony of Dr. Selwyn that make any references to Verizon's affiliate, Verizon Long Distance are allegedly internally inconsistent, or that propose a different imputation analysis than the Commission has used in the past. Verizon argues that all of this testimony properly supports the allegations in AT&T's complaint, and Verizon has failed to state any legitimate basis on which it should be stricken.
- 34 Commission Staff argues that Verizon has failed to demonstrate that any testimony should be stricken. Staff maintains that Ms. Erdahl's testimony is proper and wholly consistent with FCC rules. Staff also disputes Verizon's request to strike portions of Ms. Erdahl's testimony and Dr. Selwyn's testimony because those portions relate to Verizon's interstate operations, arguing that the Commission is not precluded from considering a company's interstate operations when it determines the correct level of the company's intrastate earnings.

Commission Discussion and Decision

- 35 The Commission has determined that the only questions before the Commission at this stage of the proceeding are cost questions: (1) are Verizon's access charges higher than Verizon's costs, and if yes, by how much, and (2) are the amounts

Verizon charges itself and its affiliates for access lower than the imputation floor for this cost. No rate issues are presented, and none will be addressed.

Applying this standard to the motions before us, the Commission grants Public Counsel's Motion to Strike Testimony and In Limine to Limit Hearings. The evidence regarding rate-rebalancing issues to which Public Counsel objects are not within the scope of this hearing. If certain adjustments proposed by Ms. Erdahl are relevant to a determination of Verizon's costs to provide service, then her testimony is within the scope of the hearing, and is relevant. We doubt the FCC intended the "freeze" to mean that erroneous calculations have to be accepted. Verizon's remaining arguments regarding this evidence are legal arguments that should more appropriately be made in Verizon's post hearing brief.

36 Verizon's Second Motion to Strike should be denied. One of the main issues addressed by this proceeding is whether the amounts Verizon charges itself and its affiliates for access are lower than the imputation floor for this cost. The testimony Verizon seeks to strike is relevant to this issue, and should be included in the hearing record.

3. Should the Commission grant summary determination on any or all of the issues?

37 Verizon has filed two motions for summary determination. Each was filed in conjunction with a motion to strike. In the first motion, Verizon sought to strike Ms. Erdahl's evidence regarding adjustments she recommends to the separation of Verizon's earnings between the intrastate and interstate jurisdiction. Verizon follows this with a motion for summary judgment asking the Commission to find as a matter of law that Verizon is not overearning. Verizon's reasoning is: "Once Staff's testimony is stricken, there is absolutely no evidence that Verizon is overearning, and therefore the Commission must grant summary determination on this point." Verizon's First Motion for Summary Judgment, page four.

38 AT&T argues that Verizon is not entitled to summary determination on the issue of its earnings. AT&T notes that Verizon's first motion for summary determination is predicated on the Commission granting Verizon's first motion to strike. If the Commission denies that motion, AT&T argues that Verizon's motion for summary determination also should be denied.

39 Commission Staff also argues that Verizon is not entitled to summary determination that it is not earning its authorized return. Staff notes that Verizon moves to strike only the portions of Ms. Erdahl's testimony regarding jurisdictional separations. According to Staff, Ms. Erdahl also testified regarding other adjustments that cast doubt on Verizon's earnings analysis. Thus, Staff concludes that there remain significant factual disputes about the level of Verizon's earnings.

40 AT&T notes that Verizon's second motion for summary determination (on imputation) is predicated on the Commission granting Verizon's second motion to strike. If the Commission denies that motion, AT&T argues that Verizon's motion for summary determination also should be denied.

Commission Discussion and Decision

41 The Commission has not yet determined whether Verizon's First Motion to Strike will be granted. If it is granted, the basis will be that the proposed evidence is not within the scope of this proceeding. It will not be based on a finding that the evidence is true or false. Verizon's motion asks the Commission to provide summary determination of an issue that is outside the scope of this proceeding. Verizon's first motion for summary judgment is denied.

42 Verizon's Second Motion to Strike is denied. Verizon's Second Motion for Summary Determination is premised on an assumption that AT&T's proposed adjustments have been stricken, and that the only remaining evidence supports Verizon's claim that all of Verizon's toll plans but for two pass imputation.

Since evidence regarding AT&T's proposed adjustments will be included in the record, there is clearly a factual dispute between AT&T and Verizon.

4. Should the Commission grant interlocutory review to AT&T?

43 On October 10, 2002, Verizon propounded its first set of data requests to AT&T. AT&T both objected and responded to those requests on October 25, 2002. On January 21, 2003 Verizon filed a motion to compel AT&T to respond to certain of the data requests.⁵ AT&T filed its response to Verizon's motion on January 27, 2003. A discovery conference was duly noticed and argument on the discovery motions was scheduled for January 28, 2003. On that date, after hearing the arguments of the parties, the presiding judge⁶ ruled that AT&T must respond to all of the challenged Verizon data requests.

44 On February 7, 2003, AT&T filed a Petition for Commission Review of Interlocutory Ruling Compelling AT&T to Respond to Verizon Data Requests. AT&T contends that the Commission should review the ruling because providing the disputed information would be unduly burdensome and expensive, and because only a challenge at this point can avoid the costs of producing the information. AT&T further argues that if the discovered information is not admitted into the record, the expense will have been incurred with no possible recourse to the Commission.

45 AT&T notes that the Commission's discovery rule requires that information sought on discovery must "appear reasonably calculated to lead to the discovery of admissible evidence." WAC 480-09-480. AT&T notes that it provided objections and responses to Verizon on October 25, 2002, and that Verizon waited

⁵ In general terms, the Data Requests seek information about AT&T's market domination, financial and competitive harm, and imputation test claims.

⁶ Administrative Law Judge Theodora Mace presided at the discovery conference because Judge Schaer was not available.

almost three months to seek to compel AT&T to respond. AT&T argues that the Commission should not reward Verizon's failure to pursue this earlier.

46 AT&T further argues that it has made no claims that it has suffered losses in providing toll services in Washington, nor has AT&T sought any damages from Verizon for such losses. Thus requests for data on AT&T's market share and on the costs AT&T incurs to provide toll and other services are inappropriate. Such information is not reasonably calculated to lead to the discovery of admissible evidence to prove or disprove the allegations AT&T raises in its complaint.

47 Verizon filed its Response to the AT&T Petition for Commission Review of Interlocutory Ruling and Verizon's Counter-Motion to Dismiss on February 18, 2003. Verizon argues that interlocutory review is not warranted, and that the presiding ALJ applied the proper standard.

48 Verizon next argues if AT&T has suffered no harm, then the Commission should dismiss AT&T's complaint. Verizon claims that the Commission should be fully informed about the balance of benefits between AT&T and consumers in order to rule on the policy questions presented to the Commission.

Discussion and Decision

49 Discovery rulings are subject to review under WAC 480-09-760,⁷ which governs the Commission discretion to accept or decline review of interlocutory orders. The Commission may review such rulings upon finding that "review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review" or "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."⁸

⁷ WAC 480-09-480(7).

50 As described above, the scope of this phase of this proceeding is limited to whether Verizon's access charges are higher than Verizon's costs to provide access, and if yes, by how much, and whether Verizon charges itself and its affiliates lower prices for access than the imputation floor for this cost. Therefore, quantification of the effect of Verizon's access charges on AT&T are not relevant to the issues, nor would discovery of information on AT&T's financial situation, its services or its market position be pertinent to any relevant issue. The only discovery question propounded to AT&T that may lead to relevant evidence is Discovery Request No. 29. This discovery request seeks information about imputation tests that AT&T has advocated or performed elsewhere. Since Verizon's imputation of costs to itself and its affiliates is an issue in this proceeding, discovery regarding imputation tests should be permitted.

51 Our ruling defining the scope of the proceeding constitutes an "other factor" that outweighs the costs in time and delay of exercising review. WAC 480-09-760(1)(c). The Administrative Law Judge's January 28, 2003 discovery ruling was premised on a broader view of the scope of the case. To require AT&T to produce substantial discovery pertaining to issues that we have determined are not within the bounds of this proceeding would of necessity place an undue burden on AT&T that could not be corrected by post-hearing review. Granting AT&T's Petition for Review would also save other parties the cost and resources required to review the information that AT&T would have provided in its answers on discovery.

52 In light of our decision regarding the scope of the issues in this proceeding, AT&T's Petition meets the requirements of WAC 480-09-760(1)(c). The Commission reverses the January 28, 2003 interlocutory ruling in this case, except for the requirement that AT&T respond to Verizon's discovery request No. 29 pertaining to imputation tests.

⁸ WAC 480-09-760(1)(b) and (c).

53 Verizon asked the Commission to dismiss this proceeding in its first motion to
dismiss, filed April 25, 2002, because AT&T does not allege that it has been
harmed. The Commission relied on RCW 80.04.110, which provides “No
complaint shall be dismissed because of the absence of direct damage to the
complainant” in denying that motion to dismiss. The Commission will not
reconsider that decision.

5. Should Verizon be allowed to file surrebuttal?

54 Verizon seeks an opportunity to rebut the adjustments included in AT&T and
Commission Staff rebuttal testimony.

55 AT&T notes that the existing schedule already permits Verizon to request
permission to file additional testimony responding to the reply testimony filed
by AT&T and Commission Staff. It notes that Verizon has not sought permission
to file outside the context of its request for a continuance. AT&T also notes that
Verizon does not claim, or explain why it cannot prepare and file the testimony
prior to the currently scheduled hearings as Verizon agreed it could do when the
schedule was originally established.

56 Public Counsel argues that Verizon is not entitled to surrebuttal. It argues that
neither AT&T nor the Commission Staff has a burden of persuasion that includes
the sufficiency of Verizon’s overall earnings. Public Counsel also argues that
although Verizon claims a need to respond to adjustments by Commission Staff
and AT&T, Verizon does not identify what it is about the alleged allegations that
would justify surrebuttal or continuance of the hearings.

57 Commission Staff argues that surrebuttal testimony is only proper where new
issues are raised in the rebuttal testimony.

Discussion and Decision

58 Verizon should have the opportunity to briefly respond to AT&T and Commission Staff testimony. The parties agreed in their jointly proposed schedule, included in the Fourth Supplemental Order, to allow Verizon to move for permission to file brief surrebuttal. AT&T's rebuttal testimony was filed on January 31, 2003, the date contemplated by the schedule. Commission Staff filed one week later on February 7, 2003. Verizon indicated in its January 28, 2003, letter to the Commission Secretary that it did not object to the continuance sought by Commission Staff.

59 Verizon has known the time frame for this matter, including the February 24, 2003, prehearing conference and the hearings scheduled for March 3—11, ever since the prehearing conference on August 27, 2002, and those dates are included in the Fourth Supplemental Order entered September 4, 2002. Thus, we are confident that Verizon has a plan to complete brief surrebuttal testimony and file it by February 24, 2003. The scope of this proceeding, as just determined, will perhaps allow for more efficient preparation.

6. Should the hearings in this matter be continued?

60 Verizon has asked the Commission to continue the hearings in this matter for four to six weeks. Verizon argues that the Commission routinely grants motions for continuance in cases where good cause is shown. Verizon also argues that AT&T's petition for review of a discovery ruling affects the current schedule, claiming that it needs the discovery answers and cannot prepare for cross-examination without this information. Verizon also complains of the delay caused by the one-week continuance in rebuttal filing granted to Commission Staff. Verizon claims that outstanding data requests and pending discovery issues will prevent it from preparing all cross-examination exhibits by the February 24 prehearing conference.

61 AT&T contests Verizon's claim that continuance of the hearing will ultimately
save the Commission and the parties time and expense. AT&T claims that delay
will prejudice AT&T's status and will lead to waste of Commission and party
resources. It also claims that further postponing a remedy for Verizon's alleged
excessive intrastate switched access rates and predatory pricing of toll services
prejudices AT&T and other toll carriers.

62 Public Counsel argues that Verizon has failed to make more than bare allegations
regarding its need to continue the hearings or file surrebuttal, and that good
cause does not exist to support granting the requested motion.

63 Commission Staff claims that rather than being in "disarray," this docket is
proceeding on a very orderly—and ordinary—course. Staff argues that the
current schedule affords Verizon sufficient time to conduct discovery and
prepare for cross-examination.

Discussion and Decision

64 As we have noted, Verizon has known the time frame for this matter since the
prehearing conference on August 27, 2002. The Commission in this order grants
Verizon's request to define the scope of this complaint case with greater
specificity. This clarity should allow the parties to prepare more efficiently for
the cross-examination hearings. Verizon has not shown any good cause why this
matter should be continued, and the Commission will proceed according to the
schedule included in the Fourth Supplemental Order.

65 Having discussed above all matters material to our decision, and having stated
general rulings on the motions, the Commission now makes the following
conclusion of law and order. Those portions of the preceding discussion that
include findings pertaining to the ultimate decisions of the Commission are
incorporated by this reference.

II. CONCLUSIONS OF LAW

- 66 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding. *Title 80 RCW, RCW 80.04.110, RCW 80.36.180, RCW 80.36.186.*

III. ORDER

THE COMMISSION ORDERS that:

- 67 (1) Public Counsel's Motion to Strike Testimony and In Limine to Limit Hearings, filed with the Commission on February 3, 2003, is granted.
- 68 (2) AT&T's Petition for Commission Review of Interlocutory Ruling Compelling AT&T to Respond to Verizon Data Requests, filed with the Commission on February 7, 2003, is granted in part; AT&T must respond to Verizon Data Request No. 29.
- 69 (3) Verizon's Motions to Continue Hearing, Determine Scope, and File Additional Testimony, filed with the Commission February 12, 2003, is granted in part and denied in part. The Commission will not continue any of the remaining hearing dates scheduled in this case. The Commission has determined the Scope of the Hearing, as set forth in this order, and the Commission will allow Verizon to File Additional Testimony by February 24, 2003.
- 70 (4) Verizon's First Motion to Strike and for Summary Determination, filed with the Commission on February 13, 2003, is denied.

- 71 (5) Verizon's Second Motion to Strike and for Summary Determination, filed with the Commission on February 14, 2003, is denied.
- 72 (6) Verizon's Motion For Leave to File Reply to Oppositions to Motion to Continue Hearings, Determine Scope and to File Additional Testimony, filed with the Commission on February 19, 2003, is granted.

Dated at Olympia, Washington, and effective this ____ day of February, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner