

**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  
SURREBUTTAL TESTIMONY OF  
TERRY R. DYE AND CARL R.  
DANNER AND FOR A LIMITING  
INSTRUCTION**

**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) affirming the Fifth Supplemental Order (5<sup>th</sup> Order) issued by the Commission on February 21, 2003, striking portions of the surrebuttal testimony of Terry R. Dye and Carl R. Danner, and ordering a limiting instruction be given.

**II. BACKGROUND**

On February 21, 2003 the Commission entered the 5<sup>th</sup> Order in this docket which granted Public Counsel's first motion to strike testimony and in limine to limit hearings. This order struck portions of Mr. Dye and Dr. Danner's direct testimony that addressed the alleged need to rebalance rates and the cost of residential basic service (R-1) relative to the total service long run incremental costs (TSLRIC) of R-1. See Attachment A to Public Counsel's first motion to strike.

On February 24, 2003 Verizon filed the surrebuttal testimony of Mr. Dye and Dr. Danner, as well as others. Once again, Mr. Dye and Dr. Danner testify regarding the current price of R-1 service relative to TSLRIC and the alleged need to rebalance rates if any decrease in access

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charges is ordered by the Commission. The following table identifies the objectionable portions of Mr. Dye and Dr. Danner’s surrebuttal testimony:

**Table 1**

<b>Witness</b>	<b>Surrebuttal Testimony Inconsistent with the 5<sup>th</sup> Supp. Order</b>
Terry R. Dye (TRD-4TC)	p. 16, l. 16-20 p. 17, l. 1-8
Carl R. Danner (CRD-3T)	p.2, l. 8-11, 18-22 p. 12, l. 7-9 p. 15, l. 11-12, 14-19 p. 16, l. 6-12 p. 34, l. 12-22 p. 39, l. 17-22 p. 40, l. 1-2

**III. MEMORANDUM**

**A. Mr. Dye and Dr. Danner should not be permitted to reintroduce testimony already stricken.**

The sections identified in Table 1 above are precisely the same type of testimony the Commission’s 5<sup>th</sup> Order directed by struck. The Commission should not permit Verizon to violate the 5<sup>th</sup> Order by filing subsequent testimony that the Commission has already determined is not germane to the current proceeding. The mere fact that the objected to testimony cites to the 5<sup>th</sup> Order makes it clear that the sections of testimony addressing the same topics previously stricken were not included by accident or oversight. This is a knowing and intentional attempt to introduce evidence into the record which has already been stricken by the Commission. Verizon

has not requested reconsideration of the 5<sup>th</sup> Order's provision striking the testimony of Mr. Dye and Dr. Danner.<sup>1</sup> Mr. Dye and Dr. Danner's surrebuttal testimony that seeks to re-introduce evidence that the Commission has already stricken once is entirely inappropriate and should be stricken again.

**B. A limiting instruction is appropriate in this proceeding.**

Given the terms of the 5<sup>th</sup> Order and Verizon's subsequent attempt to violate it through the filing of the surrebuttal testimony of Mr. Dye and Dr. Danner it is clear that a limiting instruction directed at the witnesses to this proceeding is appropriate. Courts must give a limiting instruction where evidence is admitted for one purpose but not for another and the party against whom the evidence is admitted requests the trial court give the instruction. ER 105, *State v. Aaron*, 57 Wn. App. 277, 281, 787 P.2d 949 (1990). These are typically given to a jury. Recognizing that in this proceeding the Commission is acting as the primary finder of fact and given Verizon's conduct set forth above Public Counsel believes a limiting instruction addressed to the witnesses in this proceeding on the record is appropriate. Particularly in light of the apparent agreement between counsel that Verizon may seek to reintroduce Mr. Tucek for the limited purpose of addressing access charges, such a limiting instruction is an important reminder to the witnesses in this case.

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<sup>1</sup> Verizon has sought to obtain permission to reintroduce the testimony of Mr. Tucek for the limited purposes of addressing access charges and related issues. *Verizon's Motion for Clarification of the Fifth Supplemental Order*. Public Counsel, in its answer to Verizon's motion, has agreed not to object to the re-submission of Mr. Tucek's testimony if limited to the issue of access charges.

Public Counsel requests the following statement be read by the administrative law judge to each witness after they have been sworn in:

**(witness name), please be advised that the Commission has limited the scope of this proceeding. The Commission has determined that rate issues other than access charges will not be addressed in this proceeding. You must be careful to limit your testimony and not discuss rates other than access charges, including but not limited to rate rebalancing, residential rates and costs, or related issues.**

Public Counsel believes the above instruction is appropriate given the Commission's 5<sup>th</sup> Order and Verizon's subsequent conduct.

#### **IV. CONCLUSION**

For the foregoing reasons Public Counsel requests that the Commission issue an order affirming the 5<sup>th</sup> Order, striking portions of the testimony of Mr. Dye and Dr. Danner, and directing that a limiting instruction be given to the witnesses in this proceeding.

DATED this 26<sup>th</sup> day of February, 2003.

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