

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In the Matter of the)	DOCKET NO. UT-003013
)	
)	SIXTH SUPPLEMENTAL ORDER --
)	GRANTING JOINT MOTION TO
Continued Costing and Pricing of Unbundled)	STRIKE REBUTTAL TESTIMONY OF
Network Elements, Transport, and Termination)	JOHN C. KLINK, IN PART, AND
)	ALLOWING ORAL SURREBUTTAL BY
)	QWEST AND VERIZON
.....)	

I. SYNOPSIS

1 This Order resolves a joint motion filed by Verizon Northwest Inc. (Verizon) and Qwest Corporation (Qwest) requesting that the Commission strike Rebuttal Testimony filed by John C. Klick on behalf of Covad Communications Company (Covad) and Rhythms Links, Inc. (Rhythms). The Commission strikes that portion of Mr. Klick's Rebuttal Testimony that properly should have been filed as direct testimony, but also finds that any potential prejudice caused by the remainder of the Rebuttal Testimony is avoided by allowing Qwest and Verizon to present oral surrebuttal testimony during evidentiary hearings.

II. PROCEDURAL SUMMARY

1. Nature of the Proceeding

- 2 This proceeding continues the development of costs and prices for interconnection and unbundled network elements (UNEs) started by the Commission in Docket No. UT-960369.
- 3 The Commission's First Supplemental Order (served March 16, 2000) established a two-part schedule after considering proposals and comments submitted by the parties, and set deadlines for filing testimony regarding issues in Part A: direct testimony on May 19, 2000; response testimony on July 21, 2000; and rebuttal testimony on August 4, 2000.
- 4 The May 19, 2000, deadline for filing direct testimony was intended to allow parties reasonable time to prepare and present cost study models. A shorter time period was established to allow parties a reasonable opportunity to respond to direct testimony, and an even shorter time period was established to allow rebuttal to response testimony. The Commission's Order also established Part A evidentiary hearing dates of August 21 through September 1, 2000.

2. Procedural History

- 5 Covad/Rhythms' witness Mr. Klick filed Response Testimony on July 21, 2000, and Rebuttal Testimony on August 4, 2000.
- 6 Verizon and Qwest filed their Joint Motion to Strike Rebuttal Testimony of Mr. Klick (Joint Motion) on August 11, 2000. Covad and Rhythms jointly filed an answer opposing the motion on August 15, 2000. The parties also presented oral arguments regarding the motion during a prehearing conference on August 16, 2000.

3. Commission Decision

- 7 The Commission grants the Joint Motion, in part, and strikes Mr. Klick's Rebuttal Testimony beginning on Page 27, line 22, first full sentence -- beginning "In testimony I recently provided in Minnesota ..." -- through Page 32, line 5.
- 8 The Commission also orders that Verizon and Qwest be allowed to present oral surrebuttal to the remainder of Mr. Klick's Rebuttal Testimony at any time during the Part A evidentiary hearing.

III. MEMORANDUM

1. Positions of the Parties

- 9 Qwest and Verizon (Movants) state that the Commission, after considerable discussion with the parties regarding the amount of time required to review cost information, ordered that parties be allowed 60 days between direct and responsive testimony as sufficient time to evaluate and conduct discovery on any cost estimates or models filed. *See First Supplemental Order (March 16, 2000)*.
- 10 Movants refer to Mr. Klick's Response Testimony filed July 21, 2000, as "placeholder testimony" and assert that the broad scope of that testimony does not reserve the opportunity to later file more detailed rebuttal testimony that appropriately should have been filed as direct or response testimony.
- 11 Covad and Rhythms (Respondents) answer that Mr. Klick reviewed direct testimony filed by Qwest in his Response Testimony, concluded that direct filings and discovery responses did not contain enough information to prepare a full response, and stated his intent to finalize his analysis after reviewing additional information to be provided by the Movants in other response testimony and discovery responses. Respondents argue that this additional information was not filed or produced, and that Mr. Klick's Rebuttal Testimony is appropriate under the circumstances.

- 12 Qwest and Verizon argue that Mr. Klick presents cost studies and proposed rates for line sharing and non-recurring costs in rebuttal testimony that should have been submitted in direct testimony on May 19, 2000. First, Mr. Klick submits costs for line sharing based on input from Michael Zulevic. *See Klick Rebuttal at 17:1 through 21:8, 15-19.* Second, Mr. Klick presents non-recurring costs based on an AT&T model filed in a Minnesota proceeding. *Klick Rebuttal at 27:19 through 30:13, Exhibit JCK-5.*
- 13 Movants also argue that Mr. Klick's rebuttal testimony also submits testimony and exhibits responding to direct testimony that should have been filed in responsive testimony on July 21st. *Klick Rebuttal at 2:11 - 16:5, 23:7 - 27:17, 30:15 - 32:6, and Exhibit JCK-4.*
- 14 Respondents argue that Mr. Klick does not present any new cost studies in rebuttal testimony. Mr. Klick takes information provided by Qwest and Verizon in support of their cost models filed in direct testimony, applies it to technical parameters for line sharing contained in Mr. Zulevic's Response Testimony (also filed on behalf of Covad/Rhythms), and proposes a number of new rates based on that comparison.
- 15 Respondents acknowledge that Mr. Klick refers to installation and disconnect amounts he calculated in a Minnesota proceeding using an AT&T Non-Recurring Cost Model; however, they argue that Mr. Klick merely recommends using the results obtained and he does not seek to introduce the model itself. According to Covad and Rhythms, the Commission should consider this factor when weighing the recommendations, but it does not affect their admissability.
- 16 Qwest and Verizon claim that they have not had an opportunity to conduct any discovery or in-depth analysis of these cost estimates, and will be unable to do so prior to the hearings. According to Movants, admission of Klick's Rebuttal Testimony violates the Commission's Order establishing procedural deadlines and would prejudice them.
- 17 Qwest and Verizon also challenge Mr. Klick's Rebuttal Testimony as not being timely served. Covad and Rhythms state that they inadvertantly failed to electronically serve the Movants on the scheduled filing date (Friday, August 4, 2000), but served testimony via mail. After learning of their omission, the Respondents caused the testimony to be served on the next business day (Monday, August 7, 2000).

2. Discussion and Decision

- 18 The Commission has a duty to all parties to ensure that proceedings are conducted in a fair manner, as well as a public duty to make the best decision possible based on available evidence. Parties who do not comply with procedural requirements and deadlines do so at their own peril; however, the public interest is not served by inflexible requirements.

- 19 Accordingly, the Commission will act to strike evidence that does not comply with established procedures and unfairly prejudices other parties. Further, the Commission retains discretion to modify requirements and deadlines in the public interest when unfair prejudice can be avoided. Both circumstances are present in this case.
- 20 As described by the parties, Mr. Klick's Rebuttal Testimony consists of two major sections. Mr. Klick takes information provided by Qwest and Verizon in support of their cost models filed in direct testimony, applies it to technical parameters for line sharing contained in Mr. Zulevic's Response Testimony (also filed on behalf of Covad/Rhythms), and proposes a number of new rates based on that comparison in the first section. In the second section, Mr. Klick presents recommendations based on a cost study model which is not offered as an exhibit by any party.
- 21 Consequently, in light of time constraints necessary in order to conclude Part A proceedings without causing prejudice to any party, the Movants are deprived of a fair opportunity to conduct discovery in response to information that is not otherwise a part of this case. Mr. Klick's bare recommendations based on a cost study model presented in Minnesota carries no weight in Washington. That portion of Mr. Klick's Rebuttal Testimony to be stricken begins on Page 27, line 22, first full sentence -- beginning "In testimony I recently provided in Minnesota ..." -- through Page 32, line 5.
- 22 In contrast, Mr. Klick's testimony comparing line sharing cost inputs in Mr. Zulevic's Response Testimony with cost studies filed by Qwest and Verizon in direct testimony is regarded in a different light. Because this testimony is based on direct testimony and other responsive testimony available to the parties, the lack of opportunity to conduct discovery on new rates resulting from that comparison in Mr. Klick's Rebuttal Testimony is not unfairly prejudicial.
- 23 However, Mr. Klick's testimony is more appropriately presented in response to Movants' cost study evidence filed with direct testimony, and not as rebuttal to response testimony filed by one of Respondents' other witnesses.
- 24 The Commission finds that any unfair prejudice to Movants caused by the filing of Mr. Klick's Rebuttal Testimony comparing Mr. Zulevic's response with other direct testimony is avoided by providing Qwest and Verizon with an opportunity to present oral surrebuttal testimony during the Part A hearings. These hearings are scheduled to occur over a two-week period, and the Movants may present oral surrebuttal at any time in the proceeding. Respondents' argument that similar circumstances surround rebuttal testimony filed by other witnesses is not properly presented as a motion on which the Commission is prepared to act.
- 25 The Commission finds that Respondents' delay in serving Mr. Klick's Rebuttal Testimony to the Movants did not cause any additional prejudice.

IV. ORDER

- 26 IT IS ORDERED THAT Verizon and Qwest's Joint Motion to Strike Rebuttal Testimony of Mr. Klick is granted, in part, consistent with the terms of this Order.
- 27 IT IS ORDERED FURTHER THAT Qwest and Verizon be allowed to present oral surrebuttal to Mr. Klick's testimony, consistent with the terms of this Order.

DATED at Olympia, Washington, and effective this day of August, 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner