

[Service Date April 8, 2003]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

AT&T COMMUNICATIONS OF	)	DOCKET NO. UT-020406
THE PACIFIC NORTHWEST,	)	
INC.,	)	SEVENTH SUPPLEMENTAL ORDER
	)	
Complainant,	)	ORDER DENYING STAFF PETITION
v.	)	FOR INTERLOCUTORY REVIEW
	)	AND FOR SUMMARY
VERIZON NORTHWEST, INC.,	)	DETERMINATION; CLARIFYING
	)	FIFTH SUPPLEMENTAL ORDER;
Respondent.	)	GRANTING IN PART MOTIONS TO
.....	)	STRIKE SURREBUTTAL

1 **Synopsis:** *The Commission denies Staff’s Petition for Interlocutory Review of the Commission’s Fifth Supplemental Order and Alternative Motion for Summary Determination. The Commission grants Staff’s and Verizon’s requests for clarification of the Fifth Supplemental Order. The Commission grants in part and denies in part, the Staff, AT&T and Public Counsel Motions to Strike Surrebuttal.*

2 **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 asserts that Verizon's toll plans are priced below their appropriate imputation costs, and are therefore priced below Verizon's price floor for this competitively classified service. 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.

3 **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**

4 On April 3, 2002, AT&T filed its Complaint against Verizon. On April 11, 2003,  
Verizon answered the Complaint, denying the allegations. On April 11, 2002,  
Verizon also filed with the Commission a Motion to Dismiss the Complaint. 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.

5 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 jointly proposed by the parties that has governed this  
proceeding.

6 On September 30, 2002, AT&T and Staff filed direct testimony. On December 3,  
2002, Verizon filed direct testimony.

7 On January 31, 2003, AT&T filed rebuttal testimony. On February 7, 2003,  
Commission Staff filed rebuttal testimony.

8 On February 21, 2003, the Commission entered its Fifth Supplemental Order disposing of all the outstanding petitions and motions filed to that date. In the Fifth Supplemental Order the Commission determined the scope of the proceeding and then ruled on the three motions to strike and motions in limine. Finally, the Commission ruled on Verizon's motions for summary determination, AT&T's petition for interlocutory review, Verizon's motion to file additional testimony and the Commission denied Verizon's motion to continue hearings.

9 On February 25, 2003, Verizon filed the surrebuttal testimony of seven witnesses: Orville D. Fulp, Carl R. Danner, Terry R. Dye, David G. Tucek, Nancy Heuring, Dennis B. Trimble, and Duane K. Simmons.

10 Since the Commission entered its Fifth Supplemental Order, the parties have filed six pleadings associated with clarification of the Order, or with motions to strike surrebuttal testimony. The pleadings are as follows:

- 11 (1) Staff's Petition for Interlocutory Review of the Fifth Supplemental Order; and Alternative Motion for Summary Determination is denied;
- 12 (2) Staff's Petition for Clarification of the Fifth Supplemental Order is granted;
- 13 (3) Verizon's Motion for Clarification is granted in part and denied in part;
- 14 (4) Staff's Motion to Strike Verizon's Surrebuttal Testimony is granted in part;
- 15 (5) AT&T's Motion to Strike Verizon Surrebuttal Testimony or Alternatively to File Responsive Testimony is granted in part;
- 16 (6) Public Counsel's Motion to Strike Surrebuttal Testimony of Terry R. Dye and Carl R. Danner and for a Limiting Instruction is granted

**B. ISSUES RAISED**

17 The issues raised by the parties in the pleadings filed since February 21, 2003 are discussed below, followed by a brief discussion of the arguments and a brief statement of the Commission's decision. In reaching these decisions, the Commission reviewed all pleadings and arguments submitted by the parties, whether or not they are listed in the brief summary of argument pertaining to each issue.

**1) Will the Commission foreclose itself from reducing Verizon's access charges as a result of this hearing, if evidence supports such a reduction, or are all remedies to become the subject of another phase of this proceeding or a separate rate proceeding?** *Fifth Supplemental Order*, ¶¶23, 24, 25, 35, 50.

18 Staff and AT&T contend that the Fifth Supplemental Order and Commission Orders to date require that access charges will actually be reduced as a result of this hearing, if supported by the evidence.

19 Verizon claims the Fifth Supplemental Order means that access charges cannot be reduced as a result of this hearing but that the Commission intended a separate phase of the proceeding to determine any remedies. Verizon suggests a three-phase proceeding, the third of which will address remedies.

20 **Decision:** Based on the complaint, the Commission will not foreclose a decision to reduce rates as a result of this hearing, if that is required by the record. The Commission may then consider what other process, if necessary, might be appropriate.

**2) Did the Commission exclude from the scope of hearing issues such as whether Verizon's access charges or toll rates give undue preference or are discriminatory and anticompetitive?**

21 Staff and AT&T both claim that these issues were contained in the Complaint, but that the Fifth Supplemental Order does not clearly include them in the scope of hearing. Staff requests Interlocutory Review of the portions of the Fifth

Supplemental Order that establish the scope of the hearing, or, in the alternative, Summary Determination with regard to the issue whether access charges exceed the cost to provide access service.

22 **Decision:** The Commission denies Staff's Petition for Interlocutory Review of the Fifth Supplemental Order because interlocutory review is properly directed only to orders the Commission itself has not signed and which are not final orders. *WAC 480-09-760*. The Commission agrees that some of the issues Staff raises in its Petition require clarification. The following clarification eliminates the basis for Staff's motion for summary determination and it is denied.

23 The claims of undue preference and discrimination remain as issues in this hearing, as reflected in the recitation of the statutory provisions prohibiting these practices that appear both in the Complaint and at the outset of the Fifth Supplemental Order. The Commission's paraphrase of the issues was intended to signal to the parties that the hearing on the on the merits will focus only on issues directly related to Verizon's access charges as set forth in the Complaint and will not address rate rebalancing or general ratemaking.

**3) Should the Commission consider earnings testimony or the effect of access charges on Verizon overall revenue?**

24 Staff says the Commission should consider how access charges affect Verizon's overall earnings so that the Commission has a full picture of the importance of access charges, although Staff does not advocate that this proceeding is a rate case.

25 AT&T says Verizon's access charges are excessive without regard to whether Verizon is earning its authorized rate of return; and that Verizon's need for revenues from switched access does not justify harm to competition. AT&T asks the Commission to strike earnings testimony.

26 Verizon says that access charges cover more than just long run incremental cost (LRIC) and thus all Verizon earnings testimony is relevant as is revenue requirement testimony.

27 **Decision:** Earnings testimony may be related to the costs for providing access (access charges may include a contribution to earnings). On this basis, the Commission will consider earnings testimony during this hearing, but advises the parties that such testimony may not be used to open the door to rate-rebalancing or ratemaking issues.

**4) Did the Commission grant or deny Verizon's First Motion to Strike, which pertained to Ms. Erdahl's and Dr. Selwyn's earnings testimony?**

28 Paragraphs 2, 31, 35, and 70 of the Fifth Supplemental Order address Verizon's First Motion to Strike the testimony of Ms. Erdahl and Dr. Selwyn regarding Verizon's earnings.

29 **Decision:** Pursuant to the ruling contained in paragraph 27 above, the Commission clarifies that the Fifth Supplemental Order denies Verizon's First Motion to Strike, since access charges may contain a contribution to earnings. The parties are advised that introduction of testimony regarding earnings may not be used to open the door to rate rebalancing or ratemaking generally.

**5) Should the Commission clarify the meaning of "imputation"?**

30 Commission Staff asks the Commission to clarify how the Commission's two identified issues – cost and imputation – relate to one another. Staff contends that the order does not say whether AT&T and Staff must demonstrate both that access charges are above cost and that Verizon's access rates do not pass the imputation test or whether the access charges will be found to violate the law if they are either above cost or in violation of an imputation test. According to Commission Staff, the proper imputation test is whether Verizon's toll rates are lower than a floor equal to the sum of its direct costs and its access rates.

31 AT&T also offers this clarification of the issue: whether Verizon toll rates exceed costs (including switched access charges), not whether switched access services exceed costs.

32 Verizon says the imputation issue is actually two issues: whether Verizon's toll rates pass imputation and whether Verizon charges its affiliates the same access rates it charges unaffiliated IXCs (whether Verizon re-sells toll in a non-discriminatory way).

33 **Decision:** The Commission will allow testimony relevant to any party's reasonable definition of imputation.

**6) Should the Commission strike AT&T's testimony regarding "price squeeze" and "harm" to AT&T?**

34 In its motion for clarification, Verizon states that since the Fifth Supplemental Order excludes price squeeze and harm as issues, references to those issues should be stricken. Verizon identifies specific references to "price squeeze" contained in AT&T's complaint, Dr. Selwyn's accompanying affidavit, and in argument at the August 27, 2002 prehearing conference. *Verizon Motion for Clarification at 3*. However, Verizon does not identify specific portions of the testimony that it seeks to have stricken.

35 AT&T asserts that Verizon improperly raises this issue in a motion for clarification, rather than filing a motion to strike. AT&T reiterates that AT&T's costs are not part of this case. Rather, competitive harm is the issue.

36 **Decision:** The Commission has sufficiently clarified this matter in the Fifth Supplemental Order. Discrimination and competitive harm are at issue in this proceeding. Evidence of discrimination and competitive harm, including illustrative evidence from AT&T, is relevant, but evidence of AT&T's financial status is not.

**7) How should the Commission treat the direct testimony of Verizon witness David Tucek (a broad-ranging cost study)?**

37 Mr. Tucek's direct testimony was stricken when the Fifth Supplemental Order granted Public Counsel's Motion to Strike and in Limine Limiting the Scope of the hearing. However, at the February 24, 2003, prehearing Staff contended that Mr. Tucek's direct testimony would be necessary because it addresses costs related to access charges.

38 Public Counsel does not object to using Mr. Tucek's testimony for the purpose of determining access charge costs. If Verizon re-offers Mr. Tucek's testimony for that purpose, Public Counsel will not object.

39 Verizon agrees that Mr. Tucek's testimony cannot be used in this proceeding as a basis for increasing basic residential rates.

40 **Decision:** The Commission accepts the parties' resolution of the matter.

**8) Should the Commission grant AT&T's and Staff's motions to strike all the Verizon surrebuttal testimony?**

41 AT&T and Staff move to strike all the Verizon surrebuttal testimony on three grounds: a) it is not the "brief" surrebuttal contemplated in the Fifth Supplemental Order; but rather is almost as extensive as the direct; b) most of the surrebuttal testimony could have been filed in Verizon's direct case filing – the surrebuttal is an effort to put in Verizon's direct case a few days before hearing; and c) the surrebuttal is improper, because in a complaint proceeding, the complainant (and, in this case, Staff, since it is a party in support of complainant AT&T) should have the last word procedurally.

42 Verizon disputes that AT&T and Staff's direct testimony adequately put Verizon on notice of issues that the two other parties sought to raise in their rebuttal in this hearing. In some instances Staff's rebuttal testimony made adjustments that



Verizon could not have known about at the time the company filed direct testimony. Furthermore, the rebuttal filings made by AT&T and Staff were also quite lengthy, suggesting that the two parties waited until the rebuttal phase of the case to file important parts of their testimony. Verizon suggests Staff's arguments about the appropriateness of earnings testimony in this hearing are contradictory and that the company should have a chance to respond to Staff's and AT&T's earnings adjustments.

43 **Decision:** The Commission does not lightly grant the opportunity for surrebuttal. In a complaint hearing, the last word procedurally should be with the complainant, except in rare circumstances. When surrebuttal is allowed, it should be directed toward specific rebuttal testimony that has demonstrably raised new matter in the hearing.

44 Verizon's surrebuttal does not meet this test. In some circumstances, it does not even purport to address the rebuttal testimony. Furthermore, even though technically, in other instances, the surrebuttal addresses issues contained in rebuttal testimony, the issues were raised in the AT&T and Commission Staff direct testimony and consequently could have been included in Verizon's direct testimony.

45 Verizon's argument that the rebuttal testimony filed by staff and AT&T was not "brief" is inapposite. Rebuttal is recognized procedurally as a method to allow the complaining party a chance to refute the response to the complaint. It stands in a different posture than surrebuttal, which is not commonly permitted.<sup>1</sup>

46 For these reasons, the Commission grants the motions to strike Verizon's Surrebuttal testimony except for the limited portions of testimony indicated below.

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<sup>1</sup> That said, rebuttal testimony should not be used to "sand bag" opponents with evidence that should have been included in the direct case.

**9) Should the Commission strike Mr. Dye's Surrebuttal?**

47 AT&T says this is not "brief" surrebuttal (it is 39 pages long) as is contemplated in the Fifth Supplemental Order. Also, much of it could have been filed with Verizon's December 2002 filing. AT&T provides a detailed listing of Lee Selwyn's filings and Carl Danner's surrebuttal to show that Dr. Selwyn brought up the issues addressed on surrebuttal in his direct testimony, and thus they could have been addressed by Verizon in Verizon's direct testimony, rather than in surrebuttal.

48 The first section (pages 2-17) of Dr. Danner's surrebuttal is a general response to AT&T and Staff, not tied to any rebuttal testimony. The second section, pages 17-31, rebuts Dr. Selwyn, of which pages 28-30 refer to rate rebalancing. The third section rebuts Dr. Blackmon.

49 Verizon contends that its surrebuttal filing is long because the rebuttal testimony was also quite lengthy. Furthermore, Dr. Danner's surrebuttal demonstrably addresses Dr. Selwyn's rebuttal testimony.

50 **Decision:** In keeping with the decision to grant the AT&T and Commission Staffs motions to strike, Dr. Danner's testimony should be stricken, with the following exceptions:

- Page 10, line 18 through page 11, line 18. This testimony rebuts the rebuttal testimony of Dr. Blackmon regarding allocation of loop costs. Blackmon rebuttal at 14.
- Page 23, line 22 to page 26, line 20. This testimony pertains to the assignment of retailing costs to local service. The surrebuttal properly responds to new information in Dr. Selwyn's rebuttal testimony that refers to an affidavit filed in an FCC proceeding as well as recent New York Times article on the issue.

**10) Should the Commission strike Mr. Dye's Surrebuttal?**

51 AT&T says this is not "brief" surrebuttal, either (17 pages). AT&T's specific focus is on Mr. Dye's testimony about costs for tandem switched/dedicated transport; billing and collection; and retailing/marketing for purposes of toll imputation. AT&T says these were first addressed in Dr. Selwyn's direct testimony and could have been included in Verizon's direct testimony, rather than waiting until surrebuttal on the eve of hearings.

52 Verizon contends that Mr. Dye's surrebuttal points out inconsistencies between Dr. Selwyn's direct and rebuttal testimony on the issue of proper costs for tandem switched/dedicated transport. Furthermore, Dr. Selwyn raises for the first time in rebuttal a December 2002 affidavit filed in an FCC proceeding and a January 2003 newspaper article.

53 **Decision:** Verizon may address any alleged inconsistencies in Dr. Selwyn's testimony in cross-examination. In keeping with the decision to grant the AT&T and Commission Staffs motions to strike, Mr. Dye's surrebuttal testimony should be stricken, with the following exception:

- Page 11, line 9 to page 12, line 11. This testimony rebuts Dr. Selwyn's rebuttal testimony regarding the proper assignment of incremental billing and collection costs to its toll price floor.

**11) Should the Commission strike David Tucek's Surrebuttal Testimony?**

54 AT&T says that this testimony, about Total System Long Run Incremental Cost (TSLRIC) for tandem switching, direct-trunked transport, entrance facilities, and multiplexing should have been filed in Verizon's direct testimony. Furthermore, Mr. Tucek's surrebuttal does not relate to anything in rebuttal testimony. The costs for these services provided as UNEs have already been established by the Commission.

55 Verizon responds that Mr. Tucek is not sponsoring new costs. Rather, it contends that he needed to “map”<sup>2</sup> his earlier filed cost data to obtain the handful of costs he outlines in his surrebuttal.

56 **Decision:** The Commission grants the motion to strike Mr. Tucek's testimony, in keeping with the decision to grant the AT&T and Commission Staffs motions to strike surrebuttal. Mr. Tucek's testimony does not respond to anything in rebuttal testimony, but merely repeats what he stated in his direct testimony.

**12) Should AT&T be granted an opportunity to file responsive testimony if the Danner, Dye and Tucek testimony is not stricken?**

57 **Decision:** The Commission denies AT&T's request to file responsive testimony. Most, if not all, of the surrebuttal testimony of these identified witnesses has been stricken. AT&T will have an opportunity to cross-examine on any of the remaining surrebuttal testimony and to file briefs on the issues raised. If the remaining testimony of these Verizon witnesses is not well supported, AT&T's cross-examination will be able to bring that to the Commission's attention. If, at that point, AT&T feels prejudiced by the lack of an opportunity to respond with further evidence, it may make a further motion, identifying why it would be prejudiced and what evidence it proposed to submit.

**13) Should the Commission grant Public Counsel's motion to strike the surrebuttal testimony of Mr. Dye and Mr. Danner pertaining to rate rebalancing?**

58 Public Counsel identifies specific portions of each witness's testimony that refers to rate rebalancing.

59 Verizon contends that this testimony does not propose rate rebalancing but rather explains that Verizon's access charges afford Verizon an opportunity to

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<sup>2</sup> Verizon Response to Motions to Strike at 7.

recover its costs of providing service in Washington, which include costs not presently recovered by residential service rates.

60 **Decision:** The testimony identified in Public Counsel's motion to strike has already been stricken pursuant to the ruling on AT&T and Staff's motions to strike surrebuttal.

**14) Should the Commission recite a limiting instruction to each witness to foreclose violation of the Commission's ruling on the scope of the hearing?**

61 Public Counsel proffers a one-paragraph instruction to be given to each witness prior to testifying to avoid introduction of rate issues.

62 **Decision:** In the Fifth Supplemental Order, the Commission made clear that the upcoming hearing will not address ratemaking or rate rebalancing issues. The Commission and its presiding officer will be vigilant, and surely the parties will be vigilant, that such issues are not introduced. The Commission's presiding officer may deliver a limiting instruction indicating that rate rebalancing or general rate restructuring is not an issue in this phase of this case and that earnings testimony may only be used to examine whether access charges are fair, just and reasonable.

## II. ORDER

THE COMMISSION ORDERS That:

- 63 (1) Staff's Petition for Interlocutory Review of the Fifth Supplemental Order; and Alternative Motion for Summary Determination is denied;
- 64 (2) Staff's Petition for Clarification of the Fifth Supplemental Order is granted;
- 65 (3) Verizon's Motion for Clarification is granted in part and denied in part;

- 66 (4) Staff's Motion to Strike Verizon's Surrebuttal Testimony is granted in part;
- 67 (5) AT&T's Motion to Strike Verizon Surrebuttal Testimony or Alternatively  
to File Responsive Testimony is granted in part; and
- 68 (6) Public Counsel's Motion to Strike Surrebuttal Testimony of Terry R. Dye  
and Carl R. Danner and for a Limiting Instruction is granted

DATED at Olympia, Washington, and effective this \_\_\_\_th day of April, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner