



## II. ARGUMENT

### A. The Petition Should Be Dismissed With Prejudice.

The Commission has the authority to decide whether Petitioners may withdraw this Petition with or without prejudice. WAC 480-07-380(3) provides that “[a] party may withdraw from a proceeding only upon permission granted by the commission” after an adjudicative proceeding has commenced. Under similar court rules, Washington trial courts have the discretion to decide whether a plaintiff’s motion to dismiss a complaint should be permitted with or without prejudice. *See In re the Detention of G.V.*, 124 Wn.2d 288, 298, 877 P.2d 680 (1994) (trial court has discretion to dismiss with or without prejudice both under civil rules and “as part of his or her inherent power to impose the sanction of dismissal in a proper case”).<sup>2</sup>

Under the circumstances of this docket, dismissal with prejudice is mandated. A dismissal without prejudice will expose Verizon to unfair legal prejudice. “In determining whether a dismissal without prejudice would cause harm to a defendant, the trial court should consider:

- (1) the duplicative expense of a second litigation
- (2) the extent to which the current suit has progressed, including the effort and expenses incurred by defendant in preparing for trial
- (3) the adequacy of plaintiff’s explanation for the need to dismiss
- (4) the plaintiff’s diligence in bringing the motion to dismiss
- (5) any ‘undue vexatiousness’ on plaintiff’s part.”

*Powers v. Professional Rodeo Cowboys Ass’n*, 832 P.2d 1099, 1102-03 (Colo. 1992).

Application of the five factors set forth in *Powers* demonstrates that dismissal without prejudice will impermissibly expose Verizon to unfair legal harm. First, Petitioners’ explanation of the need to dismiss is not only inadequate (*Powers* factor (3)),

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<sup>2</sup> The rule is the same in other jurisdictions. *See Mack Auto Imports, Inc. v. Jaguar Cars, Inc.*, 581 A.2d 1372, 1374 (N.J. Super. Ct. 1990) (whether “dismissal is with or without prejudice is one of the terms a court may impose in the exercise of its sound discretion”); *Smith v. Williams*, 347 S.E.2d 842, 673-74 (N.C. App. 1986) (whether to accept dismissal is “within the discretion of the trial court which may, in the further exercise of its discretion, dismiss with or without prejudice”).

but invalid in and of itself. After prodding from the Commission,<sup>3</sup> Petitioners concede that they seek to dismiss this proceeding to pursue a new docket that will include “all Skyko 2 community members.”<sup>4</sup> This stated rationale reveals an attempt to evade the Commission’s orders denying Petitioners’ motion to amend their petition to add petitioners and prohibiting use of evidence related to such persons.

Courts routinely reject these kinds of attempts by parties to evade adverse orders. In *Webb v. Altec Industries, Inc.*, 1994 WL 162815 (N.D. Ill. April 25, 1994), for example, the plaintiff’s pretrial motion regarding certain medical experts was denied. He then sought to dismiss the complaint without prejudice so that he could file a new suit and conduct discovery as to those experts. *See id.* at \*1 (“A new suit would circumvent the [court’s] discovery rulings”). The court held that legal harm would come to the defendant through the circumvention of the court’s pretrial orders, and it therefore denied the plaintiff’s motion to dismiss without prejudice. *Id.* at \*2. Similarly, in *NBN Broadcasting, Inc. v. Sheridan Broadcasting Networks, Inc.*, 659 N.Y.S.2d 262 (N.Y. Sup. Ct. 1997), the court held that a dismissal was properly granted with prejudice because the dismissal without prejudice was sought to avoid an adverse ruling.

The [trial] court properly discontinued the action with prejudice where plaintiff’s request for a discontinuance without prejudice was an apparent attempt to evade the consequences of an adverse order on defendant’s pending motion for summary judgment . . . .

*Id.* at 263; *see also Paturzo v. Home Life Ins. Co.*, 503 F.2d 333, 336 (4<sup>th</sup> Cir. 1974) (trial court denied motion to dismiss without prejudice where plaintiff sought dismissal on the day of trial because he had failed to timely request a jury; appellate court affirmed, holding that “[u]nderstandably, the court below did not want to permit plaintiff to use indirect methods to obtain those rights he had forfeited through his own lack of diligence”). Applying these cases here, the Commission should not allow Petitioners to

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<sup>3</sup> *See* Request for Supplement to Withdraw (April 6, 2006).

<sup>4</sup> Supplement to Motion to Withdraw Petition Without Prejudice at 1.

evade the Commission's rulings regarding the addition of new petitioners (and any associated evidence) by simply dismissing this Petition without prejudice and then filing a new petition.

Second, Petitioners' request to dismiss was tardy, without justification, and caused Verizon to incur substantial unnecessary effort and expense (*Powers* factors (2) and (4)). As the Commission knows, this request to dismiss came literally minutes before the full hearing of the matter was to begin—after Verizon had prepared and submitted substantial pre-filed testimony and exhibits, had engaged in extensive pre-hearing motion practice, had brought its witnesses (including an expert) and counsel to Olympia from Everett, San Francisco, and Seattle, and had incurred substantial legal expense in preparation for the hearing.<sup>5</sup>

Courts recognize that a motion to dismiss on the eve of trial will cause legal harm to the responding party, and that dismissal *with prejudice* is therefore appropriate. *See Koefoot v. American College of Surgeons*, 652 F. Supp. 882, 893-94 (N.D. Ill. 1986) (“because the Court believes that it would be grossly unfair to the defendants to permit these two plaintiffs to withdraw on the eve of trial, leaving open the possibility that they could re-file this action in the future, the dismissal shall be with prejudice”); *see also Paturzo*, 503 F.2d at 335 (denying motion to dismiss without prejudice in part because plaintiff raised motion to dismiss on the morning of trial). When a claimant has brought the responding party to the very eve of trial, as Petitioners did here, with all of the attendant expense and business disruption, it is “grossly unfair” to permit them to simply dismiss the action and walk away from the proceeding with impunity.

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<sup>5</sup> Verizon is not submitting an affidavit of fees and costs to demonstrate in detail the substantial expense to which it went in preparing for the April 3 hearing. The Commission can take official notice of the extensive record that was developed in this docket and the substantial fees and costs that would necessarily be incurred in the development of such a record. There can be no serious dispute that Verizon has incurred thousands of dollars in responding to this Petition.

*Brenhouse v. Anthony Industries, Inc.*, 548 N.Y.S.2d 533, 535 (N.Y. Sup. Ct. 1989), is squarely on point. In that case, the plaintiff waited until the day of trial to request a dismissal without prejudice. *Id.* The trial court denied the motion, and instead dismissed with prejudice. *Id.* The appellate court affirmed, holding that “the defendant was prejudiced by the plaintiff’s inordinate delay” in waiting so long to seek dismissal and that, accordingly, “a requirement that no new action be commenced on the same claim” was appropriate. *Id.* The same result should obtain here.

Moreover, Petitioners provide no adequate explanation for the tardiness of their request. With respect to other persons in the Skyko 2 area, the Commission has already ruled that Petitioners had no adequate excuse for failing to raise inclusion of those other possible service requesters earlier.<sup>6</sup> With respect to the suggested alternative providers that Petitioners say might supply them with service, Petitioners similarly provide no explanation why that possibility only arose in the days and hours immediately prior to the April 3 hearing. Petitioners could have sought dismissal of this Petition much earlier, which would have saved Verizon, Staff, and the Commission enormous expense.

Third, Verizon would be required to incur substantial duplicative expense if Petitioners are permitted to file a new Petition at some later point in time (*Powers* factor (1)). Most or all of the prehearing expenses incurred up until the moment that Petitioners asked to withdraw would have to be incurred again (such as pretrial preparation and travel), thereby duplicating money that has already been spent. Moreover, Verizon would have to file revised witness testimony, thereby incurring duplicative costs in that regard as well.

Finally, Petitioners’ actions interfere with the integrity of the administrative process (*Powers* factor (5)). As the ALJ noted at the hearing, it is important not only to seek fairness in results, but also to preserve the integrity of Commission procedures. The

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<sup>6</sup> See Order No. 5, Order Denying Motion to Add Petitioners, Denying Petitioners’ Motion for Leave to Respond ¶ 15.

significant expenditure of time, resources, and money by Verizon, Staff, and the Commission in preparation for a hearing that never took place was a substantial waste of public and private resources. The public and Verizon have spent enough on Petitioners' claims, and neither should be forced to spend any more.

A dismissal with prejudice as to Verizon is particularly appropriate because, as became clear at the hearing on April 3, Petitioners' real dispute is not with Verizon, but with the Commission. The Petitioners' ultimate goal is for the Commission to institute its own proceeding to compel a service provider to extend facilities into their area, and they are unhappy that the Commission has not chosen to undertake that task for them. Regardless of the merits of Petitioners' claims on that point (and Verizon believes that the Commission is *not* required to conduct the proceeding that Petitioners seek), it is particularly inappropriate for Verizon to be used as what amounts to a stand-in for Petitioners' disagreement with the Commission. It was unfair for Verizon to have been targeted in that fashion during the instant Petition; it would be exceedingly unfair for Verizon to be exposed to the risk of another similar proceeding in the future.

The fact that Petitioners are proceeding without counsel entitles them to no special treatment in this regard. “[A] litigant appearing pro se is bound by the same rules of procedure and substantive law as his or her attorney would have been had the litigant been chosen to be represented by counsel.” *Patterson v. Superintendent of Public Instruction*, 76 Wn. App. 666, 672, 887 P.2d 411 (1994); *see also Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997) (“pro se litigants are bound by the same rules of procedure and substantive law as attorneys”). Moreover, the cost and fairness issues here are not complicated or subtle areas of law that only counsel could be expected to understand.

**B. If Dismissal Without Prejudice Is Permitted, Conditions Must Be Imposed On Any New Filing.**

If, notwithstanding this authority, the Commission permits Petitioners to withdraw their Petition without prejudice, it must impose substantial conditions on any new filing to mitigate the legal harm to Verizon. WAC 480-07-380 gives the Commission the authority to impose conditions on withdrawal in the public interest. The public interest dictates that Petitioners not be permitted to use their tardy dismissal as a procedural technique to evade the Commission's orders. Accordingly, before the Commission permits the filing of a new Petition, the Petitioners must be required to demonstrate that the alleged basis for withdrawal (the availability of alternative service providers) was meritorious and based in fact. If Petitioners make such a showing to the satisfaction of the Commission, then any re-filing must be limited to the scope of this docket, as set forth in Commission orders.

Specifically, the conditions are:

1. Before submitting any new Petition, Petitioners must obtain Commission leave to file. A request for leave to re-file should include factual information regarding Petitioners' attempts to obtain alternative service as alleged at the April 3 hearing and as referenced in Petitioners' Supplement to Motion to Withdraw Petition Without Prejudice. The new filing would be permitted only if the Commission determined that those efforts were legitimate and based in fact.

2. Any new petition permitted by the Commission is limited to the scope of this docket, as directed by the Commission's Order No. 5, Order Denying Motion to Add Petitioners, Denying Petitioners' Motion for Leave to Respond.

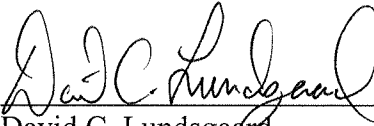
**III. CONCLUSION**

Petitioners should not be permitted to simply walk away from this proceeding after the costs and disruptions that their Petition has imposed on the Commission, Staff, and Verizon. Under the circumstances, including the reasons Petitioners have given for

their request for withdrawal, the tardiness of Petitioners' request, and the inadequate reasons that they have given for that tardiness, the Petition should be dismissed with prejudice.

DATED this 24<sup>th</sup> day of April, 2006.

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