

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of	)	DOCKET UT-050778
	)	
DOUGLAS AND JESSICA RUPP,	)	
KATHIE DUNN AND CHRIS HALL,	)	ORDER 06
MELINDA INMAN; VERLIN	)	
JACOBS, ANTHONY WILLIAMS,	)	
CHRISTINE AND SAMUEL INMAN,	)	ORDER DISMISSING PETITION
SAM HAVERKEMP AND CHRIS	)	WITHOUT PREJUDICE SUBJECT
PORTREY,	)	TO CONDITIONS IF REFILED
	)	
Petitioners,	)	
	)	
v.	)	
	)	
VERIZON NORTHWEST INC.,	)	
	)	
Respondent.	)	
.....	)	

1 *Synopsis: This order grants Petitioners' motion to withdraw and dismisses the petition without prejudice subject to conditions if refiled.*

**MEMORANDUM**

2 **NATURE OF PROCEEDING.** Docket UT-050778 is a petition by 11 persons in seven households near Index, Washington requesting the Commission to direct Verizon to expand its service territory to include petitioners' properties.

3 **APPEARANCES.** Petitioner Douglas Rupp represents himself and the other petitioners. David C. Lundsgaard, Graham & Dunn, Seattle, Washington, represents Verizon Northwest, Inc. Sally Johnston, Senior Assistant Attorney General, represents the Commission's regulatory staff (Commission Staff or Staff).

- 4     **BACKGROUND.** On May 20, 2005, a group of property owners from an area known as SkyKo 2 petitioned the Commission for an order extending the exchange area boundary of Verizon's exchange near Index, Washington, to include their properties. Petitioners properties are not within the service territory of any local exchange company and they currently do not have wireline telephone service. On June 13, 2005, Verizon answered the petition and moved to dismiss the petition.<sup>1</sup>
- 5     The Commission convened a prehearing conference before Administrative Law Judge Karen Caillé (ALJ) on July 20, 2005. Among other matters, the ALJ set a procedural schedule establishing an evidentiary hearing on December 12-13, 2005.
- 6     Petitioners filed their proposed testimony on October 12, 2005. On November 10, 2005, the Commission suspended the procedural schedule at the request of the parties pending the Commission's decision on a settlement agreement proposed in Docket UT-050814, *In the Matter of the Joint Application of Verizon Communications, Inc. and MCI, Inc. for Approval of Agreement and Plan of Merger (Merger Docket)*. One of the terms of the settlement agreement in the *Merger Docket* could have resolved the petition in this proceeding. However, the Commission's *Merger Docket* decision rejected the relevant settlement term. Subsequently, the parties in this proceeding requested that it resume.
- 7     On January 31, 2006, the Commission convened a prehearing conference to set a procedural schedule. The resulting schedule called for Verizon to file responsive testimony on March 1, 2006; for Petitioners to file rebuttal testimony on March 17, 2006, and for the evidentiary hearing to be held April 3-4, 2006.
- 8     On March 20, 2006, Petitioners filed a motion to add 14 new petitioners to this proceeding. On March 23, 2006, Verizon and Commission Staff responded opposing the motion. On March 24, 2006, Petitioners filed a motion for leave to respond and attached a proposed response. On March 27, 2006, Verizon filed a pleading in opposition to Petitioners' motion for leave to respond. On March 28, 2006,

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<sup>1</sup> On September 13, 2005, the ALJ entered an order denying Verizon's motion to dismiss. *In the Matter of the Petition of Douglas and Jessica Rupp, et al., v. Verizon Northwest Inc.*, Docket UT-050778, Order No. 02, (Sept. 13, 2005).

Petitioners filed a response to Verizon's opposition to Petitioners' motion for leave to respond.

9 On March 29, 2006, the ALJ denied the motion to add petitioners.<sup>2</sup> The order found that Petitioners' motion to add 14 new petitioners two weeks before the date of the evidentiary hearing was untimely and prejudicial to Verizon. On March 30, 2006, two working days before the evidentiary hearing, Petitioners filed a motion for continuance, requesting nine weeks to give Petitioners time to amend their petition with 14 new petitioners, and to give Verizon time to conduct discovery, to make new construction estimates, and revise its testimony. The ALJ notified the parties that she would hear argument on the motion prior to evidentiary hearing on April 3, 2006.

10 On April 3, 2006, the ALJ heard arguments on the motion for continuance. Mr. Rupp moved to dismiss Verizon from the petition.<sup>3</sup> He explained that Petitioners did not mean for their petition to be an adversarial proceeding, "[w]e were simply petitioning the Commission to find the most appropriate telephone company to provide service to us under [47 U.S.C. 214(e)(3)]. It should be the UTC that determines the most appropriate telecom."<sup>4</sup> Mr. Rupp added that he received an e-mail that morning from the former head of the Rural Utilities Service (RUS) "who has a client in the Pacific Northwest that is contemplating a proposal to provide Petitioners service."<sup>5</sup> Mr. Rupp stated that he has also been approached by another small telecom that has proposed low-cost satellite-based service.<sup>6</sup>

11 It became clear that Petitioners did not wish to be involved in an adversarial proceeding, but would prefer to work cooperatively with a provider. Verizon articulated a possible non-adversarial scenario where Petitioners might be able to come to an agreement with another company to provide service, and then that proposal would come before the Commission on a consent agenda.

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<sup>2</sup> *In the Matter of the Petition of Douglas and Jessica Rupp, et al., v. Verizon Northwest Inc.*, Docket UT-050778, Order No. 05, (March 29, 2006).

<sup>3</sup> Tr., p. 47:20-23.

<sup>4</sup> Tr., p. 48:2-7.

<sup>5</sup> Tr., p. 50:22-24.

<sup>6</sup> Tr. p. 50:24-25 thru p. 51: 1-2.

- 12 Ultimately, Petitioners agreed to file a written motion to withdraw. The ALJ indicated that the matter would be taken under advisement, and adjourned the proceeding.
- 13 **MOTION TO WITHDRAW.** On April 6, 2006, Petitioners filed a Motion to Withdraw Petition Without Prejudice. The motion did not provide any reasons supporting the request. The Commission asked Petitioners to supplement the motion with reasons. On April 13, 2006, Petitioners supplemented the motion with reasons for the withdrawal. Petitioners state that “[i]t would be in the public interest for all Skyko 2 community members, and also for others residing along the route of the proposed line extension, to be considered in whatever solution the Commission deems just and fair.” Petitioners also state that they have been advised of possible service alternatives and would like “an opportunity to explore solutions with willing partners rather than pursuing an adversarial process.”<sup>7</sup>
- 14 On April 24, 2006, Verizon filed a response to Petitioners’ motion to withdraw without prejudice. Verizon does not oppose the withdrawal of the petition, but opposes Petitioners’ request that the withdrawal be without prejudice. Verizon argues that under the circumstances of this docket, dismissal without prejudice will impermissibly expose Verizon to unfair legal harm.<sup>8</sup> First, Verizon states that Petitioners’ explanation for the withdrawal reveals an attempt to evade the Commission’s order denying Petitioners’ motion to amend petition to add petitioners.<sup>9</sup> Second, Verizon asserts that Petitioners’ request to withdraw was tardy, without justification, and caused Verizon to incur substantial unnecessary effort and expense.<sup>10</sup> Third, Verizon contends that if Petitioners’ were to file a new petition at some late point in time, Verizon would be required to incur substantial duplicative expense, such as pretrial preparation and travel.<sup>11</sup> Finally, Verizon states that Petitioners’ actions interfere with the integrity of the administrative process.<sup>12</sup>

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<sup>7</sup> Petitioners’ Supplement to Motion to Withdraw, pp. 1-2.

<sup>8</sup> Verizon cites *Powers v. Professional Rodeo Cowboys Ass’n*, 832 P. 2d 1099, 1101-1103 (Colo. Ct. of Appeals, 1992) (listing five factors the trial court should consider in determining whether a dismissal without prejudice would cause harm to a defendant).

<sup>9</sup> Verizon’s Response to Motion to Withdraw, pp.2-3.

<sup>10</sup> *Id.*, pp. 4-5.

<sup>11</sup> *Id.*, p. 5.

<sup>12</sup> *Id.*, pp. 5-6.

15 Verizon argues that if the Commission grants withdrawal without prejudice, two conditions must be imposed on any new filing. First, Verizon asserts that before submitting any new petition, Petitioners must request leave to re-file, which would include factual information regarding Petitioners' attempts to obtain alternative service. Second, Verizon argues that any new petition permitted by the Commission must be limited to the scope of this docket.<sup>13</sup>

16 **DISCUSSION AND DECISION.** A party may withdraw from a proceeding after an adjudicative proceeding has commenced only upon permission granted by the Commission in response to a written motion. The Commission will grant a party's motion to withdraw from a proceeding when the party's withdrawal is in the public interest. *WAC 480-07-380(3)*.

17 Based on the circumstances of this docket, we conclude that Petitioners' withdrawal from this proceeding is in the public interest, and that the petition should be dismissed without prejudice, but subject to conditions if refiled. We find Verizon's arguments in support of a withdrawal with prejudice unpersuasive. Verizon's arguments regarding the inadequacy of Petitioners' explanation for the need to withdraw and the timing of their motion fail to mention the other reason for Petitioners' request to withdraw: possible alternative providers and avoiding an adversarial process.<sup>14</sup>

18 According to Mr. Rupp, he received the e-mail informing him of a potential provider of telecom service the morning of April 3, the date of the evidentiary hearing. We find that the timing of that particular e-mail communication mitigates the last minute nature of the motion. Moreover, the Commission encourages parties to resolve issues cooperatively. We view Petitioners' desire to avoid an adversarial proceeding and attempt to work with other possible providers of telecommunications services as consistent with that goal.

19 We also disagree with Verizon's argument that Petitioners' other reason for withdrawal, to pursue a new docket that will include "all Skyko 2 community members," is an attempt to evade the Commission's order denying Petitioners'

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<sup>13</sup> *Id.* p. 7.

<sup>14</sup> Petitioners' Supplement to Motion to Withdraw, p. 2.

motion to amend their petition. The basis for the ruling in Order No. 05 was that adding 14 new petitioners two weeks prior to the evidentiary hearing was untimely. If, however, a new petition were filed by the 14 new petitioners it would not be reasonable or in the public interest to bar the current 11 petitioners from joining the new petition. In such a petition, Verizon would be able to salvage some of its work in this docket. Moreover, the additional petitioners would create a different fact pattern with respect to costs and other issues, so it would not be re-litigating this docket.

20 While Verizon is correct that it may be required to incur additional costs if Petitioners file a new petition, Petitioners may find another provider and not need to file a new petition, saving Verizon the costs of the evidentiary hearing, briefing, and other post-hearing process. In any event, as noted above, there may be another petition filed by 14 petitioners seeking service from Verizon, as Mr. Rupp claims.<sup>15</sup> In such case the marginal cost of allowing Petitioners to join that new petition would not be undue.

21 Despite the expenditures of time and resources by Verizon, Staff and the Commission, we find that it is in the public interest to grant Petitioners' motion to withdraw without prejudice. Dismissal will allow Petitioners to explore other options for service, allow parties to better explore the demand for service in the affected territory, afford an opportunity for negotiations among participants, and allow a better and more complete record in any ensuing proceeding.

22 Dismissal with prejudice would deprive Petitioners of any opportunity to petition again for service, irrespective of future conditions. Petitioners have shown it likely that any new petition would reflect changed conditions—the number of persons seeking service and identities of potential service providers—that would substantially affect the analysis in a future proceeding.

23 However, we do agree with Verizon that certain conditions should be imposed on refiling a petition as a matter of equity and to maintain the integrity of our adjudicative proceedings. While Petitioners' *pro se* status may call for some consideration, Petitioners' last minute motion requires us to impose the following conditions on the refiling of any petition: Petitioners must not refile the same petition they filed in this docket; any new petition must include additional petitioners and/or

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<sup>15</sup> Tr., p. 57:8-14.

some change in circumstances, such as other providers, to distinguish the new petition from the original petition.

**ORDER**

24 The Commission grants the request to withdraw and dismisses the petition without prejudice subject to the conditions set forth in paragraph 23.

DATED at Olympia, Washington, and effective May 8, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

**NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.**