SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

VERIZON NORTHWEST INC., Petitioner, v. WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Respondent.	No. 03-2-10227-8 WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION'S OPPOSITION TO VERIZON'S MOTION FOR SUPERSEDEAS

The respondent, Washington Utilities and Transportation Commission (WUTC) opposes the Motion for Supersedeas filed by the petitioner, Verizon Northwest, Inc. (Verizon), because Verizon has failed to meet the standard for supersedeas set forth in RCW 80.04.180. Specifically, Verizon has failed to show that the WUTC's order will cause it "great and irreparable" damage.[1] Therefore, the WUTC respectfully requests that the Court deny Verizon's motion.

[1] RCW 80.04.180; *see also General Tel. Co. of the Northwest v. Washington Utils. & Transp. Comm'n*, 104 Wn.2d 460, 472, 706 P.2d 625 (1985) (holding that petitioner for supersedeas under to RCW 80.04.180 must show that the loss will be material and considerable).

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

I. INTRODUCTION

Verizon has moved this Court for a stay of the WUTC's Order[2] in which the WUTC found that Verizon's access charges are so excessive that they prejudice other companies that provide long-distance service in competition with Verizon. Despite the WUTC's findings that Verizon's access charges are excessive and prejudicial, Verizon asks this Court to permit Verizon to continue to extract these excessive rates from its competitors.

Long distance companies pay local exchange companies like Verizon to access the local exchange company's customers in order to originate or terminate long-distance calls to those customers. Because Verizon owns the local network upon which long-distance calls begin and end, the long distance companies pay access charges to Verizon when they use Verizon's network to reach Verizon's customers.[3] Access service is a noncompetitive, monopoly service, and the WUTC regulates access charges.[4]

Verizon is both a local exchange company, and a long-distance company. If Verizon charges its long-distance competitors excessive rates to access its local network, then it can price its own long-distance service at a lower price and its competitors would be forced to provide long-distance service at below-cost prices in order to compete with Verizon.[5]

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[2] *AT&T of the Pacific Northwest, Inc. v. Verizon Northwest, Inc.*, WUTC Docket No. UT-020406, Eleventh Supplemental Order, Order Sustaining Complaint, Directing Filing of Revised Access Charge Rates, (Aug. 12, 2003) (Order). The Order is appended to Verizon's Petition for Judicial Review. Rather than reproduce the entire order, the WUTC has appended as Exhibit A only those pages containing the paragraphs that are cited in this pleading.

[3] Blackmon Decl., ¶ 3.

[4] Order, ¶¶ 153-55.

[5] Order, ¶ 162.

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

In its motion, Verizon has vastly overstated the alleged harm it will incur as a result of the Order, and has not mentioned the harm its excessive access charges will cause to consumers, its competitors, and the market if the Court grants a stay. The standard for supersedeas set forth in *General Tel. Co. of the Northwest v. Washington Utils. & Transp. Comm'n,* 104 Wn.2d 460, 706 P.2d 625 (1985), does not allow for such a one-sided inquiry. Verizon has not met the *GTE v. WUTC* standard. Accordingly, the Court should reject Verizon's motion for stay.

II. RELIEF REQUESTED

A. That this Court deny Verizon's Motion for Supersedeas in its entirety; and

B. That if the Court grants Verizon's motion, the Court should order Verizon to post a bond as required by RCW 80.04.180.

III. FACTS

This matter began on April 3, 2002, when AT&T Communications of the Pacific Northwest, Inc. (AT&T) filed a complaint against Verizon with the WUTC. The complaint alleged that Verizon's access charges were so excessive that they impaired AT&T's ability to compete with Verizon in the long-distance market, and therefore were prejudicial to AT&T.[6] The WUTC conducted a full evidentiary hearing on May 7-8, 2003, and on August 12, 2003, the WUTC issued its order resolving the complaint.

[6] Order, ¶¶ 41-42.

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

The WUTC concluded that Verizon's access charges were anticompetitive and prejudicial to long-distance companies.[7] To eliminate that prejudice, the WUTC ordered Verizon to reduce its access charges.[8]

IV. STATEMENT OF ISSUES

A. Has Verizon satisfied its burden of proving that the Order will cause great or irreparable harm?

B. If the Court grants Verizon's motion, should the Court require a bond reflecting the harm that will be sustained by consumers and competitors because of Verizon's excessive access charges?

V. EVIDENCE RELIED UPON

The WUTC's opposition relies upon the Order and the facts contained in the declarations of Betty A. Erdahl and Glenn Blackmon, Ph.D.

VI. ARGUMENT

A. The *GTE v. WUTC* Standard for Granting Supersedeas.

A public utility regulated by the WUTC may petition the superior court for supersedeas or stay of a WUTC order affecting rates. RCW 80.04.180. The superior court may grant the motion if the company presents evidence that the order will result in "great or irreparable damage." *Id.* In its attempt to make the required showing of great or irreparable damage, Verizon focuses almost exclusively on the amount of the access charge reduction. In *GTE v. WUTC,* GTE had requested $49.3 million in rate increases, and the WUTC had

[7] Order, ¶¶ 161-62, 181.

[8] Order, ¶¶ 162, 190 & p. 41.

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

allowed an increase of $4 million. GTE appealed for an additional $8 million in rates, and sought to collect this amount immediately pending a decision on the merits of the appeal. *GTE v. WUTC*, 104 Wn.2d at 462. The court granted GTE's request. Here, Verizon contends that because the $32 million revenue reduction is greater than the $8 million at issue in *GTE v. WUTC*, it necessarily has met its burden and should be allowed to collect its excessive access charges from its long-distance competitors.[9]

There is a perverse logic to Verizon's argument. According to this contention, the larger the demand, the greater the likelihood that Verizon will succeed in receiving the requested stay. Under this reasoning, the only fault that one could find with a utility's strategy in future rate cases would be the error of asking for too little, because it is apparent that a denial of a $500 million demand would generate much more "harm" than the denial of a demand for $32 million. Nothing in *GTE v. WUTC* suggests that this reasoning should be applied.

Rather, in *GTE v. WUTC*, the court applied a balancing test in which the utility's claim of harm is only one of several factors to be considered. The court said:

> We share the [WUTC's] concern about abuse of the statute. A reading of the statute as a whole does not indicate that the Legislature intended a utility to have a right to a supersedeas order whenever it received less than its requested increase and decided to appeal. We believe such a reading would lead to an absurd result.

GTE v. WUTC, 104 Wn.2d at 471. Likewise, the court held that the fact that the utility may not be able to recover retroactively a rate increase it seeks in a motion for stay and supersedeas is not sufficient grounds to grant the motion. Instead, the "greatness" of the alleged harm also

[9] *See* Verizon's Mot. 1, ll. 20-23; 7, ll. 4-9.

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

must be measured, and it is not established merely by reference to the dollar amount of the requested increase (or decrease). *Id.*

The court listed seven factors that must be balanced when considering whether a utility is entitled to a stay: (1) the nature of the damage; (2) the size of the damage in absolute terms; (3) the certainty that the damage will occur; (4) the effect the damage will have on the petitioner; (5) the petitioner's ability to recover from or minimize the damage; (6) any potential harm to nonparties; and (7) any other factors that may be unique to the case. *Id.* Therefore, the alleged damage to Verizon is but one factor this Court should consider.

Moreover, the court specifically indicated that the following evidence should be considered in determining whether the alleged damage to the utility merits a stay: (1) the speculative nature of the loss; (2) the ability of the company to still earn a profitable rate of return with the rate reduction ordered by the WUTC; (3) amount at issue represents a minor fraction of the company's total revenues or earnings; or (4) the company's past financial performance indicates that it can absorb the interim reduction without affecting its ability to compete, operate, or raise capital. *Id.* at 473.

B. Verizon Has Vastly Overstated the Alleged "Harm" It Will Incur as a Result of the WUTC's Order.

The evidence shows that Verizon vastly and dramatically has overstated the alleged harm it will incur as a result of the WUTC's order. This is not immediately apparent from Verizon's motion. Indeed, Verizon would have this Court believe that the WUTC-ordered reductions in its access charges constitute a significant piece of its financial operations.[10] However, the facts do not comport with the picture Verizon tries to paint.

[10] *See* Verizon's Mot. at 3, ll. 1-12; 7, ll. 10-20.

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

The so-called damage stems from the WUTC's order requiring Verizon to reduce its access charges, which will result in a $32 million reduction in revenue. While the amount of the reduction in absolute terms is a factor in the Court's analysis, it is not the touchstone for measuring the "greatness" of the order's impact. What is most relevant is how the implementation of the WUTC's order will affect Verizon.[11]

Verizon is required to submit financial information to the Federal Communications Commission (FCC) through that agency's Automated Reporting Management Information System (ARMIS). These ARMIS reports are available to the public on the FCC's website.[12] A review of the ARMIS reports shows that Verizon earned $682 million in revenue from its Washington State operations in 2002.[13] This evidence is in sharp contrast to Verizon's claim that it earned only $378 million of revenue in Washington in 2002.[14] When the Court considers Verizon's actual revenue level, it is plain that Verizon's comparisons of the access charge reduction to its total operations are overstated and flawed. In fact, when Verizon itself considered its total Washington revenue, it calculated a rate of return of 8.39 percent, even without making all of the required adjustments.[15]

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[11] *See GTE v. WUTC*, 104 Wn.2d at 473 (the WUTC could have shown that the loss to GTE would not have been great by proving that it would have minimal effect on the company's financial situation).

[12] Erdahl Decl., ¶ 9 & Exhibits 2 & 3. *See also* http://svartifoss2.fcc.gov/eafs/MainMenu.cfm.

[13] Erdahl Decl. ¶ 9. Verizon's 2002 revenue for its Washington, Oregon, Idaho, and West Coast California total service area was $1.16 billion. Therefore, Verizon earns over one-half of its total revenue from its Washington operations. *Id.* & Exhibits 2 & 3 attached thereto.

[14] It appears that Verizon based its claim that it earned $378 million revenue in Washington on what it considers "intrastate" revenue for purposes of FCC accounting. However, the WUTC does not rely on FCC jurisdictional accounting rules when setting rates for telecommunications companies. Erdahl Decl., ¶ 8. Instead, the WUTC considers a company's total revenue when setting rates. *Id.*

[15] Erdahl Decl. ¶ 8 & Exhibit 1 thereto.

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

In addition, Verizon will continue to earn a reasonable rate of return even with the reductions to its access charges. Verizon will earn a 9.24 percent rate of return after reducing its access charges as ordered by the WUTC. While slightly less than its authorized rate of return, this return is reasonable and profitable.[16]

The broader perspective is even more telling. Verizon Northwest's parent company, Verizon Communications, earns revenues of $67 billion per year.[17] Therefore, the $32 million revenue reduction that results from the WUTC's order is but a small revenue reduction for the parent.

In addition to its incorrect statement of revenue, Verizon also neglects to inform the Court of common ratemaking adjustments,[18] which, when properly and lawfully applied, show that Verizon currently is earning a rate of return of 11.57 percent.[19] As Director-Regulatory Accounting, Verizon affiant Ms. Heuring should have discussed these adjustments in her affidavit.[20]

Verizon complains that if forced to implement the WUTC-ordered access charge reductions, it will not be able to raise rates to recover the lost revenue because a rate case will

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[16] *Id.* ¶¶ 5-6. A company's authorized rate of return is not a guarantee that the company will earn that rate of return. *Id.* ¶ 5.

[17] *See* http://investor.verizon.com/profile/index.html.

[18] Verizon's failure to include many of these adjustments in its calculation of its rate of return are the ratemaking equivalent of filing financial reports with the Securities and Exchange Commission (SEC) that do not conform to the Generally Accepted Accounting Procedures (GAAP). Both actions create an inaccurate portrait of a company's financial situation.

[19] Erdahl Decl., ¶ 5.

[20] *Id.* ¶ 3. *See also* Heuring Affidavit, ¶¶ 1, 7.

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

take over a year to complete.[21] Verizon claims that it earned a rate of return of 2.42 percent in 2002. If this were true, Verizon should have filed a rate case a year ago. If Verizon actually were earning 2.42 percent, it theoretically would have to raise its rates by $100 million in order to achieve its WUTC-authorized rate of return.[22] A reasonable public utility in Verizon's alleged financial position would make a rate case a business priority. In contrast, Verizon has not said that it will file a rate case. Put another way, one must question why Verizon is dedicating its resources to challenging a $32 million access charge reduction rather than filing a $100 million rate case. This, too, casts doubt on Verizon's contention that it is earning a 2.42 percent rate of return.

The Court should reject Verizon's claim that it will suffer great and irreparable harm. As shown herein, it is plain that Verizon has greatly overstated the "harm" that will befall the company if the WUTC's order is not stayed.

C. Granting the Stay Will Harm Consumers and Verizon's Competitors.

As set forth in the *GTE v. WUTC* case, there is more to a supersedeas motion than the impact on the company seeking the stay. In considering whether to grant Verizon's motion, the Court should consider the impact of the stay on consumers, competitors, and competition.

Verizon's excessive access charges burden consumers of intrastate long-distance service. The WUTC's Order reducing Verizon's access charges will benefit Washington consumers and the intrastate long-distance market. Staying the Order will delay these benefits, or perhaps deny them all together.

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[21] Verizon's Mot. at 3, ll. 17-18, 8, ll. 1-8.

[22] Erdahl Decl., ¶ 7.

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1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

The level of a local company's access charges greatly impacts the price for long-distance service because access charges are the single largest cost component of long-distance charges.[23] While long-distance companies offer a variety of packages and promotions, they generally offer the same rates to customers regardless of which local service company serves the customer. When long-distance companies must pay Verizon's excessive access all of their customers must pay higher rates, not just Verizon's local customers. For example, AT&T offers Qwest's local customers the same long-distance rates it offers Verizon's local customers. Therefore, if AT&T must increase its long-distance rates to absorb Verizon's excessive access charges, all of its customers will have to pay the higher rates. This is unfair to all customers of intrastate long-distance service.[24] In addition to providing local service, Verizon also provides intrastate long-distance service, and therefore competes with the intrastate long-distance providers that pay its access charges. Verizon's excessive access charges directly harm its competitors because they must pay those charges (and recover them in their rates), while Verizon does not. This gives Verizon an unreasonable preference in the intrastate long-distance market, and unfairly prejudices its long-distance competitors.[25]

Verizon's excessive access charges also harm the market for intrastate long-distance service. These high charges hinder competition by making it harder for long-distance companies to compete right now, and in the future. If the Court grants Verizon's request for a stay, long-distance companies will delay their reductions in long-distance rates, which will

[23] Blackmon Decl., ¶ 6.

[24] *Id.*

[25] *Id.* ¶ 11; *see also* Order, ¶ 162.

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

hinder competition. In addition, the long-distance companies will be less likely to offer customers attractive long-distance rates in the future because they will be uncertain of their costs of providing the service. This, too, will discourage competition.

D. Verizon Has Options to Avoid the Alleged Harm.

In its motion, Verizon argues that it can do nothing to avoid the alleged harm, and faults the WUTC for suggesting that it file a rate case in order to mitigate the losses it will incur as a result of the access charge reduction.[26] Verizon also contends that a rate case will take over a year to file and litigate.[27] Verizon is wrong on both counts.

As a practical matter, a rate case is the method by which regulated companies increase their rates when they require additional revenues.[28] Contrary to Verizon's argument, there is unfair about requiring Verizon to seek a rate increase through lawful means.

Verizon has the option to file for an interim rate increase, pending the outcome of a formal rate case. This would alleviate Verizon's concerns about the length of time a formal rate case will take. Verizon also may request expedited rate relief outside of the context of a general rate case, and the WUTC could grant such relief if Verizon proved such an increase would be necessary. Therefore, Verizon has options to recover the revenue lost by the requirement that it reduce its access charges. Either of these options would be a more reasonable choice for evaluating Verizon's revenue requirement and setting Verizon's lawful

[26] Verizon Mot., at 8, ll. 1-8.

[27] *Id.*

[28] RCW 80.04.130; *see also generally* Title 80 RCW.

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

and proper rates. By allowing Verizon to continue charging its excessive rates, Verizon will have no incentive to pursue these options.

E. If the Court Grants Verizon's Motion, Verizon's Proposed Refund Is Inadequate and the Court Should Order Verizon to Post a Bond.

If the Court grants Verizon's motion for supersedeas, and later affirms the WUTC's order, it will be impossible to compensate all who were harmed by Verizon's excessive access pending judicial review. The benefits of the WUTC's Order would have been spread across all intrastate long-distance consumers in the state, and would have taken a variety of forms.[29] It would be impossible to determine how much and what form of benefit should be refunded to each customer. Even the seemingly simple task of determining who may be entitled to a refund would be impossible because the list would include many consumers who are neither customers of Verizon nor the long-distance companies who are parties to this proceeding. Indeed, the majority of consumers who would be harmed by the stay are not Verizon customers.[30]

A one-time refund to long-distance companies is inadequate because the companies would have virtually no competitive incentive to pass through the refund to their customers. Companies doing business in a competitive market set their prices based on their ongoing and expected future costs, and any one-time cost or benefit likely would be absorbed by each company.[31] The harm to competition that would occur in the event of a stay also could not be remedied later if the WUTC's decision is affirmed on judicial review. The harm to

[29] Blackmon Decl., ¶ 9.

[30] *Id.*

[31] *Id.*, ¶ 10.

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

competition goes far beyond the excess money Verizon charges for access service.[32] If allowed to continue to charge excessive access charges to its competitors, Verizon would be able to attract more long-distance customers that it otherwise would, and it could charge those customers higher long-distance rates than it could if it faced greater competition.[33] A subsequent refund would at best compensate competitors for the excess cost of serving the customers they were able to keep, but would do nothing to compensate them for the business they were unable gain because of the unreasonable preference Verizon created in favor of its own long-distance service.[34]

Therefore, a refund is inadequate to compensate for the harm a stay would cause consumers and other long-distance providers. The Court should order Verizon to post a bond as required by RCW 80.04.180.

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[32] *Id.*, ¶ 11.

[33] *Id.*

[34] *Id.*

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183

VII. CONCLUSION

The Court should deny Verizon's motion to stay the WUTC's Order. Verizon has failed to show that a stay is necessary to prevent "great or irreparable damage" to the company. If the Court decides to grant Verizon's motion, then the Court should require Verizon to post a bond.

Dated: September 2, 2003.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General

SHANNON E. SMITH,
WSB # 19077
Assistant Attorney General
Counsel for Respondent
Washington Utilities and
Transportation Commission

Direct telephone: (360) 664-1192
E-mail: ssmith@wutc.wa.gov

ATTORNEY GENERAL OF WASHINGTON
Utilities and Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1183