BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

In the Matter of	)	
	)	DOCKET NO. UT-041127
THE JOINT PETITION FOR	)	
ENFORCEMENT OF	)	
INTERCONNECTION	)	**VERIZON'S REPLY TO**
AGREEMENTS WITH VERIZON	)	**THE ANSWERS OF STAFF**
NORTHWEST INC.	)	**AND THE CLECS**
	)	

Pursuant to Order No. 1, Verizon Northwest Inc. (Verizon) files its Reply to the Answers of Commission Staff, the Joint CLECs (ATI, MCI and UNICOM), AT&T, and Tel West.

I. INTRODUCTION

1. The CLECs concede what Verizon established in its Answer and Motion for Judgment on the Pleadings, *viz.*, that the unbundling provisions of the various interconnection agreements were intended to (and do) embody, and therefore cannot contradict, the requirements of federal law. Thus, only one issue of law remains before this Commission – what duties, if any, does federal law impose upon ILEC deployment and use of packet switching equipment under 47 U.S.C. §§ 251 & 252 and FCC rules and orders implementing those provisions? The answer is straightforward – repeated FCC rulings directly on point conclusively establish that packet switches are not subject to any unbundling obligations and never have been. Indeed, because the FCC has consistently found that CLECs are not impaired without access to an incumbent's packet switch and that the unbundling of packet switches would *frustrate federal law and competition policy* by creating disincentives to both ILEC and CLEC deployment of

packet switching technology, federal law precludes this Commission from using federal law, state law, or the terms of an individual interconnection agreement to impose such an obligation.

2. The CLEC and Staff position on this legal issue is untenable. They claim that federal law requires Verizon to unbundle a packet switch where Verizon uses it "to provide traditional, narrowband voice services." Joint Petition at 10-11, para. 19. But as Verizon established in its Motion for Judgment on the Pleadings ("Motion"), federal law has *never* required packet switches to be unbundled, even where those switches are used to provide traditional voice service. Staff is the only party to address this issue squarely. According to Staff, ILECs are not required to unbundle packet switches when they provide *advanced services*, but "the FCC did not relieve ILECs of their obligation to provide unbundled local switching for *voice traffic.*" Staff Answer at 12-13, ¶ 22 (emphasis added). Staff is simply wrong. The FCC held ***exactly the opposite*** when MCI asked the FCC to establish this untenable distinction in the *Triennial Review* proceeding. Staff simply cannot explain away the fact that MCI proposed Staff's exact interpretation to the FCC, but the FCC explicitly rejected it.

3. Lacking Staff's candor, the CLEC petitioners try to shift focus away from the legal issue raised in their petition toward newly manufactured "factual" disputes. As the Commission is well aware, in the CLECs' Joint Petition and every other pleading the CLECs have argued that this dispute could be decided simply by looking at the parties' agreements, which the CLECs claimed were "plain and unambiguous." *See, e.g.*, Joint Petition at 6, ¶ 12; Joint CLEC Motion for Enforcement of Order No. 5, Docket No. UT-043013, at 6, ¶ 14.

4. In fact, the Commission explained in Order No. 10 in Docket No. UT-043013 that the purpose of this proceeding is to address "whether the provisions of the Triennial Review Order, other FCC Orders and interconnection agreements allow the replacement of existing circuit switches used for voice service with packet switches." *Id.* at ¶ 36. This is a purely legal issue, which Verizon addressed in its Answer and its Motion. But rather than respond to Verizon's legal arguments, the CLECs – apparently recognizing that their legal position on the

interconnection agreements is untenable – now attempt to change the subject by ginning up a "factual issue" over what is a "packet switch." In so doing, the CLECs contradict their own prior pleadings in this case, their own public statements characterizing their own deployment of identical switches, and a host of FCC decisions – all of which leave no doubt that Verizon is deploying "packet switches" as both the FCC and the industry have used that term for years. The Commission should reject the CLECs' procedural gamesmanship on this score, and address the legal issue that the Commission reserved for this enforcement proceeding in its Order No. 10.

II. ARGUMENT

A. The Only Relevant Issue Is Whether Federal Law Requires Verizon To Unbundle Its Packet Switch When Providing Voice Service. The Answer Is "No."

5. Significant portions of the CLECs' Responses contradict the CLECs' earlier pleadings and present irrelevant arguments in an attempt to evade the single issue presented in this dispute: Whether federal law requires Verizon to unbundle its packet switch for the provision of voice services despite repeated decisions from the FCC that packet switches lie outside the UNE regime entirely and should not be unbundled for any reason.

6. The essential facts are undisputed. Verizon notified the CLECs that it would no longer provide unbundled local switching because it was replacing its circuit switch with a packet switch, which has never been considered a "network element" subject to any unbundling obligations under federal law. On September 10, 2004, Verizon replaced its Mt. Vernon circuit switch with a packet switch. It did so consistent with this Commission's Order No. 10. Moreover, Verizon offered to (and did) work with the CLECs to migrate any existing UNE-P customer base to the resale platform. As the record makes clear, Verizon has never treated end office packet switches as unbundled network elements, and has not developed any OSS or other support systems to offer CLECs access to packet switches as UNEs. Indeed, Verizon relied upon the FCC's clear pronouncements regarding the status of packet switching equipment as standing

outside the UNE regime in evaluating its capital investment in replacement packet switching in the first place.

7. As noted above, in Order No. 10, the Commission characterized the remaining issue in this docket as a purely legal one. Commission Staff is the only party to squarely (but incorrectly) confront this issue and the requirements of federal law in its Answer:

> 10. Verizon contends that the FCC has held that packet switches are not subject to the unbundling requirements of the federal Act, regardless of the function they serve. Verizon is wrong. Rather, the FCC consistently has required ILECs to provide unbundled access to local switching for voice traffic.
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> * * *
>
> 13. Contrary to Verizon's motion, the FCC plainly held that the features, functions, and capabilities define the switching UNE, not the device performing those features, functions, and capabilities. (emphasis in original)

In short, Staff's position is that the FCC's definition of local switching is "function-oriented," and therefore "Verizon must provide CLECs with unbundled access to the local voice switching function regardless of the device used to provide the functionality." Staff Answer at 10, ¶19.

8. Staff is wrong. As Verizon explained in its Motion for Summary Determination, the FCC plainly held that the "device" – *i.e.*, the packet switch – is not subject to any unbundling requirements under federal law and that any such requirements would affirmatively frustrate the federal policy of encouraging rapid deployment of new packet-based technologies. Not only did the FCC make no exception for any particular functionalities, it made clear that there could be no such exception consistent with federal law and its own nationally binding findings under Section 251(d).

9. First, the Telecommunications Act of 1996 ("the Act") requires ILECs to provide "access to network elements on an unbundled basis" when the FCC has found impairment. 47 U.S.C. § 251(c)(3), (d)(2). The term "network element" means "a *facility* or *equipment* used in

the provision of a telecommunications service," and "includes features, functions, and capabilities that are provided *by means of such facility* or *equipment*." *Id.* § 153(29) (emphases added). And the Act mandates that it is the FCC -- not state commissions -- that must "determine[] what network elements should be made available for purposes of [Section 251(c)(3)]." *Id.* § 251(d)(2). Thus, the Act requires the FCC to determine whether a particular network element – a *facility or equipment* – should be unbundled. If so, all the "features and functions" of that facility or equipment must be provided on an unbundled basis. In other words, the "features and functions" provided by a packet switch are not subject to unbundling unless the packet switch itself is.

10. Second, the FCC itself has expressly rejected Staff's position. Again, Staff claims that ILECs are not required to unbundle packet switches when they provide an *advanced services* functionality, but argues that the FCC "did not relieve ILECs of their obligation to provide unbundled local switching for *voice traffic*" even where ILECs use a packet switch. Staff Answer at 12-13, ¶ 22 (emphasis added). As explained in Verizon's Motion, the FCC unequivocally rejected this very position when MCI asked the FCC to

> clarify that, although it does not require ILECs to make packet switching available as an unbundled network element for the provision of advanced services, ILECs are required to make packet switching available as a UNE when they are using it to provide voice services.

MCI Petition for Clarification at i (Executive Summary).

11. The FCC rejected MCI's request, making clear that, because the FCC had refused to "require unbundling of packet-switching *equipment*," CLECs could not obtained unbundled access even when that packet switching *equipment is used to provide voice services. Triennial Review Order*, 18 F.C.C.R. 16,978, ¶ 288 n.833 (emphases added).

12. Staff's response to this point is set forth in a single sentence on page 12 of its Answer. There, Staff claims the FCC denied MCI's motion "because the FCC had determined

not to require unbundling of advanced services." But this is not what the FCC said. As Staff correctly points out in footnote 41 of its Answer, the FCC "decline[d] to require unbundled access to packet-switching *equipment*," not just the advanced services *functionality* provided by packet switches. Staff's attempt to rewrite the FCC's holding must be rejected.[1]

13. Third, an unbroken line of FCC decisions confirms that packet switches are simply not subject to unbundling, regardless of the service provided. As explained in pages 4-8 of Verizon's Motion, on three separate occasions, the FCC did precisely what the Act requires *it* to do – it examined packet switches and concluded that competing carriers would not be impaired without unbundled access to them.

14. In its *Local Competition Order* in August 1996, the FCC established the set of "network elements" that would be subject to unbundling requirements under Section 251(c)(3) & (d)(2) of the Act. *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499 (Aug. 8, 1996) ("*Local Competition Order*"). The FCC held that ILECs must unbundle circuit switches, but explicitly rejected the CLECs' request to unbundle packet switches:

> At this time, *we decline to find*, as requested by AT&T and MCI, *that incumbent LECs' packet switches should be identified as network elements*. . . . [T]he record is insufficient for us to decide whether packet switches should be defined as a separate network

[1] For this reason, Staff's "DSLAM" argument also must be rejected. Staff argues that (1) DSLAMs are included in the FCC's definition of packet switching, (2) DSLAMs "are not used in the provision of voice switching, but are used only in the provision of advanced services," therefore (3) the FCC did not intend to exclude packet switches from unbundling where those switches are used for voice traffic. Williamson Declaration at 6-7, ¶¶ 15-17. Obviously, if Staff's argument were correct, MCI would have had no reason to request that the FCC require that the delivery of voice services over packet switches be treated as a network element subject to unbundling. And, if MCI had been mistaken about the effect of the FCC's decision to not require unbundling of packet switches even where they are used to provide voice services, the FCC's response to MCI's motion would have provided the perfect opportunity for the FCC to "clarify" that, contrary to what it said, it did intend to require unbundling of packet switches where they were, or could be, used to provide voice services. The FCC did not so "clarify" its decision and instead reiterated in no uncertain terms that it was not requiring unbundling of packet switches period, regardless of the services provided over the equipment. Moreover, Staff misreads the FCC's definition of packet switching, which includes "the basic packet switching function" *and* "the functions that are performed by DSLAMs." 47 C.F.R. § 51.319(a)(2)(i). These are *separate* functions, i.e., under the FCC's definition, the basic packet switching function is *not* dependent upon the existence of a DSLAM, as Staff erroneously suggests.

> element. We will continue to review and revise our rules, but at present, *we do not adopt a national rule for the unbundling of packet switches.*

Id. ¶ 427 (emphases added).

15. The FCC's blanket refusal to define packet switching equipment – regardless of use – as a "network element" necessarily meant that none of the "features, functions, and capabilities . . . that are provided *by means of [packet switches]*" were subject to unbundling, even if the packet switch was used only to provide voice, not data. Likewise, the FCC clearly distinguished between packet switches and circuit switches, and thus did not define a "network element" by functionality (*e.g.*, voice switching capability) independent of the equipment used to provide that functionality. In short, the *Local Competition Order* made clear that while AT&T was entitled to *all* the functionality of circuit switches, it was entitled to *none* of the functionality of packet switches. Therefore, the only type of "facility or equipment" that could be unbundled to provide "local switching" as defined in the *Local Competition Order* was a *circuit* switch.

16. In 1999, the FCC again refused to designate packet switches as "network elements" subject to general unbundling obligations. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 F.C.C.R. 1724, ¶ 306 (Nov. 5, 1999) ("*UNE Remand Order*").[2] This decision was based in part on the fact that CLECs and cable companies were "leading the incumbent LECs" in deploying packet switches, *id.* ¶ 307, and because the FCC concluded that unbundling packet switches would neither "open local markets to competition" nor "encourage the rapid introduction of local competition to the benefit of the greatest number of customers," *id.* ¶ 309.

17. Finally, just last year in the *Triennial Review Order*, the FCC affirmed its longstanding determination that ILECs are not required to unbundle packet switches:

[2] The limited exception, which has since been closed, is described in Verizon's Motion at 5 n.2.

> [T]here do not appear to be any barriers to deployment of packet switches that would cause us to conclude that requesting carriers are impaired with respect to packet switching. We therefore find that the evidence in the record confirms the [FCC's] findings in the *UNE Remand Order* that competitors continue to actively deploy their own packet switches, . . . and *are not impaired without unbundled access to these facilities from incumbents.*

Triennial Review Order, 18 F.C.C.R. 16,978 ¶ 539 (footnotes omitted) (emphasis added).[3]

18. Staff's attempt to separate the functionalities offered by packet switches simply cannot be reconciled with both the plain language and reasoning of FCC Orders that are squarely on point. The FCC made clear in the *Triennial Review Order* that, "by prohibiting access to packet-based networks of incumbent LECs, we expect that our rules will stimulate competitive LEC deployment of next generation networks." *Id.* at ¶ 290. The FCC also made quite clear that ILECs could avoid the unbundling obligations connected with traditional circuit switches by "deploying more advanced packet switching." *Id.* at 446 n. 1365. The FCC's holding that the deployment of packet switches eliminates the unbundling requirements connected with traditional circuit switches is categorical—it cannot be reconciled with Staff's attempt to create a "voice only" exception.

19. In sum, the Act requires the FCC to determine whether a particular network element – a *facility or equipment* – should be unbundled. If so, the "features and functions" of that facility or equipment are part of the unbundling requirement. The FCC has consistently held that packet switches need not be unbundled, and therefore none of their features or functions must be unbundled. Staff's approach contradicts the plain language of the Act and its interpretation by the FCC.

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[3] The FCC's finding of lack of impairment on a national basis is one that only the FCC is authorized by statute to make and that a state commission cannot participate in or second guess. *USTA v. FCC*, 359 F.3d 554, 565-566 (D.C. Cir. 2004) (noting that Section 252(d)(2) assigns the impairment finding to the Commission and rejected the notion that any portion of that finding can be delegated to state commissions).

20. The CLECs take a less direct approach than Staff. They argue that they "are not in this proceeding requesting that this Commission require Verizon to provide 'unbundled packet switching,'" but instead only "seeking the capabilities described in the FCC's definition of 'local circuit switching.'" Joint CLEC Answer 15, ¶ 27. This is doublespeak. To obtain unbundled access to any functionality of Verizon's packet switch – whether that be advanced services capabilities or the switching of plain old telephone service – the CLECs must, by definition, obtain unbundled access to the "facility or equipment" that provides those capabilities, i.e., Verizon's packet switch. *See* 47 U.S.C. § 153(29) (defining "network element" as "a *facility* or *equipment* used in the provision of a telecommunications service," and "includes features, functions, and capabilities that are provided *by means of such facility* or *equipment*." (emphasis added)).

21. The CLECs attempt to muddle the issue by arguing that their unbundling request is all about "functionality" and not "hardware." *Id.* ("The FCC defines packet switching, not as a piece of hardware, but as a *functionality*." (emphasis added)). Their sole support for this attempted confusion is that "the FCC does not discuss packet 'switch*es*.' Rather, it has stated that ILECs are not required to unbundle 'packet switch***ing***." Joint CLEC Answer at 15, ¶ 27 (emphasis in original). This couldn't be farther from the truth. In considering the "Impact of Unbundling on Switching Deployment" in the *Triennial Review Order*, the FCC made perfectly clear that the ILECs' obligation under the Act to unbundle "local circuit switching" is an obligation to unbundle "legacy circuit switching networks" and *not* "packet switches." *Triennial Review Order* ¶ 447-48, 450.

22. Specifically, the FCC "consider[ed] investment incentives in the context of unbundled local circuit switching" and noted "that the particular incentives at issue here differ in a key respect from those at issue" with regard to "FTTH and hybrid loops." *Id.* ¶ 448. It explained:

> There [i.e., regarding FTTH and hybrid loops], the primary inquiry involved the incumbents' incentives to develop and deploy new broadband-capable loop facilities if those facilities were subject to unbundling. Here [i.e., regarding local circuit switching] -- where the incumbents already operate ubiquitous *legacy circuit switching networks* -- our inquiry into unbundling's impact on investment incentives focuses primarily on the competitive LECs' incentives to deploy alternative switching facilities. In fact, given that *we do not require packet switches to be unbundled*, there is little, if any, basis for an argument that our treatment of circuit switches gives LECs a disincentive to upgrade their switches.

Id. (emphasis added). The FCC could not have made itself more clear: "[W]e do not require packet switch*es* to be unbundled." *Id.* (emphasis added).

23. For all of these reasons, the Commission can and should grant Verizon summary determination. The CLECs admit that the definition of local switching contained in their existing agreements reflects the FCC's definition of "local circuit switching," *see, e.g.,* Joint Petition at 10-11, ¶ 19,[4] and the law is clear that this definition does *not* require ILECs to unbundle packet switches regardless of how the switch is used.

B. The CLECs Have Waived Any Argument That The Mt. Vernon Switch Is Anything Other Than A Packet Switch.

24. In a desperate attempt to sidestep the fact that the interconnection agreements and federal law do not support their position, the CLECs claim – for the first time – that the Mt. Vernon switch might not be a packet switch after all. *See, e.g.*, Joint CLEC Answer at 11, ¶ 19.

25. Nevertheless, the CLECs have waived any argument that Verizon's Succession switch is not a packet switch because they never raised it in their Joint Petition. (Nor did they raise it in any pleading, letter, or other document since Verizon sent its June 8, 2004 Notice.) In their Joint Petition, the CLECs disagreed with Verizon's legal conclusion but not with the basic

[4] Even if the CLECs did not admit this point, there is no doubt that the interconnections agreements were intended to, and do, reflect federal law, as Verizon explained on pages 9-14 of its Motion. To the extent they do not, the interconnection agreements would violate, or be preempted by, federal law, as Verizon explained on pages 23-28.

and indisputable fact that Verizon intended to, and did, replace the Mt. Vernon circuit switch with a packet switch. The CLECs conceded that Verizon had deployed a packet switch and claimed merely that their "existing agreements define 'local switching' broadly enough to include packet switching used to provide traditional, narrowband voice services." Joint Petition at 6, ¶12. In explaining the nature of the parties' dispute, the Joint Petition states that, "Verizon, through its proposed substitution of *packet switches* for circuit switches, intends to cease the provision of unbundled switching and combinations of UNEs that include unbundled switching, to the Joint Petitioners." Joint Petition at 6, ¶ 11 (emphasis added). It also states that the "existing agreements define 'local switching' broadly enough to include *packet switching* used to provide traditional, narrowband voice services." *Id.* ¶ 12 (emphasis added). Further, the Joint Petition alleges that, "Verizon's refusal to continue to provide traditional, narrowband voice services, *wherever Verizon chooses to substitute packet switches for circuit switches* is a breach of the Joint Petitioners' agreements." *Id.* ¶ 18 (emphasis added). The CLECs cannot take a new position in these proceedings simply because they now find their old one inconvenient. *See Northwest Line Constructors Chapter of the National Electrical Contractors v. Snohomish County PUD No. 1*, 104 Wash. App. 842, 848-50, 17 P.3d 1251 (2001) (disallowing claims and arguments raised for the first time on summary judgment when such were not raised in the complaint; initial pleadings must give opposing party fair notice of both the claims and the grounds upon which they rest); *Malloy v. City of Bellevue*, 71 Wash. App. 382, 385-87, 859 P.2d 613 (1993) (a party cannot defeat summary judgment by raising new issues not previously raised in the initial complaint; a complaint must apprise the defendant of both the plaintiff's claims and the basis upon which they rest).

26. Moreover, the Joint Petition includes as exhibits Verizon's June 8, 2004 Notice and June 7, 2004 letter to AT&T, which explain that a packet switch is being installed in Mt. Vernon (Exs. A and C-1); AT&T's July 30, 2004 letter to Verizon, where AT&T did not dispute that a packet switch was being installed (Ex. C-2); and Verizon's August 4, 2004 letter to AT&T,

where Verizon once again explains it is deploying as packet switch and that it is not required to unbundle it (Ex. C-3). These exhibits are a part of the Joint Petition and present the undisputed fact that the Mt. Vernon switch is a packet switch. The CLECs did not contest this fact in their petition as required by WAC 480-07-650(a)(iii), and their attempt to raise it here must be rejected.[5]

27. Verizon's objection to the CLECs' new position regarding the fundamental question concerning the nature of the switch involved in the CLECs' petition is not just a procedural technicality. Petitions under WAC 480-07-650 are heard on an expedited basis – but that treatment depends on the parties having had the opportunity to engage in good faith negotiations on the dispute. WAC 480-07-650(1)(a)(i). The CLECs cannot possibly maintain that they have negotiated this issue, in good faith or otherwise, since they have never raised in any fashion until filing the answers at issue here.

C. The Mt. Vernon Switch Is A Packet Switch That Performs Packet Switching.

28. Even if CLECs had properly raised this issue – which they did not – their arguments still would not raise a material fact dispute when the evidence they submit in support of their new argument is examined.

29. First, the CLECs themselves attach to their Answer a "Product Brief" from Nortel (Att. 4), which explains that the Nortel Succession Switch "delivers a *packet*-enabled, feature-rich offering" and "provides flexible, distributed call and service control across a *packet* network." Product Brief at 2 (emphasis added). Indeed, the Product Brief uses the term "packet" to describe the switch no fewer than nineteen times.[6] In light of the evidence that they

[5] This newly-minted argument also underscores the CLECs' failure to negotiate in good faith the parties' discovery dispute. At the October 11 scheduling conference, MCI and the other CLECs indicated for the first time that facts might be at issue and that they needed to conduct discovery. Verizon agreed to work with them to eliminate any alleged factual disputes and answered all questions to the CLECs' satisfaction. Importantly, the CLECs *never* asked whether the Mt. Vernon switch was a packet switch.

[6] Among other things, the Product Brief indicates that the switch serves as "the center of your *packet*-based long distance solution," provides the "benefits of *packet*-based networking," "enables you to take a giant step in

have themselves submitted, the CLECs raise no genuine issue of fact that would preclude granting Verizon's motion for summary disposition.

30. Second, the indisputable fact that the switch Verizon has deployed in Mt. Vernon is a *packet* switch is confirmed by CLEC public statements made outside of this litigation. On June 3, 2003, MCI issued a press release celebrating its deployment of the precisely the type of switch Verizon has deployed at Mt. Vernon, the Nortel Succession Communication Server 2000 superclass softswitch. At that time MCI frankly acknowledged such switch is indeed a packet switch:

> ATLANTA, GA, SUPERCOMM, June 3, 2003 - As part of MCI's (WCOEQ, MCWEQ) convergence networking strategy to deliver advanced IP services for businesses and consumers, the company today announced it is joining with Nortel Networks (NYSE/TSX: NT) to accelerate migration of its voice network to a common IP core. The company has chosen and deployed Nortel Networks' industry-leading Succession superclass softswitches and Passport Packet Voice Gateways to create a *next generation packet voice network* that will fuel innovation, simplicity and value for its customers.
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> "By 2005, MCI plans to move 100 percent of our traffic to an all IP core," said Fred Briggs, MCI President of Operations and Technology. "Nortel Networks Succession *voice over packet solution* will converge voice, data and multimedia services, helping us to more flexibly and cost-effectively optimize our network. With this implementation, we will increase network efficiency and realize operational savings while providing additional value to our customers."

Press Release, *MCI Joins with Nortel Networks to Accelerate Convergence of Voice and Data Networks on Common IP Core: Equipment Deployed throughout Major Metropolitan U.S. Cities Marks Largest Scale Nationwide Deployment of a Next Generation Packet Voice Network*

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converting your current access investment to *packet*," "allow[s] you to address new markets with new *packet* access solutions such as IP phones and cable access," and contains "simplified, *packetized* architecture."

(June 3, 2003) (emphasis added) (available at http://global.mci.com/about/news/news2.xml?newsid=7810&mode=long&lang=en&width=530&root=/about/&langlinks=off); *see also id.* ("Nortel Networks Succession portfolio is the industry's most proven portfolio of *voice over packet* products, services and solutions for service providers. It enables the delivery of solutions across all four carrier *voice over packet* market applications: cable, local, long distance and wireless." (emphasis added)).

31. In short, the "factual" dispute CLECs attempt to raise here is merely a belated attempt to forestall a decision on the merits of their legal claim and not an issue that is genuinely disputed in the industry.[7] As the FCC noted in its *Triennial Review Order* (¶ 293), "the bright line between . . . legacy technology and newer technology . . . is best drawn based on technological boundaries rather than transmission speeds, bandwidth, or some other factor – ***the technical characteristics of packet-switched equipment versus TDM-based equipment, for example, are well-known and understood by all members of the industry***." The CLECs certainly know what a packet switch is, and their last-minute claims to the contrary must be rejected.

32. While Verizon believes that the CLECs are bound by their prior representations to the Commission and that they have waived this "factual issue" by not presenting it in their Petitions for Enforcement or raising it in discovery requests or negotiations, Verizon submits a brief affidavit from Nortel's Solutions Architect for the Mt. Vernon deployment, confirming the public record information regarding this new packet switch.[8] The attached affidavit from Nortel,

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[7] Similarly MCI's witness at the September 9, 2004 hearing before ALJ Rendahl, Ms. Lichtenberg, never questioned that the Nortel Succession switch is a packet switch and explained, "My understanding from reading the *packet switch* specifications . . . is that the *packet switch* allows the connections of lines to trunks to provide switching, plain old narrow band telephone service." 9/9 Hearing Tr. 246 (emphases added); *see also id.* at 233 (answering in the affirmative when MCI's counsel, Ms. Singer Nelson, asked whether Verizon "notif[ied] MCI that Verizon replaced its existing Mount Vernon class 5 Nortel DMS-100 switch, [with the] Nortel Succession *packet switch*" (emphasis added)).

[8] Indeed, Verizon believes that the Commission could take official notice of the nature of the Nortel switch from the material cited in the text, including Nortel's product description and MCI's own public characterization of the same switch as a packet switch. Verizon's submission of this affidavit is out of an abundance of caution and to ensure the Commission that it has accurately characterized the switch at issue in its own prior filings. Verizon does

the switch manufacturer, confirms the obvious: the Mt. Vernon switch is a packet switch that is not performing circuit switching. While not necessary for consideration of Verizon's pending motion, this affidavit explains that:

> 1. The Mt. Vernon switch – known as the Nortel "Local VoIP Solution" – is a packet based end office switch.
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> 2. All analog voice calls carried over the switch are converted to and switched as packet.
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> 3. Verizon did not deploy a "hybrid" switch in Mt. Vernon, over which some of the subscriber voice traffic would be switched using TDM circuits; instead, the packet-based version of the Nortel Local VoIP Solution that Verizon installed in Mt. Vernon takes all analog voice calls and converts and switches these calls as packets.

Affidavit of Danny Peeler of Nortel Networks ¶¶ 5, 7, 8-11 (Attachment A).

33. Staff acknowledges that Verizon's switch is a packet switch that uses ATM technology. Staff's telecommunications engineer, Robert Williamson, states so very clearly: "On September 10, 2004, Verizon replaced [its Nortel DMS-100] switch with a Nortel Succession switch, *which is a type of packet switch.* Williamson Decl. 2-3, ¶ 6 (emphasis added); *see id.* at 4-5, ¶ 11. Staff, though, attempts to qualify that uncontroverted fact by stating that ATM technology uses "cells" to transport data rather than "packets," *id.* ¶ 12. This point is irrelevant. The FCC defines the packet switching to include "the routing or forwarding packets, frames, *cells* or other data units based on address or other routing information contained in the packets, frames, *cells* or other data units." 47 C.F.R. § 51.319(a)(2)(i) (emphases added). Moreover, the FCC, in discussing the various types of packet switches that need not be unbundled, specifically included ATM switches: "The record also shows that several carriers maintain their own frame relay and ATM networks with AT&T, WorldCom, and Sprint each

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not believe there is any material issue of fact here and, even if there were, it does not preclude the Commission from deciding the issue of law framed by Order No. 10 and the CLEC petitions prior to addressing this last-minute "factual issue" raised by the CLECs. *See* Joint Pet. at 2 & n. 2 (acknowledging that the "factual issue" could be resolved *after* a legal ruling on the merits for either party).

operating extensive, nationwide networks." *Triennial Review Order,* ¶ 538 (citing BOC UNE Fact Report 2002).[9] And the UNE Fact Report 2002 -- on which the FCC relied in the *Triennial Review Order* to affirm its earlier decision not to require the unbundling of packet switches, *see Triennial Review Order* 538-39 & nn.1650-56, 1658 -- makes clear that a "softswitch" is merely a specific type of next generation packet switch. UNE Fact Report 2002 ("A new generation of 'softswitch' packet switches is now accelerating" the trend of CLECs and cable operators migrating to packet switches). Finally, as Mr. Peeler explains in his affidavit (¶ 13), there is no doubt that the Nortel switch Verizon deployed is, in fact, a packet switch.

34. In sum, Verizon installed a packet switch and also installed separate, peripheral gateways that allow the switch to process traditional voice calls. As explained in the preceding section, the fact that Verizon uses this packet switch to carry traditional voice calls is irrelevant, because Verizon is not required to unbundle the packet switch regardless of how Verizon uses it.

D. Verizon's Technical Ability or Inability To Maintain Circuit Switching Is Irrelevant Because Verizon Is Not Required, as a Matter of Law, To Maintain Circuit Switching.

35. The Joint CLECs claim that Verizon "could have chosen to leave in place its existing circuit switch," or could have added a module to its packet switch that would allow it "to support end-to-end circuit switching." Joint CLEC Answer at 19, ¶ 34, Haltom Declaration at 7, ¶ 38. In a related argument, AT&T claims that Verizon cannot avoid its obligations to provide local switching by simply replacing a circuit switch with a packet switch, and AT&T "challenges Verizon's claim of switch exhaust," apparently assuming that Verizon could not lawfully deploy a packet switch without proving switch exhaustion. AT&T Answer at 5, ¶ 10, n.12.

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[9] For these reasons, Staff's discussion of "connection-oriented" ATM switches and "connectionless" packet networks also is irrelevant. *See, e.g.,* Williamson Declaration at 4, ¶ 10. Also, Verizon does not agree with any allegations included in the Williamson or Haltom declarations (or the Lichtenberg affidavit, discussed *infra*) including any claim that Verizon could easily modify its packet switch to provide circuit switching. These allegations, however, are irrelevant to Verizon's Motion for the reasons discussed above.

36. These arguments are irrelevant. The FCC has made clear that ILECs have the right to replace a circuit switch with a packet switch even if the *sole purpose* of such deployment is to avoid having to continue to provide unbundled switching. It held:

> [T]o the extent that there are significant disincentives caused by the unbundling of circuit switching, incumbents can avoid them by deploying more advanced packet switching. This would suggest that incumbents have every incentive to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage.

Triennial Review Order, ¶ 446 n.1365. This makes perfectly clear that, under binding FCC precedent, ILECs "can avoid" the "unbundling of circuit switching" by "deploying more advanced packet switching" – and that there is no need to prove switch exhaust to justify deploying a packet switch.

37. Furthermore, if the FCC intended that ILECs maintain their old circuit switches, it would have said so. But it didn't. For example, where an ILEC deploys a new *fiber loop*, the FCC's rules require the ILEC to maintain and make available to CLECs on an unbundled basis the old *copper loop* under very limited circumstances. *See* 47 C.F.R. § 51.319(a)(3)(ii). The FCC did not establish a similar rule when ILECs replaced circuit switches with packet switches, nor did the FCC require the ILECs to configure or deploy packet switches to include a circuit switching functionality. And Verizon has not done so in Mt. Vernon.

E. The Fact That Verizon Is Not Sending Packets "Between Network Users" Is Irrelevant.

38. The Joint CLECs claim that Verizon is not really using a packet switch or packet switching because it is not routing packets, frames or cells "between network users." Haltom Declaration at 4, ¶ 16. According to the Joint CLECs, a packet switch must be unbundled unless a call "begins and ends" in packet form. Joint CLEC Answer at 17-18, ¶ 31. In support of this argument, the CLECs cite to the FCC's *AT&T VoIP* access charge case and the Commission's *LocalDial* case. These cases hold that a traditional voice call (a "telecommunications service") –

does not become a VoIP call (an "information service") just because the carrier uses internet technology to transport part of the call.

39. This argument is a repackaged version of the CLECs' argument that the ILEC must unbundle the packet switch where it uses it to provide traditional voice service instead of advanced services. As noted above, the FCC expressly rejected this claim when MCI made it in its Petition for Clarification. For this reason, the *AT&T VoIP* case and the *LocalDial* case are irrelevant. Furthermore, the question in those cases was completely different: whether the fact that some portion of a long distance call was handled with Internet Protocol (IP) immunized the long distance carrier from paying for the access services provided by the originating and terminating carriers on the call. The FCC ruled that the fact that IP was involved somewhere in the middle does not mean that the long distance carrier gets access service from LECs at either end for free. That has nothing to do with this case: Verizon is not claiming that it is exempt from originating or terminating access charges; rather, Verizon is explaining that it is not required to unbundle its switch. These are two completely different issues.

F. This Commission Cannot Require Verizon To Unbundle Its Packet Switch Under State Law.

40. Tel West is the only party to claim in its Answer that this Commission can require ILECs to unbundle packet switches under state law. Tel West Answer at 7-8. Tel West, preliminarily, should not be permitted to broaden the issues in this proceeding. It pledged not to in its Petition to Intervene (at p. 2) nor did it satisfy the Commission's requirements for an intervenor seeking to broaden the issues in a case. *See* WAC 480-07-355(1)(c)(iv). It should not be permitted to make this argument. In any event, Tel West's theory is wrong. Verizon explained why in its Motion (pages 19-22), and will not repeat its arguments here. Tel West failed to respond to these arguments, stating only that the FCC allowed ILECs to *deploy* packet switches but not to *replace* circuit switches with packet switches. Tel West Answer at 8, ¶ 21. Tel West provides no support for this bizarre argument. The FCC orders and rules discussed

above make clear that ILECs are not required to unbundled packet switches under *any* circumstance. Also, as noted above, the FCC did not require ILECs to maintain their old circuit switches when they installed new packet switches. Any contrary authority in state law – which does not exist – therefore would be preempted.[10]

G. The Commission Should Grant Verizon's Motion to Strike And Should Also Strike the Lichtenberg Affidavit.

41. On September 27, 2004, Verizon filed a Motion to Strike portions of the Joint Petition and its accompanying affidavits and declarations that alleged the CLECs would be "harmed" by Verizon's packet switch. Pursuant to Order No. 1, the CLECs were required to respond to this motion by October 27. The CLECs did not respond, and the CLECs' counsel sent an e-mail to the ALJ and the parties explaining that the CLECs did not contest the motion. Accordingly, it should be granted.

42. The Commission should also strike the affidavit of Sherry Lichtenberg on behalf of MCI, which is an exhibit to the Joint CLEC Answer. The stated purpose of the affidavit is to describe the Operations Support Systems (OSS) MCI thinks Verizon would need to deploy to support unbundled local switching from its Mt. Vernon packet switch. Lichtenberg Affidavit at 1, ¶ 4. This issue, however, is not relevant to Verizon's Motion, as Verizon explained in its response to MCI's Discovery Request #1. The only issue presented by Verizon's Motion is whether Verizon is required by law to unbundle its Mt. Vernon packet switch. If it is not

[10] As Justice Scalia made quite clear in affirming the FCC's authority to issue binding regulations in this area: "[T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any 'presumption' applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n. 6 (1999). Where the FCC has found a lack of impairment and further found that incentives to deployment require a preclusion of unbundling, any attempt to establish a contrary regime based upon state authority is clearly preempted. Verizon's Mot. at 21-28. None of the CLECs, including Tel West, even attempt to dispute this legal point.

required to do so, then the Joint Petition must be dismissed. Verizon's OSS has nothing to do with this issue. For this reason, the entire affidavit should be stricken as well as the portions of the Joint CLEC Answer that refer to the affidavit:

1. Page 2, paragraph 3, strike the phrase, "and whether Verizon has in place the Operations Support Systems ("OSS") needed to support unbundled local switching on the Nortel switch."

2. Page 3, strike paragraph 5 in its entirety.

3. Pages 20-22, strike all of subsection C, including the heading and paragraphs 35-39.

H. AT&T's Attempts To Mischaracterize Verizon's Position Must Be Rejected.

43. At the October 11 scheduling conference, and again in its Answer, AT&T claimed that Verizon's Motion fails to address "the real issue at hand" – whether Verizon breached its contracts – and instead "launches an attack against the Joint Petitioners alleging that they seek to overturn federal law." AT&T Answer at 1, ¶ 2.

44. The Commission should reject AT&T's attempts to confuse the issues and avoid a decision on the merits. Verizon's Motion clearly explains why the interconnection agreements do not require Verizon to unbundle its packet switch or otherwise provide CLECs with unbundled local switching in Mt. Vernon. For AT&T's benefit, Verizon distills its explanation to two simple points:

45. First, the interconnection agreements at issue were intended to, and do, reflect federal law. Verizon Motion at 9-14. Specifically, the agreements' definitions of unbundled "local switching" are identical to the FCC's definition of unbundled "local *circuit* switching." *Id.* at 29, ¶ 55. The CLECs agree with this point. Joint Petition at 10-11, ¶19. In fact, AT&T's Answer has a separate section explaining that the AT&T agreement is "completely consistent with federal law." AT&T Answer at 7-8, ¶¶ 15-16.

46. Second, given that the agreements reflect federal law, the only issue is, "What does federal law require?" Verizon's Motion explains that federal law does not require, and

never has required, ILECs to unbundled packet switches. *See, e.g.,* Verizon's Motion at 4-9, ¶¶ 7-17.

47. In short, this case presents a single legal issue and Verizon fully addressed this issue in its Motion. AT&T's attempts to complicate the issue so as to avoid a decision on the merits must be rejected.[11]

48. Finally, AT&T is the only CLEC to allege that Verizon failed to comply with the "network modification" provision of the AT&T agreement. AT&T Answer at 8-9. Verizon addressed this argument in footnote 12 of its Motion. In any event, AT&T claims Verizon violated the network modification provision by unlawfully "ceas[ing] to provide switching" in Mt. Vernon. *Id.* at 9, ¶ 19. But as discussed above, Verizon did not violate the law, because the law does not require Verizon to unbundle the packet switch, and therefore Verizon did not violate the network modification provisions. Finally, AT&T admits in footnote 25 of its Answer that it was not "affected" under the agreement by the network modification because AT&T "has no UNE-P customers served out of the Mt. Vernon central office." This admission moots AT&T's argument.

III. CONCLUSION

49. This dispute presents a single, legal issue: Whether the FCC's Orders finding a lack of impairment and affirmatively exempting packet switches from any unbundling obligations can be evaded in Washington. The plain fact is that the FCC has concluded that packet switches lie outside the UNE regime, regardless of what functionalities they provide, and no state commission has the power to second-guess or override that determination under any rubric. Accordingly, the Commission should grant Verizon's Motion for Judgment on the Pleadings and deny with prejudice the CLEC Petitions for Enforcement.

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[11] AT&T also claims that Verizon is violating its agreement by failing to provide "common transport" associated with calls traversing the packet switch. AT&T Answer at 3, ¶ 6. AT&T waived this claim because it is not included in the Joint Petition. In any event, it is moot – if Verizon is not required to provide unbundled switching (and it is not), then it is not required to provide common transport for the switched traffic.

Dated this 12th day of November, 2004.

Respectfully submitted,

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Attachment A

November 12, 2004

BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

In the Matter of	)	
	)	DOCKET NO. UT-041127
THE JOINT PETITION FOR	)	
ENFORCEMENT OF	)	
INTERCONNECTION	)	AFFIDAVIT OF
AGREEMENTS WITH VERIZON	)	Danny Peeler
NORTHWEST INC.	)	
	)	

I, Danny Peeler, declare as follows:

1. I am making this affidavit at the request of Verizon Northwest, Inc. ("Verizon"):

2. I am the solution architect for Nortel's Local VoIP Solution, which Verizon has deployed in Mt Vernon, Washington. (The Local VoIP Solution is the current Nortel branding for the switch that Verizon has deployed in Mt Vernon.) I have served in this position since the beginning of 2000. In my position, I define the architecture for Nortel's Local VoIP Solution and I work with the hardware and software design teams to complete detailed designs for the solution components and implement the components within the solution. I am also responsible for reviewing the technical details of all deployments of the Local VoIP Solution.

3. I have two engineering degrees from North Carolina State University. I have a Bachelor of Science in Electrical Engineering and a Bachelor of Science in Computer Engineering. I have over 13 years of experience with Nortel in telecommunications equipment and network design. Prior to my present position, I was an architect for

Nortel's Media Gateway 9000 (MG9000)[1], which is the access gateway in the Local VoIP Solution[2].

4. I am familiar with the switch that Verizon installed in Mt. Vernon, Washington, which is a deployment of the Local VoIP Solution (hereinafter referred to as the "Mt. Vernon deployment"). I have reviewed the details of the Mt Vernon deployment provided to me by the Nortel sales engineers for that project.

5. The purpose of my affidavit is to verify that (a) the Mt. Vernon deployment is a packet-based end office switch; (b) all analog voice calls in the Mt Vernon deployment are converted to and switched as packet; (c) Verizon did not deploy a "hybrid" version of the Local VoIP Solution in Mt Vernon in which some of the subscriber voice traffic would be switched using TDM circuits; and (d) Asynchronous Transfer Mode (ATM) is a packet technology.

6. Historically, end office switches in the PSTN (Public Service Telephone Network) have used TDM (Time Division Multiplexing)-based circuits to switch subscriber voice traffic. The DMS-100 is Nortel's TDM-based end office switch. The Local VoIP Solution is Nortel's packet-based end office switch.

7. The Local VoIP Solution is a Multiservice Switching System (MSS), which is a distributed switching system designed to support various forms of subscriber traffic such as voice, video, and data over a range of packet-based protocols.

8. The Local VoIP Solution is a network solution that uses packet technology as the basis for switching subscriber traffic. The Local VoIP Solution is comprised of the

[1] http://www.nortel.com/products/01/succession/cs/mg9k/index.html

[2] http://www.nortel.com/solutions/pt/cs/local/index.html

following components: a call server (softswitch), media servers, trunk gateways, access gateways, broadband access gateways, and a packet network. The call server provides the call control function. The media servers provide the media services such as conferencing and announcements. The trunk gateways access gateways, and broadband access gateways convert subscriber traffic to packets for switching through the packet network.

9. In the Mt Vernon deployment, the Communications Server 2000 (CS2000) is the call server that processes calls and directs the access gateways and trunk gateways to set up the packet flows to carry the subscriber's voice. The Universal Audio Server (UAS) and Maintenance Trunk Module (MTM) act as the media servers. The MG9000 is the access gateway and the Media Gateway 4000 (MG4000) is the trunk gateway that process calls as directed by the CS2000 and convert subscriber voice traffic to packets as it enters the network and from packets as it leaves the network. The packet network that carries the signaling and voice packets is built with the Multiservice Switch 15000.

10. In the Mt Vernon deployment, all subscriber line service is provided by the MG9000. The MG9000 converts all subscriber voice traffic to packets. The MG9000 does not use TDM (Time Division Multiplexing) to route subscriber voice to other media gateways. The MG9000 only support a packet interface for routing subscriber traffic to other media gateways.

11. The Local VoIP Solution can be deployed in a "hybrid" configuration where some subscribers are served through a TDM switching fabric and some subscribers are served through a packet fabric. Verizon did not deploy the Local VoIP Solution in a "hybrid"

configuration in Mt Vernon. All subscribers in the Mt Vernon deployment are served through a packet fabric.

12. A cell is a specific type of packet. The word "packet" is a general term used to describe a means of encoding and carrying data. A packet is composed of two parts: the header which contains information such as the destination for the packet, and the payload which contains the data carried in the packet. There are numerous forms of packet communications. Frame Relay, ATM, IP, MPLS are all examples of packet-based communications. What differentiate these protocols are the specifics in how the packets are created, such as the information that goes in the header, the size of the header, the size of the payload. ATM networks use a packet of a fixed size, which is referred to as a "cell". The Beginners' Overview of Asynchronous Transfer Mode (ATM)[3] describes ATM as follows:

> Asynchronous Transfer Mode (ATM) is the world's most widely deployed backbone technology. This standards-based transport medium is widely used within the core--at the access and in the edge of telecommunications systems to send data, video and voice at ultra high speeds.
>
> ATM is best known for its easy integration with other techn ogies and for its sophisticated management features that allow carriers to guarantee qua y of service. These features are built into the different layers of ATM, giving the protocol an inherently robust set of controls.
>
> Sometimes referred to as cell relay, ATM uses short, fixed-length packets called cells for transport. Information is divided among these cells, transmitted and then re-assembled at their final destination.

13. The foregoing is true and correct to the best of knowledge and belief.

[3] http://www.atmforum.com/aboutatm/guide.html

Danny Peeler

11/12/2004

Date Signed

Theresa W. Boyce

THERESA W. BOYCE NOTARY *** PUBLIC DURHAM COUNTY, N.C.

My Commission Expires: 12-19-04

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of November, 2004, served the true and correct original, along with 7 copies, of ***Verizon's Reply to the Answers of Staff and the CLECs, the subjoined Affidavit of Danny Peeler and this Certificate of Service*** upon the WUTC, via the method(s) noted below, properly addressed as follows:

Carole Washburn, Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98503-7250

_X_ Hand Delivered
___ U.S. Mail (1st class, postage prepaid)
___ Overnight Mail
___ Facsimile (360) 586-1150
_X_ Email (records@wutc.wa.gov)

I hereby certify that on this 12th day of November, 2004, the enclosed document was sent via U.S. First Class Mail and electronic mail to the following:

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I declare under penalty under the laws of the State of Washington that the foregoing is correct and true.

DATED this 12th day of November, 2004, at Seattle, Washington.

Heidi L. Wilder

Heidi L. Wilder