

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

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| In the Matter of |) | |
| |) | DOCKET NO. UT-041127 |
| THE JOINT PETITION FOR |) | |
| ENFORCEMENT OF |) | ORDER NO. 02 |
| INTERCONNECTION |) | |
| AGREEMENTS WITH VERIZON |) | RECOMMENDED DECISION |
| NORTHWEST, INC. |) | GRANTING VERIZON'S |
| |) | MOTION FOR JUDGMENT ON |
| |) | THE PLEADINGS AND |
| |) | DENYING, IN PART, |
| |) | VERIZON'S MOTION TO |
| |) | STRIKE |
| |) | |

1 **Synopsis.** *This Order recommends that Verizon's motion for judgment on the pleadings be granted, dismissing the joint petition for enforcement. The Order also recommends granting in part, Verizon's motion to strike, and grants Verizon's request to strike the October 27, 2004, affidavit of Ms. Lichtenberg and references in pleadings to the issues addressed in Ms. Lichtenberg's affidavit.*

PROCEDURAL BACKGROUND

2 **Nature Of Proceeding.** This proceeding involves a petition filed by Advanced TelCom, Inc. (ATI), AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle (collectively AT&T), MCImetro Access Transmission Service, LLC (MCI), and United Communications, Inc., d/b/a UNICOM (UNICOM), collectively the Joint Petitioners, seeking enforcement of their interconnection agreements with Verizon Northwest, Inc. (Verizon).

3 **Procedural History.** On August 31, 2004, ATI, AT&T, Covad Communications Company (Covad), MCI, and UNICOM, collectively the Competitor Group, filed

with the Commission in Docket No. UT-043013 a motion for enforcement of Order No. 05 in that proceeding, the CLECs' interconnection agreements and the Federal Communications Commission's (FCC) Triennial Review Order.¹ The Competitor Group asserted that Verizon's planned conversion from a circuit switch to a packet switch in Mount Vernon, Washington, on September 10, 2004, violated these orders and agreements.

4 The Commission heard argument on the motion at a prehearing conference in Docket No. UT-043013 held on September 7, 2004. Based upon concerns raised by the CLECs that Verizon's planned switch conversion may cause disruption to customers, the Commission held a hearing for September 9, 2004, to determine whether the switch conversion would affect customers served by the switch or was purely a matter of pricing.

5 On September 13, 2004, Administrative Law Judge Ann E. Rendahl entered Order No. 10 in Docket No. UT-043013, granting in part, the motion for enforcement, and requiring ATI, AT&T, MCI, Covad, and UNICOM to file a petition for enforcement with the Commission to allow the Commission to address the issue of whether the provisions of the FCC's Triennial Review Order, other FCC Orders, and interconnection agreements allow the replacement of existing circuit switches used for voice service with packet switches, rather than the mere deployment of packet switching.

6 On September 20, 2004, ATI, AT&T, MCI, and UNICOM, collectively the Joint Petitioners, filed with the Commission a Joint Petition for Enforcement of their interconnection agreements with Verizon.

¹ *In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96098, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (Rel. August 21, 2003) [Hereinafter "Triennial Review Order"].

- 7 On September 24, 2004, Tel West Communications, L.L.C. (Tel West) filed with the Commission a petition to intervene in the proceeding.
- 8 On September 28, 2004, Verizon filed with the Commission a motion for judgment on the pleadings and a motion to strike certain portions of the Joint Petition and supporting affidavits.
- 9 The Commission held a prehearing conference on October 11, 2004, before Administrative Law Judge Rendahl. Order No. 01, a prehearing conference order, was entered in this proceeding on October 14, 2004, granting Tel West's petition for intervention and establishing a procedural schedule for the proceeding.
- 10 On October 27, 2004, Commission Staff filed a Response to Verizon's Motion for Judgment on the Pleadings and Declaration of Robert Williamson. On the same day, ATI, MCI and UNICOM filed a joint response to Verizon's motion, attaching the Affidavits of Jeff Haltom, and Sherry Lichtenberg. AT&T and Tel West also filed responses to Verizon's motion on October 27, 2004.
- 11 On October 27, 2004, counsel for ATI and UNICOM and counsel for MCI submitted e-mails to the Administrative Law Judge and the Commission concerning Verizon's motion to strike.
- 12 On November 12, 2004, Verizon filed a Reply to the Answers of Staff and the CLECs, attaching the affidavit of Danny Peeler.
- 13 On November 23, 2004, Verizon filed a letter supplementing its reply dated November 12, 2004. On November 29, 2004, Tel West filed a letter in response to Verizon's supplemental letter.

14 **Appearances.** Letty Friesen, AT&T Law Department, Denver, Colorado, represents AT&T. Michel Singer Nelson, Senior Regulatory Attorney, Denver, Colorado, represents MCI. Brooks Harlow, Miller Nash LLP, Seattle, Washington, represents ATI and UNICOM. David E. Mittle, Santa Fe, New Mexico, represents Tel West. Timothy J. O'Connell and John H. Ridge, Stoel Rives LLP, Seattle, Washington, and Charles H. Carrathers, III, Vice President and General Counsel for Verizon Northwest Inc. and Verizon Southwest Inc., Irving, Texas, represent Verizon.

MEMORANDUM

15 **A. Background Facts.** On June 8, 2004, Verizon issued a Notice of Network Change informing the Joint Petitioners and other CLECs that Verizon intended to replace the existing Nortel DMS 100 switch in Mount Vernon, Washington, with a Nortel Succession switch. *See Exhibit A to Joint Petition.* The existing DMS 100 switch was a circuit switch used for local switching. Verizon described the replacement Nortel Succession switch as a packet switch. Verizon further notified all affected CLECs that "Verizon is not required to provide unbundled packet switching," and that unbundled packet switching would not be available at the Mount Vernon switch beginning on September 10, 2004. *Id.*

16 Of the four Joint Petitioners, only AT&T directly responded to or contested Verizon's notice. *Joint Petition, ¶¶ 6-10; see also Exhibit C-2.*

17 On June 28, 2004, ATI and other CLECs requested that the Commission enter an order directing that Verizon may not eliminate UNE-P by replacing its Mount Vernon circuit switch with a packet switch. The Commission rejected the CLECs' request in Order No. 08 in Docket No. UT-043013 as procedurally improper, stating that the parties could file a formal complaint or petition for enforcement.

- 18 As noted above, on August 31, 2004, ATI, AT&T, Covad, MCI, and UNICOM, filed in Docket No. UT-043013 a motion for enforcement of Order No. 05 in that proceeding, the CLECs' interconnection agreements and the Triennial Review Order, asserting that Verizon's planned conversion from a circuit switch to a packet switch in Mount Vernon, Washington, on September 10, 2004, violated these orders and agreements.
- 19 Following a hearing on September 9, 2004, Administrative Law Judge Rendahl entered Order No. 10 allowing the switch conversion to proceed and requiring ATI, AT&T, MCI, Covad, and UNICOM to file a petition for enforcement with the Commission to address the merits of the CLECs' arguments.
- 20 On September 10, 2004, Verizon replaced the Mount Vernon DMS 100 circuit switch with a Nortel Succession switch. Verizon's action in Washington is unique, as Verizon has not replaced a circuit switch with a packet switching in any other location in the United States.² See *Joint CLECs Response, Attachment 3 at 4*.
- 21 **B. The Petition.** The Joint Petitioners filed a petition for enforcement of their interconnection agreements (ICAs) with Verizon, and more specifically, provisions in their ICAs that require Verizon to "provide access to unbundled switching and combinations of UNEs that include unbundled switching, such as UNE-P and UNE-P line splitting." *Joint Petition*, ¶ 5.

² Although Verizon has installed packet switches in California to replace circuit switches, the packet switches are not in use and have not replaced circuit switches. See *Joint CLECs Response, Attachment 3 at 4*. On September 15, 2004, the California Public Utilities Commission entered an order restraining Verizon from converting Class 5 circuit switches to packet switches in two central offices. See Exhibit H to Joint Petition, *AT&T Communications of California, Inc. (U 5002 C)*, *TCG Los Angeles, Inc. (U 5462 C)*, *TCG San Diego (U 5389 C)* and *TCG San Francisco (U 5454 C) v. Verizon California Inc. (U 1002 C)*, Assigned Commissioner and Administrative Law Judge's Ruling on AT&T's Emergency Motion For Order Maintaining the Status Quo Pending Resolution of the Complaint, California Public Utilities Commission Case No. 04-08-026 (Sept. 15, 2004) [Hereinafter "California Decision"].

- 22 The Joint Petitioners quote portions of their ICAs describing and defining “Local Switching” or “The unbundled Local Switching Element” and assert that the definitions are broad enough “to include packet switching used to provide traditional, narrowband voice services.” *Id.*, ¶¶ 12-17. The Joint Petitioners assert that the definitions address basic switching functions, not the type of equipment used to provide the switching function, consistent with the FCC’s definition. *Id.*, ¶¶ 12, 19. Based on this analysis, the Joint Petitioners assert that Verizon has breached its ICAs by not providing “traditional, narrowband voice services” when Verizon replaces circuit switches with packet switches. *Id.*, ¶18.
- 23 The Joint Petitioners argue that the FCC limited its decision in the Triennial Review Order to not unbundle packet switching to the functionality of packet switching used to provide broadband services. *Id.*, ¶21, citing *Triennial Review Order*, ¶541.
- 24 The Joint Petitioners assert that they are not asking Verizon to unbundle packet switching, but asking Verizon to honor the provisions of its interconnection agreements “to provide traditional narrowband voice services using unbundled switching in the area served by the Mount Vernon switch.” *Id.*, ¶ 20. The Joint Petitioners note that Verizon is providing such traditional, narrowband voice service to its own end user customers served by the new switch, and ask for the same service to the Joint Petitioners customers. *Id.*, ¶22.
- 25 The Joint Petitioners attach to the Petition affidavits from company representatives setting forth facts to support the Petition and to describe the harms caused as a result of Verizon’s alleged breach of ICAs. *Id.*, ¶ 25; see also *Exhibits C-F*.
- 26 **C. Verizon’s Motion on the Pleadings.** On September 28, 2004, Verizon filed an answer to the Joint Petition as well as a Motion for Judgment on the Pleadings

and a motion to strike portions of the Joint Petition and supporting affidavits. This recommended decision addresses Verizon's motions, not its answer.

27 In its Motion on the Pleadings, Verizon argues that the Joint Petition has no basis in law and should be dismissed on the pleadings pursuant to WAC 480-07-650(4)(b). *Verizon Motion on the Pleadings*, ¶ 6. Verizon asserts that the Joint Petition presents solely a matter of law without asserting material facts in dispute. *Id.* Verizon characterizes the question of law as: Can this Commission disregard the FCC's repeated holdings that packet switches are exempt from all unbundling obligations?" *Id.*

28 Verizon asserts that the Telecommunications Act of 1996 (Act)³ defines "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." *Id.*, ¶ 7, citing 47 U.S.C. § 153(29). Verizon further asserts that the FCC determines what network elements must be unbundled pursuant to Section 251(c)(3). *Id.*

29 Verizon asserts that the FCC has consistently determined in its Local Competition Order,⁴ UNE Remand Order,⁵ and Triennial Review Order that packet switches are not unbundled network elements and not subject to unbundling requirements. *Id.*, ¶¶ 7-17. Specifically, Verizon asserts that the FCC rejected CLECs' request in the Local Competition that ILEC packet switches should be identified as network elements, and declined to adopt a national rule for unbundling packet switches. *Id.*, ¶ 8, citing *Local Competition Order*, ¶ 427.

³ Public Law No. 104-104, 101 Stat. 56, codified at 47 U.S.C. § 151 *et seq.*

⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket No. 96-98, CC Docket No. 95-185, 11 F.C.C.R. 15,499 (Aug. 8, 1996) [Hereinafter "Local Competition Order"].

⁵ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 16 F.C.C.R. 1724 (Nov. 5, 1999) [Hereinafter "UNE Remand Order"].

Verizon argues “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.” *Id.*, ¶ 9 (*emphasis omitted*). Likewise, Verizon asserts that the FCC refused in its UNE Remand Order to classify or identify packet switches as network elements under the Act. *Id.*, ¶ 10, *citing UNE Remand Order*, ¶¶ 306-309.

30 Verizon asserts that the FCC affirmed its policy of refusing to require ILECs to unbundle packet switching in the Triennial Review Order. *Id.*, ¶¶ 11-13, *citing Triennial Review Order*, ¶¶ 537-39. Verizon asserts that the FCC reached this decision given the number of competitors deploying their own packet switches, as well as the goal under Section 706 of the Act of encouraging investment and deployment of broadband technology. *Id.*, ¶ 13. Verizon asserts that the FCC not only held that packet switches are not subject to unbundling, but also “expressly held that the replacement of a circuit switch with a packet switch eliminates any unbundling requirement—even if the sole purpose of such deployment is to avoid having to continue to provide unbundled switching.” *Id.* Verizon relies on a footnote in the Triennial Review Order for this asserted finding of the FCC:

[To 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 advanced networks, which is precisely the kind of facilities deployment we wish to encourage.

Triennial Review Order, ¶ 446, n.1365.

31 Verizon further argues that the FCC rejected the CLECs argument that ILECs are obligated to unbundle packet switches when the switches are used to provide voice service. *Verizon Motion on the Pleadings*, ¶ 14. Verizon asserts that the FCC denied in the Triennial Review Order a Petition for Clarification filed by MCI, in which MCI requested that the FCC clarify that ILECs are required to make

packet switching available as a UNE when the ILEC uses the switch to provide voice services. *Id.*, ¶¶ 14-15. Verizon asserts that the D.C. Circuit Court upheld this decision its decision on the Triennial Review Order. *Id.*, ¶ 16, citing *USTA v. FCC*, 359 F.3d 554, 580 (D.C. Circuit 2004).

32 Verizon asserts that the Joint Petitioners' ICAs are based upon and must be read to conform to federal law, including ILEC unbundling obligations. *Id.*, ¶ 18-28. Verizon asserts that AT&T's ICA was approved in August 1997 after the FCC reached its first decision not to unbundle packet switching. *Id.*, ¶ 19-21. Verizon also asserts that the record of the arbitration proceeding between AT&T and Verizon confirms that provisions in the agreement are intended to be consistent with the Act, the Local Competition Order, and Commission Orders. *Id.*, ¶ 20-21. Verizon insists that ICAs are not just contracts, but a "federal regulatory device, which exist solely to implement the network sharing duties imposed on Verizon by Section 251." *Id.*, ¶ 22. Verizon notes that MCI chose to adopt the terms of the Verizon-AT&T agreement, which the Commission approved effective on December 31, 2003. *Id.*, ¶ 27.

33 Verizon asserts that the ATI and UNICOM ICAs are similar, noting that the Commission approved the ATI agreement in June 2001 and the UNICOM agreement in May 2001. *Id.*, ¶ 24-25. Verizon asserts that these agreements provide that Verizon will provide the CLECs will access to local switching in accordance with applicable law, meaning that Verizon is not obligated to provide unbundled local switching through packet switching. *Id.*, ¶ 25-26.

34 Verizon asserts that the Joint Petitioners' ICAs do not require Verizon to unbundle packet switching, as the agreements incorporate federal law. *Id.*, ¶ 52. Verizon asserts that even if terms in the agreements were ambiguous, courts must interpret the terms to void preemption and conflict with federal law. *Id.*, citing *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674 (1996). Verizon asserts that none of the ICAs classify packet switches as network

elements, and the definitions of local switching mirror the FCC's definition. *Id.*, ¶ 54. Verizon asserts that the FCC's definition of local switching is a definition of local circuit switching, which excludes packet switching. *Id.*, ¶ 55. Verizon also asserts that nothing in the agreements prevents Verizon from discontinuing circuit switching, for example, to allow Verizon to upgrade its network. *Id.*, ¶ 56.

35 Verizon asserts the Joint Petitioners request the Commission to impose an unbundling requirement for packet switching contrary to FCC decisions on this issue. While the Joint Petitioners claim they are not seeking to unbundle packet switching, their request for access to voice service over the packet switch at TELRIC rates amounts to unbundling. *Id.*, ¶ 36-37. Verizon asserts that state commissions are preempted from upsetting "the delicate balance" established in Section 251 by making findings expressing reserved to the FCC. *Id.*, ¶ 42.

36 Finally, Verizon argues that the Joint Petitioner are requesting that the Commission make a Section 251 unbundling determination under the guise of interpreting or enforcing ICAs. *Id.*, ¶ 45. Verizon asserts that "state commissions can only act to effectuate federal regulations" and "apply federal law and regulations." *Id.*, ¶46. Verizon also asserts that states may not accomplish through contract interpretation what is not allowed under federal law. *Id.*, ¶ 47.

37 **Joint CLECs' Response.** The Joint CLECs, composed of MCI, ATI, and UNICOM, asserts that Verizon's motion for judgment on the pleadings is actually a motion for summary judgment filed pursuant to WAC 480-07-380(2)(a). *Joint CLECs' Response*, ¶ 1. The Joint CLECs assert that Verizon's motion must be dismissed as there are genuine issues of material fact concerning the capabilities of the new Nortel Succession switch, the nature of local switching required by the Joint CLECs' ICAs, and whether Verizon has in place the Operations Support Systems (OSS) necessary to support unbundled local switching on the new switch. *Id.*, ¶¶ 3-6.

- 38 The Joint CLECs assert that their ICAs with Verizon require Verizon to offer unbundled local switching and combinations of UNEs that include local switching throughout Verizon's territory in Washington State. *Id.*, ¶ 7. The Joint CLECs further assert that local switching is defined in the agreements based on the functionality of local switching, regardless of the technology used to provide the local switching function. *Id.*, ¶¶ 7-12. The Joint CLECs assert that the definition of local switching identified by the FCC in the Triennial Review Order is a functional definition of local switching that is not based upon specific technology or equipment. *Id.*, ¶ 13. The Joint CLECs assert that it is technically feasible for Verizon to provide UNE-P over its new switch in Mount Vernon. *Id.*, ¶ 14.
- 39 The Joint CLECs assert that, even assuming Verizon's legal argument is correct, that Verizon has failed to establish that the new Nortel switch in Mount Vernon is actually a packet switch or provides packet switching. *Id.*, ¶¶ 17-25. Verizon supports its arguments with the Affidavit of Jeff Haltom, and exhibits containing Verizon's responses to data requests and a "product brief" describing the Nortel Succession switch. *See Exhibit A and Attachments 1-4 to Joint CLECs' Response.*
- 40 The Joint CLECs assert that Verizon has consistently described the new switch as a packet switch, but that the type of switch Verizon has deployed, a Nortel Succession switch, can support both traditional circuit switching as well as packet switching. *Joint CLECs' Response* ¶ 20; *see also Haltom Affidavit*, ¶¶ 9-11, 34-42. The Joint CLECs assert that information provided by Verizon indicates that the new switch continues to provide the functions of local switching as defined in their ICAs. *Id.*, ¶ 24. The Joint CLECs assert that there is a material factual dispute as to whether Verizon has deployed a packet switch and is actually providing packet switching out of the Mount Vernon central office, and whether Verizon can support unbundled local switching out of that central office. *Id.*, ¶¶ 21-22, 25.

- 41 The Joint CLECs assert that, pursuant to the Triennial Review Order and other federal law, Verizon may not discontinue local switching to CLECs in Mount Vernon even if Verizon has installed and configured the new Nortel Succession switch to include packet switching capabilities. *Id.*, ¶ 26. The Joint CLECs assert that they are not seeking for Verizon to provide packet switching at the Mount Vernon central office, but the capabilities of “local circuit switching” as defined by the FCC. *Id.*, ¶ 27. The Joint CLECs assert that the new switch is capable of providing such a switching function, and that it appears that there has been no change in how Verizon switches local voice traffic since Verizon installed the switch. *Id.*, ¶ 29.
- 42 The Joint CLECs assert that the issue of the Mount Vernon switch is similar to the issues in the FCC’s AT&T VoIP access charge case and the Commission’s Local Dial case. *Id.*, ¶ 31. Specifically, the Joint CLECs assert that the fact that there may be use of advanced services, *i.e.*, use of a packet switch, in the middle of a telephone call does not change the nature of the service from a telecommunications service to an information service. *Id.* Further, the Joint CLECs assert that, even if Verizon is using packet switching, the ICAs do not dictate the technology used to provide the local switching function, and that Verizon is still obligated to provide that switching function. *Id.*, ¶ 32. As long as Verizon is connecting lines to line, the Joint CLECs assert that Verizon must continue to provide the local switching function. *Id.*, ¶ 33.
- 43 The Joint CLECs dispute Verizon’s legal arguments that it is not required to provide unbundled packet switching traditional narrowband voice grade services. *Id.*, ¶ 34. The Joint CLECs assert that the law Verizon relies upon discusses only on whether an ILEC must unbundled broadband services over a packet switch. *Id.* The Joint CLECs assert that Verizon may not breach its contractual obligations to provide traditional voice grade services because it has decided to replace a circuit switch with a switch that may contain packet switching. *Id.*

44 The Joint CLECs also assert that a material dispute of fact exists concerning Verizon's claim that unbundled circuit switching is no longer available in its Mount Vernon central office. *Id.*, ¶ 35. Specifically, the Joint CLECs assert that the facts are not clear as to whether the OSS systems necessary to provide unbundled local switching are lacking or have been modified to preclude provision of such switching functions. *Id.*, ¶¶ 36-37. The Joint CLECs offer the affidavit of Sherry Lichtenberg concerning the OSS requirements required and that Verizon could support all of the OSS functions required for unbundled local switching and UNE-P on the new switch with minor modifications. *Id.*, ¶¶ 37-38; *see also Lichtenberg Affidavit*, ¶¶ 5-22.

45 Finally, the Joint CLECs assert that Verizon fails to recognize that the switching capabilities of remote switches connected to the new switch likely retain the local switching function, and could be used to provide traditional local switching as required by the Joint Petitioners' ICAs. *Id.*, ¶ 40. The Joint CLECs request the Commission deny Verizon's motion as to the remote switches connected to the Mount Vernon central office. *Id.*, ¶ 41.

46 **AT&T Response.** AT&T asserts that Verizon is obligated under federal law, including the FCC's Interim Order⁶, to comply with its interconnection agreements. *AT&T Response*, ¶ 6. AT&T asserts that the Interim Order requires Verizon and other ILECs to continue providing unbundled access to local switching and certain other UNEs under their interconnection agreements until the effective date of final unbundling rules issued by the FCC, six months after publication of the Interim Order, if the FCC enters an intervening order concerning specific unbundling obligations, and if a state commission raises rates for network elements. *Id.*, *citing Interim Order*, ¶ 1. AT&T asserts that none of these events have occurred to relieve Verizon of its obligation to provide

⁶ *Unbundled Access to Network Elements*, WC Docket No. 04-313, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. August 20, 2004) [Hereinafter "Interim Order"]

unbundled local switching. *Id.* AT&T asserts that the Commission's Orders No. 5 and 10 in Docket No. UT-043013 similarly obligate Verizon to continue to provide products and services under its interconnection agreements until the Commission approves amendments to the agreements. *Id.*, ¶ 7.

47 AT&T asserts that Verizon's assertion that it may replace circuit switches with packet switches to avoid unbundling requirements relies solely on dicta in a footnote in the Triennial Review Order. *Id.*, ¶ 8-11. AT&T asserts that footnote 1365, quoted above in paragraph 30 of this Recommended Decision, is a large footnote discussing dissenting opinions concerning unbundling of circuit switches and that the small portion that Verizon quotes discusses only deployment, not replacement, of switches. *Id.*, ¶¶ 9, 11. AT&T asserts that Footnote 1365 does not support a legal interpretation that Verizon may breach its contract obligations, especially in view of the requirements of the Interim Order. *Id.*, ¶ 11.

48 AT&T asserts that it is not requesting that Verizon unbundle packet switching, or seeking to prevent Verizon from deploying packet switching for its own customers. *Id.*, ¶ 12. AT&T asserts that Verizon may not use deployment of a packet switch to breach interconnection agreements, or violate the Interim Order or the Commission's orders, by not providing local switching. *Id.* AT&T asserts that Verizon may not discontinue service on a circuit switch used for wholesale customers without also complying with the obligations in its agreements for network modifications. *Id.*

49 AT&T asserts that the Commission has authority to interpret interconnection agreements to avoid preemption and conflict with federal law. *Id.*, ¶ 15, citing *Tanner*, 128 Wn.2d 656 (1996) and *Davidson v. Hansen*, 135 Wn.2d 112, 129 (1998). AT&T asserts that the Commission can resolve this matter by applying the terms of the parties' interconnection agreements, the FCC's Interim Order and the

Commission's status quo order. *Id.*, ¶ 15. AT&T asserts that its interpretation is reasonable and consistent with the law and intent of the parties. *Id.*

50 AT&T reiterates its allegations in the Joint Petition that Verizon has breached the change of law and network modification provisions of AT&T's agreement. *Id.*, ¶ 17. AT&T asserts that contrary to Verizon's allegation that AT&T has waived its right to plead these issues, that the discussion of the issue in affidavits attached to the Joint Petition satisfies the requirements for petitions for enforcement in WAC 480-07-650(1)(a)(ii) and (iii). *Id.*

51 Finally, AT&T requests that the Commission deny Verizon's motion on the pleadings asserting that Verizon has failed to address the very issue raised in the pleadings, *i.e.*, whether Verizon has breached its interconnection agreements, and because there is a material fact in dispute as to whether Verizon's new switch is a packet switch as defined by the FCC. *Id.*, ¶¶ 21-23.

52 **Staff Response.** Staff asserts that the functionality of local switching rather than the equipment used to provide local switching determines whether an ILEC must provide unbundled access to local switching. *Staff Response*, ¶ 19. Staff requests the Commission deny Verizon's motion. *Id.*, ¶ 1. Staff characterizes the narrow legal issue for consideration as whether the Commission is authorized to relieve Verizon of the obligation to provide unbundled access to local switching if Verizon changes the equipment used to provide the local switching function, and "whether Verizon must provide unbundled access to packet switches for the provision of local switching for voice traffic." *Id.*, ¶¶ 2, 4, 20. Staff focuses solely on the requirements of federal law, not interpretation of the Joint Petitioners' agreements with Verizon. *Id.*, ¶ 3.

53 Relying on the Declaration of Robert Williamson, Staff explains the technology used in circuit switches such as the Nortel DMS-100 switch and the technology of packet switching. *Id.*, ¶¶ 4-8; *See Williamson Declaration*. Staff asserts that the

Nortel Succession switch with which Verizon replaced its circuit switch uses similar technology to the Nortel DMS-100 switch when switching voice calls, asserting that both are connection-oriented switches. *Id.*, ¶ 8; *Williamson Declaration*, ¶¶ 11, 18. Staff asserts that Verizon's new switch relies on ATM or Asynchronous transfer mode, technology when switching voice calls and that the functionality of the ATM portion of the switch is the same functionality as local circuit switching. *Id.* Staff asserts that the switch does not provide any advanced services and that the change in switches has not resulted in a change of switching functionality for local voice traffic. *Id.*

54 Staff asserts that the FCC has consistently required ILECs to provide unbundled access to local switching for voice traffic. *Id.*, ¶ 10. Staff contends that Verizon's arguments concerning FCC decisions concerning the lack of unbundling obligations for packet switching are simply wrong. *Id.*

55 Staff asserts that the FCC defined the local switching UNE based upon features, functions, and capabilities, not based upon the equipment or device that performs the features, functions and capabilities. *Id.*, ¶¶ 12-13, citing *Local Competition Order*, ¶¶ 410-12. Staff asserts that the FCC has defined packet switching as the function of routing information in packets based on address or other routing information used in providing advanced services, not voice traffic. *Id.*, ¶ 15, citing *UNE Remand Order*, ¶ 304; See also *Williamson Declaration*, ¶¶ 15-17. Staff criticizes Verizon for misquoting the UNE Remand Order to refer to packet switching when the FCC referred to advanced services. *Id.*, ¶ 17.

56 Staff asserts that the Triennial Review Order reiterates the FCC's findings that CLECs are impaired without access to unbundled local circuit switching. *Id.*, ¶ 19, citing *Triennial Review Order*, ¶ 447. Staff also states that the FCC retained the functionally based definition of packet switching in the Triennial Review Order, and declined to require unbundling of packet switching as "it is the kind of

equipment used in delivery of broadband.” *Id.*, ¶ 18, citing *Triennial Review Order*, ¶541.

57 Based on this analysis, Staff asserts that Verizon must provide CLECs with unbundled access to the local voice switching function, regardless of the equipment used to provide the functionality of local switching. *Id.*, ¶ 19, 22. Staff contests Verizon’s argument that the FCC has determined that packet switches are not subject to unbundling requirements when the switches are used for voice service. *Id.*, ¶ 21. Staff construes the FCC’s treatment of MCI’s petition for clarification differently than Verizon, arguing that Verizon reads more into the FCC’s footnote rejecting the MCI petition than the FCC intended. *Id.*, ¶ 22.

58 **Tel West Answer.** Tel West requests that the Commission deny Verizon’s motion as a matter of law, asserting that the FCC “has not determined that packet switches may replace existing circuit switches and not merely deployed, that in some cases ... CLECs must continue to have access to copper loops at total element long-run incremental cost (‘TELRIC’), and that State commissions can require the unbundling of packet switches.” *Tel West Answer*, ¶ 2.

59 Tel West contests Verizon’s characterization of FCC findings concerning packet switching in the Local Competition Order, asserting that the FCC determined that there was insufficient information to make a determination as to whether packet switches were a network element or whether they should be unbundled. *Id.*, ¶ 4-5. Tel West asserts that the FCC did qualify packet switching as a network element in the UNE Remand Order, but did not require unbundling of packet switching except in a limited circumstance. *Id.*, ¶¶ 7-8, citing *UNE Remand Order*, ¶¶ 304, 306. Tel West asserts that the FCC did not preclude State commissions in either order from ordering the unbundling of packet switches. *Id.*, ¶¶ 6, 9.

- 60 Tel West asserts that in the Triennial Review Order, as in past orders, the FCC distinguished between advanced services and voice services concerning access to packet switching. *Id.*, ¶ 12. Tel West asserts that the FCC’s unbundling rules for loops depend on the nature of the loop technologies and architectures, and asserts that these distinctions should also apply to packet switching. *Id.*, ¶¶ 13-14. Tel West asserts that because there is no evidence in the record concerning the loop architecture at the Mount Vernon central office, the Commission must deny Verizon’s motion. *Id.*, ¶ 14.
- 61 Tel West further asserts that Verizon’s reliance on footnote 1365 of the Triennial Review Order for its assertion that ILECs may replace circuit switches to avoid unbundling requirements is misplaced. *Id.*, ¶ 15. Tel West asserts that the same footnote later states that existing competition should not be thrown away. *Id.*, citing *Triennial Review Order*, ¶ 447, n.1365. Tel West asserts that competition in the area of the Mount Vernon central office is likely to be compromised if CLECs do not have access to the switch at TELRIC rates. *Id.*, ¶ 15.
- 62 Tel West also criticizes Verizon’s reliance on footnote 833 of the Triennial Review Order concerning MCI’s petition for clarification. *Id.*, ¶ 16. Tel West argues that the FCC limited its discussion in the footnote to ILEC unbundling obligations for broadband services, and asserts that in subsequent paragraphs of the Triennial Review Order, the FCC reiterated its position that ILECs must continue to unbundle “the features, functions, and capabilities of hybrid loops that are not sued to transmit packetized information.” *Id.*, ¶, quoting *Triennial Review Order*, ¶ 289.
- 63 Finally, Tel West asserts that state commissions have authority under Sections 251(d)(3)(a) and (c) of the Act to prescribe and enforce regulations concerning access and interconnection obligations of ILECs as long as the states do not substantially prevent implementation of the purposes of the Act. *Id.*, ¶ 19. Tel West asserts that the D.C. Circuit Court determined that preemption claims were

not ripe in the appeal of the Triennial Review Order. *Id.*, ¶ 20, citing *USTA II*, 359 *F.3d at 359*. Tel West asserts that there is no evidence in the proceeding that ordering Verizon to provide unbundled local switching through packet switch will prevent or compromise implementation of the Act, and that to do otherwise would compromise competition. *Id.*, ¶ 21.

64 **Verizon Reply.** Verizon asserts that the only relevant issue in the proceeding is the question of law presented in Order No. 10 of Docket No. UT-043013, *i.e.*, “whether the provisions of the Triennial Review Order, other FCC Order and interconnection agreements allow the replacement of existing circuit switches used for voice service with packet switches. *Verizon Reply*, ¶¶ 1, 3-4. Verizon asserts that the FCC has consistently found that CLECs are not impaired without access to ILEC packet switches and that unbundling would frustrate federal law and policy on competition by creating disincentives to deployment of packet switching technology. *Id.*, ¶ 1. Verizon asserts that the Commission may not interpret federal law, state law or the terms of interconnection agreements to impose an obligation to unbundle packet switching. *Id.*

65 Verizon contests the position of the CLEC and Staff that federal law requires Verizon to unbundle a packet switch where Verizon uses it to provide traditional, narrowband voice services. *Id.*, ¶ 2. Verizon assert that Staff’s position, that the FCC’s definition of local switching is based on function and that ILECs must provide unbundled local switching regardless of the equipment used, is incorrect. *Id.*, ¶ 7. Verizon asserts that the FCC rejected Staff’s position in the Triennial Review Order by rejecting MCI’s petition for clarification as to whether ILECs must unbundle packet switching equipment to provide voice services, and stating that “the FCC does not “require unbundling of packet-switching equipment.” *Id.*, ¶¶ 10-11, citing *Triennial Review Order*, ¶ 288, n.833. Verizon asserts that the FCC declined to unbundle packet switching equipment, not just the advanced services functionality provided by packet switches. *Id.*, ¶ 12.

- 66 Verizon repeats its arguments that the FCC's determinations in the Local Competition Order, UNE Remand Order and Triennial Review Order do not require ILECs to unbundle packet switching. *Id.*, ¶¶ 13-19. Verizon asserts that the Act defines a network element as a facility or equipment, of which the features and functions are a part. *Id.*, ¶ 19. Because the FCC has not required packet switches as a network element to be unbundled, neither must ILECs unbundle the features and functions of the packet switch. *Id.*
- 67 Verizon objects to Staff's and the CLECs assertions that local circuit switching is a functional obligation without reference to technology, *i.e.*, FCC references to packet switching rather than packet switches. *Id.*, ¶ 20-21. Verizon argues that the FCC's determinations concerning unbundling of packet switches refers to the equipment, not the functionality of packet switching, noting the FCC's determination that "given that we do not require packet switches to be unbundled, there is little, if any, basis for argument that our treatment of circuit switches gives LECs a disincentive to upgrade their switches." *Id.*, ¶¶ 21-22, citing *Triennial Review Order*, ¶ 448.
- 68 Verizon asserts that the CLECs attempt to shift the focus of the legal issue in the proceeding by raising new factual disputes. *Id.*, ¶ 3. Verizon asserts that the CLECs did not raise these factual issues in their Joint Petition or other pleadings addressing this issue of the Mount Vernon switch, and that the CLECs have waived this argument. *Id.*, ¶¶ 3, 25. Verizon requests that the Commission reject the CLECs' arguments and gamesmanship and address the legal issue presented. *Id.*, ¶¶ 3-4, 26. Verizon asserts that the CLECs pleadings concerning this issue in Docket No. UT-043013 and this docket do not appear to dispute that the Nortel Succession switch is a packet switch. *Id.*, ¶¶ 25-26.
- 69 Verizon asserts that even if the CLECs has properly raised the issue of a factual dispute, the evidence does not support the CLECs' claim. *Id.*, ¶ 28. Verizon asserts that the "product brief" attached to the Joint CLECs' Response describes

the Nortel Succession switch as a packet switch. *Id.*, ¶ 29. Verizon asserts that MCI has deployed the same type of switch as Verizon in other locations and described it as a packet switch. *Id.*, ¶ 30. Finally, Verizon offers the affidavit of Danny Peeler, Nortel's Solutions Architect for the Mount Vernon deployment, confirming that the switch is a packet switch, that the switch uses packet switching to switch analog voice calls, and that the switch is not a hybrid switch using TDM circuits. *Id.*, ¶ 32, citing *Peeler Affidavit*, ¶¶ 5, 7, 8-11.

70 Verizon asserts that the CLECs' arguments that Verizon could have left the circuit switch in place and that Verizon must prove switch exhaustion before replacing a circuit switch with a packet switch are irrelevant. *Id.*, ¶ 35. Verizon refers to footnote 1365 of the Triennial Review Order, asserting that the FCC has specifically granted ILECs the right to replace circuit switches with packet switches, without justification. *Id.*, ¶ 36. Verizon further asserts that the FCC could have provided, but did not provide, guidelines for replacement of circuit switches as it did for copper loop replacement. *Id.*, ¶ 37.

71 Verizon distinguishes the Joint CLECs arguments concerning the AT&T VoIP case and the Commission's Local Dial cases, noting that those cases concerned the payment of access charges, not the determination of unbundling requirements. *Id.*, ¶¶ 38-39. Further, Verizon requests that the Commission reject Tel West's arguments concerning the Commission's ability to unbundle packet switching under state law. *Id.*, ¶ 40.

72 **Discussion and Decision.** Verizon's motion on the pleadings and the responses raise a number of issues, the first being the standard of review of Verizon's motion, and related to that issue, the question of whether there are material facts in dispute.

73 **Standard of Review.** Verizon brings its motion under WAC 480-07-650(4)(b), asserting that the matters raised in the petition may be resolved on the pleadings

as a matter of law. The Joint CLECs assert that Verizon's motion on the pleadings is a motion for summary judgment pursuant to the requirements of WAC 480-07-380(2). The Joint CLECs assert that there are material facts in dispute precluding a decision as a matter of law. Verizon contests the Joint CLECs argument as to a factual dispute, asserting that the CLECs had not yet raised the issue of factual questions, only an issue of law.

74 WAC 480-07-650(4)(b) provides that "The presiding officer will determine at the prehearing conference whether the issues raised in the petition can be determined on the pleadings, submissions, and oral statements without further proceedings." At the prehearing conference, counsel for Verizon indicated that its motion is similar to a motion under CR 12(c), or a motion to dismiss, which does not follow the same standards as a summary judgment motion, and under WAC 480-07-650 suggesting that the matter be resolved on the pleadings. *See Tr. 15, lines 20-23, Tr. 17, lines 16-20; see also WAC 480-07-380(1)(a)*. The Administrative Law Judge explained that a decision would be made upon the pleadings and Verizon's motion. *Tr. 31, line 25 through Tr. 32, line 3*.

75 Given the posture of Verizon's motion as a motion to dismiss under CR 12(c), and the provisions of WAC 480-07-380(4)(b) allowing the presiding officer discretion to determine whether to make a decision on the pleadings, the fact that there may be material disputes as to fact are not relevant to whether the Commission may make a determination on the pleadings and the question of law in this proceeding.

76 Even if the Commission were to consider the CLECs arguments that there are material facts in dispute, the only relevant factual dispute would be whether the Nortel Succession switch is a packet switch.⁷ The declaration of Mr. Williamson

⁷ Whether or not Verizon can or should modify its OSS to accommodate provision of unbundled local switching or UNE-P is not relevant to the question of whether the Triennial Review Order, other FCC Orders or interconnection agreements preclude Verizon from replacing a circuit

and the affidavits of Mr. Haltom and Peeler squarely address the issue of the technical capabilities of the Nortel Succession switch and make clear that Verizon has options in deploying the switch as a hybrid packet switch or fully packetized switch. *Williamson Declaration*, ¶¶ 11, 18-19; *Haltom Affidavit*, ¶¶ 9-11, 22-32; *Peeler Affidavit*, ¶¶ 5, 11. Mr. Peeler makes clear in his affidavit that Verizon has chosen to deploy and install the Nortel switch not as a hybrid packet switch, but as a pure packet switch using packet switching functions to switch voice grade traffic. *Peeler Affidavit*, ¶¶ 5, 9-11. Thus, there is not dispute as to the nature and functions of the new switch: Verizon has deployed a packet switch using solely packet switching functions.

77 *Determination as a Matter of Law.* All parties have characterized the narrow legal question in this proceeding in various ways. The issue is not whether Verizon has an obligation to unbundle packet switching, but more narrowly as set forth in paragraph 37 of Order No. 10 in Docket No. UT-043013, “whether the provisions in the Triennial Review Order, other FCC Orders and interconnection agreements allow the replacement of existing circuit switches used for voice service with packet switches, rather than the mere deployment of packet switching”

78 All parties quote the same portions of the Local Interconnection Order, UNE Remand Order, and Triennial Review Order to bolster their positions as to Verizon’s obligations concerning packet switching. It is clear from these orders that packet switching is a network element, and that the FCC has determined that packet switching equipment, otherwise described as packet switches, are not subject to unbundling obligations. *See UNE Remand Order*, ¶ 306; *Triennial Review Order*, ¶¶ 539, *see also* ¶ 448. The remaining question is whether ILECs may replace circuit switches with packet switches to avoid obligations to unbundle local switching.

switch with a packet switch. For this reason, the recommended decision finds that there is not material factual dispute concerning Verizon’s OSS capabilities.

79 Verizon relies on provisions of footnote 1365 and paragraph 448 of the Triennial Review Order as support for its argument that ILECs may do so. Footnote 1365 is a footnote discussing the dissent's arguments concerning local circuit switching that runs over a page in length. The portion on which Verizon relies states:

Moreover, the dissents fail to consider the incentives created by our decision on packet switching and advanced services. Specifically, we no longer unbundle packet switching and the advanced networks used with such switching. This means that to the extent there are significant disincentives cause by 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, ¶ 447, n.1365. Further, in paragraph 448 of the Triennial Review Order, the FCC states: "In fact, given that we do not require packet switches to be unbundled, there is little, if any, basis for argument that our treatment of circuit switches gives LECs a disincentive to upgrade their switches."

80 The CLECs approach the issue from the opposite angle asserting that their interconnection agreements require provision of local switching, and that local switching as defined by the FCC, is based on function, not technology. Verizon's arguments on this issue are persuasive, in that a network element is a facility or equipment, of which the features and functions are a part. Because the FCC has not required packet switches as a network element to be unbundled, the ILECs are not required to unbundle the features and functions of the packet switch, even if they are capable of providing a local switching function. *Id.*

81 The FCC appears to assert in the Triennial Review Order that packet switches are not required to be unbundled, and that ILECs may deploy packet switches without requiring unbundled access, and may upgrade switches with packet switches to avoid the unbundling requirement. *See Triennial Review Order*, ¶¶ 447, n.1365; 448. The Joint Petitioners, Staff, and Tel West object that it is inappropriate to allow Verizon to cease providing services required under its interconnection agreements on the basis of dicta in a footnote in the Triennial Review Order. Although the language in footnote 1365 and paragraph 448 are more dicta than final ruling, they provide insight into the FCC's understanding of the issue.⁸

82 As the FCC allows ILECs to upgrade switches, it is appropriate to look to whether Verizon has followed the terms of its interconnection agreements for pursuing an upgrade of equipment. Verizon demonstrates in its Motion on the Pleadings that it has complied with the FCC's requirements, and those in the Joint Petitioners interconnection agreements for upgrading equipment and discontinuing service. *See Verizon Motion on the Pleadings*, ¶¶ 29-32, *see also Exhibit 1-10*. Based upon this analysis, it does not appear that Verizon has failed to comply with or breached its interconnection agreements with the Joint Petitioners, but has followed the provisions of its agreements to upgrade equipment.

83 ***What is effect of Interim Order?*** AT&T asserts that the FCC's Interim Order and Commission Order No. 08 preclude ILECs from discontinuing service under interconnection agreements for local switching. These Orders require ILECs to comply with the provisions of their interconnection agreements until certain events occur. The discussion above indicates that Verizon has complied with the provisions of its interconnection agreements, and has not violated the terms of the Interim Order or Commission Order No. 08.

⁸ As the FCC is continuing to develop final rules in the wake of the USTA II decision, the FCC may address the issue more directly in the near future.

84 For the reasons discussed above, Verizon's Motion on the Pleadings is granted, dismissing the joint petition for enforcement.

85 **D. Verizon's Motion to Strike.** Verizon moves to strike portions of the Joint Petition and support affidavits asserting that the only issue raised in the Joint Petition is breach of the interconnection agreements, and that allegations of harm are not appropriate in this proceeding. *Motion to Strike*, ¶¶ 1-2. Verizon objects to allegations of harm in the affidavits of Mr. Wigger on behalf of ATI, Mr. Daughtry on behalf of UNICOM, and Ms. Lichtenberg on behalf of MCI. *Id.*, ¶ 3. Verizon requests that certain portions of the affidavits and portions of the Joint Petition be stricken. *Id.*, ¶¶ 4-5. In the alternative, Verizon requests that the entire transcript of the September 9, 2004, hearing be included in the docket and the Verizon be allowed to file counter affidavits. *Id.*, ¶ 6.

86 Counsel for ATI and UNICOM and counsel for MCI submitted e-mails to the Administrative Law Judge and the Commission on October 27, 2004, concerning Verizon's motion to strike. In the e-mails, counsel asserts that ATI and UNICOM do not believe the sentences at issue are essential to determination of the issues and do not oppose the alternative remedy of including the transcript of the September 9, 2004, hearing in Docket No. UT-043013 and allowing counter affidavits. MCI agreed with the position stated by counsel for ATI and UNICOM.

87 In its reply, Verizon asserts that its motion should be granted as the Joint Petitioners did not respond and indicated by e-mail that they were not contesting the motion. *Verizon Reply*, ¶ 41. Verizon also objects to the affidavit of Ms. Lichtenberg concerning OSS to support unbundled local switching from the Mount Vernon switch. *Id.*, ¶ 42. Verizon asserts that the affidavit and references to the issue in the Joint CLECs' Response should be stricken. *Id.*

88 **Discussion and Decision.** While not essential to determination of the primary issues in the Joint Petition, the issue of harm addressed in the Joint Petition and the affidavits of Mr. Wigger on behalf of ATI, Mr. Daughtry on behalf of UNICOM, and Ms. Lichtenberg on behalf of MCI, is relevant to the issue of a remedy should the Commission find in favor of the Joint Petitioners. For that reason, Verizon's alternative proposal, *i.e.*, inclusion of the entire September 9, 2004, hearing transcript in Docket No. UT-043013, and the opportunity for Verizon to file counter affidavits or declarations is an appropriate resolution of the matter. Verizon's motion to strike is denied, in part, consistent with the discussion above.

89 Given that this recommended decision determines that there is no dispute of material fact that requires affidavits or declarations, Verizon's request to strike the affidavit of Ms. Lichtenberg attached to the Joint CLECs' Response concerning OSS to support unbundled local switching from the Mount Vernon switch is granted.

FINDINGS OF FACT

90 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

91 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.

- 92 (2) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.
- 93 (3) On June 8, 2004, Verizon Northwest Inc. issued a Notice of Network Change informing the Joint Petitioners and other CLECs that Verizon intended to replace the existing Nortel DMS 100 switch in Mount Vernon, Washington, with a Nortel Succession switch.
- 94 (4) On September 10, 2004, Verizon Northwest Inc. replaced the Mount Vernon DMS 100 circuit switch with a Nortel Succession packet switch which uses packet switching functions to switch voice grade traffic.

CONCLUSIONS OF LAW

95 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

- 96 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.
- 97 (2) Where a party files a motion on the pleadings in an enforcement proceeding conducted under WAC 480-07-650, and describes the pleading as a motion to dismiss under CR 12(c), the Commission may make a

determination on the pleadings without determining whether there is a material dispute of fact.

- 98 (3) The Declaration of Mr. Williamson, and the affidavits of Mr. Haltom and Mr. Peeler establish that there is no material fact in dispute concerning the nature of the Nortel Succession switch.
- 99 (4) The FCC has not required packet switches as a network element to be unbundled and ILECs are not required to unbundle the features and functions of the packet switch, even if they are capable of providing a local switching function.
- 100 (5) ILECs may deploy packet switches without requiring unbundled access, and may upgrade switches with packet switches to avoid the unbundling requirement. *See Triennial Review Order, ¶¶ 447, n.1365; 448.*
- 101 (6) Verizon has complied with the FCC's requirements, and those in the Joint Petitioners interconnection agreements, for upgrading equipment and discontinuing service.
- 102 (7) The FCC's Interim Order and Order No. 08 in Docket No. UT-043013 require ILECs to comply with the provisions of their interconnection agreements until certain events occur. Verizon has complied with the provisions of its interconnection agreements, and has not violated the terms of the Interim Order or Commission Order No. 08.

ORDER

THE COMMISSION ORDERS:

- 103 (1) Verizon Northwest Inc.'s Motion for Judgment on the Pleadings is granted.

- 104 (2) The Joint Petition of Advanced TelCom, Inc., AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle, MCImetro Access Transmission Service, LLC, and United Communications, Inc., d/b/a UNICOM for Enforcement of Interconnection Agreements is dismissed.
- 105 (3) Verizon Northwest Inc.'s Motion to Strike is Granted, in part, to strike the October 27, 2004, Affidavit of Ms. Sherry Lichtenberg attached to the Joint CLEC Response to Verizon's Motion for Judgment on the Pleadings, as well as the following portions of the Joint CLEC Response to Verizon's Motion for Judgment on the Pleadings:
- The phrase on page 2, paragraph 3, "and whether Verizon has in place the Operations Support Systems ('OSS') needed to support unbundled local switching on the Nortel switch.";
 - Paragraph 5 on page 3, in its entirety; and
 - All of subsection C on pages 20-22, including the heading and paragraphs 35-39.

106 **NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810..**

Dated at Olympia, Washington, and effective this 3rd day of December, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge