ATER WYNNE LLP
ATTORNEYS AT LAW

Suite 5450
601 Union Street
Seattle, WA 98101-2327
206-623-4711
Fax 206-467-8406

ARTHUR A. BUTLER
Email aab@aterwynne.com

December 13, 2004

VIA E-MAIL AND LEGAL MESSENGER

Carol J. Washburn
Executive Secretary
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive S.W.
Olympia, WA 98504-7250

Re: *Joint CLEC Petition for Review of Order No. 2*
WUTC Docket No. UT-041127

Dear Ms. Washburn:

Enclosed please find the original and fourteen (14) copies of Joint CLEC Petition for Review of Order No. 2. All parties of record will be served via US Mail, first-class, postage prepaid, and E-mail as indicated on the attached certificate of service. Please feel free to contact our office if you have any questions.

Sincerely,

ATER WYNNE LLP

Aaron Hottell
Assistant to Art Butler

cc: Parties of Record

[Service Date: December 13, 2004]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of	)	
	)	DOCKET NO. UT- 041127
THE JOINT PETITION FOR	)	
ENFORCEMENT OF	)	**Joint CLEC Petition for Review of**
INTERCONNECTION	)	**Order No. 2**
AGREEMENTS WITH VERIZON	)	
NORTHWEST, INC.	)	
(a/k/a GTE)		

Pursuant to WAC 480-07-810, AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively "AT&T") and MCImetro Access Transmission Services, LLC. ("MCI"), (collectively, the "Joint CLECs"), hereby request that the Washington Utilities and Transportation Commission ("WUTC" or "Commission") review the Administrative Law Judge's ("ALJ's") Order in this matter and reject the ALJ's recommendation that the Commission grant Verizon's Motion for Summary Determination ("Verizon's Motion") and dismiss the Joint Petition for Review. In support therefore, the Joint CLECs state the following.

I. INTRODUCTION

1. This is an unprecedented legal and policy decision that could deprive Washington consumers of the unbundled network element platform

("UNE-P") prematurely and even where access to switching would otherwise remain after the Federal Communications Commission, ("FCC") issues its final unbundling rules, causing serious consumer and market disruption.

2. This is particularly egregious here where the law is unsettled in this area:

a) no FCC precedent forecloses access to packet switches for voice, but only for delivery of broadband and it is undisputed the Joint Petitioners are *not* asking for access to deliver broadband;

b) even if such precedent existed (and it does not), there are disputed material issues of fact and the FCC has definitely not ruled on these unique facts:

i) whether new switches are hybrid and capable of both packet and circuit switching; and

ii) the Joint Petitioners are requesting circuit switching for voice service.

Thus, it is entirely inappropriate to dispense with this case based on a motion for summary judgment or dismissal.

3. Order No. 2 errs in several respects, requiring that this Commission reject the recommendations of the ALJ to grant Verizon's Motion for Judgment on the Pleadings and dismiss the Joint Petition.[1] Order No. 2 also errs in recommending that the Commission strike the Affidavit of MCI witness, Sherry

[1] Order No. 2 at paras. 103 and 104.

Lichtenberg, and those sections of the Joint CLEC Response to Verizon's Motion that address matters discussed in Ms. Lichtenberg's Affidavit.[2]

4. First, Order No. 2 errs in applying the standard applicable to motions to dismiss to Verizon's Motion, rather than the standard applicable to motions for summary judgment. The Order errs in concluding that material disputes as to fact are not relevant here.

5. Second, the Order errs in resolving a material disputed issue of fact on the pleadings and affidavits submitted by the parties in briefing. Summary judgment may only be granted when the pleadings together with the discovery and affidavits submitted demonstrate no disputed, material issue of fact. Although it claims to have resolved the matter on the pleadings, in fact, the Order improperly concludes that the Verizon switch installed at Mount Vernon is a "packet switch," despite testimony filed by the CLECs that the switch contained both packet and circuit switching functionalities and therefore cannot be classified as a "packet switch."

6. Third, the Order errs in concluding that the other material issues of fact raised by the CLECs in their responses to Verizon's Motion, are not relevant. This includes the determination that the Affidavit of Sherry Lichtenberg should be stricken as should be the sections of the CLEC Response that refer to the

[2] Order No. 2 at para. 105.

matters discussed in the Affidavit. The Commission should also find as a matter of law that the remote switches connected to the Mount Vernon central office are subject to unbundling. For the following reasons, the Commission should reject the conclusions reached in Order No. 2.

II. ARGUMENT

A. The Commission may accept review of Order No. 2 on the basis that the Order dismisses the Joint Petitioners' Petition for Enforcement and thereby terminates their participation in the proceeding.

7. At paragraph 106, Order No. 2 declares itself to be an interlocutory order and provides that administrative review of the Order may be available pursuant to WAC 480-07-810. WAC 480-07-810 provides that the Commission may accept review of interlocutory orders, among other reasons, if it finds that the ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harms.[3]

[3] This rule appears to apply typically to situations where parties are dismissed from a proceeding and the proceeding continues without them or orders relating to discovery or evidence. Here, because the Order dismisses the Petition for Enforcement in its entirety, if the Order is allowed to stand, no proceeding continues. Thus, this rule seems equally valid here, where all the Petitioners lose the opportunity to be heard and have the proceeding decided on the merits. Furthermore, because the Order instructed us to do so, the CLECs file this motion under WAC 480-07-810.

8. This Order terminates the Petitioners' rights under the federal Telecommunications Act of 1996[4] and their interconnection agreements ("ICAs") to utilize legally available UNEs to provide local service in the Mt. Vernon area, and it allows Verizon to avoid its contractual obligations to continue providing the Petitioners' with unbundled local switching. The Petitioners will suffer substantial and irreparable harm if the Order is allowed to stand.

9. First, Petitioners will no longer be able to offer local service to residential and small business customers in the Mt. Vernon area under the terms those services were offered prior to the installation of Verizon's new switch there. In many cases, Petitioners will not be able to offer the services in that area at all.

10. Second, as a result of this Order, Verizon is free to replace all its stand alone circuit switches in the entire state of Washington with Nortel Succession switches in order to avoid its unbundling obligations throughout the state. If Verizon is allowed to do so, Petitioners will lose their ability to provide local service to residential and small businesses in all of Verizon territory in Washington State.

11. This will not only harm Petitioners themselves but it will also harm local service customers in Washington by removing existing competitive choices

[4] 47 U.S.C. secs. 153 et seq. (hereafter referred to as the "Act").

from them. The development of local service competition will be severely hindered if Order No. 2 is allowed to stand.

B. Order No. 2 errs in concluding that material disputes as to fact are not relevant here.

12. Order No. 2 never articulates the actual standard of review applied; however, it alleges that it treated Verizon's Motion as one pursuant to Rule 12(c) of the Washington Superior Court Rules of Civil Procedure:

> 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.[5]

13. Rule 12(c) provides as follows:

> Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

14. For the ALJ to have employed the proper Rule 12(c) standard, she would have had to treat it in much the same manner as a strict motion to dismiss; that is, she would have to assume that all well-plead factual allegations in the

[5] Order No. 2 at para. 75.

Petition were true, and that despite the truth of such facts, Verizon's legal conclusions were correct.[6] This, however, is not the standard the ALJ actually employed. Rather, she assumed Verizon's factual claims were true and thereby concluded that its legal assertions were also correct.

15. Applying the correct standard, for the Commission to resolve Verizon's Motion, it must determine whether in fact the Nortel Succession switch installed by Verizon in Mt. Vernon is a "packet switch" as that term is used by the orders and regulations of the FCC. This issue is not resolved in the Joint Petition and Verizon's Answer. Rather, it is a disputed factual issue that the ALJ resolved by referring to Verizon's affidavit attached to its Reply to Staff and the CLECs' responses:

> Even if the Commission were to consider the CLECs (sic) arguments that there are material facts in dispute, the only relevant factual dispute would be whether the Nortel Succession switch is a packet switch. The declaration of Mr. Williamson and the affidavits of Mr. Haltom and (sic) Peeler squarely address the issue of the technical capabilities of the Nortel Succession switch and

[6] *Hodgson v. Bicknell,* 298 P.2d 844, 847 (Wash. 1956)("The rule is that the party who moves for judgment on the pleadings admits, for the purposes of the motion, the truth of every fact well pleaded by his opponent and the untruth of his own allegations which have been denied."); *Loger v. Washington Timber Prod., Inc.,* 509 P.2d 1009, 1010 (Wash. Ct. App. 1973)(" A party moving for judgment on the pleadings admits, for the purposes of the motion, all facts well pleaded."); *cf, Burnette v. Carothers,* 192 F.3d 52, 56 (2d Cir. 1999)(" In deciding a Rule 12(c) motion, we apply the same standard as that applicable to a motion under Rule 12(b)(6), accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *See id.* We may dismiss the complaint only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."); *Frey v. Bank One,* 91 F.3d 45, 46 (7th Cir. 1996)("We review a motion pursuant to Rule 12(c) under the same standard as a motion to dismiss under Fed.R.Civ.P. 12(b). Accordingly, the motion should not be granted unless it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief.").

> make clear that Verizon has options in deploying the switch as a hybrid packet switch or fully packetized switch. *Williamson Declaration, paras. 11, 18-19; Haltom Affidavit, paras. 9-11, 22-32; Peeler Affidavit, paras. 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, paras. 5, 9-11.* Thus, there is not (sic) dispute as to the nature and functions of the new switch: Verizon has deployed a packet switch using solely packet switching functions.[7]

16. Thus, without express acknowledgement by the ALJ, Order No. 2 looked beyond the pleadings to resolve this issue.[8] Because resolution of Verizon's Motion requires consideration of matters outside of the pleadings, Rule 12(c) requires that the motion be treated as one for summary judgment pursuant to Rule 56.

17. Rule 56 provides:

> (b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) Motion and Proceedings. . . .*The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.* . . .

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[7] Order No. 2 at para. 76.

[8] Were the ALJ to have relied solely on the pleadings, she would have had to accept as true the Joint Petitioner's argument that Verizon's use of the Succession Switch was to provide nothing more than "traditional, narrowband voice service to its own end users" and that such usage does not constitute stand alone packet switching to provision broadband service such that it is exempt from FCC unbundling obligations. Petition at paras. 21 – 22. She chose to ignore these facts rather than accept them as true.

18. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Samis v. City of Soap Lake*, 143 Wn.2d 798, 23 P.3d 477 (2001). The moving party bears the burden of establishing the absence of disputed material facts, and all reasonable inferences are drawn against the moving party. *Folsom*, 135 Wn.2d at 663.

19. Under this standard, the ALJ was required to consider whether the pleadings, answers to data requests, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Order No. 2 failed to apply this standard and concluded that material disputes as to fact are not relevant here. The Commission should reject this recommendation of the Order and find that material facts exist here that prevent the granting of summary judgment in Verizon's favor.

C. Order No. 2 errs by resolving a material factual dispute at this stage of the proceeding.

20. Order No. 2 also errs by, at this stage of the proceeding, resolving a factual dispute, that is, whether the Nortel Succession switch installed in Mt. Vernon is a "packet switch," as that term is used in the relevant FCC orders and rules.

21. By concluding that Verizon's Mt. Vernon switch is a "packet switch," Order No. 2 resolves the factual dispute central to Petitioners' claims and does so in favor of the moving party rather than the non moving party, as the summary judgment standard requires. To arrive at this factual conclusion, Order No. 2 must utterly ignore facts that demonstrate that the Nortel Succession switch is not a standalone packet switch. The Order errs by concluding that the declarations submitted by Verizon, Staff and MCI show there is no dispute as to the nature and functions of the new switch and that Verizon has deployed a packet switch.[9]

22. Staff submitted the Expert Declaration of Mr. Robert Williamson, demonstrating that the Nortel Succession switch installed by Verizon in Mt. Vernon is a hybrid circuit/packet switch. Mr. Williamson testified that the Succession switch, as currently configured, is not even capable of carrying broadband traffic.[10] MCI submitted the Expert Affidavit of Mr. Jeff Haltom also

[9] See Order No. 2 at paras. 76 and 98.

[10] Williamson Declaration at paras. 7, 11-12, 18-19.

demonstrating that the Nortel Succession switch is both a circuit and a packet switch, capable of providing local switching as requested by the CLECs.[11]

23. Verizon submitted the declaration of Mr. Peeler, who confirmed that the Nortel Succession switch can be deployed with the TDM switching fabric, to support circuit switching.[12] Mr. Peeler also states that currently "all subscribers in the Mt. Vernon deployment are served through a packet fabric." Apparently based on this statement, the Order concludes that "Verizon has deployed a packet switch using solely packet switching functions."[13] However, this conclusion by the ALJ is more sweeping than Mr. Peeler's statement supports without further examination.

24. Mr. Peeler states that Verizon did not deploy the Nortel switch in a so-called "hybrid" configuration to support both packet and circuit switching. However, it is not clear whether Mr. Peeler means that the Mt. Vernon switch lacks the circuit switching fabric, or whether the Mt. Vernon switch includes the TDM circuit switching fabric, but Verizon has not enabled it. Based on Verizon's deployment plans for the exact same Nortel switch in California, there is reason to believe the latter.

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[11] Haltom Affidavit, at ¶ 9.

[12] Peeler Affidavit, at ¶ 11.

[13] Order, at ¶ 76.

25. In California, Verizon provided in discovery, network configuration diagrams for two Nortel switches it intends to deploy in California. As Mr. Haltom discusses in a declaration he filed in California, the diagrams show that both Nortel switches in California will have the TDM circuit switching fabric module, called the enhanced network ("ENET") module.[14] Given the benefits of uniform deployment of switches, it is reasonable to believe that all of Verizon's Nortel switches will include the ENET module.

26. At a minimum, fairness and due process require that this Commission determine the exact configuration that Verizon has installed at Mt. Vernon before accepting the Order's conclusion that the switch has "solely packet switching functions." If the Mt. Vernon switch has the ENET module, then it has resident circuit switching capability. If Verizon has simply not enabled it, Verizon should be required to do so, and provide unbundled local switching through the Mt. Vernon Nortel switch.

27. Order No. 2 concludes that the equipment rather than functionalities of the switch determine an ILECs' unbundling obligations:

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[14] A copy of Mr. Haltom's California declaration, and the network diagrams that Verizon produced in California are provided as Attachment A. Verizon declined to similar network diagrams to MCI, even though issued a data request asking Verizon to "[s]pecify which Nortel Succession switch was installed by Verizon at Mt. Vernon and provide all Nortel product documentation in Verizon's possession relating to the switch. First Set of Requests to Verizon, Request 10. Indeed, Verizon refused even to identify the model of the Mt. Vernon switch shortly before MCI had to file its response to Verizon's Motion for Judgment on the Pleadings. After the Order was issued, MCI issued a short set of discovery questions seeking specific information needed to clarify the statements in Mr. Peeler's declaration. Attachment B.

> 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, para. 306; Triennial Review Order, paras. 539, see also para. 448.
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> * * *
>
> 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 unbundled the features and functions of the packet switch, even if they are capable of providing a local switching function.[15]

28. Applying this reasoning, however, if the Nortel Succession switch is both a "circuit switch" and a "packet switch," at a minimum, the law relating to circuit switch unbundling should apply to the "circuit switching" features and functions of the switch. In sum, the question remains whether the Mt. Vernon switch is a "packet switch," a "circuit switch," or both. The affidavits of Mr. Williamson and Mr. Haltom demonstrate that the Nortel Succession switch is both a "packet switch" and a "circuit switch," depending upon the functionalities discussed. Petitioners have explained repeatedly in their pleadings and briefs on this issue, that they do not seek the "packet" functionality of the switch, only its local switching functionality.[16] Verizon should not be allowed to avoid its legal obligation to continue to provide

[15] Order No. 2 at paras 78 and 80.

[16] See e.g. Exhibit A to Joint CLEC Response to Verizon Motion at paras. 5 and 12-34.

unbundled local switching to the CLECs through clever wordsmithing, omission, or obfuscation.

29. Moreover, MCI sought through discovery in its first set of data requests in this matter, to determine the nature of the switch installed by Verizon at Mount Vernon and to obtain documentation discussing the features and functions of the switch.[17] Verizon objected to providing this information, claiming that it is "not directly related to the matters at issue" nor "essential to the requesting party." Verizon objected further claiming that it is not relevant nor reasonably calculated to lead to the discovery of admissible evidence.[18] After consultation between counsel, Verizon agreed to identify which Nortel switch it had installed in Mt. Vernon, but refused to provide documentation describing the switch. Days before the Joint CLEC Response was due, Verizon identified which switch was installed in Mt. Vernon.[19]

30. The information provided by Verizon in Mr. Peeler's Affidavit was responsive to this MCI discovery yet Verizon did not produce it. Instead, Verizon waited until the final round of briefing on its Motion for Judgment on the Pleadings to disclose some information concerning the nature of the switch.

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[17] See Attachments 1 and 2 to Exhibit A to the Joint CLEC Response to Verizon's Motion, Nos. 10 and 21.

[18] *Id.*

[19] See Exhibit A, Attachment 3 to Joint CLEC Response to Verizon's Motion.

Even then, it carefully limited its discussion to the packet functionality of the switch. If Verizon had properly responded to discovery, MCI would have been able to either resolve the factual dispute or provide additional information to the Commission to demonstrate that a factual dispute exists. Verizon should not be allowed to profit as it has, from its decision to withhold, and then attempt to use discoverable information in an offensive manner.[20] Specifically, Verizon should not be allowed to rely on this evidence to defeat Petitioners' claims.

31. At a minimum, for all of the above reasons, Verizon's Motion should be denied since a material fact remains concerning whether the switch installed by Verizon at Mount Vernon contains local circuit switching functionalities.[21]

D. Order No. 2 errs in striking the Affidavit of MCI witness, Sherry Lichtenberg.

32. At paragraph 89, the Order determines:

> 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.

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[20] See *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 355-56, 858 P.2d 1054 (1993).

[21] The Joint CLECs direct the Commission to their Reply to Verizon's Motion for a full discussion of all factual issues that prevent the entry of summary judgment here.

33. Order No. 2 also struck those sections of the Joint CLEC Response that rely on to Ms. Lichtenberg's Affidavit.[22] Because these conclusions rely upon a determination that is in error, if the Commission finds that summary judgment under Rule 56 is the appropriate standard of review to apply to Verizon's Motion, the Commission should also reject the ALJ's recommendation that Ms. Lichtenberg's Affidavit and related sections of the Joint CLEC Response be stricken.

34. The Joint CLECs attached Ms. Lichtenberg's Affidavit to demonstrate that disputed issues of material facts exist in this matter that prevent this Commission from entering judgment against Petitioners as a matter of law. Ms. Lichtenberg's Affidavit rebuts Verizon's representation in its Motion that, because it has deployed the Nortel Succession switch, "unbundled circuit switching is no longer available in the affected wire centers."[23] Ms. Lichtenberg also responds to Verizon's claim that even if the Nortel Succession switch could support unbundled circuit switching, Verizon could not do so because "it [Verizon] has no OSS to allow for the back office functions necessary to provision

[22] See Order No. 2 at para. 105.

[23] Verizon Motion at para. 36.

UNEs from the new packet switches and it is not obligated to build such an OSS under either the [Interconnection] agreements or federal law."[24]

35. It is further improper for the Commission to strike Ms. Lichtenberg's Affidavit, while at the same time allowing Verizon to submit the entire transcript of the September 9, 2004 hearing in Docket No. UT-043013 and additional affidavits concerning that transcript, for inclusion in this record. The transcript is replete with discussion of the supposed inability of Verizon's OSS to support unbundled local switching on the Nortel switch. The Commission should allow Ms. Lichtenberg's Affidavit to remain in the record of this proceeding.

E. Order No. 2 Errs by Rewriting the Definition of "Local Switching" Contained in the ICAs.

36. Order No. 2 glosses over the CLEC arguments relating to the definitions of local switching contained in the ICAs and concludes, "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 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."[25] This

[24] Verizon Motion, at ¶ 56, n.23.

[25] Order No. 2 at para. 80.

conclusion is inconsistent with the clear definitions of "local switching" contained in the parties' interconnection agreements.

37. Verizon has a clear legal obligation under its ICAs with the Joint CLECs to continue providing access to unbundled local switching. Verizon's ICAs with the Joint CLECs state that it will provide a local switching UNE, and there is no limitation regarding the type of switch that will be used to provide such UNE. For example, the ICAs with MCI and AT&T state that Verizon will provide:

> Definition: Local Switching is the Network Element that provides the *functionality* required to connect the appropriate originating lines or trunks wired to the Main Distributing Frame (MDF) or Digital Signal Cross Connect (DSX) panel to a desired terminating line or trunk. Such *functionality* shall include all of the features, functions, and capabilities of the Verizon switch including but not limited to: line signaling and signaling software, digit reception, dialed number translations, call screening, routing, recording, call supervision, dial tone, switching, telephone number provisioning, announcements, calling features and capabilities (including call processing), CENTRANET, Automatic Call Distributor (ACD), Carrier pre-subscription (e.g., long distance carrier, intraLATA toll), Carrier Identification Code (CIC) portability capabilities, testing and other operational features inherent to the switch and switch software. Local Switching provides access to transport, signaling (ISDN User Part (ISUP) and Transaction Capabilities Application Part (TCAP), and platforms such as adjuncts, Public Safety Systems (911), operator services, directory services and Advanced Intelligent Network (AIN). Remote Switching Module functionality is included in the Local Switching function. The

switching capabilities used will be based on the line side features they support where technically feasible. [26]

38. There are no provisions in the ICAs involved in this proceeding that limit provision of the local switching UNE only to certain types of switches or facilities. Verizon admits that the Nortel Succession switch that it deployed in Mt. Vernon is capable of providing the functionality of "local switching" described in the parties' interconnection agreements.[27]

39. Verizon cannot now be allowed retroactively to attempt to avoid its legal contractual obligations by *implying* a limitation on the type of switch used to provide local switching. The Petitioners' ICAs provide that all material terms and conditions are contained within the contract. For instance, Section 23.13 of the MCI and AT&T ICAs state:

> This Agreement, which shall include the Attachments, Appendices and other documents referenced herein, constitutes the entire agreement between the Parties on the subject matter hereof, and supersedes any prior agreements, representations, statements, negotiations, understandings, proposals or undertakings, oral or written, with respect to the subject matter expressly set forth herein.

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[26] MCImetro Access Transmission Services, LLC Interconnection Agreement with Verizon, Attachment 2, page 11, Section 47.1 (Exhibit F-1 to Petition)(emphasis added) AT&T Interconnection Agreement with Verizon, § 47.1 (Exhibit C-4 to Petition)(emphasis added).

[27] Verizon Response to MCI Data Request No. 21, Attachment 2 to the Affidavit of Jeff Haltom, Exhibit A to the Joint CLEC Response to Verizon's Motion.

40. Thus, if the law had been settled and as "unambiguous" as Verizon claims, Verizon would reasonably have been expected to include an express provision in the ICAs stating that the local switching UNE was limited to circuit switches. The Petitioners can find no such provision in their ICAs with Verizon, and Verizon has declined to identify any provision, term or condition that would limit unbundled local switching to circuit switches only. Further, the Joint CLECs have not agreed to modify their ICAs in a manner that limits local switching to a particular type of switch. Thus, Verizon has a clear, continuing legal obligation to provide local switching to the CLECs regardless of the type of switch used.

41. Order No. 2 improperly limits the parties' interconnection agreement language to exclude from the definition of "local switching" those switches that contain the added capability to provide packet switching functionalities. The Joint CLECs thus ask the Commission to reject Order No. 2's rewriting of the parties' contracts.

F. Order No. 2 Accepts Verizon's Improper Distinction Between ILEC Network Facilities and Functionalities

42. As noted by the ALJ, the Congress adopted a very broad definition for network element as "a facility or equipment used in the provision of a telecommunications service . . . [which] includes features, functions and

capabilities that are provided by means of such facility or equipment . . . ."[28] Thus, the Act requires Verizon to unbundle both network facilities *and functionalities.* Verizon's claim (with which Order No. 2 agrees) that its unbundling obligations under the ICAs are limited to facilities or equipment by federal law, only recognizes part of this definition.

43. The FCC has repeatedly held that the plain language of the Telecom Act means that ILECs' unbundling obligations apply not only to network facilities and equipment, but also to features and functions of ILEC networks needed by CLECs' to provide competitive services to customers.[29] In the *Local Competition Order,* the FCC defined the local switching UNE as encompassing the "line-side and trunk-side facilities plus features, functions, and capabilities of the switch."[30] The FCC further stated that the "features, functions, and capabilities" of the local switch include the basic switching function of connecting lines to lines, lines to trunks, trunks to trunks."[31]

44. Clearly, this language leaves no room for Verizon's claim that the FCC's unbundling obligations apply to switching equipment itself, and not the features, functions and capabilities of switching equipment. Most recently the

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28 47 U.S.C. § 153(29).

29 *Triennial Review Order,* at ¶ 58.

30 *Local Competition Order at* ¶ 412.

31 *Id.*

FCC held in the *Triennial Review Order* that "we disagree with those commenters that continue to argue that 'network elements' can only be physical facilities or pieces of equipment and therefore cannot include mere features, functions and capabilities of a physical facility or equipment . . . ." Indeed, the U.S Supreme Court has previously considered and rejected arguments that UNEs should be limited only to equipment or physical facilities, and should not include functions or capabilities such as the high frequency portion of a loop. The Supreme Court stated in *Iowa Utilities Board* that Congress broadly defined "network element" so that "it is impossible to credit the incumbents' argument that a 'network element' must be part of the physical facilities and equipment used to provide local telephone service.[32]

45. The plain language of the Act, and an unbroken line of FCC orders and even U.S. Supreme Court precedent, completely undercut Verizon's argument that it is only required to provide unbundled local switching on facilities that are themselves designated as UNEs.[33] Thus, Verizon is incorrect when it asserts that interpreting the ICAs to require the continued provision of unbundled local switching functionality, regardless of the type of switch used, would improperly exceed federal requirements. Verizon is not entitled to summary judgment on this issue as a matter of law.

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32 *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 387 (1999).

33 *See* Motion, at p.17 n.16, 34-35, 39.

G. Order No. 2 fails to resolve the Joint CLECs' argument that UNE-P should continue to be available in Verizon's remote switches.

46. The host/remote issue was raised in paragraphs 40 and 41 of the Joint CLECs' Response To Verizon's Motion. Verizon ignored the argument in its Reply, therefore effectively defaulting on the issue. Order No. 2 summarizes the CLEC argument at paragraph 45. However, the Order does not discuss, analyze, or rule on that part of the CLEC Response.

47. It is difficult to determine why the Order ignores the host/remote issue. It may be because the ALJ determined it to be outside the scope of the issues in the docket, which was stated narrowly in paragraph 77 of the Order as "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." As so stated, the Order incorrectly limits the scope of the Joint Petition.

48. The Petition incorporates the Verizon July 8, 2004 Notice. Petition, at paragraph 2 and Exhibit A. The Notice states:

> Accordingly, Verizon will not provide unbundled packet switching at the site identified above in accordance with the provisions of the Triennial Review Order beginning September 10, 2004. The unavailability of unbundled switching at the Mt. Vernon central office will also affect the remotes identified on Attachment 1 to this

> notice to the extent that they rely on access to unbundled switching at the host.[34]

Although the above language in Verizon's Notice seems to recognize that unbundled switching should continue to be provided at the remotes, since there is no indication they are being converted to a packet switch, the next paragraph of the letter reflects that Verizon is withdrawing all unbundled local switching in Mt. Vernon and the remote switches.

> If you have unbundled local circuit switching arrangements at Mt. Vernon, Washington ***or the other impacted sites identified in attachment 1***, you must submit LSRs to establish alternative service arrangements, such as one of the many resale arrangements, for completion no later than August 27, 2004.[35]

49. In other words, Verizon treated the switching as an "all or nothing" proposition. Even if local switching may be performed by a remote and that remote is not a packet switch, Verizon is withdrawing local switching as to end users served by the remote and requiring that such end users be converted to resale arrangements.

50. Paragraph 24 of the Petition describes the breach of contract by Verizon broadly as follows:

> ***Verizon's unilateral conduct is a breach of its obligations*** under the above-described [interconnection agreement] provisions. The Joint Petitioners ask that the Commission order Verizon to provide

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[34] Petition, Exhibit A at 2.

[35] Petition, Exhibit A at 2 (emphasis added).

the unbundled network elements under the agreements cited above.

The asserted unilateral conduct included withdrawal of UNE switching at the remote switches.

51. In the Request For Relief, the CLECs asserted that "Verizon's elimination of CLEC access to unbundled elements violates the terms of the interconnection agreements." Further, the Joint CLECs requested broadly that Verizon be required to "honor the terms of its existing interconnection agreement with Joint Petitioners, which require the provision of unbundled switching ***throughout Verizon's local territory in Washington,*** including Verizon's Mt. Vernon switch . . ." Additionally, Joint CLECs requested "such other and further relief as the Commission deems appropriate under the circumstances."

52. It is clear that the question of whether the withdrawal of local switching from the remote switches tended by the Mt. Vernon switch violated the interconnection agreements was squarely placed in issue by the Petition. Moreover, under the rationale in the ALJ's recommended decision, since none of the remotes listed in Attachment 1 to Verizon's June 8th Notice constitutes a "packet switch," under the rationale of Order No. 2, the Commission should rule as a matter of law that CLECs are entitled to continue to receive unbundled local switching from Verizon in each one of the remotes.

53. Order No. 2 states "a network element is a facility or equipment."[36] Because there is no dispute that the remotes are not packet switches, the remotes and their features and functions must still be unbundled as required by the Joint CLECs' interconnection agreements. The ALJ's recommendation should be modified on review to require Verizon to continue to provide local switching in all of the Mt. Vernon remotes.

H. The Facts of this Proceeding Pose a Novel Circumstance Not Yet Settled Under Federal or State Law

54. Order No. 2 relies on paragraph 447, note 1365 and paragraph 448 of the FCC's *Triennial Review Order* to grant Verizon's Motion and dismiss Petitioners' claims. The Order acknowledges that this authority is "more dicta than final ruling" but found it to "provide insight into the FCC's understanding of the issue."[37] The Joint CLECs ask the Commission to reject the ALJ's recommendation to terminate their rights to purchase UNE-P from Verizon based on mere dicta. Moreover, the Joint CLECs disagree with Order No. 2 that the two citations relied upon apply to the factual situation presented by the pleadings in this matter.

55. Order No. 2 agrees with Verizon's analysis of the FCC orders discussed in the parties' briefs. Verizon's analysis is wrong, however. In its

[36] Order No. 2 at ¶ 80.

[37] Order No. 2 at para. 81.

Motion, Verizon repeatedly claims that the issue of access to packet switching has long been settled in FCC decisions. Verizon relies on untenable interpretations and unfounded extrapolations of FCC orders to reach the conclusion that the legal issues in this case have been squarely addressed. Verizon does not cite, nor the CLECs believe there is any FCC order that addresses the facts of this situation – whether ILECs must provide local switching functionalities when: 1) the ILEC installs a switch that can support both circuit and packet switching features and functions; and 2) the ILEC has unilaterally decided to remove all stand-alone circuit switches that could support analog voice grade traffic. Order No. 2 fails to acknowledge these deficiencies in Verizon's arguments.

a. The FCC's Local Competition Order Did Not Establish Any Rule At All Regarding Unbundling of Packet Switching

56. In its Motion, Verizon claims that the "Federal law has consistently precluded UNE treatment of any packet switching facilities or equipment."[38] Verizon then cites several FCC orders, but none of them address the facts presented in this case. Indeed, the same FCC orders cited by Verizon have consistently required ILECs to provide unbundled access to local switching for voice traffic.

[38] Motion at p. 4.

57. The FCC's *Local Competition Order*[39] unambiguously held that ILECs "must provide local switching as an unbundled network element"[40] under Section 251 of the Telecommunications Act of 1996, and no subsequent FCC order (including the Triennial Review Order) has reversed that holding. In the *Local Competition Order*, the FCC defined the local switching UNE as encompassing the "line-side and trunk-side facilities plus features, functions, and capabilities of the switch." [41] The FCC further stated that the "features, functions, and capabilities" of the local switch include the basic switching function of connecting lines to lines, lines to trunks, trunks to trunks." [42]

58. Clearly, this language leaves no room for Verizon's claim that the FCC's unbundling obligations apply to switching equipment itself, and not the "features, functions and capabilities" of switching equipment.[43] Verizon then compounds its dubious legal theory by claiming that the *Local Competition Order* held that "packet switches clearly were not a network element and therefore were not `facilit[ies] or equipment' subject to unbundling."[44] Verizon even goes

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[39] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 et al.*, CC Docket Nos. 96-98 *et al.*, First Report and Order, 11 FCC Rcd. 15,499, FCC 96-325 (1996) (*Local Competition Order*).

[40] *Id.*, ¶ 410.

[41] *Id.*, ¶ 412.

[42] *Id.*, ¶ 412.

[43] See Motion at p. 4-5.

[44] Motion at p. 5.

so far as to claim that the *Local Competition Order* states that packet switches need not be unbundled whether used for voice or data.[45]

59. In truth, the *Local Competition Order* actually declined to adopt any rule at all regarding unbundling packet switches for data, stating that it did not have sufficient information to make such determination at that time regarding unbundling of packet switching.[46] It is clear that Verizon is straining to read into the *Local Competition Order* holdings that simply were not there – namely that CLECs should be denied unbundled access to packet switches for all purposes, even if such switches were being used to provide local switching functionality for voice.[47] Verizon's "interpretation" of the *Local Competition Order* appears to be a futile effort to retroactively find a federal "law" that predates the execution of its ICAs with AT&T, MCI and other CLECs rather than a genuine effort to discern the actual intention of the FCC. Only then can Verizon attempt to support its argument that the ICAs must necessarily meant to exclude unbundled local switching on packet switches because the "law" at the time was well settled. To the extent that the ALJ agreed with these Verizon arguments in dismissing Petitioners' claims, the Order is in error.

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45 Verizon Reply at p. 7.

46 *Local Competition Order*, ¶ 427.

47 Reply at p. 7.

b. The *UNE Remand Order* Addressed Only Unbundling of Packet Switching for Advanced Services.

60. In its Motion, Verizon argues that the FCC's *UNE Remand Order* also rejected unbundling of packet switches and implies that the *UNE Remand Order* holding regarding unbundled packet switching for "advanced services" extends to any and all switching functionality carried out on a packet switch[48]

61. However, Verizon omits the fact that the FCC's holding in the *UNE Remand Order* addressed only the question of "whether there is 'any basis for treating network elements used in the provisioning of packet-switched *advanced services.*"[49] Thus, there is no reasonable argument that the *UNE Remand Order* settled the law regarding ILECs' obligation to unbundled packet switches for voice services, much less an argument that ILECs are not required to switch analog voice traffic over their packet switches in the circumstance of this case, i.e., where the ILEC's switch is capable of supporting both packet and circuit switched TDM traffic, where the ILEC unilaterally and without request from a CLEC converts analog voice traffic from CLEC customers to packets and where the ILEC has removed the existing standalone circuit switch.

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[48] Motion at pp. 5-6; Reply at p. 7.

[49] UNE Remand Order, ¶ 300 (quoting *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, Second Notice of Proposed Rulemaking, 14 FCC Rcd. 8694, FCC 99-70, ¶ 35 (1999)) (emphasis added).

62. In the *UNE Remand Order*, the FCC's holding regarding unbundling of packet switches was expressly in the context of advanced services, not analog voice service ("POTS"). The FCC stated:

> [t]he record demonstrates that competitors are actively deploying facilities used to provide advanced services to serve certain segments of the market – namely, medium and large business – and hence they cannot be said to be impaired in their ability to offer service, at least to these segments without access to the incumbent's facilities. In other segments of the market, namely, residential and small business, we conclude that competitors may be impaired in their ability to offer service without access to incumbent LEC facilities. . . We conclude, however, that given the nascent nature of the advanced services marketplace, we will not order unbundling of the packet switching functionality as a general matter."[50]
>
> # # # # #
>
> Despite the encouraging signs of investment in facilities used to provide *advanced services* described above, we are mindful that regulatory action should not alter the successful deployment of advanced services that has occurred to date. **Our decision to decline to unbundle packet switching therefore reflects our concern that we not stifle burgeoning competition in the *advanced service market.*** We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation.[51]

63. The UNE Remand Order did make one thing clear – it reaffirmed the FCC's holding that the local switching UNE must be defined in terms of switching functionality, not the device used to perform that function. Despite

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[50] *Id.*, ¶ 306 (emphasis added).

[51] *UNE Remand Order*, ¶ 316 (emphasis added)

Verizon's claim to the contrary,[52] the FCC has clearly held that switching is defined by its functionality. In the context of packet switching, the FCC held, "[w]e define packet switching as the *function* of routing individual data units, or 'packets,' based on address or other routing information contained in the packets.[53] Thus, contrary to Verizon's claim, the FCC's *UNE Remand Order* cannot reasonably be said to address unbundling of packet switches other than for *advanced services.* The Order did not hold that ILECs could deny CLECs access to switching performed by a packet switch to provide local switching of analog voice grade service ("POTS"). Because Order No. 2 allows Verizon to do this, it should be reversed.

c. The FCC's *Triennial Review Order* Did Not Address Unbundling of Packet Switches for Voice Service, and Reaffirmed Unbundling Requirements for Access to Local Switching Functionality.

64. The FCC retained the functionality-oriented definition of packet switching from the *UNE Remand Order* in its *Triennial Review Order.*[54] In that latter Order, the FCC further explained that it would not require the unbundling of *packet switching* (i.e., the functionality of switching packets) "because it is used

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[52] Motion at pp. 4-5; Reply at pp. 4-9.

[53] *Id.*, ¶ 304(emphasis added).

[54] *In the Matter for Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338 *et al.*, Further Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16,978, FCC 03-36, ¶ 535 (2003) (*Triennial Review Order*). *See also id.*, ¶ 537 & n.1645 (defining packet switching as a component of advance services by including routers and DSLAMs and applying the conclusion of non-impairment to both the mass market and enterprise market.).

in the provision of broadband *services*."[55] Thus, once again, the FCC's analysis clearly focuses on unbundling packet switching (the functionality) in the context of broadband services, not voice.[56]

65. In its Motion and Reply, Verizon creates the misleading impression that the *Triennial Review Order* endorses Verizon's approach of purposely removing its existing circuit switch, and replacing those switches with packet switches in order to avoid its unbundling obligations for local switching.[57] First, it should be noted that the "holding" relied on by Verizon is actually an excerpt from a single footnote from an order almost 500 pages long, and it is an effort by the majority to dispel concerns raised by the minority. Thus, at best, this footnote is dicta, not a holding. Further, it is clear when one examines the entire discussion in the footnote, and not just Verizon's misapplied excerpt, that the FCC is stating that ILECs can avoid unbundling obligations for *advanced services*, not for voice service, by deploying packet switches. The FCC stated:

> Moreover, the dissents fail to consider the incentives created by our decisions on packet switching and advanced services. Specifically, we no longer unbundle packet switching and the advance networks used with such switching. This means that to the extent there are significant disincentives caused by unbundling of circuit switching,

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[55] *Id.*, ¶ 541 (emphasis added).

[56] The FCC's recent Order in the Qwest forbearance proceeding once again characterizes "packet switching" as a broadband network element. *In the Matter of Qwest Communications International Inc.'s Petition for Forbearance Under 47 U.S.C. Sec. 160(c) from Application of Section 271*, WC Docket No. 03-260, Order (rel. Dec. 7, 2004) at para. 2.

[57] Motion at pp. 6-9; Reply at pp. 7-8.

> incumbents can avoid them by deploying more advanced packet switching. This would suggest that incumbents have every incentive to deploy these more advanced networks, with is precisely the kind of facilities deployment we wish to encourage.[58]

66. Thus, the FCC makes clear that it is declining to unbundle packet switches solely because it wishes to encourage deployment of such switches for the provision of advanced services, not because it intends to give ILECs a means to avoid unbundling obligations for voice services. The FCC states "[f]inally, because packet switching is used in the provision of broadband services, our decision not to unbundle *stand-alone* packet switching is also guided by the goals of, and our obligations under section 706 of the 1996 Act." (emphasis added) Of course, section 706 deals solely with advanced services, not analog voice services. Further, the FCC clearly presupposes as part of its decision not to unbundle packet switches that the ILECs will continue to make available local switching UNEs for voice service on their legacy networks. The FCC states:

> Here—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.[59]

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58 *Triennial Review Order*, ¶ 446, n.1365.

59 *Triennial Review Order*, ¶ 448.

67. Further, Verizon attempts to create the impression that the FCC has ruled in the *Triennial Review Order* that packet switches need not be unbundled specifically for the provision of voice service. Verizon's purported "ruling" does not exist. Verizon creates the appearance of a ruling by clever, though misleading juxtaposition. MCI had filed a petition for reconsideration, asking the FCC to unbundle packet switches for data and for voice.[60] In a footnote in the *Triennial Review Order,* the FCC denied MCI's Petition, but expressly stated that it was denying MCI's petition "requesting that we unbundle packet switching equipment, DSLAMs and other equipment *used to deliver DSL.*[61] Thus, the actual language in the *Triennial Review Order* only addresses unbundling of packet switching equipment used to provide DSL.

68. Evidence that the FCC intended to limit its ruling on unbundling of packet switches to situations in which the packet switches are used to provide broadband services is also evident from the fact that the footnote is contained in the section of the *Triennial Review Order* addressing "next generation networks," not "local circuit switching."[62] In addition, the FCC states expressly in other

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[60] *Motion at pp. 8-9; Reply at p. 5.*

[61] *Triennial Review Order*, ¶ 288, n.833 ("Because we decline to require unbundled access to packet-switching equipment, we deny WorldCom's petitions for reconsideration and clarification requesting that we unbundled packet-switching equipment, DSLAMs, and other equipment used to deliver DSL service.").

[62] The topic of next generation networks and advanced services is discussed in paragraphs 272-297, but local circuit switching is addressed in paragraphs 419-532.

portions of the *Triennial Review Order* that it is declining to unbundle packet switching for advanced services. For example, that FCC states, "we decline to require unbundling on a national basis for standalone packet switching because it is the type of equipment used in the delivery of broadband."[63] Similarly, the FCC stated:

> Second, by prohibiting access to the packet-based networks of incumbent LECs, we expect that our rules will stimulate competitive LEC deployment of *next-generation networks*. Because competitive LECs will not have unbundled access to the packet-based networks of incumbent LECs, they will need to continue to seek innovative access options, including the deployment of their own facilities necessary for providing *broadband services* to the mass market.[64]

69. Thus, it cannot fairly be argued that the FCC has ever squarely ruled on unbundling of packet switches to support voice service, and the FCC certainly has never considered the facts at issue in this proceeding – the propriety of an ILEC removing the legacy circuit switch, replacing it with a switch capable of supporting both packet and circuit switching, but then attempting to discontinue providing unbundled local switching on the basis that packet switches do not have to be used to support local switching.

70. Every FCC order cited by Verizon analyzes unbundling of packet switches in the context of "advanced" or "broadband" services, not voice.

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63 *Triennial Review Order*, ¶ 541.

64 *Triennial Review Order*, ¶ 290.

Contrary to Verizon's claim in its Motion, no federal authority exists that precludes the Commission from requiring that ILECs give CLECs unbundled access to switches like the Nortel Succession switch, that supports both packet switching and local switching UNEs. It is far from settled that the FCC would allow ILECs to deny CLECs all access to unbundled switching by replacing all existing circuit switches. That is what Verizon's efforts portend, and a decision determining whether to allow such outcome should be made in the context of a full evidentiary hearing, with all affected parties present, not by unilateral fiat by Verizon. Because Order No. 2 allows Verizon to deny Petitioners all access to unbundled switching by its replacement of its circuit switches with the Succession switch, it should be reversed.

d. FCC has consistently required included exemptions for CLEC access to UNEs needed to provide narrowband services

71. Although the FCC has not directly ruled on CLEC access to unbundled packet switching for voice service, it is likely the FCC would require such access in instances where no other facility is available to support UNEs such as local switching. In the *Triennial Review Order*, the FCC retained a requirement for access to hybrid fiber/copper loops for TDM voice transmission, even though such loops otherwise need not be unbundled.

> We stress that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and

> DS3 service to customers. . . . In this regard, we prohibit incumbent LECs from engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop UNEs (either hybrid loops or stand-alone copper loops) provided to competitive LECs. To ensure competitive LECs receive the transmission path within the parameters we establish, we determine that any incumbent LEC practice, policy, or procedure that has the effect of disrupting or degrading access to the TDM-based features, functions, and capabilities of hybrid loops for serving the customer is prohibited under the section 251(c)(3) duty to provide unbundled access to loops on just, reasonable, and nondiscriminatory terms and conditions.[65]

72. Similarly, the FCC held that even if ILECs choose to deploy technology, such as Integrated Digital Loop Carrier ("IDLC"), that impedes CLECs' ability to obtain access to UNEs, ILECs still have an obligation to provide the UNE. The FCC stated:

> 297. Even still, we require incumbent LECs to provide requesting carriers access to a transmission path over hybrid loops served by Integrated DLC systems. We recognize that in most cases this will be either through a spare copper facility or through the availability of Universal DLC systems. Nonetheless even if neither of these options is available, incumbent LECs must present requesting carriers a technically feasible method of unbundled access. [66]

73. Further, the FCC clearly presupposes that that ILECs will continue to make available local switching UNEs for voice service on their legacy networks as part of its decision in the *Triennial Review Order* not to unbundle packet switches. The FCC states:

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[65] *Triennial Review Order*, ¶ 297.

[66] *Triennial Review Order*, ¶ 297 (internal citations omitted).

> Here—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.[67]

74. Thus, far from endorsing Verizon's claim that the FCC has held ILECs may cut off access to UNEs through new technology deployment, the FCC's holdings in the *Triennial Review Order* actually undercut Verizon's claim. Although the FCC has not ruled directly on access to packet switches for voice service when no legacy circuit switch is available, it has held in other contexts that ILECs may not engineer away their unbundling obligations. Thus contrary to the ALJ's conclusion in Order No. 2, it is likely the FCC would hold that ILECs must provide unbundled local switching on packet switches if no legacy circuit switch exists. This is especially true, where as here, the next generation switch Verizon intends to deploy is capable of supporting both packet and circuit switching.

III. CONCLUSION

75. For all of the reasons discussed herein as well as in the responses filed by the CLECs and Staff to Verizon's Motion, this Commission should (1)

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[67] *Triennial Review Order*, ¶ 448.

grant review of Order No. 2; (2) reject the Order's recommendations that Verizon's Motion be granted and the Joint Petition be dismissed; (3) reject the Order's recommendation that the Affidavit of Sherry Lichtenberg and the references to the Affidavit in the Joint CLEC Response be stricken; and (4) find as a matter of law, that the remote switches connected to the Mount Vernon central office are subject to unbundling.

Dated this 13th day of December 2004.

MCI

By: _____ for

Michel Singer Nelson
707 17th Street, Suite 4200
Denver, Colorado 80202
(303) 390-6106
michel.singer_nelson@mci.com

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. AND AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE AND TCG OREGON

Mary B. Tribby
Letty S.D. Friesen
AT&T Law Department
1875 Lawrence Street, Suite 1575
Denver, Colorado 80202
(303) 298-6475

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of December, 2004, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

Carole Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S Evergreen Park Drive SW
Olympia, WA 98504-7250

- [X] Hand Delivered
- [ ] U.S. Mail (first-class, postage prepaid)
- [ ] Overnight Mail (UPS)
- [ ] Facsimile (360) 586-1150
- [X] Email (records@wutc.wa.gov)

I hereby certify that I have this 13th day of December, 2004, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

On Behalf Of Verizon Northwest, Inc.:

Charles H. Carrathers III
Verizon Northwest Inc.
MC: HQE02H20
600 Hidden Ridge
PO Box 152092
Irving TX 75015-2092

- [ ] Hand Delivered
- [X] U.S. Mail (first-class, postage prepaid)
- [ ] Overnight Mail (UPS)
- [ ] Facsimile (972) 718-0936
- [X] Email (chuck.carrathers@verizon.com)

On Behalf Of United Communications:

Michael E. Daughtry
United Communications Inc.
d/b/a Unicom
389 SW Scalehouse Court
Bend OR 97702

- [ ] Hand Delivered
- [X] U.S. Mail (first-class, postage prepaid)
- [ ] Overnight Mail (UPS)
- [ ] Facsimile (541) 312-6479
- [X] Email (mike@ucinet.com)

On Behalf Of Verizon Northwest, Inc.:

Judith Endejan
Graham & Dunn, PC
Pier 70
2801 Alaskan Way, Suite 300
Seattle WA 98121-1128

- [ ] Hand Delivered
- [X] U.S. Mail (first-class, postage prepaid)
- [ ] Overnight Mail (UPS)
- [ ] Facsimile (206) 340-9599
- [X] Email (jendejan@grahamdunn.com)

On Behalf Of AT&T Communications:

Letty S. Friesen
AT&T Communications of the Pacific Northwest
Law Department
1875 Lawrence Street, Suite 1500
Denver CO 80202

- [ ] Hand Delivered
- [X] U.S. Mail (first-class, postage prepaid)
- [ ] Overnight Mail (UPS)
- [ ] Facsimile (303) 298-6301
- [X] Email (lsfriesen@att.com)

On Behalf Of Advanced TelCom:

Brooks E. Harlow
Miller Nash LLP
601 Union Street, Suite 4400
Seattle WA 98101-1367

___ Hand Delivered
_X_ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (206) 622-7485
_X_ Email (brooks.harlow@millernash.com)

On Behalf Of Tel West Communications:

David Mittle
Law Office of David Mittle
208 Maynard
Sante Fe NM 87501

___ Hand Delivered
_X_ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile
_X_ Email (dmittle@att.net)

On Behalf Of Verizon Northwest, Inc.:

Timothy J. O'Connell
Stoel Rives LLP
600 University Street, Suite 3600
Seattle WA 98101-3197

___ Hand Delivered
_X_ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (206) 386-7500
_X_ Email (tjoconnell@stoel.com)

On Behalf Of Advanced TelCom:

David L. Rice
Miller Nash LLP
601 Union Street, Suite 4400
Seattle WA 98101-1367

___ Hand Delivered
_X_ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (206) 622-7485
_X_ Email (david.rice@millernash.com)

On Behalf Of Verizon Northwest, Inc.:

John Ridge
Stoel Rives LLP
600 University Street, Suite 3600
Seattle WA 98101-3197

___ Hand Delivered
_X_ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (206) 386-7500
_X_ Email (jhridge@stoel.com)

On Behalf Of MCImetro Access:

Michel L. Singer Nelson
MCI, Inc.
707 17th Street, Suite 4200
Denver CO 80202-3432

___ Hand Delivered
_X_ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (303) 390-6333
_X_ Email (michel.singer_nelson@mci.com)

On Behalf Of Tel West Communications:

Don Taylor
Tel West Communications, LLC
3701 S Norfolk Street, Suite 300
Seattle WA 98118

___ Hand Delivered
_X_ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (206) 577-6578
_X_ Email (dtaylor@telwestservices.com)

On Behalf Of Staff:

Jonathan Thompson
Attorney General of Washington
Utilities & Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia WA 98504-0128

___ Hand Delivered
_X_ U.S. Mail (first-class, postage prepaid)
___ Overnight Mail (UPS)
___ Facsimile (360) 586-5522
_X_ Email (jthompso@wutc.wa.gov)

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

DATED this 13th day of December, 2004, at Seattle, Washington.

_____

ATTACHMENT A

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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) Complainants v. VERIZON CALIFORNIA INC. Defendant	C.04-08-026 (Filed August 19, 2004)
TELSCAPE COMMUNICATIONS, INC. (U 6589 C), WHOLESALE AIRTIME, INC. (U 5751 C), AND BLUE CASA COMMUNICATIONS, LLC (U 6764 C), Complainants v. VERIZON CALIFORNIA, INC. (U 1002 C) Defendant.	Case 04-09-001 (Filed September 1, 2004)
ACN COMMUNICATION SERVICES, INC. (U 6342 C), COVAD COMMUNICATIONS CO. (U 5752 C), AND VYCERA COMMUNICATIONS, INC. (U 5477 C) Complainants v. VERIZON CALIFORNIA INC. (U 1002 C) Defendant.	Case 04-09-010 (Filed September 7, 2004)

DECLARATION OF JEFF HALTOM IN SUPPORT OF OPPOSITION OF MCI, INC. TO VERIZON'S APPLICATION FOR REHEARING OF D.04-09-056

November 16, 2004

I, Jeff Haltom, declare as follows:

1. I am an Advisory Engineer in the Network Engineering Department for MCI.

2. I hold a Bachelor of Science degree in Electrical Engineering (BSEE) from Purdue University and have more than 10 years of industry experience in Local, International, Long Distance, Voice over IP, Data, Wireless, and Packet Switching services and technologies.

3. In my position, I evaluate, recommend, and install new technologies into the MCI network.

4. The purpose of this affidavit is to provide a factual, technical description of several issues relevant to this case. First, I will explain that although Verizon is seeking to deploy two next-generation switches from- Nortel's Succession family in California, such switches are not limited to providing packet switching functionality. Rather, the Succession series switches can be deployed with a number of different modules that support a variety of capabilities, including both packet and TDM circuit switching.

5. Second, I explain that MCI is not trying to purchase packet switching functionality, that is, directing Verizon to convert, switch or route UNE-P traffic as packets. Rather, MCI wants Verizon to continue to provide local switching for MCI's UNE-P traffic, using whatever technology Verizon chooses. I will demonstrate that, from a technical perspective, nothing has changed in MCI's UNE-P traffic – MCI's UNE-P customers continue to send the same analog POTS traffic to the Succession switch that was previously carried on Verizon's circuit switch. MCI's UNE-P customers' traffic originates and terminates as analog POTS traffic.

6. Finally, I will explain that even if Verizon has unilaterally chosen to switch MCI's UNE-P traffic as packets for any portion of the call on the trunk or transport side of the switch, such conversion is not required from a technical standpoint. The Nortel Succession switch can be deployed to support end-to-end TDM circuit switching of UNE-P traffic.

VERIZON'S NORTEL SUCCESSION SWITCH IS NOT LIMITED TO PROVIDING PACKET SWITCHING

7. Verizon states that it is seeking to replace its existing Nortel DMS-100 circuit switch with a Nortel Succession "Packet" switch" at two COs in California.[1] "Packet Switch" is a label that Verizon has applied; it is not the nomenclature that Nortel uses. Nortel refers to the Succession product family as a soft switch or next generation switch.

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[1] Verizon Application for Rehearing of D.04-09-056, at p. 2; Emergency Notice Regarding Packet Switch Replacement in California, Sept. 17, 2004, at p. 1.

8. Verizon has stated in response to discovery requests from MCI that it is deploying the Nortel Succession Communications Server 2000 ("CS2K").[2] Based on my knowledge of the Nortel Succession family of switches, I am aware that the Nortel CS2K can support both traditional TDM circuit switching functionality and packet switching functionality. Verizon provided a diagram of the two CS2K switches that it intends to deploy in California and both include the ENET module. As I discuss below, the ENET is a switching matrix that can support circuit switching functionality. In fact, based on my knowledge of the Nortel Succession family, Verizon could have chosen to leave in place its existing circuit switch and deploy the Nortel Succession switch as an upgrade to add advanced service capabilities.

9. Therefore, from a technical perspective, Verizon's claim that continuing to provide local switching using the new Nortel switch would necessarily constitute unbundled packet switching is factually incorrect. It appears to me that Verizon may be using a word game to obscure technical reality. Verizon seems to be claiming that because the Nortel Succession switch is a "packet" switch, then all functionality supported on that switch (even circuit switching functionality) is classified as "packet switching" and need not be provided on an unbundled basis. The other possible explanation is that even though it is technically possible to deploy the Nortel Succession switch with an already existing module that supports end-to-end TDM circuit switching, Verizon may not have chosen to do so. (This issue is described in detail below).

MCI IS NOT DIRECTING VERIZON TO PROVIDE UNBUNDLED PACKET SWITCHING TO SUPPORT UNE-P TRAFFIC

10. MCI's Interconnection Agreement with Verizon does not specify the type of technology that Verizon must use to provide local switching. From a technical perspective, it does not matter to MCI what technology Verizon may choose to use to switch and route UNE-P traffic, so long as it meets technical specifications for quality, and is transparent to MCI's end user customer. Verizon could use either circuit switching or packet switching technology.

11. In order to analyze Verizon's claims that MCI is asking for unbundled packet switching, it may be helpful to review the industry standard definitions for circuit and packet switching.

12. A circuit switched network provides a communications channel for exclusive use by connected parties until the connection is released.

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[2] Verizon's Response to MCI's Data Request 1-4. A copy of Verizon's response is provided with this Declaration as Attachment A to MCI's Opposition.

13. The FCC defines packet-switched networks as those in which messages *between network users* are divided into units, commonly referred to as packets, frames, or cells. These individual units are then routed *between network users*.[3]

14. Verizon claims that MCI is seeking unbundled packet switching, but from a technical and factual perspective, Verizon's claim is incorrect. From a technical perspective, the only way that MCI could fairly be said to be asking for unbundled packet switching is if MCI were directing Verizon specifically to convert, switch or route UNE-P traffic as packets, frames or cells.

15. MCI is not directing Verizon to use packet technology to accomplish local switching. Rather, MCI wants Verizon to continue to provide local switching for MCI's UNE-P traffic, according to MCI's ICA, using whatever technology Verizon chooses.

16. From a technical perspective, nothing would change in MCI's UNE-P customer traffic or MCI's request for local switching if the Nortel Succession switch were deployed. MCI UNE-P customers would continue to send the same analog POTS traffic to the Succession switch that was previously carried on Verizon's circuit switch. MCI's UNE-P traffic originates and terminates as analog POTS traffic.

17. Both before and after Verizon deployed the Nortel Succession switch, UNE-P customers would utilize telephone equipment (*i.e.*, traditional "black phones") that receives and transmits analog voice grade POTS over analog loops between the customer premises and the Verizon CO.

18. MCI has never requested, and has no plan to request that Verizon switch its UNE-P traffic by taking the incoming analog voice grade signal and converting it to packets so that it can be switched across an IP network or packet switch's backplane.

19. Both before and after the deployment of the Nortel Succession switch, MCI's UNE-P traffic would come into a Verizon switch from the customer premises as analog voice grade circuits, and it would terminate to the customer premises as analog voice grade circuits.

20. From a technical perspective, MCI is seeking switching of the exact same analog voice grade signal that Verizon has been providing to MCI with its existing circuit switches in California, and which Verizon intends to provide to its own customers via the Succession switch. MCI could fairly be said to be seeking unbundled packet switching *only* if its customers were handing off digital, packetized bit streams over its customer loops to the Verizon CO and asking Verizon to switch those packets or if MCI

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[3] *UNE Remand Order*, ¶ 302 (emphasis added).

customers were handing off analog voice signals and directing Verizon to convert the signal to packets for switching through Verizon's network. However, MCI is not doing, and has not done, any of these things.

21. Even if Verizon is actually carrying MCI's UNE-P traffic as packets for some portion of the call, such an approach would be entirely Verizon's decision.

22. Verizon confirmed in its discovery responses that it is intends to provide "plain old telephone service" (POTS) to its retail customers using the Nortel Succession "Packet Switch".[4] The FCC defines POTS as "ordinary switched voice service," and as "analog" service.[5] The definition the FCC uses is the commonly accepted industry definition of POTS.

THE NORTEL SUCCESSION SWITCH COULD BE DEPLOYED BY VERIZON TO SUPPORT END-TO-END TDM CIRCUIT SWITCHING

23. As discussed above, the Nortel Succession Switch can support both traditional circuit switching and packet switching functionality.

24. Also as discussed above, the Nortel Succession switch can accept an analog voice signal from MCI's UNE-P customers and deliver the same analog voice signal to another user at the termination point. This is exactly what Verizon is doing in Washington state, where it has already deployed the same Nortel Succession switch it plans to deploy in California.

25. Based on my independent knowledge of the Nortel Succession switch, it is possible to deploy the switch in a hybrid manner such that the switch can support both end-to-end circuit switched TDM traffic, and TDM to packet to TDM conversions. MCI has significant experience with the Nortel Succession family of switches, and has tested and deployed the Nortel Succession switch in a hybrid mode that supports both TDM circuit switched traffic and packet switched traffic.

26. In order to support end-to-end circuit switched TDM traffic (i.e., with no conversion to packets at any point during the call), Verizon would need only to deploy the Internetworking Gateway, an already existing peripheral module that converts TDM circuit switched traffic to packets, and vice versa. Verizon confirmed in response to MCI's Data Requests

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[4] Verizon's response to MCI Data Request 1-15. A copy of Verizon's response is provided as Attachment A.

[5] *Triennial Review Order*, ¶ ¶ 127, 197 n. 624, 459 .

that it has purchased the Internetworking Gateway peripheral module, and intends to use it in California to support POTS to its retail customers.[6]

27. In response to discovery requests from MCI, Verizon provided a diagram of the Nortel CS2K it intends to deploy. The diagram shows the presence of the ENET ("Enhanced Network" module).[7] The ENET is a call routing matrix for TDM circuits. Based on my knowledge of the CS2K, Verizon could deploy the Nortel Succession switch in a hybrid mode, which would have both the ENET circuit switching call matrix and a packet switching call matrix. Communication between the two 'planes' of the switch would be done via an Interworking Gateway.

28. If deployed in a hybrid manner, TDM circuits may be switched to other TDM circuits without ever converting the signal to packets on the backplane of the switch or routing it as packets across Verizon's IP network.

29. If MCI's UNE-P traffic is switched using the TDM switch matrix, it remains as circuit switched TDM traffic throughout the entire call. For this reason, Verizon cannot legitimately argue that MCI's UNE-P traffic is packet switched.

30. MCI is not necessarily advocating that Verizon adopt any particular switch technology or deployment approach. Pursuant to its ICA, MCI is asking that Verizon be required to continue to provide local switching for UNE-P traffic through whatever technology Verizon deems most appropriate.

31. In summary, it appears to me from a technical perspective that there are at least three ways that Verizon can continue to provide unbundled local switching to MCI for UNE-P traffic. First, Verizon could continue to operate a circuit switch with the Nortel Succession switch deployed either as a parallel node, or as an upgrade to the circuit switch. Second, Verizon could provide unbundled local switching for analog UNE-P traffic on its Nortel switch whether or not a portion of the call might be converted to packets. Third, if Verizon insists that it will support unbundled local switching only for TDM circuit switched traffic, then Verizon could utilize the already existing module discussed above to handle UNE-P traffic as circuit switched TDM traffic for the entirety of the call.

32. Based on my knowledge of the Nortel Succession family, Verizon could have deployed the Nortel Succession switch as an upgrade to its existing circuit switch instead of replacing it. The Nortel Succession switch is specifically designed to allow a carrier to protect its existing investment in

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[6] Verizon response to MCI Data Request 1-7 in Attachment A and Verizon's Supplemental Response to MCI Data Request 1-9 in Attachment D.

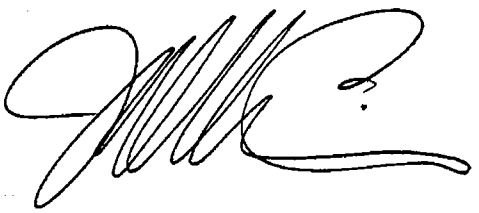
[7] See Exhibit 1 to this Declaration. It was provided to MCI by Verizon in response to MCI's Data Request 1-7.

circuit switching. From a technical perspective, upgrading an existing circuit switch with the Nortel Succession upgrade cannot be said to have transformed the existing switch into a packet switch. Rather, the existing switch would merely have hybrid circuit and packet switching capabilities.

33. Verizon may find one of these options discussed above preferable to the others based on its own internal considerations. However, it is clear from a technical perspective, that any of the three options would be a technically feasible way for Verizon to provide unbundled local switching as required by MCI's Interconnection Agreement.

The facts stated in this Declaration are true and correct to the best of my knowledge and belief.

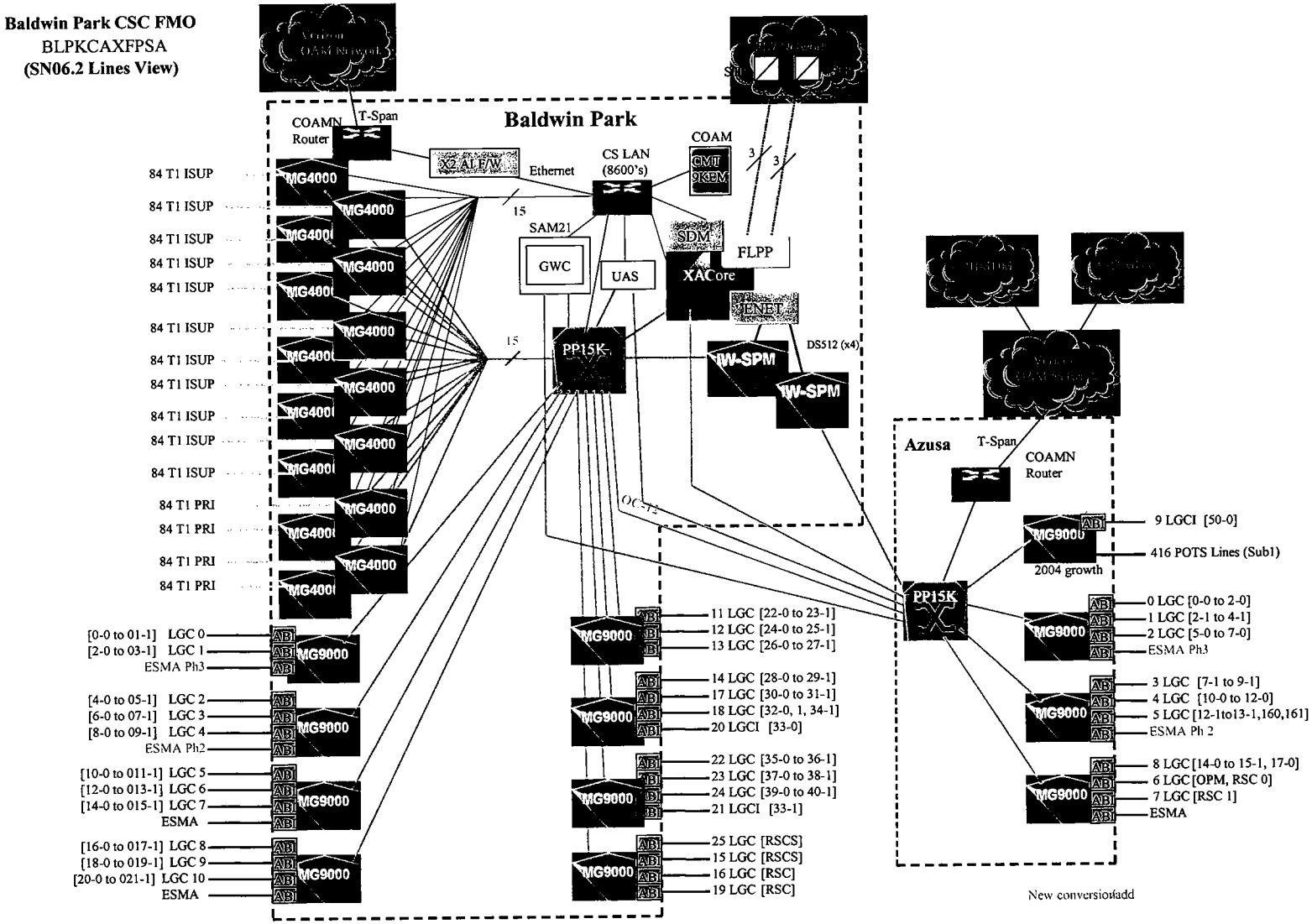
Executed on this 16th day of October, 2004 at Richardson, Texas.



Jeff Haltom

ATTACHMENT A
EXHIBIT A

BALDWIN PARK (Baldwin_Park_NETD_version_01.03_Released.xls)



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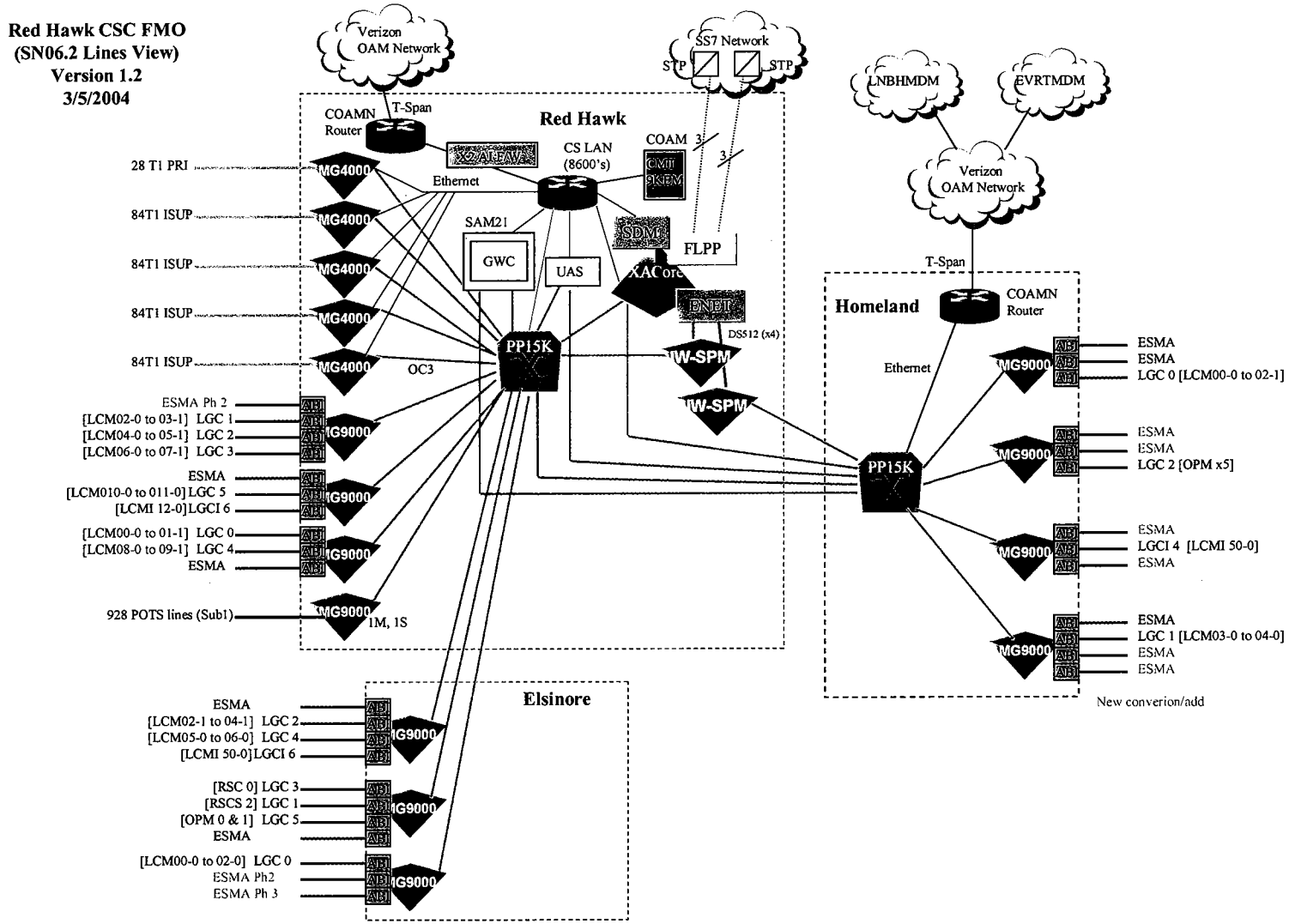

ATTACHMENT B

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of	)	
	)	
THE JOINT PETITION FOR	)	DOCKET NO. UT- 041127
ENFORCEMENT OF	)	
INTERCONNECTION	)	**MCI THIRD SET OF DATA**
AGREEMENTS WITH VERIZON	)	**REQUESTS TO VERIZON**
NORTHWEST, INC.	)	
(a/k/a GTE)		

MCImetro Access Transmission Services, LLC ("MCI") pursuant to WAC 480-07-405, hereby serves its third set of data requests on Verizon Northwest, Inc. ("Verizon"). MCI hereby requests that Verizon provide complete responses to these Requests on or before December 10, 2004. Such response date is justified because MCI is asking only a few questions that are critical to clarify certain statements made by Verizon and relied upon by the Administrative Law Judge in Order No. 2 in this proceeding.

INSTRUCTIONS

1. MCI incorporates by reference herein the Instructions contained in its First Set of Data Requests to Verizon. Responses to these Requests are to be provided to MCI on or before 5 p.m. on December 10, 2004. Any Request received by you prior to 5 p.m. Pacific Standard Time shall be deemed received on the date of service. Service of responses, and all notifications, shall be made in person and by facsimile and email to:

Michel Singer Nelson
MCI, Inc.
707 17th Street, Suite 4200
Denver, CO 80202
Phone 303 390 6106
Fax 303 390 6333
Michel.singer_nelson@mci.com

DEFINITIONS

1. The term "analog" refers to electrical signals representing sound or data that are transmitted in a linear, non-digital format.
2. The acronym "CLEC" refers to a competitive local exchange carrier.
3. The term "central office" or the acronym "CO" refers to the single physical ILEC building that houses one or more Class 5 or other ILEC end office ILEC switch(es) used to provide local exchange service, and in which end user customers' loops are cross connected to ILEC switching equipment or CLEC collocation arrangements.
4. "Common Transport" has the same definition that it has in the MCI Interconnection Agreement with Verizon.
5. The term "communication" includes, without limitation of its generality, correspondence, email, statements, agreements, contracts, reports, white papers, users guides, job aids,

discussions, conversations, speeches, meetings, remarks, questions, answers, panel discussions and symposia, whether written or oral. The term includes, without limitation of its generality, both communications and statements which are face-to-face and those that are transmitted by documents or by media such as intercoms, telephones, television, radio, electronic mail or the Internet.

6. The term "customer premises" refers to the physical point at which the end user customer assumes responsibility for telecommunications wiring (i.e., the network interface device ("NID") for single unit dwellings, and the individual point of demarcation at the end user customer's unit for multi-unit buildings such as office buildings and apartment buildings).

7. The term "digital" refers to electrical or optical signals representing sound or data that are transmitted in a binary, discontinuous, non-linear format.

8. The term "document," as used herein, shall have the same meaning and scope as contained in Rule 34 of the Federal Rules of Civil Procedure, Section 2016(3) of the Washington Code of Civil Procedure and shall include, without limitation, all written, reported, recorded, magnetic, graphic, photographic matter, however produced or reproduced, which is now, or was at any time, in the possession, custody, or control of your company and its affiliates including, but not limited to, all reports, memoranda, notes (including reports, memoranda, notes of telephone, email or oral conversations and conferences), financial reports, data records, letters, envelopes, telegrams, messages, electronic mail (e-mail), studies, analyses, books, articles, magazines, newspapers, booklets, circulars, bulletins, notices, instructions, accounts, pamphlets, pictures, films, maps, work papers, arithmetical computations, minutes of all communications of any

type (including inter- and intra-office communications), purchase orders, invoices, statements of account, questionnaires, surveys, graphs, recordings, video or audio tapes, punch cards, magnetic tapes, discs, data cells, drums, printouts, records of any sort of meeting, invoices, diaries, and other data compilations from which information can be obtained, including drafts of the foregoing items and copies or reproductions of the foregoing upon which notations and writings have been made which do not appear on the originals.

9. The term "identify" or "identifying" means:

   (a) When used in reference to natural persons: (1) full name; (2) last known address and telephone number; (3) whether the person is currently employed by, associated or affiliated with SWBT; (4) that person's current or former position; and (5) dates of employment, association or affiliation.

   (b) When used in reference to a document: (1) its author; (2) actual or intended recipient(s); (3) date of creation; and (4) brief description of its contents.

   (c) When used in reference to a communication: (1) whether the communication was oral or written; (2) the identity of the communicator; (3) the identity of the person receiving the communication; and (4) the location of the communicator and the person receiving the information, if the communication was oral.

10. "Local Switching" has the same definition that it has in MCI's Interconnection Agreement with Verizon.

11. The terms "relate, mention, reference, or pertain" shall be used to mean documents or communications containing, showing, relating, mentioning, referring or pertaining in any way, directly, or indirectly to, or in legal, logical or factual way connection with, a document Request, and includes documents underlying, supporting, now or previously attached or appended to, or used in the preparation of any document called for by such Request.

12. The term "Verizon" refers to Verizon Northwest, Inc., and includes Verizon's parent or any subsidiary or affiliate and all current or former officers, directors, employees, agents, representatives, contractors, attorneys, investigators, or consultants of Verizon, as well as any persons or other entities who have acted or purported to act on behalf of Verizon or any of the above-mentioned persons or entities.
13. The term "wire center" is synonymous with the term "central office," and refers to the single physical building that houses one or more Class 5 or other end office ILEC switch(es) used to provide local exchange service and in which end user customer's loops are cross connected to the Class 5 or other end office ILEC switch(es) used to provide local exchange service.
14. The terms "you," "your," "yours," or "your company" means Verizon, the entity receiving these Requests, including without limitation, all affiliates, subsidiaries, officers, agents, attorneys, employees, representative, agents, and consultants, or any other entity or person acting with or on behalf of the person or entity to whom these Requests are directed.

THIRD SET OF DATA REQUESTS

Request No. 35: With regard to the "Nortel Succession Packet Switch" that Verizon has deployed in the Mt. Vernon central office, please provide the following.

(a) switch manufacturer and model;

(b) currently loaded version of switch software;

(c) function of the switch (e.g., stand-alone, host, or remote, other [e.g. DLC node with no intelligence and/or no or limited switching capability]);

(d) location of the switch;

(e) any differences in quality of service compared to local exchange service provided on circuit switches (i.e., reliability, throughput, ubiquity, outages, mean time to repair, etc.)

(f) the geographic area served by the switch compared to the geographic area served by any circuit switches you use to provide local exchange service;

(g) any differences in the technical or operational requirements for the MCI customers served by the Nortel Succession switch to obtain local exchange service from Verizon, including customer premises equipment or software (i.e., specialized phone set; availability of computer, cable modem, set top box), access method (i.e., DSL, cable television, satellite service), provisioning interval;

(h) a diagram showing all components (e.g., hardware, software, switching fabric) that have been deployed whether or not all such components have been enabled or are currently operational.

Request No. 36: With regard to Verizon's statement in paragraph 32 of its Reply to the Answers of Staff and the CLECs that the "Mt. Vernon switch is a packet switch that is not performing circuit switching," please admit or deny whether Verizon has deployed ENET, or any other "TDM switching fabric" at Mt. Vernon. If your response is a denial, please admit or deny whether Verizon will deploy, or has considered deploying, ENET or any other "TDM switching fabric," 1) any time within the next year 3) any time within the next five years.

Request No. 37: With regard to the "hybrid configuration" and "TDM switching fabric" referenced in paragraph 11 of the declaration of Danny Peeler, attached to Verizon's Reply to the Answers of Staff and the CLECs, please admit or deny whether Verizon considered deploying the TDM switching fabric. If your response is a denial, please provide a detailed technical description of the steps Verizon would have to take to deploy or enable the "TDM switching fabric" referred to by Mr. Peeler. Please provide copies of all documents and communications addressing or relating to this Request, or upon which Verizon relies to answer this Request.

Request No. 38: With regard to paragraph 11 of the declaration of Mr. Danny Peeler that "all subscribers in the Mt. Vernon deployment are served through a packet fabric," please provide a detailed technical explanation of the following:

(a) the exact location at which any incoming analog signal from MCI or Verizon's retail customers is converted from analog to digital packets (e.g. switch backplane; network gateway, etc.) and the method of timeslot and device selection for origination;

(b) the reason the signal is packetized by Verizon;

(c) the method of packet transport (connectionless or connection oriented)

(d) the manner in which the signal is carried in Verizon's network to the termination point (i.e, packetized or analog)

(e) exact location at which the signal is converted from digital to analog for termination and the method of timeslot and device selection for termination.

Request No. 39: Please state whether Verizon's retail customers located in the service area of the Mt. Vernon central office will receive their voice service as data packets, or will receive their voice service as Voice Over Internet Protocol (VOIP).

Dated: December 7, 2004.

MCI

Michel Singer Nelson
707 17th Street, Suite 4200
Denver, Colorado 80202
(303) 390-6106
michel.singer_nelson@mci.com