BEFORE THE
WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

Petition of Verizon Northwest Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Washington Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order	**DOCKET NO. UT-043013**

COMPETITIVE CARRIER COALITION'S REPLY TO VERIZON'S RESPONSE TO THE COALITION'S MOTION TO DISMISS

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1. Focal Communications Corp. of Washington; ICG Telecom Group, Inc.; Integra Telecom of Washington, Inc., McLeodUSA Telecommunications Services, Inc., and Pac-West Telecomm, Inc. (collectively the "Competitive Carrier Coalition" or "Coalition") hereby submits this Reply to the Response of Verizon Northwest Inc. ("Verizon") to the Coalition's Motion to Dismiss ("Verizon Response") that Verizon filed on April 27, 2004.

2. As explained below and contrary to Verizon's contentions, the Commission should dismiss Verizon's Petition because: (1) Verizon's obligation to offer UNEs as required by the *Bell Atlantic/GTE Merger Order* still continues; (2) Verizon's Petition blatantly defies the procedural requirements mandated by federal law and this Commission; (3) the arbitration is doomed to yield half-baked results due to the tremendous uncertainty of the law that needs to be applied; and (4) an amendment is not needed for Verizon to comply with its pre-existing legal duty to offer routine network modifications when provisioning UNEs and Verizon is already recovering the cost of doing so.

DISCUSSION

I. Dismissal is Justified Because Verizon's Obligation to Provide UNEs in Accordance with the *Bell Atlantic Merger Order* Has Not Expired.

3. Verizon's Petition here rests entirely on the premise that the *TRO* changed its legal obligations with respect to offering UNEs, and therefore entitles it to invoke "change of law" clauses in various interconnection agreements. If Verizon's legal obligations did not change, this premise is entirely invalid and the Petition must be dismissed. As the Coalition has shown in previous filings, Verizon's obligations in fact did not change, because its duties under the FCC merger conditions continue in effect notwithstanding the release of the *TRO*.

4. Verizon makes four arguments that conditions imposed on it by the *Bell Atlantic/GTE Merger Order*[1] are not applicable, all of which fail. First, Verizon claims that the obligation to provide UNEs in accordance with the *UNE Remand Order* and *Line Sharing Order* lasts only "until the date of any final and non-appealable judicial decision [on the direct appeals of those two named orders]."[2] Verizon submits that its obligation to offer UNEs pursuant to the *UNE Remand Order* and *Line Sharing Order* became non-appealable when the Supreme Court denied certiorari on the D.C. Circuit's decision in *USTA I*.[3]

5. Verizon is entirely incorrect in this regard. In the *Bell Atlantic/GTE Merger Order*, the FCC was perfectly clear about how and how long this merger condition applies and its basis for imposing the condition when it approved the merger of these two powerful companies that were

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[1] *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, FCC 00-221, ¶ 316 (2000) ("*Bell Atlantic/GTE Merger Order*").

[2] *Bell Atlantic/GTE Merger Order*, ¶ 316.

[3] Verizon Response at 12-13.

already dominant forces in their respective markets. The FCC stated, "In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, from now until the date on which the Commission's orders in those proceedings, ***and any subsequent proceedings***, become final and non-appealable, Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders.…"[4] As explained in the Coalition's Motion, the *TRO* is a "subsequent proceeding" and it is far from being final and non-appealable.

6. Further, Verizon's argument that the condition has terminated because the Supreme Court's denial of certiorari of *USTA I* was "a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area"[5] is equally incorrect. Contrary to Verizon's claims, *USTA I* was no such decision. *USTA I* remanded FCC orders that had <u>required</u> unbundling; by contrast, what Verizon needs to terminate the merger condition is judicial affirmation of an FCC decision that particular UNEs are <u>not required</u> to be unbundled.[6] Such findings could only be made in the Triennial Review or subsequent decisions, which all agree are *not* final and non-appealable.

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[4] *Bell Atlantic/GTE Merger Order*, ¶ 316 (emphasis added).

[5] *Bell Atlantic/GTE Merger Order*, Appendix D ¶ 39 .

[6] For example, the *TRO* determined that ILECs are not required to provide certain broadband UNEs to CLECs for mass market customers. *USTA II* affirmed this decision, but it remains subject to appeal at the Supreme Court. *USTA II*, 359 F.3d at 585. If the Supreme Court affirmed the FCC's decision, then and only then would there be a triggering of the condition subsequent associated with the merger condition (thus ending Verizon's obligation under the condition) because there would have been a "final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area." See *Bell Atlantic/GTE Merger Order*, Appendix D ¶ 39.

Because there has never been any final, non-appealable order of the FCC that determined that the UNEs at issue are not required, the UNE merger condition clearly remains in effect.[7]

7. Second, Verizon claims that the FCC's Common Carrier Bureau said that if the Supreme Court vacated the FCC's TELRIC pricing rules, the *Bell Atlantic/GTE Merger Order* "would not independently impose an obligation to follow any finally invalidated pricing rules."[8] Verizon goes on to reason that the *UNE Remand Order* and the *Line Sharing Order* have been "finally invalidated," and thus the *Bell Atlantic/GTE Merger Order* imposes no independent obligation to follow those rules. What Verizon fails to explain, however, is that the *Bell Atlantic/GTE Merger Order* imposed *different* conditions relating to (1) the offering of UNEs and (2) the pricing of UNEs. With respect to pricing, the FCC stated in the *Bell Atlantic/GTE Merger Order* itself that Verizon must price UNEs consistent with the FCC's TELRIC pricing rules only until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide UNEs at cost-based rates.[9]

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[7] Verizon's argument that an independent auditor has verified that the obligations imposed under paragraph 39 of the merger conditions expired on March 24, 2003 is farcical. Verizon Response at 14-15 & n.15. Auditors are engaged to determine questions of fact, not matters of law. Moreover, the independent auditor relied solely on assertions made by Verizon management that the Bell Atlantic/GTE merger condition at issue, *i.e.*, Condition XIII, expired on March 24, 2003. Moreover, Verizon's suggestion that CLECs should have disputed the auditor's determination before the FCC is far fetched. The auditor's determination was contained in an *ex parte* submission in an FCC docket that contains well over 900 records. Contrary to Verizon's contention, CLECs do not have an obligation to sift through every single proceeding that the FCC has opened and submit objections to *ex parte* comments filed by parties. Nor is there anything in the Bell Atlantic/GTE merger conditions themselves that gives any particular legal effect to the report of the auditor. Until the FCC specifically releases an order that specifically repeals Verizon's obligations under the Bell Atlantic/GTE merger conditions, those obligations continue as contemplated by the merger conditions at issue.

[8] Verizon Response at 14 (citing Letter Clarification, Bell Atlantic/GTE Merger Order, 15 FCC Rcd 18327, 18328, DA 00-2168, at 2 (2000)).

[9] *Bell Atlantic/GTE Merger Order*, ¶ 316.

8. Unlike the condition that requires Verizon to *offer* UNEs consistent with the *UNE Remand Order* and *Line Sharing Order* until the FCC's orders in those proceedings and any "subsequent proceedings" become final and non-appealable, the TELRIC pricing condition was not contingent upon "subsequent proceedings" becoming final and non-appealable.[10] Significantly, the FCC recognizes that it would not be "consistent with the ordinary principles of textual construction to read one provision … in a fashion that nullifies another provision."[11] In this case, Verizon is essentially suggesting that the last sentence of paragraph 316, which does not include the reference to subsequent proceeding, nullifies the first sentence in the paragraph that does. Such an interpretation violates such basic recognized principles.

9. Third, Verizon argues that obligations imposed on it by the *Bell Atlantic/GTE Merger Order* expired in July 2003, or 36 months after the Bell Atlantic/GTE merger closed.[12] As explained in the Coalition's Motion, Verizon is wrong. In paragraph 64 of attachment D to the *Bell Atlantic/GTE Merger Order*, the FCC explicitly stated that, "[e]*xcept where other termination dates are specifically established herein*, all Conditions set out in th[e] [Order] … shall cease to be effective and shall no longer bind Bell Atlantic/GTE in any respect 36 months after the merger closing date."[13] With respect to the FCC's requirement that Verizon offer UNEs in accordance with the *UNE Remand Order* and *Line Sharing Order*, the "specific" termination date is "the date" on which "the Commission's orders in those proceedings, and any subsequent

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[10] *Bell Atlantic/GTE Merger Order*, ¶ 316.

[11] *See* Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau to Ms. Carr, Senior Executive Vice President, SBC Communications, Inc., 15 FCC Rcd 20131, DA 00-2340 (2000) (rejecting SBC's interpretation of merger conditions imposed on it by the FCC).

[12] Verizon Response at 15.

[13] *Bell Atlantic/GTE Merger Order*, Appendix D ¶ 64 (emphasis added).

proceedings, become final and non-appealable."[14] Since that condition subsequent has not occurred (for the reasons discussed above and in the Coalition's Motion), Verizon is not relieved of its continuing obligation in this regard.

10. The FCC's Enforcement Bureau has even endorsed this reading of a similar merger condition in the *SBC/Ameritech Merger Order*.[15] The Bureau explained that "The effective period for many of the merger conditions terminates thirty-six months after the Merger Closing Date…"; however, "[s]ome of the conditions … are not subject to that expiration date because the condition itself specifically establishes its own period of applicability [*i.e.*, based on the specific future event]."[16] It also specifically pointed out that the SBC/Ameritech merger condition (as set forth in paragraph 53 of Appendix C of the *SBC/Ameritech Merger Order*) regarding Offering UNEs remains in effect beyond 36 months after the merger closing date.[17]

11. The language of that SBC merger condition is virtually the same as the Verizon merger condition at issue here, so that both conditions should be interpreted similarly. Indeed, the conditions adopted by the FCC in the *Bell Atlantic/GTE Merger Order* were "patterned closely"

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[14] *Bell Atlantic/GTE Merger Order*, ¶ 316.

[15] *See Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 17 FCC Rcd 19595, DA 02-2564, ¶ 3 & n.7 (Oct. 8, 2002) ("*FCC's Enforcement Bureau Order*") (citing and interpreting *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, FCC 99-279, Appendix C ¶¶ 53 & 74 (1999) ("*SBC/Ameritech Merger Order*")).

[16] 17 FCC Rcd at 19596, ¶ 3 (emphasis added).

[17] *Id*. ¶ 3 & n.7.

after those adopted in the *SBC/Ameritech Merger Order*.[18] Thus, Verizon's obligation to offer UNEs (pursuant to paragraph 316 and paragraph 39 of Appendix D to the *Bell Atlantic/GTE Merger Order)* has its own express period of applicability, which is until "the date" on which the Commission's orders in the [UNE Remand and Line Sharing] proceedings, and any subsequent proceedings, become final and non-appealable."[19]

12. Finally, Verizon contends that the FCC in the *TRO* somehow relieved Verizon from complying with this ongoing merger condition.[20] The *TRO*, however, says no such thing. In paragraph 705 of the *TRO*, the FCC was addressing SBC/Qwest/BellSouth's concerns (notably not Verizon's) that certain change of law provisions in interconnection agreements that these ILECs have with CLECs may not be triggered until all the appeals of the *TRO* become final and

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[18] *Bell Atlantic/GTE Merger Order* ¶ 248. *Compare SBC/Ameritech Merger Order* ¶ 394 & Appendix C ¶¶ 53 & 74, with *Bell Atlantic/GTE Merger Order* ¶ 316 & Appendix D ¶¶ 39 & 64.

[19] *Bell Atlantic/GTE Merger Order* ¶ 316. In its Response, Verizon submits that an Arbitrator's decision in the Verizon-Rhode Island arbitration proceeding held that first clause of paragraph 64 only applies to specific dates and not specific future events. Verizon Response at 15-16 (citing *In re Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements*, RI PUC Docket 3588, Procedural Arbitration Decision, at 18-19 (R.I. PUC. Apr. 9, 2004) ("*RI Procedural Arbitration Decision*"). The FCC itself, however, has not recognized this distinction, and has treated a specific future event as equivalent to a specified future date. In rendering his decision, the Arbitrator apparently inadvertently overlooked the FCC's Enforcement Bureau's decision that demonstrates that the Bell Atlantic merger condition at issue has its own period of applicability, *i.e.*, it does not terminate after 36 months and is based on the specific event specified by the FCC. *See FCC's Enforcement Bureau Order* ¶ 3 & n.7. The Coalition is therefore seeking reconsideration of this erroneous determination made by the Rhode Island Arbitrator.

The Coalition is also seeking reconsideration of the Rhode Island Arbitrator's determination that paragraph 705 of the *TRO* implicitly repealed Verizon's obligations under the merger condition at issue. Contrary to this decision, the legal doctrine of repeal by implication applies to statutes, not agency decisions, and application of the doctrine is not favored in any event. *See Rodriguez v. United States*, 480 U.S. 522, 524 (1987). In this case, the doctrine would be inapplicable because there is no "irreconcilable conflict" between paragraph 705 and the merger condition at issue, nor is there "clear and manifest" evidence that *TRO* repealed Verizon's obligation under the merger condition. *See Id*. Under this clear legal principle, for the FCC to have repealed a merger condition, it would have had to do so explicitly. Verizon's obligation under the Bell Atlantic/GTE merger condition therefore must be treated as an exception to the *TRO*.

[20] Verizon Response at 16.

non-appealable.[21] Although the FCC agreed that the change of law provisions in interconnection agreements were generally triggered when the *USTA I* decision of the D.C. Circuit became final and non-appealable, the FCC never even addressed, and certainly never relieved Verizon of, the independent obligations imposed on it in the *Bell Atlantic/GTE Merger Order*. Nor could it in the *TRO*.

13. As previously emphasized in the Coalition's Motion, the merger conditions are separate and independent legal obligations that were imposed on Verizon to mitigate the public interest harms from the merger of two extremely powerful companies and to enhance competition in the local exchange and exchange access markets in previous Bell Atlantic and GTE serving areas.[22] The FCC stated that the conditions serve as a "floor not a ceiling,"[23] and that "[t]he conditions are designed to address the public interest harms specific to the merger of the Applicants, not the general obligations of incumbent LECs"[24], especially those established in "other more general proceedings."[25] Paragraph 705 of the *TRO* is, of course, just such a general obligation established in a general proceeding, and therefore does not repeal the floor established by the FCC in the *Bell Atlantic/GTE Merger Order*.

14. In approving the Bell Atlantic/GTE merger, the FCC sought, among other things, to reduce uncertainty to competing carriers from litigation associated with the UNE Remand and

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[21] *TRO*, ¶ 705 & n.2093. This statement by the FCC appears to be mere *dicta* in any event, and is not binding on the Commission. The FCC did not have the terms of specific interconnection agreements before it and was in no position to offer an authoritative interpretation of particular change of law clauses. Nor would such an interpretative ruling be within the scope of the FCC's rulemaking process.

[22] *See, e.g., Bell Atlantic/GTE Merger Order*, ¶¶ 4, 246-47.

[23] *Bell Atlantic/GTE Merger Order* ¶ 252.

[24] *Bell Atlantic/GTE Merger Order* ¶ 253.

[25] *Bell Atlantic/GTE Merger Order* ¶ 252.

Line Sharing Orders and subsequent orders (*i.e.*, the *TRO*) prior to their ultimate conclusion. At this time, it is obvious that Verizon is exploiting the very market dominance that the FCC was concerned about when it approved the merger. Verizon is the only RBOC that seeks to arbitrate a TRO amendment at this time (SBC, Qwest, and BellSouth have not filed arbitration petitions seeking to do the same) and Verizon is blatantly abusing the market dominance it gained from the merger, in a manner that defies the merger conditions, to harm the public interest and impede competition.

15. At bottom, no change of law has occurred and Verizon's Petition should be dismissed because the *Bell Atlantic/GTE Merger Order* unambiguously requires Verizon to offer UNEs, in accordance with the *UNE Remand* and *Line Sharing Orders,* at this time. However, if the Commission has difficulty coming to this conclusion (which it should not), the Commission should recognize that when there have been issues regarding how to construe conditions the FCC imposed on a merger of two RBOCs, the FCC has, as a general matter, broadly interpreted them and has rendered clarifications that favor CLECs rather than the merged entity.[26] Thus, the Commission should confidently construe the *Bell Atlantic/GTE Merger Order* in the same manner as the Coalition and reject Verizon's narrow reading.[27]

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[26] *Global NAPs, Inc., Complainant, v. Verizon Communications, Verizon New England, Inc., and Verizon Virginia, Inc.*, File No EB-01-MD-010, Memorandum Opinion and Order, 17 FCC Rcd 4031, FCC 02-59, ¶ 15 (2002) (declining to construe the merger conditions that the FCC imposed on Verizon in the "cramped" manner suggested by Verizon); Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau to Mr. Michael L. Shor, Swidler Berlin Shereff Friedman, LLP, 16 FCC Rcd 22, DA 00-2890 (2000) (rejecting Verizon's limited interpretation of the merger conditions that the FCC imposed on Verizon); *SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-0030, Forfeiture Order, 17 FCC Rcd 19923, FCC 02-282, ¶ 4 (2002) (rejecting SBC's statement that the merger conditions were unclear and assessing forfeitures for SBC's failure to comply with what the FCC characterized as "unambiguous" merger conditions that the FCC imposed on SBC).

[27] Significantly, the Commission has the authority to require Verizon to perform an act as specified by the BA/GTE merger conditions and Verizon cannot argue otherwise. *See Bell Atlantic/GTE Merger* (Cont'd)

II. Dismissal is Warranted Because Verizon's Petition Fails to Comply with Procedural Requirements Mandated by Section 252.

16. Verizon argues unpersuasively that its Petition complies with the Section 252 requirements.[28] Verizon claims initially that the requirements that apply to a petition for arbitration under Section 252(b)(2) of the Act do not necessarily apply to Verizon's petition to amend existing agreements. Again Verizon is incorrect.

17. To be sure, it is unclear whether the FCC had the authority in the first place to expand the application of Section 252 to include ILEC requests to amend interconnection agreement to CLECs.[29] Section 252 itself states that the negotiation and arbitration process is initiated by a CLEC request, which has not occurred here. The FCC clearly did not, however, purport to be creating an entirely new arbitration process for purposes of *TRO*-related amendments to agreements. Either the FCC had the authority to invoke the entire Section 252 process, or it didn't. If it did, this Commission must dismiss Verizon's Petition because Verizon has failed to comply with procedural requirements mandated by § 252(b). On the other hand, if Section 252 does *not* apply, there is no jurisdictional basis for Verizon to seek arbitration before this Commission. Either way, Verizon's Petition should be rejected.

Order, Appendix D, ¶ 63 (providing that "Bell Atlantic/GTE shall not be excused from its obligations under these federal Conditions on the basis that a state commission lacks jurisdiction under state law to perform an act specified or required by these Conditions....").

[28] Verizon Response at 10.

[29] Significantly, on March 24, 2004, staff of the Virginia State Corporation Commission moved to dismiss Verizon-VA's Arbitration Petition on these grounds among others. *See Petition of Verizon Virginia Inc. and Verizon South Inc. Petition for Arbitration*, Case No. PUC-2004-00030, Staff Motion to Dismiss (filed Mar. 24, 2004).

18. Further, Verizon avers that it should not be held to Section 252's requirements because CLECs were untimely in responding to Verizon's proposed amendment.[30] Even if some CLECs did not engage in significant negotiations with Verizon, others tried to do so, but Verizon made no attempt to engage in significant negotiations either.[31] Verizon simply ignored all counter-proposals and responses it received from CLECs, and indiscriminately sought arbitration on every interconnection agreement it has, whether the CLEC sought to negotiate or not. As a result, it would be difficult if not impossible for the Commission to make up for the lost time of 135 days of negotiations and still complete the arbitration on schedule. There is a reason that the Act requires nearly five months of negotiation as a prerequisite for an arbitration. The Commission need not suffer the consequences of this failure; it should instead, at a minimum, defer the arbitration unless the parties have engaged in real negotiations.

19. Second, Verizon suggests that dismissal of its Petition due to technical defects would be inappropriate just because it did not satisfy Section 252(b) of the Act. The procedural requirements of Section 252(b) are, however, not mere "formalities" but are quintessential to the arbitration process, because they frame the issues that must be resolved by the Commission in an expedited time frame. In this case, that has not been done. Indeed, Verizon's Petition neither fully frames the issues nor provides all parties clear notice of Verizon's position. At this time, all the Commission has is Verizon's proposal and the CLECs' proposals by generic UNE section. Further, the Commission must recognize that every single sentence and possible phrase in

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[30] Verizon Response at 11.

[31] For instance, some of the members of the Competitive Carrier Coalition who are parties in this and/or other state arbitration proceedings with Verizon regarding the same matter, *e.g.*, RCN Telecom Services, Inc., Lightship Telecom, LLC, PAETEC Communications, Inc. (all of whom were negotiating with Verizon on a multi-state basis), submitted to Verizon their redlines of Verizon's proposed amendment but never heard back from Verizon until the arbitrations commenced.

each section of the amendment could be deemed a separate issue that needs to be arbitrated. Because Verizon's Petition does not frame the issues in the specific manner contemplated by the Act, Verizon's Petition is deficient and should be dismissed.

20. Otherwise, the Commission, as previously explained in the Coalition's Motion, will need to consume precious time narrowing down the issues, a process that will effectively begin after the responses to the arbitration petition are due, and will reduce even further the time available for actual resolution of issues in dispute. Under the circumstances, it would be highly improper if the Commission ignored federal law and its own procedural requirements and allowed this arbitration to proceed.[32] Significantly, the Nevada Public Utilities Commission recently realized just that and dismissed a similar arbitration petition that Verizon Nevada filed with it for these reasons among others.[33]

III. Dismissal is Appropriate Because the Petition is Doomed to Yield Half-Baked Results.

21. Verizon next argues that the federal rules that Verizon seeks to implement in the arbitration are not undetermined and that the Commission should only move forward with this arbitration with respect to the issues that *USTA II* upheld (and not with respect to the issues that were

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[32] In the alternative, if the Commission does not dismiss Verizon's Petition due to Verizon's failure to strictly comply with the statutory and Commission requirements for arbitration, the Commission should hold that it will not strictly comply with the statutory requirements for resolving the issues submitted to arbitration within a nine-month time frame. Instead, the Commission should conclude the arbitration within a reasonable time. *See RI Procedural Arbitration Decision* at 21 (ordering just that and stating that "[i]f VZ-RI were to insist on an arbitration decision within the strict statutory mandates or in a less than reasonable time period, as defined by the Arbitrator or the Commission, this motion to dismiss will be granted.").

[33] *In re Petition of VERIZON CALIFORNIA INC., d/b/a VERIZON NEVADA, for arbitration of an amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, Docket No. 04-2030, Order Granting Motions to Dismiss, at 8 (Nev. P.U.C. April 28, 2004) ("*Nevada Order Granting Motions to Dismiss*").

vacated).[34] Verizon then points to various portions of the *TRO* that *USTA II* affirmed.[35] However, many of these upheld FCC determinations such as broadband, fiber to the home, hybrid loops, line sharing, call related databases, 271 pricing — which are major aspects of the *TRO* — are still subject to further appeal by CLECs to the Supreme Court. Therefore, these legal determinations are still subject to being challenged and changed. Given this, the Commission should not continue this proceeding on a piecemeal basis.

22. Rather, the Commission should dismiss this proceeding. Verizon seeks only to implement immediately certain scraps of the TRO that are still standing, albeit on wobbly grounds, and subject to further appeal.[36] *USTA II* made it clear that the *TRO* is less than half-baked and moving forward with this arbitration will likely yield similar results given the instability of the law. If the Commission decides to move forward (which it should not), it will face an unpredictable and extremely complicated legal mess determining what law to apply and how to apply it (to make matters worse, the Commission will know the whole time that the law will likely change again after an FCC remand and that it will have to go through this whole process again when the fog of legal uncertainty has lifted and the settled law can be applied in an easier and far more confident and deliberate fashion by the Commission, than it can be now, in this arbitration setting.).[37] In short, it will be an exercise in futility for the Commission to proceed with this arbitration at this time and therefore dismissal is proper.

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[34] Verizon Response at 17 & 20.

[35] Verizon Response at 18.

[36] In its Response, Verizon submits that arbitration proceedings are underway and have not been dismissed in approximately twenty other states. However, most of these states are currently considering similar motions to dismiss.

[37] Although the FCC indicated that implementation of *TRO* should not be delayed, the FCC optimistically believed that its Order was lawful; however, *USTA II* concluded that it is not in many respects. *See* (Cont'd)

23. Significantly, the New Hampshire Public Utilities Commission ("NH PUC") recently refused to move forward with respect to a virtually identical Verizon arbitration petition because it recognized that doing so would be wasteful of administrative resources. In particular, on April 12, 2004, the NH PUC declined to act on Verizon-NH's petition, explaining as follows:

> we take this step as a matter of efficiency and resource conservation. The status of the applicable law remains in flux, as the D.C. Circuit decision on the *TRO* has reversed certain FCC decisions and is being challenged. It is not a prudent use of our limited state resources to arbitrate these agreements, on an expedited basis, only to face the possibility that the TRO standards will yet again be changed by the Circuit Court or U.S. Supreme Court.[38]

The NH PUC further stated if Verizon-NH wishes to pursue its arbitration, Verizon-NH could go to the FCC immediately.[39] If Verizon-NH does so, it would be wasteful and inefficient for the Commission to address Verizon's Petition since the FCC would already be addressing identical issues. Indeed, if the Commission follows the same approach as the NH PUC, then Verizon could petition the FCC to arbitrate issues with respect to this State, which would likely be consolidated with the Verizon-NH arbitration proceeding. This approach is not only a far more

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FCC News, Statement of FCC Commissioner Michael J. Copps, Kevin J. Martin, and Jonathan S. Adelstein on the D.C. Circuit's Decision to Eliminate the FCC's Rules (rel. Mar. 3, 2004). Indeed, contrary to the FCC's assertion, it would be unreasonable and contrary to public policy to force an arbitration when it is known that the *TRO*, in many aspects, has been deemed unlawful and still being challenged.

[38] *Verizon New Hampshire Petition for Consolidated Arbitration for an Amendment to the Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers*, DT 04-018, Order Addressing Motions to Dismiss, Order No. 24,308, at 9 (rel. April 12, 2004).

[39] The North Carolina Utilities Commission made a similar suggestion to Verizon-NC. *In the Matter of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Docket No. P-19, Sub 477, Order Continuing Proceeding Indefinitely, at 2 (N.C.U.C. Mar. 3, 2004) ("*N.C. Order Continuing Proceeding Indefinitely*") (noting that "Verizon that it may avail itself of the provisions of Section 252(e)(5), wherein the arbitration may be referred to the FCC.").

efficient but also leaves the interpretation and implementation of the *TRO*, in its wounded and precarious state, to its drafters.

IV. There is No Need to Amend the Agreement to Reflect Verizon's Pre-Existing Legal Duty to Make Routine Network Modifications, and Verizon Should Not Be Permitted to Double-Recover Costs for These Modifications.

24. With respect to the Coalition's support for dismissal of Verizon's Petition with respect to routine network upgrades, Verizon argues that this is a new obligation or departure from existing law.[40] Verizon's argument improperly distorts the FCC's actual ruling.

25. In the *TRO*, The FCC found Verizon's refusal to perform routine network upgrades when provisioning UNEs to be "discriminatory on its face."[41] Contrary to Verizon's contentions, the Act and FCC implementing rules (since 1996) have always required that Verizon offer UNEs on a nondiscriminatory basis, which includes performing routine upgrades. The *TRO* did not establish new obligations in this regard but rather made certain that ILECs do not subvert existing duties. Section 251(c)(3) of the Act imposes a duty upon ILECs to provide CLECs "nondiscriminatory access to network elements on an unbundled basis … on rates, terms and conditions that are just, reasonable, and nondiscriminatory."[42] Sections 51.307, 51.311 and 51.313 of the FCC's rules similarly require ILECs to offer all requesting carriers nondiscriminatory access to UNEs. None of these rules has ever been vacated by a reviewing court. These nondiscrimination rules specifically apply to all inherent features of the network element, the quality of the element, and the terms for access to the element, respectively. Under these broad and unquali-

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[40] Verizon Response at 20.

[41] *TRO*, at n.1940.

[42] 47 U.S.C. § 251(c)(3).

fied nondiscrimination requirements, Verizon has always been required to make routine network modifications or enhancements for CLECs whenever it does so for its retail customers.

26. In addition, Section 51.311(b) of the FCC's rules has required since 1996 that "the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself."[43] Furthermore, Section 51.313(b) of the FCC's rules requires that "the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself."[44]

27. The parity requirement of these rules has always included the tasks involved in performing routine network expansions and modifications to electronics and other facilities that ILECs normally perform for their retail customers.[45] Courts have even noted that ILECs had this duty prior to the release of the *TRO* and specifically stated that if an ILEC "upgrades its own network (or would do so upon receiving a request from a [retail] customer), it may be required to make

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[43] 47 C.F.R. § 51.311(b); *see also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, , CC Docket. No. 96-98, CC Docket No. 95-185, First Report and Order, 11 FCC Record 15499, ¶¶ 312-13 (1996) ("*Local Competition Order*") (subsequent history omitted).

[44] 47 C.F.R. § 51.313(b); *see also Local Competition Order*, ¶¶ 315-16.

[45] *US West Communications, Inc. v. AT&T Communications of the Pacific Northwest*, Inc, 31 F.Supp.2d 839, 856 (D. Or. 1998) *rev'd and vacated in part on other grounds sub nom. US West Communications, Inc. v. Hamilton*, 224 F.3d 1049 (9th Cir. 2000); *see also U.S. West Communications, Inc. v. Jennings*, 46 F.Supp.2d 1004, 1025 (D. Ariz. 1999) (citing *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 n.33 (8th Cir.1997)).

comparable improvements to the facilities that it provides to its competitors to ensure that they continue to receive at least the same quality of service that the [ILEC] provides to its own customers."[46] The FCC did not depart from existing law in the *TRO* as Verizon contends. The parity requirements of 251(c)(3) of the Act and FCC Rules 51.311(b) and 51.313(b) already mandated that Verizon perform routine network modifications so that CLECs can access underlying network elements or interconnect at the same level of quality or pursuant to the same terms and conditions, respectively, that Verizon provides to itself.

28. Likewise, with respect to Verizon's Petition to arbitrate the rates it may charge for routine network modifications and as discussed in the Coalition's Motion, Verizon seeks to recover costs that are already built into UNE rates. Thus, Verizon's Petition in this regard is improper and should be dismissed as well. Short of doing that, the Commission should, at a minimum, establish interim rates of zero until Verizon's proposed charges are fully investigated.

29. Significantly, Arbitrators with the Texas Public Utility Commission recently concluded that "a policy that [the FCC found in the *TRO*] is 'discriminatory on its face' surely violated the FCC's nondiscriminatory access rules <u>in place before the [*TRO*] Order</u>."[47] With respect to the rates Verizon attempted to charge for routine network modifications in Texas, the Arbitrators held that:

> Verizon's argument that a TELRIC cost study does not include network modification costs appears to have been contradicted by the FCC in its [*TRO*], where it states that "costs associated with these modifications often are reflected in the recurring rates that

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[46] 31 F.Supp.2d at 856; *see also* 46 F.Supp.2d at 1025.

[47] *Complaint and Request for Interim Ruling of Western Communications, Inc. dba Logix Communications for Post-Interconnection Agreement Dispute Resolution with Verizon Southwest Regarding DS-1 Loop Provisioning Issues*, PUC Docket No. 28353, Arbitration Award, at 13 (Tex. P.U.C. Mar. 5, 2004) (emphasis added).

> [CLECs] pay for loops." The Arbitrators therefore conclude that Verizon has not yet shown itself entitled to any charges for recovery of "routine network modification" costs.[48]

In addition, an Arbitrator with the Rhode Island Public Utilities Commission recently held that "the FCC's TRO by its language, and as exhibited by VZ-RI's conduct over the years, did not create a new legal obligation for VZ-RI to perform but merely clarified an old pre-existing obligation."[49] This Commission should come to the same conclusion.

30. In its Petition, Verizon has not attempted to overcome the specific presumption established by the FCC that it is already recovering its costs in its recurring loop rates. Its failure in this regard further demonstrates that dismissal of Verizon's Petition is warranted.

[48] *Id*. at 14; *see also RI Procedural Arbitration Decision* at 14 (dismissing Verizon-RI's Petition to arbitrate rates for routine network modifications).

[49] *See RI Procedural Arbitration Decision* at 11.

CONCLUSION

31. For the foregoing reasons, the Commission should dismiss Verizon's Petition.

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