BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Development of Universal Terms and Conditions for Interconnection and Network Elements to Be Provided by Verizon Northwest Inc.	DOCKET NO. UT-011219 COMMISSION STAFF'S RESPONSE TO VERIZON NORTHWEST INC.'S MOTION TO TERMINATE PROCEEDING

1 Verizon Northwest Inc. ("Verizon") has filed a motion to terminate the present proceeding, contending that the federal Telecommunications Act (47 U.S.C. § 151 *et seq.*) ("the Act") preempts the Commission's authority to conduct the proceeding. Verizon contends that the Commission has set up an impermissible process intended to allegedly "bypass" or eliminate interconnection agreements altogether. Verizon cites to various federal court decisions, which allegedly support its factual and legal contentions. Commission Staff has reviewed the Act and the legal authority cited by Verizon in its motion, as well as the Commission's prior orders in this docket. Staff believes that Verizon's arguments are not well taken, and that this Commission has authority to conduct the present proceeding to develop

terms and conditions for interconnection with Verizon, to be incorporated into interconnection agreements entered into between Verizon and competing carriers. Verizon's motion to terminate this proceeding should, therefore, be denied.

ARGUMENT

I. The Commission has previously set forth its statutory authority to conduct this proceeding. In so doing, the Commission emphasized that this proceeding is intended to establish terms and conditions which may be incorporated into parties' interconnection agreements, rather than eliminating the interconnection agreement process altogether.

2 Verizon's arguments are premised on the claim that this proceeding is intended to eliminate or "bypass" the interconnection agreement process altogether, contrary to sections 251-252 of the Act and the case law. As shown below, this is not correct. The Commission previously addressed its statutory authority to conduct this proceeding in its prior orders in this docket. In the First Supplemental Order, the Commission pointed to numerous state statutes that authorize it to regulate the rates, services, facilities, and practices of telecommunications companies, and to establish terms and conditions of service. Docket No. UT-011219, First Supplemental Order, ¶¶ 14 and 19, and fn. 5 and 6 (March 2002). In addition to citing RCW 80.36.100-.130, which authorizes tariff filing requirements, the Commission's Order also referenced the Fourth Supplemental Order in Docket UT-941464, which cited RCW 80.01.040(3), RCW 80.36.080, RCW 80.36.140, RCW

80.04.110, and RCW 80.36.160-.186, in concluding that "the Commission's authority is sufficiently broad for it to order compensation arrangements . . . and other terms and conditions for local interconnection[.]" The Commission also found that the proceeding was consistent with Section 252(g) of the Act, which allows state commissions to consolidate certain proceedings in order to reduce administrative burdens on telecommunications carriers and the state commission. *Id.*

3 Significantly, in paragraph 18 of the First Supplemental Order, the Commission noted:

> Staff emphasizes that it does not propose that the Commission abolish interconnection agreements. Rather, it proposes that the Commission exercise its state authority to establish terms and conditions, available to any party requesting interconnection, to be incorporated into interconnection agreements in the absence of a contrary agreement of the parties.

4 In the Third Supplemental Order, the Commission agreed, and confirmed that this proceeding was not intended to establish tariffs to completely bypass the interconnection agreement process. Specifically, in response to the first issue raised ("What is the specific goal of the process?"), the Commission stated,

> Although there was discussion about whether the SGAT [i.e., a statement of generally available terms and conditions] would be in the form of a tariff or an interconnection agreement, the parties now agree that the process should result in a form interconnection agreement. . . . The parties' agreements that the goal of this proceeding is the development of a form interconnection agreement for use by CLECs in

negotiating interconnection agreements with Verizon is acceptable for present purposes.

Docket No. UT-011219, Third Supplemental Order, ¶ 7-9 (August 2002).

II. The decisions in *Verizon North, Inc. v. Strand* (6th Cir.) and *Wisconsin Bell, Inc. v. Bie* (7th Cir.), which held that state commissions may not bypass the interconnection agreement process altogether when establishing terms and conditions for interconnection, do not preclude the Commission from establishing a form interconnection agreement in this proceeding. Moreover, both *US West v. Sprint* (10th Cir.) and *MCI v. GTE Northwest* (D. Or.) support the Commission's authority to act.

5 Verizon relies primarily on two cases from the Sixth and Seventh Circuit, *Verizon North, Inc. v. Strand,* 309 F.3d 935 (6th Cir. 2002), and *Wisconsin Bell, Inc. v. Bie,* 340 F.3d 441(7th Cir. 2003), in making its argument that the Commission lacks authority to proceed in this docket. This reliance is misplaced. In those cases, the Michigan and Wisconsin Public Service Commissions required the ILEC to file tariffs setting forth the prices and terms at which competitors could purchase services from the ILEC, or interconnect with the ILEC's network. The state commissions there proposed a process which "completely bypasses and ignores the detailed process for interconnection set out by Congress in the FTA [the Act]." *Verizon North,* 309 F.3d at 941, 944; *accord, Wisconsin Bell,* 340 F.3d at 445 (the state commission's proposed tariff requirement would "enable would-be entrants to bypass the federally ordained procedure.")

6 The "federally ordained procedure" to which both courts referred is that set forth in section 252 of the Act, which provides for negotiated or arbitrated interconnection agreements, entered into by ILECs and CLECs, as prerequisites to interconnection. The Commission in this docket, by contrast, has not proposed eliminating such agreements. Rather, the terms and conditions resulting from this docket would be incorporated into those interconnection agreements. Such a process is consistent not only with *Verizon North* and *Wisconsin Bell*, but also with two other recent federal decisions, *US West Communications, Inc. v. Sprint Communications Co., L.P.*, 275 F.3d 1241 (10th Cir. 2002), and *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157 (D. Or. 1999).

7 In *US West*, 275 F.3d at 1251, Qwest challenged the legality of a tariff opt-in provision that allowed Sprint, which had an interconnection agreement with Qwest, to choose the rates and terms set forth in Qwest's tariffs. The court upheld the provision, and contrasted the case with *Verizon North*, stating:

> Here, in contrast [to *Verizon North*], the challenged provision does not eliminate interconnection agreements, but rather is a part of one. A decision by MCI or Sprint to purchase services at the rates and terms set forth in one or more of Qwest's tariffs does not result in abandonment of the interconnection agreement between itself and Qwest. It simply means that the interconnection agreement is amended to include the terms of the particular tariff(s). The parties remain bound by the interconnection agreement at all times, as anticipated by the Act.

This Commission recognized the validity of such a provision, which does not eliminate the interconnection agreement itself, in the First Supplemental Order in this docket. (*See id.* at ¶ 19 and fn. 6).

8 Likewise, in *MCI Telecommunications*, the court held that the Oregon Commission could not authorize CLECs to simply purchase services from ILECs "off the rack," without any interconnection agreement. On the other hand, the court held that the commission *did* have authority to adopt a "universal short-form interconnection agreement" which a CLEC, upon signing, could use to purchase services at the prices established therein. The court rejected GTE's argument that GTE must be permitted to negotiate different prices with each CLEC, and further stated:

> The court also acknowledges the PUC's concern that the cost of negotiating (and possibly litigating) a custom interconnection agreement is prohibitive for many prospective CLECs. In theory, a CLEC could avoid litigation by signing a contract acceptable to GTE, but that effectively would allow GTE to dictate the terms.

MCI Telecommunications, 41 F. Supp. 2d at 1177. The court concluded that while the Act does not specifically provide for a universal short-form agreement, "the Act does not forbid it either. The primary goal of the Telecommunications Act of 1996

was to open local telephone markets to competition, and this procedure furthers that goal and is not inconsistent with either the terms or the purposes of the Act." *Id.*

9 Again, each CLEC would enter into an interconnection agreement with the ILEC. Contrary to Verizon's claims, such a procedure does not violate the Act.

III. The Commission has previously set forth the state statutes authorizing the present proceeding. The Act does not preempt the Commission from conducting this proceeding.

10 Verizon argues that the Telecommunications Act "provides no authority for this proceeding." This argument is incorrect. Section 251(d)(3), entitled "Preservation of State Access Regulations," provides that the FCC "shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purpose of this part" [i.e., Part II, sections 251-261 of the Act].

11 This proceeding has been established to establish the terms and conditions of Verizon's interconnection with other carriers. The Commission has previously referenced the state statutes authorizing the proceeding, in its First and Third Supplemental Orders. As the case law holds, so long as the Commission does not entirely bypass the interconnection agreement set forth in section 252 of the Act, the

proceeding meets the requirements of section 251(d)(3) and is valid. Verizon has not shown that it will "substantially prevent implementation" of Part II of the Act.

12 Given this, no other independent "authorization" in the Act is necessary. Verizon argues that section 252(f) cannot be relied upon for authority, first because it provides for SGATs by "Bell operating companies" (Verizon Northwest contends that unlike Qwest, it is not a BOC in Washington because its predecessor is GTE, not Bell Atlantic); and second, because section 252(f) applies only if a company voluntarily agrees to file an "SGAT" under this section. But the Commission need not reach Verizon's contentions on these points, because authority under section 252(f) is not necessary to conduct this proceeding.

13 Finally, Verizon also contends that section 252(g), which allows for consolidation of certain proceedings, does not provide authority for the Commission to act here. The Commission previously held to the contrary, in the First Supplemental Order in this docket (*see* ¶ 19). Again, however, as this proceeding is consistent with section 251(d)(3) of the Act, no further authorization is necessary.

IV. CONCLUSION

14 For the reasons stated above, Verizon's motion to terminate this proceeding should be denied.[1]

DATED this 28th day of June 28, 2004.

CHRISTINE O. GREGOIRE
Attorney General

_____
GREGORY J. TRAUTMAN
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff

[1] Verizon's motion to terminate the proceeding includes, in addition to the Company's legal arguments, statements regarding the progress of negotiations between Verizon and the CLECs. (*See* the "Background" section of Verizon's motion, at pp. 4-6.) Staff's response does not address these statements.