600 University Street, Suite 3600
Seattle, Washington 98101
main 206.624.0900
fax 206.386.7500
www.stoel.com

VERONICA MOORE
Direct (206) 386-7519
vmoore@stoel.com

December 23, 2004

VIA E-MAIL AND FEDERAL EXPRESS

Ms. Carole Washburn, Executive Secretary
Washington Utilities & Transportation Committee
1300 Evergreen Park Drive, SW
Olympia, WA 98504

Re: Docket No. UT-041127

Dear Ms. Washburn:

Please find enclosed an original and seven copies of Verizon's Response to Petition for Review and a Certificate of Service.

Please contact us if you have any questions, and thank you in advance for your assistance.

Very truly yours,

Veronica Moore
Assistant to Timothy J. O'Connell

Enclosures

cc: ALJ Ann Rendahl
Parties of Record

Oregon
Washington
California
Utah
Idaho

BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

In the Matter of THE JOINT PETITION FOR ENFORCEMENT OF INTERCONNECTION AGREEMENTS WITH VERIZON NORTHWEST INC.	DOCKET NO. UT-041127 **VERIZON'S ANSWER TO PETITIONS FOR REVIEW**

Verizon Northwest Inc. (Verizon) responds to the Petitions for Review of *Order No. 2* filed by the Joint CLECs (AT&T, TCG, and MCI) and Tel West. Verizon also responds to Commission Staff's Comments on the Recommended Decision.[1]

I. INTRODUCTION

1. The Joint CLECs argue that *Order No. 2* erred in (1) deciding the single, legal issue the Joint CLECs specifically asked the ALJ to decide; (2) holding that federal law and the parties' interconnection agreements do not require Verizon to unbundle its packet switch; (3) finding that material facts are not in dispute; and (4) striking the affidavit of MCI witness Sherry Lichtenberg. The Joint CLECs mischaracterize *Order No. 2*, misstate the facts, and ignore the law. Their Petition for Review must be denied.

[1] For simplicity, this Answer focuses on the Joint CLEC Petition for Review. Tel West and Staff make the same legal arguments as the Joint CLECs, therefore this Answer applies to these parties' arguments as well.

II. ARGUMENT

A. *Order No. 2* Properly Held that the Parties' Pleadings Present an Issue of Law.

2. The Joint CLECs make the remarkable claim that *Order No. 2* should *not* have decided the very legal issue the Joint CLECs repeatedly have asked this Commission to decide since last June: whether Verizon is required by federal law or its interconnection agreements to unbundle its packet switch. Having lost on the key legal issue, the Joint CLECs now want to turn back the clock and argue about the facts. This Commission should reject this transparent attempt to defy the Commission's procedural rules and sandbag both Verizon and the ALJ. In any event, the new "factual issues" raised by the Joint CLECs are neither material nor subject to reasonable dispute.

3. As *Order No. 2* explains, on June 8, 2004, Verizon issued a notice informing the Joint CLECs and others that it intended to replace its existing circuit switch in Mt. Vernon with a packet switch, and that unbundled switching would not be available at the Mt. Vernon switch beginning on September 10, 2004. *Order No. 2* ¶ 15. Verizon's notice specifically stated that, "Verizon will replace the existing Mount Vernon Norte-DMS-100 switch with a Nortel Succession packet switch." *See* Joint Pet. For Enforcement of Interconnection Agreements, Docket No. UT-041127 (filed Sept. 17, 2004) at Exh. A. Verizon's notice specifically alluded to the FCC's repeated finding that packet switches are not subject to unbundling. *Id.* It invited the CLECs to work with Verizon to shift their present customer base to a resale platform—a platform the CLECs themselves had used to serve retail customers in Washington State and elsewhere in the past. *Id.* The only CLEC to respond was AT&T, *id.* ¶16, and in its

response AT&T did not dispute that the Nortel Succession switch was a packet switch, which used an entirely different routing technology than a circuit switch, and was capable of providing new services such as VoIP, high-speed data transmission, and video programming. *See* Joint Pet. For Enforcement at Exh. C-1 (raising change of law and notice issues regarding Verizon's claim that federal law "relieves Verizon of its obligation to provide packet switches as a UNE." *Id.*

4. On June 28, 2004, several CLECs requested that the Commission enter an order that, as a matter of law, Verizon must continue to provide unbundled local switching and the UNE-P despite the replacement of its Mount Vernon circuit switch with a packet switch. The Commission rejected the CLECs' request in *Order No. 8* in Docket No. UT-043013 as procedurally improper, and directed the CLECs to file a formal complaint or petition for enforcement.

5. On August 31, 2004, the CLECs, including the Joint CLECs, filed a motion in Docket No. UT-043013 asking the Commission to enforce *Order No. 5*, the CLECs' interconnection agreements, and the Federal Communications Commission's (FCC) *Triennial Review Order*, asserting "that Verizon's planned conversion from a circuit switch to a packet switch in Mount Vernon, Washington, on September 10, 2004, violated these orders and agreements." *Order No. 2* ¶ 3. The CLECs specifically argued that Verizon's refusal to unbundle its Mt. Vernon packet switch "is contrary to the plain language in the agreements." Joint CLEC Motion at ¶ 14. The motion then quoted what the CLECs believe to be the relevant provisions of the various interconnection agreements. *Id.* ¶¶ 13-24. Nowhere did the CLECs claim that the

agreements were ambiguous or that facts were in dispute. *See id.* at ¶ 13 ("Verizon, through its proposed substitution of packet switches for circuit switches, intends to cease the provision of unbundled switching and UNE-P to the Competitive Group.")

6. Deferring consideration of the merits of MCI's and the other CLECs' claims, the ALJ held a hearing to determine whether any "immediate harm" to the CLECs would result if Verizon converted its Mt. Vernon switch and did not unbundle it. She concluded there was no such harm, and she instructed the CLECs to file a separate petition for enforcement of their interconnection agreements.

7. The CLECs filed their petition in this docket on September 17, 2004. There, they argue once again that Verizon's position "is contrary to the plain language in the agreements." Joint CLEC Petition for Review ¶ 12. As before, they rely on the agreements' "Local Switching" definitions to support their position. *Id.* ¶¶ 12-19. They also stated that "the FCC's definition of local switching is consistent with the [agreements'] definitions and supports the Joint Petitioners' arguments." *Id.* ¶ 19. Nowhere in their petition do they present anything other than legal arguments or in any way allege that the agreements are ambiguous or that facts are in dispute.

8. Verizon filed its Motion for Judgment on the Pleadings and Answer (the "Verizon Motion") on September 27, 2004. There, Verizon explained: (1) that its interconnection agreements are creatures of federal law, incorporating the FCC's definition of local circuit switching; (2) that federal law, including the FCC's binding interpretation of Section 251(d)(2) and its definition of local circuit switching, precludes packet switch unbundling; and, therefore (3) that Verizon is exercising its federal rights

to upgrade its network and nothing in its interconnection agreements eliminated that right. *See, e.g.*, Verizon Motion ¶¶ 18-28 (describing how the various agreements reflect federal law); *id.* ¶ 44 (explaining how federal law does not now require, and never has required, packet switch unbundling).

9. In short, the parties agree that the interconnection agreements are intended to (and do) reflect federal law, but disagree over what federal law requires. Specifically, the CLECs claim that the FCC's definition of "local circuit switching" requires ILECs "to provide the functionality of traditional, narrowband voice service regardless of the technology used," *i.e.*, regardless of whether the ILEC uses circuit or packet switches. Joint CLEC Petition for Enforcement ¶ 19. Verizon claims exactly the opposite – the FCC's definition requires the unbundling of only circuit switches. *See, e.g.*, Verizon Motion ¶¶ 54-55.

10. Given that the parties' positions presented only the legal issue of whether packet switches must be unbundled, Verizon asked the Commission to decide the case on the pleadings. But at the October 11, 2004 scheduling conference, MCI and the other CLECs indicated *for the first time* that facts might be at issue and that they needed to conduct discovery. To support this claim, they pointed to a single paragraph in the "Introduction" section to Verizon's Motion. There, Verizon made the common-sense statement that, "Saddling the deployment of new technology with burdensome new unbundling duties, including the development of the necessary wholesale operations support systems (OSS), is not only unnecessary and unlawful, but would render these

upgrades uneconomic." Verizon Motion ¶ 4.[2] Based on this single sentence, the CLECs claimed that they needed to conduct discovery on Verizon's OSS before they could respond to Verizon's Motion.

11. At the October 11, 2004 conference, the ALJ asked the parties to try and resolve their discovery dispute, stating that the CLECs had the right to pursue discovery on new factual issues, if any, raised by Verizon's Motion. The parties did so. For example, Verizon responded to the CLECs' OSS argument by stating that, "Verizon is not asserting that changes to its OSS, if any, relating to the switch replacement are relevant to Verizon's Motion." Verizon's Response to MCI DR #1. Verizon also responded to numerous other Joint CLEC discovery requests. The Joint CLECs did not object to Verizon's responses or file a motion to compel, even though the ALJ made clear she would be ready at a moment's notice to resolve any discovery disputes. Also, at no time during this process did the CLECs indicate to Verizon or the ALJ that they were claiming the Mt. Vernon switch was not a packet switch.

12. In sum, it is beyond dispute that the CLECs' Petition for Enforcement and Verizon's Motion presented a discrete issue of federal law. Not until the Joint CLECs filed their Response to Verizon's Motion on October 27, 2004 did they claim that the Mt. Vernon switch might not be a packet switch or that certain remotes might be performing circuit switching. Because this newly minted factual issue was not raised by

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[2] This statement is merely a reflection of the FCC's reasoning in declining to require the unbundling of packet switches. *See infra* pp. 12-13 (discussing FCC's decision to preclude unbundling of packet switches in part to creat incentives to investment); *see also United States Telecom Ass'n v. FCC*, 359 F.3d 554, 582 (D.C. Cir. 2004) (*"USTA II"*) ("the Commission reasonably interpreted § 251(c)(3) to allow it to withhold unbunding orders, evenin the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment.

the CLECs' Petition or Verizon's Motion, the ALJ properly decided the single, legal issue presented. In the alternative, the ALJ properly held that, on the record evidence submitted, there was no genuine dispute of material fact whether "Verizon has deployed a packet switch using solely packet switching functions." *Order No. 2* ¶¶ 75-76.

B. <u>*Order No. 2* Correctly Held that Neither Federal Law Nor the Parties' Interconnection Agreements Require Verizon to Unbundle Its Packet Switch.</u>

13. The Joint CLECs disagree with *Order No. 2*'s holding that Verizon is not required to unbundle its packet switch, and claim that Verizon should continue unbundling just as if the switch were a traditional circuit switch. As a threshold matter, this legal issue is moot. On December 15, 2004, the FCC adopted new rules providing that ILECs "have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching." FCC News Release, *FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers* at 2 (rel. Dec. 15, 2004) ("FCC News Release") (attached as Exh. A). And although the FCC has established a 12-month transition period, this transition applies only to the embedded customer base. *Id.*

14. This recent decision is important not only because it eliminates UNE-P, but also because it recognizes that the FCC's transitional unbundling rules apply only to local ***circuit switching***, not packet switching. Thus, it reaffirms the conclusion the ALJ reached in *Order No. 2*:

> It is clear from [the *Local Competition Order*, *UNE Remand Order*, and *Triennial Review Order*] that packet switching is a network element, and that the FCC has determined that packet switching equipment, otherwise described as packet switches, are not subject to

> unbundling obligations. *See UNE Remand Order*, ¶ 306; *Triennial Review Order*, ¶¶ 539, *see also* ¶ 448.

Order No. 2 ¶ 78.

15. Setting aside the FCC's new rules, the Joint CLECs misstate the law. Their Petition for Review simply restates the arguments they made in their Petition for Enforcement and Answer to Verizon's Motion, and therefore in response Verizon incorporates by reference its Motion and Reply.

16. Briefly, the Joint CLECs' argument is that the FCC's definition of local circuit switching is "function oriented" and therefore Verizon must provide CLECs with unbundled access to the local voice switching function regardless of the device used to provide the functionality. *See, e.g.*, Joint CLEC Petition for Review ¶¶ 2, 37-38, 42, 45, 55, 58, 61, 63, 64, 70. In other words, Verizon must unbundle its packet switches where it uses them to switch *voice* traffic. Staff makes essentially the same argument. *See* Staff Comments on Recommended Decision ¶¶ 1, 6; Staff Answer ¶ 19.

17. The Joint CLECs (and Staff) are wrong. As Verizon explained in its Motion and Reply, the FCC plainly and consistently has held that the "facility or equipment" at issue – *i.e.*, the packet switch – is not subject to any unbundling requirements under federal law and that any such requirements would affirmatively frustrate the federal policy of encouraging rapid deployment of new packet-based technologies. *See* Verizon Motion ¶¶ 7-17, 38; Verizon Reply ¶¶ 8-23. Not only did the FCC make no exception for any particular functionalities, it made clear that there could be no such exception consistent with federal law and its own nationally binding findings under Section 251(d). *See* Verizon Motion ¶ 44; Verizon Reply ¶¶ 2, 12, 15, 18-19.

18. *First*, it is a basic precept of commercial law that a business's private property is not subject to forced sharing with its competitors. *See, e.g.*, *Verizon Communications Inc. v. Trinko*, 124 S. Ct. 872, 879-80 (2004); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994). The Telecommunications Act of 1996 ("1996 Act"), which authorizes the FCC to make limited exceptions to that rule, imposes no "underlying duty to make all network elements available" to competitors, from which the FCC then may carve "isolated exemptions." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391-92 (1999). Instead, before any part of an ILEC's network is subject to unbundling, the FCC must "determin[e]" that it is a "network element" that "should be made available for purposes of [Section 251(c)(3)]." 47 U.S.C. § 251(d)(2); *see Iowa Utils. Bd.*, 525 U.S. at 391-92 (holding that Section 251(d)(2) "requires the [FCC] to determine on a rational basis *which* network elements must be made available"). As such, the CLECs are not entitled to unbundled access to Verizon's packet switches because they cannot carry their burden of identifying a specific FCC order or rule that requires their unbundling for any purpose.

19. *Second*, an unbroken eight-year line of FCC decisions confirms that packet switches are simply not subject to unbundling, regardless of the functionalities they may provide. As Verizon has explained, the FCC on four separate occasions did precisely what the 1996 Act requires *it* to do – it examined packet switches and concluded that competing carriers would not be impaired without unbundled access to them. *See* Verizon Motion ¶¶ 8-17; Verizon Reply ¶¶ 13-17. These decisions are summarized here:

The 1996 *Local Competition Order*

20. In 1996, the FCC explicitly *rejected* the CLECs' request to unbundle packet switches, and even refused to identify packet switches as "network elements" that would be subject to unbundling requirements under Section 251(c)(3) & (d)(2) of the 1996 Act:

> At this time, *we decline to find*, as requested by AT&T and MCI, *that incumbent LECs' packet switches should be identified as network elements*. . . . [T]he record is insufficient for us to decide whether packet switches should be defined as a separate network element. We will continue to review and revise our rules, but at present, *we do not adopt a national rule for the unbundling of packet switches.*

Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, 11 F.C.C.R. 15,499, 15,713 (¶ 427) (Aug. 8, 1996) ("*Local Competition Order*") (emphases added).

21. The FCC's blanket refusal to define packet switching equipment – regardless of use – as a "network element" subject to unbundling necessarily meant that none of the "features, functions, and capabilities . . . that are provided *by means of [packet switches]*" were subject to unbundling, even if the packet switch was used only to provide voice, not data. Likewise, the FCC clearly distinguished between packet switches and circuit switches, and thus did not define a "network element" by functionality (*e.g.*, voice switching capability) independent of the equipment used to provide that functionality. Specifically, the *Local Competition Order* made clear that while CLECs were entitled to *all* the functionality of circuit switches, they were entitled

to *none* of the functionality of packet switches. Therefore, the only type of "facility or equipment" that could be unbundled to provide "local switching" as defined in the *Local Competition Order* was a *circuit* switch.[3]

The 1999 *UNE Remand Order*

22. In 1999, the FCC again refused to impose a general unbundling requirement on packet switches. *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 15 F.C.C.R. 3696, 3835 (¶ 306) (Nov. 5, 1999) ("*UNE Remand Order*"). Indeed, as the D.C. Circuit has explained, the *UNE Remand Order* only directed the unbundling of "packet switches in a *few* circumstances." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 421 (D.C. Cir. 2002) ("*USTA I*") (emphasis added). The sole and very limited exception to the blanket rule that packet switches are not subject to unbundling concerned DSLAMs at remote terminals, which are not at issue here. *See id.* at 420; Verizon Motion ¶ 10 n.2. The FCC recognized *no other exception*, and certainly no exception for "circuit switching for voice service" functionality. Joint CLEC Petition for Review ¶ 2. The FCC's and D. C. Circuit's repeated characterization of the limited duties to provide access to DSLAMs as an exception, makes clear that the general rule was that packet switching technology was subject to no other unbundling requirements at all.

[3] The CLECs' suggestion that the FCC's *Local Competition Order* somehow "declined to adopt any rule at all" regarding the unbundling of packet switches, Joint CLEC Petition for Review ¶ 59, is fatal to their claim. Even assuming that the FCC's views as to packet switches were unsettled in the *Local Competition Order* – which they were not – Verizon still would prevail because a network element cannot be unbundled *absent an affirmative FCC determination that unbundling is required. See, e.g., Iowa Utils. Bd.*, 525 U.S. at 391-92; *supra* at pp. 6-7.

The 2003 *Triennial Review Order*

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

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

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16,978, 17,323 (¶ 539) (Aug. 21, 2003) (footnotes omitted) (emphases added) ("*Triennial Review Order*"); *see also id.* (¶ 541) ("In order to ensure that both incumbent LECs and competitive LECs retain sufficient incentives to invest in and deploy broadband infrastructure, *such as packet switches*, we find that *requiring no unbundling* best serves our statutorily-required goal." (emphases added)); *id.* (¶ 540) ("[W]e decline to permit any limited exceptions to our decision not to unbundle packet switching.").[4]

The 2004 *Forbearance Order* and Rules

24. The FCC reiterated its position yet again in its recent *Section 271 Forbearance Order*. *See Petition for Forbearance of the Verizon Tel. Co. Pursuant to 47 U.S.C. § 160(c)*, WC Dkt. No. 01-338, FCC 04-254 (rel. Oct. 27, 2004). There, the FCC once

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[4] The FCC's finding of lack of impairment on a national basis is one that only the FCC is authorized by statute to make and that a state commission cannot participate in or second guess. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) ("*USTA II*") (noting that Section 252(d)(2) assigns the impairment finding to the FCC and rejecting the notion that any portion of that finding can be delegated to state commissions).

more stated that "packet switching" is not subject to unbundling and that the FCC's determination on this point has been made on a national basis. *Id.* ¶ 1. That packet switches need not be unbundled is confirmed by the FCC's adoption of new unbundling rules on December 15, 2004. Under those rules, ILECs no longer have any "obligation to provide competitive LECs with unbundled access to mass market local *circuit switching*." FCC News Release at 2 (emphasis added). The decision nowhere purports to alleviate any supposed obligation to unbundle *packet switches* – reconfirming that packet switches *never* have been subject to unbundling requirements.

25. The FCC's consistent pronouncements that packet switches are not subject to unbundling belie the suggestion that access to packet switches was required in 1996, or that the law somehow has changed since 1996. *See* Joint CLEC Petition for Review ¶¶ 56-59. If the *Local Competition Order* truly had required Verizon to "provide unbundled access to local switching for voice traffic," *id.* ¶ 56 – which it did not – then the FCC's later orders could not have exempted packet switches from unbundling without adequately explaining why the FCC was changing course.[5] Of course, the FCC offered no such explanation, but instead treated the *Triennial Review Order*'s "no unbundling" rule as simply a reaffirmation of the decision it made in the *Local Competition Order* and *UNE Remand Order*. Thus, there is no basis to conclude that

[5] Under the federal Administrative Procedure Act ("APA"), an agency may not depart from its past practices or policies without providing a reasoned explanation for doing so. *See, e.g.*, *Ramaprakash v. FAA*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003) (emphasizing that "agency action is arbitrary and capricious if it departs from agency precedent without explanation"); *Columbia Broad. Sys., Inc. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971) (holding that an unexplained policy shift constitutes "an inexcusable departure from the essential requirement of reasoned decision making"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (holding that an agency engages in arbitrary and capricious action whenever it "casually ignore[s]" its own "prior policies and standards"), *cert. denied*, 403 U.S. 923 (1971).

the *Local Competition Order* reflects anything other than the same "no unbundling" rule reflected in the later orders, and all of the FCC orders mean what they say: packet switches are not subject to unbundling, regardless of what service they are used to deliver.

26. Furthermore, the FCC itself has expressly rejected the CLECs' and Staff's claim that packet switches must be unbundled when used for voice services. *See* Staff Answer ¶ 22 (arguing that ILECs are not required to unbundle packet switches when they provide an *advanced services* functionality, but that the FCC "did not relieve ILECs of their obligation to provide unbundled local switching for *voice traffic*" even where ILECs use a packet switch (emphasis added)). As explained in Verizon's Motion, the FCC unequivocally rejected this very position when MCI asked the FCC to clarify that, "even if the [FCC] does not require ILECs to make packet switching available as an unbundled network element for the provision of advanced services, it should clarify that packet switching must be made available as a UNE when the ILEC is using it to provide voice services."[6]

27. The FCC rejected MCI's request, making clear that, because the FCC had refused to "require unbundling of packet-switching *equipment*," CLECs could not obtained unbundled access even when that packet switching *equipment is used to provide voice services*. *Triennial Review Order*, 18 F.C.C.R. at 17,149 n.833 (¶ 288)

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[6] Petition of MCI WorldCom, Inc. for Clarification, CC Dkt. No. 96-98, at 2-3 (filed Feb. 17, 2000) (footnote omitted) ("MCI Petition for Clarification"), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6010955528 (attached as Exh. B).

(emphasis added) (citing MCI Petition for Clarification at 2, 13); *see* Verizon Motion ¶¶ 14-15; Verizon Reply ¶¶ 2, 10-12.[7]

28. In short, the Joint CLECs' and Staff's attempts to separate the functionalities offered by packet switches simply cannot be reconciled with both the plain language and reasoning of FCC orders that are squarely on point. The FCC made clear in the *Triennial Review Order* that, "by prohibiting access to the packet-based networks of incumbent LECs, we expect that our rules will stimulate competitive LEC deployment of next-generation networks." 18 F.C.C.R. at 17,150 (¶ 290). The FCC also made clear that ILECs could avoid the unbundling obligations connected with traditional circuit switches by "deploying more advanced packet switching." *Id.* at 17,253-55 n.1365 (¶ 447). The FCC's holding that the deployment of packet switches eliminates the unbundling requirements connected with traditional circuit switches is categorical – it cannot be reconciled with the CLECs' or Staff's attempt to create a "voice only"

[7] The notion that the FCC rejected MCI's Petition for Clarification only insofar as it related to DSL service, *see* Joint CLEC Petition for Review ¶¶ 67-68, does not withstand scrutiny. On page 2 of its Petition for Clarification, MCI did not request the unbundling of DSL equipment, but instead asked for precisely the same relief he CLECs seek here: "that packet switching must be made available as a UNE when the ILEC is using it to provide *voice services*." MCI Petition for Clarification at 2 (emphasis added). In rejecting the request, the FCC *specifically referred* to page 2 of MCI's Petition for Clarification. *See Triennial Review Order*, 18 F.C.C.R. at 17,149 n.833 (¶ 288) (rejecting MCI's request that the FCC unbundle "packet-switching equipment" and citing directly to the MCI Petition for Clarification at 2). By contrast, MCI requested in a *separate* Petition for Reconsideration that the FCC "define DSL equipment, including the DSLAM, as an unbundled network element separate from packet switching." Petition of MCI WorldCom, Inc. for Reconsideration, CC Dkt. No. 96-98, at 13 (filed on Feb. 17, 2000) ("MCI Petition for Reconsideration"), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6010955182. The FCC rejected this separate request by citing to MCI's Petition for Reconsideration. *See Triennial Review Order*, 18 F.C.C.R. at 17,149 n.833 (¶ 288) (rejecting MCI's request that the FCC unbundle "DSLAMs, and other equipment used to deliver DSL service" and citing directly to MCI Petition for Reconsideration at 2-18). Thus, it is obvious that the portion of the FCC's holding about "DSLAMs, and other equipment used to deliver DSL service" addressed MCI's specific request for that equipment in its Petition for Reconsideration, and had nothing at all to do with the FCC's separate rejection of MCI's request to unbundle packet switches when they are used to provide voice services.

exception. For all of these reasons, *Order No. 2* correctly concluded that "[i]t is clear from [the *Local Competition Order*, *UNE Remand Order*, and *Triennial Review Order*] 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." *Order No. 2* ¶ 78.

29. *Third*, the plain language of the 1996 Act confirms that CLECs are not entitled to the "functionalities" of Verizon's packet switch because they are not entitled to the packet switch itself. The term "network element" means "a *facility* or *equipment* used in the provision of a telecommunications service," and "includes features, functions, and capabilities that are provided *by means of such facility* or *equipment*." 47 U.S.C. § 153(29) (emphases added). And the Act mandates that it is the FCC – not state commissions – that must "determine[] what network elements should be made available for purposes of [Section 251(c)(3)]." *Id.* § 251(d)(2). Thus, the Act requires the FCC *alone* to determine whether a particular network element – a *facility or equipment* – should be unbundled. States have no authority under federal law to make unbundling determinations of their own.[8] If the FCC makes the required impairment finding, and further finds that no other factors militate against unbundling, then and only then do the "features and functions" of a particular piece of equipment or a facility in the ILEC's network become available on an unbundled basis. In other words, the "features and functions" provided by a packet switch are not subject to unbundling *unless the packet*

[8] Any attempt by this Commission to require the unbundling of packet switches would conflict with and frustrate the federal policy of encouraging the deployment of next-generation technologies, and hence would be preempted. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Air Transp. Ass'n of Am. v. City of San Francisco*, 266 F.3d 1064, 1066, 1076 (9th Cir. 2001).

switch itself must be unbundled. See Verizon Motion ¶ 7; Verizon Reply ¶¶ 9, 19; *Order No. 2* ¶ 80 (recognizing that "a network element is a facility or equipment, of which the features and functions are a part," and concluding that, because "the FCC has not required packet switches as a network element to be unbundled, the ILECs are not required to unbundle the features and functions of the packet switch").[9]

30. The CLECs previously attempted to muddle the issue by arguing that their unbundling request is all about "functionality" and not "hardware." Their sole support for this contention was that "the FCC does not discuss packet 'switch*es.*' Rather, it has stated that ILECs are not required to unbundle 'packet switch***ing***.'" Joint CLEC Response ¶ 27 (emphasis in original). This couldn't be farther from the truth. It requires no more than a cursory review of the relevant FCC orders to see that *both* the packet-switching functionality *and* the packet switches themselves need not be unbundled. *See, e.g., Triennial Review Order*, 18 F.C.C.R. at 17,256 (¶ 448) ("[W]e do not require packet switch***es*** to be unbundled . . . ." (emphasis added)); *Local Competition Order*, 11 F.C.C.R. at 15,713 (¶ 427) (refusing to find that "packet

[9] Because neither *Order No. 2* nor Verizon claim, as the Joint CLECs falsely suggest, that "Verizon's . . . unbundling obligations under the ICAs are limited to facilities or equipment," Joint CLEC Petition for Review ¶ 42, the Joint CLECs' newfound reliance on the *Triennial Review Order* ¶ 58 and *Iowa Utilities Board* is misplaced. Those authorities demonstrate, as Verizon has maintained, that a "network element" does not consist solely of physical facilities or equipment, but, as the statutory definition requires, also includes the functionality provided by means of such facilities or equipment. *See Triennial Review Order*, 18 F.C.C.R. at 17,019 (¶ 58) (noting 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" (emphasis added)); *Iowa Utils. Bd.*, 525 U.S. at 387 (rejecting the argument that "that a 'network element' must be part of the physical facilities and equipment," and holding that it also includes the "'features, functions and capabilities . . . provided by means of' the network equipment"). In other words, under the statutory definition of "network element," a "facility or equipment" is inextricably linked with the "features, functions and capabilities" that are "provided *by means of such facility or equipment.*" 47 U.S.C. § 153(29) (emphasis added).

switch***es*** should be identified as network elements," and declining to "adopt a national rule for the unbundling of packet switch***es***" (emphases added)); *USTA I*, 290 F.3d at 421 (emphasizing that the *UNE Remand Order* directed the unbundling of "packet switch***es*** in a few circumstances," none of which apply here (emphasis added)).

31. Indeed, the Joint CLECs' own authorities and the statutory definition of "network element" itself squarely refute the Joint CLECs' erroneous (and wholly unsupported) assertion that ILECs can be required "to provide unbundled local switching" over facilities or equipment that the FCC has held are off limits to unbundling. Joint CLEC Petition for Review ¶ 45. Consistent with the statutory definition, the *Triennial Review Order* refers to "network elements" not as stray functionalities untied to any particular facility or equipment, but rather as the "facility or equipment (*and the accompanying* features, functions and capabilities)" and the "facilities or equipment (*and associated* features, functions and capabilities)." *Triennial Review Order*, 18 F.C.C.R. at 17,020 (¶ 59) (emphases added). Thus, the packet switching network element consists of the "facilities or equipment" (*i.e.*, the packet switch itself) and the "accompanying" and "associated" functions of the packet switch. *See, e.g.*, *UNE Remand Order*, 15 F.C.C.R. at 3834 (¶ 304) (holding that "[t]he packet switching network element includes the necessary electronics" (*i.e.*, the facility or equipment) as well as "the function of routing individual data units, or 'packets,' based on address or other routing information contained in the packets"); *Triennial Review Order*, 18 F.C.C.R. at 17,321, 17,323 (¶¶ 537, 541) (holding that both "packet switches" and "packet switching" are not subject to unbundling).

32. Conversely, it is nonsensical for the Joint CLECs to claim that a "function[]" provided "by means of [a particular] facility or equipment," could somehow be subject to unbundling when the particular facility or equipment (here, packet switches) used to provide that function has been consistently determined by the FCC to be entirely off limits to unbundling. *See* 47 U.S.C. § 153(29). The Joint CLECs' argument reads the clause "by means of such facility or equipment" entirely out of the 1996 Act's definition of "network element," and therefore must be rejected. *See id.* It would also mean that *any* next-generation equipment in an ILECs' network – no matter how ubiquitously deployed by CLECs themselves – could be subject to the selective "functionality" unbundling the CLECs ask this Commission to create from whole cloth.

33. *Fourth*, *Order No. 2* correctly determined that ILECs have the right to replace a circuit switch with a packet switch even if the *sole purpose* of such deployment is to avoid having to continue to provide unbundled switching. *Order No 2* ¶ 81 (interpreting FCC order to provide that "ILECs may deploy packet switches without requiring unbundled access, and may upgrade switches with packet switches to avoid the unbundling requirement").

34. This decision tracks precisely the FCC's holding:

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

Triennial Review Order, 18 F.C.C.R. at 17,254-55 n.1365 (¶ 447). This makes perfectly clear that, under binding FCC precedent, ILECs "can avoid" the "unbundling

of circuit switching" by "deploying more advanced packet switching" – and that there is no need to prove switch exhaust to justify deploying a packet switch. Indeed, Verizon's interconnection agreements specifically reserve the right to upgrade its network.

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

C. The ICAs' "Local Switching" Provisions Only Require The Unbundling of Circuit Switches and Do Not Contemplate the Unbundling of Packet Switches.

36. The Joint CLECs similarly argue that the ICAs require Verizon to provide "a local switching UNE, and there is no limitation regarding the type of switch that will be used to provide such UNE." Joint CLEC Petition for Review ¶¶ 36-41. This is merely a rerun of the "functionality" canard, framed in the context of the ICAs, and therefore must be rejected.

37. As Verizon has explained, *see* Verizon Motion ¶¶ 47, 53, the ICAs are federal mandates, entered and enforced by state commissions under federal law, with terms that would never be arrived at by arms-length bargaining in private transactions.[10] The

[10] *See, e.g., Verizon Md., Inc. v. Global NAPs, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004) (interconnection agreements are a "creation of federal law, specifically the 1996 Act," and "are the tools through which

unbundling provisions of these interconnection agreements therefore do not reflect voluntary commitments on Verizon's part, but instead "represent nothing more than an attempt to comply with the requirements of the 1996 Act." *AT&T Communications of the S. States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). The AT&T/MCI ICA to which the Joint CLECs refer is no different. As Verizon has explained, it does not, and cannot, require more unbundling than otherwise required under federal law, and therefore in no way requires the unbundling of packet switches in any circumstances. *See* Verizon Motion ¶¶ 19-23, 27-28.

38. This is confirmed by the Joint CLECs' reference to the "Local Switching" provision in the AT&T/MCI ICA. *See* Joint CLEC Petition for Review ¶ 37. This provision is merely the FCC's "local *circuit* switching" rule written into the ICA. The Joint CLECs admit as much, stating that the FCC's "definition of local switching is consistent with the ICAs' definitions" and then going on to prominently quote from paragraph 433 of the *Triennial Review Order*. *See* Joint CLEC Petition for Enforcement ¶ 19.[11] Paragraph 433 appears directly under the heading entitled

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[the 1996 Act] is [implemented and] enforced" (quotations omitted)); *see also BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278 (11th Cir. 2003) (en banc) ("Interconnection agreements are tools through which the [Act is] enforced.").

[11] The FCC's unbundling rules for "local switching" (as it was termed in the *Local Competition Order*, *see Local Competition Order*, 11 F.C.C.R. at 15,706 (¶ 412)) and "local circuit switching" (as it was later termed, *see, e.g.*, *UNE Remand Order*, 15 F.C.C.R. at 3805 (¶ 244)); *Triennial Review Order*, 18 F.C.C.R. at 17,237) contain the same unbundling requirement, as they have consistently focused on "the connection of lines to lines, lines to trunks, trunks to lines, and trunks to trunks," and it is these rules that are written into the Joint CLECs' ICAs as the "Local Switching" provision. *See* Verizon Motion ¶ 55. In fact, in the *UNE Remand Order*, the FCC made clear that "local switching" and "local circuit switching" are exactly the same thing, and thus that the "local switching" requirement in the *Local Competition Order* (and, necessarily, the copied language in the interconnection agreements) is an obligation to unbundle "local circuit switching." *UNE Remand Order*, 15 F.C.C.R. at 3805 (¶ 244) (Definition of Local Circuit Switching) ("In the [*Local Competition Order*], the Commission defined *local circuit switching* as including the basic function of connecting lines and trunks. . . . We . . . find no reason to alter our current definition of *local circuit switching*." (emphasis added)).

"Definition of Unbundled Local *Circuit* Switching Element," and it – like the Joint CLECs' ICAs – defines "local *circuit* switching" as "encompass[ing] line-side and trunk-side facilities, plus the features, functions, and capabilities of the switch[,]" which includes "the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks." *Triennial Review Order*, 18 F.C.C.R. at 17,245 (¶ 433).[12] Yet, inexplicably, the Joint CLECs nonetheless argue that by incorporating the FCC's definitions of "local circuit switching," their interconnection agreements somehow take on a different meaning and *include* the same packet switching facilities that the FCC *excludes* in the same orders. This makes no sense.

39. Indeed, the FCC has made clear that, contrary to the Joint CLECs' contention, *see* Joint CLEC Petition for Review ¶ 38, the "local circuit switching" network element is in fact tied to ILEC "circuit switching technologies" and thus is not technologically neutral. *See UNE Remand Order*, 15 F.C.C.R. at 3805-06 (¶ 245) ("We cannot find, on the basis of the record before us, that incumbent LEC circuit switching technologies have changed in such a way as to warrant modification of our circuit switching definition."). The FCC's impairment analysis demonstrates beyond dispute that the "local circuit switching" unbundling obligation is tied to circuit switch *equipment and facilities*; it is a "circuit switch unbundling obligation" and, specifically, an obligation only to unbundle "local circuit switches," "circuit switching equipment," and circuit

[12] *See* Joint CLEC Petition for Review ¶ 37 (quoting AT&T/MCI ICA definition of "Local Switching" as "the Network Element that provides the functionality required to connection the appropriate originating lines or trunks wired to the Main Distribution 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"); Verizon Motion ¶ 22 n.4 (noting that the AT&T/MCI ICA's definition of "Network Element" is substantively identical to the definition of that term in the 1996 Act).

"switching facilities." *See id.* at 3810-11, 3813-14, 3821, 3822-23, 3827-28 (¶¶ 256, 260, 273, 277, 287); *Triennial Review Order*, 18 F.C.C.R. at 17,237, 17,244, 17,247, 17,265 (¶¶ 419, 429, 435, 463). Thus, the Joint CLECs' argument that an interconnection agreement's "Local Switching" provision (which is merely the FCC's "local circuit switching" rule) is all about "functionality" and is untied to circuit switches themselves is specious.

40. In this regard, it bears emphasis that the FCC's "local switching"/"local circuit switching" rules have never required the unbundling of packet switches, not only because the FCC's unbundling orders have plainly held that packet switches are off limits to unbundling requirements, *see* Verizon Motion ¶¶ 7-17; Verizon Reply ¶¶ 13-15, but also because the FCC defines the functions of packet switches (*i.e.*, packet switching) as something entirely different, *see* 47 C.F.R. § 51.319(a)(2)(i) (defining "packet switching" to include "the routing or forwarding of packets, frames, *cells* or other data units based on address or other routing information contained in the packets, frames, *cells* or other data units." (emphasis added)). Simply put, because the FCC's "local switching"/"local circuit switching" rules have never required the unbundling of packet switches and the "Local Switching" provision in the Joint CLECs' ICAs is no different than (and, in fact, incorporates) those rules, it necessarily follows that the Joint CLECs' ICAs – like the FCC's rules – do not require the unbundling of packet switches. *Compare Triennial Review Order*, 18 F.C.C.R. at 17,245-46 (¶ 433) (defining local *circuit* switching), *with id.* at 17,320-23 (¶¶ 535-41) (holding that there is no obligation to unbundle packet switches).

D. ***Order No. 2* Properly Held that Even If the Commission Were to Consider the Joint CLECs' Newly Minted Fact-Based Arguments, No Material Facts Are In Dispute.**

41. *Order No. 2* also correctly concluded that "[e]ven if the Commission were to consider the CLECs' arguments that there are material facts in dispute, the only relevant factual dispute would be whether the Nortel Succession switch is a packet switch," and that the parties' declarations showed that "there is no[] dispute as to the nature and functions of the new switch: Verizon has deployed a packet switch using solely packet switching functions." *Order No. 2* ¶ 76.

42. The Joint CLECs' claims that the ALJ employed the wrong standard in deciding Verizon's motion are meritless. *See* Joint CLECs' Petition, at ¶¶ 12 – 19. The Joint CLECs appear to argue that Verizon's motion should have been evaluated as a summary judgment motion, pursuant to the standards of CR 56, rather than a motion for judgment on the pleadings under CR 12(c). The Joint CLECs' arguments fail to acknowledge, however, the burdens imposed on a party opposing a motion for summary judgment. The party opposing summary judgment cannot rely on the allegations in their pleadings, but must set forth in affidavits or other competent evidence "specific facts showing that there is a genuine issue for trial." CR 56(e). The Joint CLECs may not rely on claims in their briefing or "conclusory allegations, speculative statements or argumentative assertions." *Grimwood v. Univ. Of Puget Sound, Inc.*, 110 Wn.2d 355, 359 (1988). Once the unsupported assertions made by the Joint CLECs are disregarded, as they must be under the standards for summary judgment sought by the Joint CLECs, the ALJ's conclusion that the Joint CLECs failed to raise a genuine issue of material fact is unimpeachable.

43. Only three declarations (or affidavits) were before the ALJ: the declaration of Robert Williamson on behalf of Staff; the affidavit of Jeff Haltom on behalf of the Joint CLECs; and the affidavit of Danny Peeler from Nortel Networks (the manufacturer of the Mt. Vernon switch) on behalf of Verizon, which responded to Williamson and Haltom. The Williamson declaration stated that the Nortel Succession switch used ATM technology that uses "cells" instead of "packets" Williamson Decl. ¶ 11. In response, the Peeler affidavit explained that a cell is a type of packet and that ATM networks are packet networks. Peeler Aff. ¶ 12. Thus, there is no dispute regarding these facts; indeed, Staff's Comments on the Recommended Decision acknowledges that the Nortel switch "'packetizes' the narrowband traffic for its own internal purposes, within the switch itself." Staff Comments ¶ 10. (Staff, of course, disagrees with Verizon on the *legal* issue – whether the FCC requires the unbundling of packet switching for narrowband traffic – but there is no dispute over the fact that the Nortel switch is a packet switch.)

44. Similarly, the Haltom affidavit does not state that the Nortel Succession switch is not a packet switch; instead, it states that Verizon "is not necessarily ***using*** its Nortel switch to provide packet switching," Haltom Aff. ¶¶ 4, 7-11) (emphasis added), and that the Nortel switch ***could be*** deployed to provide circuit switching, *id.* ¶¶ 35-43. In response, the Peeler affidavit acknowledges that the Nortel switch ***could be*** deployed in a hybrid fashion to provide circuit switching, but confirms that Verizon did not deploy the switch in this fashion and that "All subscribers in the Mt. Vernon deployment are served through a packet fabric." Peeler Aff. ¶ 11. Here, too, there is no conflict

between the affidavits. Indeed, MCI itself has characterized the Nortel switch as a packet switch. *See* Verizon Reply ¶ 30.

45. The Joint CLECs' argument that *Order No. 2* errs in not discussing whether certain remotes served by the Mt. Vernon switch must be unbundled is equally misplaced. *See* Joint CLEC Petition for Review ¶¶ 46-53. The Joint CLECs admit that they did not raise this issue until they filed their response to Verizon's Motion, *i.e.*, it was not part of the Joint CLECs' Petition for Enforcement or Verizon's Answer. *Id.* ¶ 46. Thus, *Order No. 2* properly declined to consider it.[13] In any event, the remotes do not provide intra-remote circuit switching—all traffic is switched in the Mt. Vernon packet switch. The only exception is if an emergency occurs and the Mt. Vernon switch is temporarily disconnected or non-operable. In this event, the remotes provide intra-remote circuit switching on an emergency basis.[14]

46. In sum, the record fully supports *Order No. 2*'s conclusion that there are no material facts in dispute:

> The declaration of Mr. Williamson and the affidavits of Mr. Haltom and Peeler squarely address the issue of the technical capabilities of the Nortel Succession switch and make clear that Verizon has options in deploying the switch as a hybrid packet switch or fully packetized switch. *Williamson Declaration, ¶¶ 11, 18-19; Haltom Affidavit, ¶¶ 9-11, 22-32; Peeler Affidavit, ¶¶ 5, 11.* Mr. Peeler makes clear in his affidavit that Verizon has chosen to deploy and install the Nortel switch not as a

[13] Moreover, as Verizon explained in its Reply (¶¶ 24-27), the Joint CLECs waived this issue.

[14] Verizon's July 8, 2004 Notice – the record evidence upon which the Joint CLECs expressly rely, *see* Joint CLEC Petition for Review ¶ 48 – makes clear that the impacted remotes are at issue "to the extent that they rely on access to unbundled switching at the host." Petition, Exh. A at 2. Needless to say, the joint CLECs provide no *evidence*, as opposed to speculation in their briefing, that any unbundled switching is provided solely by the remotes without reliance on the Mt. Vernon packet switch. Such baseless speculation is not a reason to overturn the ALJ's Order.

> hybrid packet switch, but as a pure packet switch using packet switching functions to switch voice grade traffic. *Peeler Affidavit,* ¶¶ *5, 9-11.* ***Thus, there is not dispute as to the nature and functions of the new switch: Verizon has deployed a packet switch using solely packet switching functions.***

Order No. 2 ¶ 76 (emphasis added).

47. Perhaps recognizing that *Order No. 2* correctly summarizes the evidence that was before the ALJ, the Joint CLECs present new evidence and arguments in their Petition for Review. First, they attach a declaration Mr. Haltom filed in a California proceeding that discusses an "ENET module." Preliminarily, the Haltom affidavit simply states that Verizon California's packet switches "could be deployed" to provide circuit switching, Haltom Aff. ¶¶ 23-33, the same claim Haltom made in his declaration on this proceeding. Again, Verizon acknowledges that it "could have" deployed a circuit switch, but that point is irrelevant because it has no legal obligation to do so.

48. More importantly, as a matter of law the Joint CLECs are expressly barred from introducing new evidence at this stage of the proceeding. Under the APA, review by the Commission of an ALJ's order disposing of the proceeding is limited to "the whole record or such portions of it as may be cited by the parties." RCW 34.05.464(5). If there were any doubt about the issue, the Court of Appeals has been explicit: "The statute does not provide that the reviewing officer may go outside the record or take additional evidence." *Towle v. Dept. of Fish & Wildlife*, 94 Wn. App. 196, 205 (1999). The rationale under the APA is simple: when the administrative agency reviews a dispositive ruling from an administrative law judge, the "reviewing scheme mirrors the

manner in which an appellate court reviews and is confined to the trial court record." *Id.* at 206.

49. Second, the Joint CLECs claim that Verizon "withheld" information from them during discovery and then used this discoverable information – via the Peeler affidavit – in an "offensive manner." Joint CLEC Petition for Review ¶ 30. They argue that Verizon should "not be allowed to profit" from these tactics. *Id.*

50. This argument must be rejected; it is the Joint CLECs who are engaging in procedural gamesmanship, not Verizon. As discussed above, the CLECs' Motion for Enforcement in Docket No. UT-043013 and their Petition for Enforcement in this docket presented a single, legal issue. Verizon responded to this issue in its Motion, and the Joint CLECs sought limited discovery from Verizon. Because the CLECs never alleged that the Nortel Succession switch was not a packet switch, there was no need for discovery on this issue.

51. Also, as noted above, the CLECs accepted Verizon's discovery responses – they did not file a motion to compel, and they did not raise at that time the issue of whether the Nortel Succession switch was a packet switch with the ALJ or Verizon. Instead, the CLECs raised this issue for the first time in their response to Verizon's Motion, ***after*** they served discovery and ***after*** Verizon responded to it. Moreover, the discovery the Joint CLECs attached to their Petition for Review, and that they complain Verizon did not answer, is discovery they served on December 7, 2004, four days ***after*** the ALJ issued *Order No. 2*. This late-filed discovery proves the CLECs are trying to manufacture fact-based arguments on appeal simply because they disagree with *Order*

No. 2's resolution of the legal issue. Verizon was, of course, correct to object to such belated discovery, since any such information would be irrelevant as a matter of law under RCW 34.05.464(5), as explained above. Similarly, their unilateral attempt to accelerate this discovery, without an order of the ALJ, *see* WAC 480-07-405(7)(b), is improper and does not raise a dispute of fact that in any way undermines the ALJ's Order.[15]

52. For the various reasons given above, it is the CLECs who acted improperly by raising new fact issues in a responsive pleading after telling this Commission in two separate dockets that the parties' dispute raised a single, legal issue. They should not be allowed to profit from their procedural gamesmanship by further delay of this docket.

E. *Order No. 2* Properly Struck the Lichtenberg Affidavit.

53. The Joint CLECs have waived any argument that *Order No. 2* erred in striking the affidavit of MCI witness Sherry Lichtenberg, which addressed certain OSS issues. As *Order No. 2* explains, the Joint CLECs included this affidavit in their Petition for Enforcement, and Verizon filed a motion to strike explaining that OSS issues were not relevant to the issue of whether Verizon is required by law to unbundle the Nortel Succession switch. No CLEC opposed this motion; in fact, the CLECs sent an e-mail to the ALJ stating they did not contest it. *Order No. 2* ¶ 87. The ALJ granted Verizon's motion, finding that the OSS issues were not relevant. *Id.* ¶ 76 n.7. The CLECs cannot

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[15] Furthermore, the Joint CLECs' claims that they did not understand the Nortel Succession switch and needed Verizon to explain it is belied by the affidavit of the Joint CLECs' own witness, Jeff Haltom, which was attached to the Joint CLECs' Response to Verizon's Motion. There, Mr. Haltom explained that he has "independent knowledge of the Nortel Succession switch," and that his client, MCI, "has significant experience with the Nortel Succession family of switches," and has "tested and deployed" such switches (¶ 37). Also, as Verizon has explained, MCI issued a press release in 2003 acknowledging that the Nortel Succession switch is a packet switch. *See* Verizon Reply ¶ 30.

now claim that the ALJ erred; indeed, this tactic is barred by the well-recognized doctrine of invited error – a party may not complain that the ALJ took an action they expressly agreed to. *See State v. Marks*, 90 Wn. App. 980, 987 (1998).[16]

54. Finally, the CLECs also claim that *Order No. 2* contradicts itself by striking the Lichtenberg affidavit but admitting the transcript of the September 9, 2004 hearing in Docket No. UT-043013, which included testimony on OSS issues. The CLECs are wrong – *Order No. 2* admitted the transcript conditionally, "should the Commission find in favor of the Joint [CLECs]" (¶ 88). This transcript is irrelevant if the Commission affirms *Order No. 2*, as it should.

III. CONCLUSION

55. The Commission should affirm *Order No. 2* on all grounds.[17] It properly

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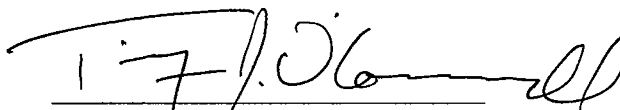
[16] Here, of course, the Joint CLECs offered the Lichtenberg testimony; Verizon moved to strike the testimony; the Joint CLECs did not oppose the motion; but now the Joint CLECs complain that the ALJ erred by granting the motion. Our courts have rejected such tactics, in this precise fact pattern. *See, e.g.*, *Vizzaro v. King County*, 130 Wash. 398, 405 (1924) (en banc) ("In this instance appellant did not oppose respondent's motion to strike the testimony in any manner, and must be held to have acquiesced in the ruling, and consequently cannot base error thereon.")

[17] The Order does contain a scrivener's error: paragraph 91 mistakenly refers to Qwest rather than Verizon. It should read, "Verizon is an incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington."

granted judgment on the pleadings, and its findings of fact and conclusions of law are fully supported.

Dated: December 23, 2004.

Respectfully submitted,



Timothy J. O'Connell
John H. Ridge
STOEL RIVES LLP
One Union Square
600 University St., Suite 3600
Seattle, WA 98101
(206) 624-0900
(206) 386-7500

Charles H. Carrathers, III
Vice President and General Counsel

Counsel for Verizon Northwest Inc.

EXHIBIT A

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Federal Communications Commission
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FOR IMMEDIATE RELEASE:
December 15, 2004

NEWS MEDIA CONTACT:
Mark Wigfield, 202-418-0253
Email: mark.wigfield@fcc.gov

FCC ADOPTS NEW RULES FOR NETWORK UNBUNDLING OBLIGATIONS OF INCUMBENT LOCAL PHONE CARRIERS

New Network Unbundling Rules Preserve Access to Incumbents' Networks by Facilities-Based Competitors Seeking to Enter the Local Telecommunications Market

Washington, D.C. – The Federal Communications Commission today adopted rules concerning incumbent local exchange carriers' (incumbent LECs') obligations to make elements of their network available to other carriers seeking to enter the local telecommunications market. The new framework builds on actions by the Commission to limit unbundling to provide incentives for both incumbent carriers and new entrants to invest in the telecommunications market in a way that best allows for innovation and sustainable competition.

The rules directly respond to the March 2004 decision by the U.S. Court of Appeals for the D.C. Circuit which overturned portions of the Commission's Unbundled Network Element (UNE) rules in its Triennial Review Order. We provide a brief summary of the key issues resolved in today's decision below.

- **Unbundling Framework.** We clarify the impairment standard adopted in the *Triennial Review Order* in one respect and modify its application in three respects. *First*, we clarify that we evaluate impairment with regard to the capabilities of a *reasonably efficient* competitor. *Second*, we set aside the *Triennial Review Order*'s "qualifying service" interpretation of section 251(d)(2), but prohibit the use of UNEs for the provision of telecommunications services in the mobile wireless and long-distance markets, which we previously have found to be competitive. *Third*, in applying our impairment test, we draw reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets. *Fourth*, we consider the appropriate role of tariffed incumbent LEC services in our unbundling framework, and determine that in the context of the local exchange markets, a general rule prohibiting access to UNEs whenever a requesting carrier is able to compete using an incumbent LEC's tariffed offering would be inappropriate.

- **Dedicated Interoffice Transport.** Competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines. Competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Finally, competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's

network in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity dedicated transport where they are not impaired, and an 18-month plan to govern transitions away from dark fiber transport. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled dedicated transport at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **High-Capacity Loops.** Competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are not impaired without access to dark fiber loops in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity loops where they are not impaired, and an 18-month plan to govern transitions away from dark fiber loops. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled facilities at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **Mass Market Local Circuit Switching.** Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundled mass market local circuit switching. This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs. During the transition period, competitive carriers will retain access to the UNE platform (*i.e.*, the combination of an unbundled loop, unbundled local circuit switching, and shared transport) at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004, plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for this combination of elements, plus one dollar.

Action by the Commission, December 15, 2004 (FCC 04-xxx).

Wireline Competition Bureau Staff Contact: Jeremy Miller, 418-1507; Email: jeremy.miller@fcc.gov

-FCC-

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SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

RE: Unbundled Access to Network Elements (WC Docket No. 04-313); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338)

Today's decision crafts a clear, workable set of rules that preserves access to the incumbent's network where there is, or likely will be no other viable way to compete. The rules have also been carefully designed to pass judicial muster, for I hope we have learned that illegal rules, no matter their other merits, are no rules at all. For eight years, the effort to establish viable local unbundling rules has been a litigation roller coaster. Regrettably, years of fierce battles to bend the rules entirely toward one sector or another without proper respect for the legal constraints have contributed to a prolonged period of uncertainty and market stagnation.

This item decidedly does not attempt to make all sides happy. Consequently, one will undoubtedly hear the tortured hand-wringing by incumbents that they are wrongly being forced to subsidize their competitors. They have a legal duty to provide access under limited conditions and they do protest too much in arguing for the end of vast portions of their unbundling requirements. Conversely, one can expect to hear dire predictions of competition's demise from those who wanted more from this item. Time will show this will not be so. Business models may change, but competition and choice for consumers in the information age will continue to grow and thrive.

After repeated defeats in court, the Commission has heeded the call to apply a meaningful impairment analysis to switching. Therefore, while commercial agreements can be established to offer UNE-P services, such services are no longer legally compelled. We recognize, however, that during the years of wrangling over the lawfulness of UNE-P, companies have sold phone service to significant numbers of consumers using this now thoroughly legally discredited business approach. While we cannot justify the continuation of this approach, we see the need and obligation to minimize the impact on consumers by providing a smooth transition of these customers to other alternatives. To accomplish this, we have adopted a significantly longer transition than first proposed. In addition to the six months already provided by our Interim Order, we will extend the transition into early 2006. We are confident this will mean less disruption for customers and provide time for quickly emerging alternatives—not the least of which include cable telephony, wireless and VoIP—to root in the market.

Facilities competitors are favored under the Act and Commission policy and we have attempted to permit wide unbundling for the key elements of loops and transport, where there is clear and demonstrable impairment. Recall that two years ago all five Commissioners stood together in requiring substantial unbundling of virtually all loops and transport. The Court rejected that effort. So today we have tried again to satisfy the court, while preserving access to incumbent's networks outside the most competitive and

densest business districts. Incumbents made forceful attempts to remove the majority of these elements, but the record and our analysis demonstrated that competitors still depended significantly on them in the overwhelming majority of markets and, thus, we have required unbundling in those circumstances. We did not just check off the CLEC holiday list, however, and were careful to draw the lines tightly, understanding the rigors of the statutory impairment test and the inevitable need to withstand judicial challenge. Where loops or transport are removed, we also provide substantial transition periods to avoid disruption.

Over the course of the past few months, the five commissioners have worked very hard together to craft a solution that all of the offices could support. Ultimately, although my colleagues' insights and proposals improved the final result, we could not bridge the gap to reach a unanimous result that I felt could pass judicial muster. Finally I would be remiss if I did not praise the extraordinary efforts and leadership of the Wireline Competition Bureau and our Office of General Counsel, particularly Jeff Carlisle, Austin Sclick, Michelle Carey, Tom Navin, Russ Hanser and Jeremy Miller. They have been tireless advocates for a rigorous decision that advances the public interest. We all owe them a debt of gratitude.

In 1996, no one could have guessed that nearly a decade later the FCC would be on its fourth attempt to develop local competition rules that are lawful. We hope to end that here and now, for the market cannot possibly continue another day plagued by an ever-shifting regulatory foundation. We can only hope that the fourth time is the charm.

STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand (adopted Dec. 15, 2004).

Section 251 of the Communications Act directs the Commission to make unbundled network elements available to competitors, but it provides little guidance as to *which* elements should be made available in *which* markets. Three times in the past eight years the Commission has endeavored to answer those bedeviling questions, and three times our rules have been rejected as overbroad by the courts of appeals (including by the U.S. Supreme Court). Regardless of one's policy views regarding the appropriate degree of mandatory unbundling, we must put an end to the debilitating cycle of court reversals and the resultant marketplace uncertainty. As a veteran of the competitive sector, I have great sympathy for carriers that crafted business plans in compliance with our rules, only to have the rug later pulled out from under them. The only responsible solution to this problem is to adopt rules that comply faithfully with the decisions of the D.C. Circuit and the Supreme Court, so that we can *finally* move forward with stable rules in place.

Notwithstanding that non-negotiable constraint on our discretion, the Commission worked hard to find ways to make transmission facilities available wherever true bottlenecks exist, consistent with the court's guidance. Building on our earlier decisions to eliminate unbundling obligations for most broadband facilities and optical-capacity transport and loop facilities, we have phased out the unbundling of circuit switching and significantly curtailed unbundling of higher-capacity (DS-3 and dark fiber) transmission facilities. These decisions recognize, as the court directed, that the costs of unbundling outweigh its benefits in markets where high revenue potentials have already led to significant competition or create a strong potential for it to develop. At the other end of the spectrum, we have established an obligation to unbundle the vast majority of DS-1 loop facilities, and significant amounts of DS-1 transport, in light of the many factors that typically make duplication of such facilities uneconomic. In short, while the issues are extremely complex and defy facile solutions, the Order we are adopting succeeds in promoting facilities-based competition while faithfully complying with judicial mandates.

Where I part ways with my dissenting colleagues is my unwillingness to vote for proposals — such as nationwide impairment findings or tests that focus exclusively on actual competition, to the complete exclusion of potential competition — that are flatly inconsistent with the D.C. Circuit's decision in *USTA II*. That decision is unquestionably the law of the land, and we are duty-bound to adhere to it. Were it not for past overreaching, the D.C. Circuit in all likelihood would have accorded us greater deference and also refrained from *vacating* (as opposed to merely remanding) our unbundling rules. In any event, it would be a pyrrhic victory for competitive carriers if the Commission at this stage were to reinstitute unbundling frameworks that have already been rejected and cannot be sustained on appeal. The ensuing disruption and dislocation that would result

— particularly if the court did not permit a further freeze on unbundling requirements that are vacated once again — would prove crippling to the competitive industry. I am confident that this Order on Remand, by contrast, can serve as the blueprint for sustainable facilities-based competition, and, in turn, a high degree of innovation, choice, and other consumer benefits.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
DISSENTING**

Re: *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand (WC Docket No. 04-313, CC Docket No. 01-338)

We are living in a new world when it comes to wireline competition. It is not a world of my making or my choosing, and I am deeply troubled by the conviction that this new world will be characterized by dramatic changes that will negatively impact American consumers. In decision after decision over the past three years, this Commission has taken actions curbing competition and limiting consumer choices, in the process straying far from the paradigms of competition laid out in the Telecommunications Act of 1996.

Our challenge today is to craft rules that will be acceptable to the courts and true to our statutory directives. I entered this remand proceeding hopeful that we could reach a compromise that would ensure some future for competition among wireline service providers and to provide a decent future for facilities-based carriers. We have had a long and serious dialogue over this item, extending through most of the night and right into today. I appreciate my colleagues' willingness to engage in this discussion and to make the effort to achieve consensus. Unfortunately, in the final analysis, consensus eluded us. I thought we were getting close, but we couldn't cross the finish line. I cannot support the decision that resulted.

What we have in front of us effectively dismantles wireline competition. Brick-by-brick, this process has been underway for some time. But today's Order accomplishes the same feat with all the grace and finality of a wrecking ball. No amount of rhetoric about judicially sustainable rules and economically efficient competitors can hide the bang-up job this Commission has done on competition. During its tenure, the largest long distance carriers have abandoned the residential market. And as a result of today's decision, other carriers will follow suit. In their wake we will face bankruptcies, job losses and customer outages. Billions of dollars of investment capital will be stranded. And down the road consumers will face less competition, higher rates and fewer service choices.

After having abandoned residential competition earlier, today the majority also hangs up on small business consumers. Small business likes competition. It has voted with its feet for competition. In fact, the Small Business Administration tells us that in metropolitan areas competitive carriers serve 29 percent of small businesses. The inroads competitive carriers have made in this community are important, because small business is the engine of our economy. Small businesses generate between two-thirds and three-quarters of all new jobs in this country. They represent over 90 percent of employers and they produce over half of the nation's private sector output. The savings they enjoy from competitive telecommunications services go straight to the bottom line. But the

majority's action today pulls the bottom out from under small business competition. It places restrictions on access to high-capacity loop and transport facilities that are vital for carriers serving small businesses. It imposes economically unsound tests. In short, it burns the bridges competitive carriers have made in serving the small business community.

For a Commission that has laced its decisions with praise for facilities-based competition, today's action is a funny way of showing its continued support. As a result of this decision there will be less competition, less choice and higher rates. The people who pay America's phone bills deserve better. I dissent.

Some would have us believe that this is the road we have to travel in the wake of court decisions. Yet it is this Commission that refused to seek review of the very court decisions they now claim constrain us.

Though I do not join this decision today, I wish to thank the Commission staff for their hard work on this item. This proceeding—and its predecessor—have not been easy. But throughout the Bureau has been helpful, candid and generous with their time. I am grateful for their devotion to the task at hand and hope that there is some well-deserved time for rest and relaxation in the weeks ahead.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN,
DISSENTING

Re: *Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 (Dec. 15, 2004).*

With this Order, the Commission officially cuts the cord on the local competition provisions of the Telecommunications Act of 1996, the companies and investors which sought to deliver on the promise of the Act, and the American consumers – to whom that promise was made. By fundamentally undermining facilities-based competition, the Commission relegates consumers to an inevitable future of higher rates and fewer choices. Regrettably, and unnecessarily, the Commission's action will ratchet up rates for both residential consumers and small businesses, which are so central to our nation's economic growth.

By not defending the Commission's prior decision before the Supreme Court, the majority placed itself in a box, in effect a coffin for telecom competition. Now, the majority buries telecom competition six feet under. The only choice I was given was where to pound in the nails. I cannot support this decision, because it will force consumers and businesses to pay higher prices and have fewer choices.

Throughout this proceeding, I have sought to take a careful and balanced view of the benefits and burdens of our unbundling rules. The record here, however, overwhelming demonstrates that competitors need access to critical bottleneck elements from the incumbents' legacy networks in order to connect their networks to their customers. Yet, today the Commission denies access to those elements with an overbroad decision that is divorced from the requirements of the statute, the direction of the courts, and the realities of providing telephone service.

Most stark is the Commission's treatment of local loops, which carry telephone traffic from customers' locations to a service provider's network. These local loops act as the on and off ramps to reach the alternative facilities-based networks that competitors have constructed at considerable expense. In this Order, the Commission adopts unbundling rules for these elements that are strangely disconnected from the operational and economic barriers a competitor would face if it had to duplicate the incumbent's legacy network. This blow to competition and choice comes with a certain slight of hand, couched by the majority as "inference tests" compelled by the courts. But "inferences" aside, there should be little doubt about the real-world implications of this Order. By cutting facilities-based competitors off from access to essential network elements, the Commission undermines choice for small and medium size business customers across the country, let alone all consumers. In my view, these small business customers have yet to realize the wave of rate increases to come.

Nowhere, though, will this disconnection be as pronounced as in the largest metropolitan markets. These are areas where competitors have been able to gain a tenuous but growing foothold, building out their own networks closer to consumers, just as this Commission repeatedly encouraged them to do. Investors, who have committed billions of dollars of private investment in facilities-based wireline competition, have argued persuasively that the type and

locations of their facilities were selected precisely to mesh with loop and transport elements leased from incumbent carriers as unbundled network elements pursuant to the Act. These investors have emphasized that their investments are "essentially worthless" and that "further investments will not be forthcoming," without access to those elements leased from the incumbents. No "inferences" are required to understand the true effect of today's decision on investment.

The message from the facilities-based competitive industry has been clear: this Order will be devastating. It will create dislocation not only for telecommunications companies and their employees, but it will disrupt service for thousands of businesses that rely on them. Given the importance of the cutting-edge services these upstarts provide, this decision is bound to be a drag on the growth of our overall economy. While some argue it will spur investment, it is more likely to diminish it, as competitors who would otherwise invest are forced out of business and incumbents face less pressure to respond to their offerings.

Today's decision also marks the demise of UNE-based competition for residential consumers. For millions of residential consumers, that translates into fewer choices and higher prices. The majority concludes here that this residential competition, predicated on the availability of unbundled local switching, is unsustainable under existing legal precedent. Despite these protestations, the majority all but ensured this result.

I note with appreciation that the majority at least took some of our suggestions. Applying strict eligibility criteria to stand-alone UNE loops would have drastically limited competitors' ability to provide data services, which this Commission has touted as the future of the telecommunications market. Also, I appreciate the majority's willingness to extend slightly the transitions available to competitors who have invested so much in the effort to fulfill the goals of the 1996 Act. I would have supported relief more in line with the Commission's transition approaches used in other proceedings, where the Commission has been granted great deference to fashion transitional remedies.

Moreover, I have serious concerns that consumers may experience unnecessary service disruptions as their providers of choice are forced to exit the marketplace or as carriers rush to convert to new systems. To safeguard against this upheaval, it will be imperative that our State commission colleagues monitor the re-absorption, like the proverbial rat in a python, of millions of consumers who have chosen competitive alternatives. Our failure to address this possibility more comprehensively shows unnecessary disregard for consumers who have signed up with competitors -- for such disruptions would come through no fault of their own.

While I strongly dissent from this Order, I want to thank my colleagues for their candor in approaching these issues. I am deeply disappointed that we cannot find common ground on this result, but I respect their opinions and our dialogue. Some may argue the dissenters drove too hard a bargain and let the perfect be the enemy of the good. I weighed heavily this concern but cannot agree. The disconnect between the Commission's pro-competitive statements and the anti-competitive policies adopted here is too wide to sanction. The Commission's lofty promises and assurances directed this summer at facilities-based competitors ring hallow in this Order. Beyond rhetoric, the harm to competition and consumers is too great a price for the constrained and ineffectual approach outlined in this Order. Finally, I find this Order dismissive of Congress's vision that the 1996 Act would allow facilities-based competitors to grow and to get

a foothold in the market by relying on elements like loops and transport that they need to do business. For all these reasons, I respectfully dissent.

EXHIBIT B

MCI WORLDCOM

Richard S. Whitt
Senior Policy Counsel
Internet and Data Markets
Law and Public Policy

DOCKET FILE COPY ORIGINAL

February 17, 2000

RECEIVED
FEB 17 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*****; CC Docket No. 96-98**

Dear Ms. Salas:

In accordance with section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, today MCI WorldCom filed a Petition for Reconsideration of portions of the Commission's Third Report and Order in *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*; CC Docket 96-98 (rel. Nov.5, 1999) (*Third Report and Order*). Because the Commission's rules on their face do not preclude a separately filed Petition for Clarification, MCI WorldCom also is filing with the Commission today the attached Petition for Clarification of the *Third Report and Order*. If the Commission believes that separately filed Petitions for Clarification do not comport with the Commission's rules, MCI WorldCom hereby respectfully requests a page-limit extension to accommodate the Petition for Clarification in the above-referenced proceeding. The length and complexity of the *Third Report and Order* and the number of important issues that require clarification necessitates the submission of the Petition for Clarification in the present format.

Please do not hesitate to contact me with any questions.

Sincerely,

Richard S. Whitt

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List ABCDE

1801 Pennsylvania Avenue, NW
Washington, DC 20006
202 887 3845
Fax 202 887 3866

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of:	)	
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Implementation of the	)	
Local Competition Provisions	)	**CC Docket No. 96-98**
of the Telecommunications Act of 1996	)	
	)	

PETITION OF MCI WORLDCOM, INC. FOR CLARIFICATION

Of Counsel:

Mark D. Schneider
JENNER & BLOCK
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6005

Anthony C. Epstein
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036
(202) 429-8065

Chuck Goldfarb
Richard S. Whitt
Cristin Flynn
MCI WorldCom, Inc.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-2199

Dated: February 17, 2000

EXECUTIVE SUMMARY

MCI WorldCom urges the Commission to clarify several issues of great importance for the implementation of the unbundled network element ("UNE") requirements of the Telecommunications Act of 1996. Clarification will provide essential guidance to the industry. These clarifications are needed for one of two reasons: (1) for several issues, the language in the Order or in the Rules is potentially ambiguous or open to misinterpretation, or (2) for several other issues, the Order is silent, but the issues are highly relevant. In the absence of clarification from the Commission, the ILECs already are exploiting every ambiguity by clinging to the interpretation that most restricts competitive local exchange carriers' ("CLEC") access to UNEs. MCI WorldCom therefore respectfully requests that the Commission address these issues for clarification on an expedited basis.

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

- The Commission should clarify that ILECs are prohibited from tying the purchase of their advanced services to the purchase of their voice services.

- The Commission should clarify and reconfirm the applicability of Rule 51.315(b) to ordinary combinations.

- The Commission should clarify that when a CLEC purchases an unbundled loop, by itself or as part of UNE-platform, the CLEC can use all the functionalities of that loop to provide both voice and high-speed data services, either by collocating its own DSLAM at the ILEC central office of by sharing the loop with a data CLEC that collocates a DSLAM at the ILEC central office. The Commission also should clarify that the ILEC must perform all the cross-connections and other activities required for the CLEC to fully utilize the functionalities of the loop and set nonrecurring charges for these activities that are consistent with the Commission's pricing rules and principles.

- The Commission should make clear that an ILEC must unbundle packet switching in any

location where it places advanced services equipment when a requesting carrier cannot collocate advanced services equipment in that location. The language in the Order inadvertently limits such access to remote terminal locations, but there also may not be collocation space available at the central office or at other locations.

- The Commission should make clear that states have the authority to determine rates, including zero rates, for line conditioning as long as their methodology is consistent with the FCC's forward looking pricing rules.

- The Commission should make clear that unless an ILEC that leases unbundled local switching to a requesting carrier provides a nondiscriminatory, technically feasible, and efficient method for that requesting carrier to combine that switching with ther requesting carrier's own OS/DA platform or a with an available third-party OS/DA platform, the ILEC must make its own OS/DA platform available to the requesting carrier as an unbundled network element.

- The Commission should make clear that when ILECs challenge rebuttable presumptions relating to the technical feasibility of unbundling the subloop, this can be done within any acceptable state process, such as a collaborative process, not only in the context of a section 252 arbitration proceeding.

- The Commission should make clear that requesting carriers are entitled to access to unbundled network elements in a fashion that allows them to commingle local and access traffic, or local and interstate traffic, for the efficient provision of telecommunication services. The Commission also should make clear that requesting carriers are entitled to access to combinations of unbundled elements in a fashion that allows them to use those elements efficiently and that creates minimum disruption to end-user customers.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Local Competition Provisions	)	CC Docket No. 96-98
of the Telecommunications Act of 1996	)	
	)	

Petition of MCI WorldCom for Clarification

MCI WORLDCOM, Inc. ("MCI WorldCom"), by its attorneys, hereby files this petition for clarification of the Third Report and Order and Fourth Further Notice of Proposed Rulemaking ("Order"),[1] issued by the Commission on November 5, 1999 in the above-captioned proceeding. MCI WorldCom urges the Commission to clarify several issues of great importance for the implementation of the unbundled network element ("UNE") requirements of the Telecommunications Act of 1996 to provide essential guidance to the industry. These clarifications are needed for one of two reasons: (1) the language in the Order or in the Rules is potentially ambiguous or open to misinterpretation, or (2) the Order is silent, but the issues are highly relevant. In the absence of clarification from the Commission, the ILECs already are exploiting every ambiguity by clinging to the interpretation that most restricts competitive local exchange carriers' ("CLEC") access to UNEs. MCI WorldCom therefore respectfully requests that the Commission address these issues for clarification on an expedited basis.

A. The Commission should clarify that even if it does not require ILECs to make packet switching available as an unbundled network element for the provision of advanced services, ILECs are required to make packet switching available as a

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[1] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238, released Nov. 5, 1999.

UNE when the ILEC is using it to provide voice services.

To foster ILEC deployment of advanced services, the Commission has chosen to restrict CLEC access to unbundled packet switching. The Commission's decision was based solely on its perception of the market for advanced services, with no consideration given to the impact on the competitive provision of voice services. Unfortunately, this decision not only harms competition in the advanced services market, as discussed above, it also harms competition in the voice services market, where packet switching can — and, according to ILEC announcements, will — be used to provide voice services to a substantial portion of customers. Thus, even if the Commission does not require ILECs to make packet switching available as an unbundled network element for the provision of advanced services, it should clarify that packet switching must be made available as a UNE when the ILEC is using it to provide voice services.

Packet switched technology can be used to provide voice services as well as high-speed Internet access. The recent announcement by SBC of its "Project Pronto" helps to clarify the issue. SBC declared that it will spend $6 billion to make xDSL services available to approximately 80% of its customers and will use "voice trunking over Asynchronous Transfer Mode (ATM)" to transport voice traffic in packet form.[2] CLECs unquestionably have unbundled access to the ILECs' circuit switches to provide local voice telephone service to most residential and small business customers.[3] SBC now promises that 80% of its customers will be served by packet switch "in the

[2] News Release "SBC Selects Suppliers for Broadband Network Project," November 3, 1999, http://www.sbc.com/News_Center/Article.html?query_type=article&query=19991103-04, ("11/3/99 SBC News Release") at p. 1.

[3] Order at paragraphs 272 and 274.

next three years"[4] for their local voice telephony. Given the Commission's expressed policy of implementing the 1996 Act in a technology-neutral fashion,[5] it cannot be the Commission's position that voice traffic that is transmitted through a new type of switch is no longer subject to the 1996 Act's unbundling obligation. Indeed, no rational distinction between circuit-switched voice service and packet-switched voice service can be countenanced by the Act. The Commission should clarify that packet switching must be unbundled as a network element to the extent that it is used to provide narrowband or voice services.

B. The Commission should clarify that an ILEC may not condition a customer's purchase of its advanced services on the purchase of its voice services.

The Commission itself recognizes that denial of unbundled access to packet switching and DSLAMs impairs CLECs' ability to provide mass market advanced services in competition with ILECs. Without a restriction on anticompetitive tying requirements, ILECs will leverage — and already are leveraging — their resulting power over advanced services to impede competitive provision of voice services by refusing to sell advanced services to customers who purchase voice services from CLECs using UNE-platform. The Commission should end this discriminatory, anticompetitive, and unlawful practice.

The Commission itself found that CLECs cannot fully compete against ILECs to provide advanced services without the unbundled access to ILEC advanced services capabilities that the Commission generally denied.[6] As a result, unless ILECs offer advanced services on a

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[4] 11/3/99 SBC News Release at p. 1.

[5] See Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, released Dec. 23, 1999 ("Advanced Services Remand Order"), at paragraph 12.

[6] Order at paragraph 309.

nondiscriminatory, stand-alone basis to mass market retail customers, CLECs cannot compete effectively to provide UNE-based voice services to customers who also want advanced capability. Quick to seize on any opportunity to further entrench themselves in voice services, ILECs have been unwilling to provide broadband services to customers who do not also buy voice services from them.[7] Only ILECs can, as a practical matter, meet the surging demand for broadband services over local telephone networks, and customers who want broadband service over local loops must therefore buy ILEC voice service as well. ILEC refusal to sell broadband service to CLEC voice customers means that CLECs cannot sell UNE-based voice services to customers who also want broadband services that CLECs cannot practicably provide.

This anticompetitive ILEC practice is unlawful. It violates section 251(c)(3), which requires access to UNEs to be provided on "rates, terms and conditions that are just, reasonable and nondiscriminatory." The Commission has interpreted this unbundling obligation to facilitate the rapid introduction of local competition, including competition through use of the UNE-platform.[8] CLECs are denied just, reasonable, and nondiscriminatory access to UNEs when prospective customers of UNE-based voice services must give up the ability to purchase broadband services from the only carrier — the ILEC — that can ubiquitously provide these services in the mass market. Moreover, to the extent that advanced services are used to provide interstate access,[9] ILEC

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[7] See Petition of AT&T Corp. For Expedited Clarification or, in the Alternative, for Reconsideration, In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, dated Feb. 9, 2000, p. 6.

[8] See Order at paragraph 273.

[9] Advanced Services Remand Order at paragraphs 35-45.

tying of voice and broadband services constitutes an unjust and unreasonable practice that violates section 201(b) and an unreasonably discriminatory practice that violates section 202(a).

The Commission has prohibited bundling or tying of telecommunications services that limits competition.[10] Voice and xDSL-based services are "two distinct services that are otherwise technologically and operationally distinct."[11] Denying customers the ability to purchase UNE-based CLEC voice services and ILEC broadband services prevents competition by CLECs for voice customers by deterring customers from switching to CLEC voice services, and thereby frustrates the Commission's policy to facilitate competition to provide voice service through UNE-platform.[12]

ILECs have no legitimate basis to refuse to provide any xDSL-based service on a stand-alone basis to any customer who wishes to subscribe to it. This arrangement is straightforward to implement from a technical standpoint. If an ILEC were providing broadband service to an end-user, the voice traffic could simply be separated at the splitter and looped back to the CFA on the MDF and then routed to the CLEC's collocation space to go over the CLEC's voice network.

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[10] See Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880, 5904-06 (1991) 7 FCC Rcd. 2677, 2679-83 (1992); See generally Policy and Rules Concerning the Interstate, Interexchange Marketplace, 13 F.C.C.R. 21531 ¶¶ 1-2 (1999) (summarizing Commission's current anti-bundling rules). The unreasonableness of anticompetitive bundling practices is confirmed by the fact that tying arrangements by firms with market power violate the antitrust laws. Tying arrangements are unlawful *per se*, without further proof of anticompetitive effects, "when the seller has some special ability — usually called 'market power' — to force a purchaser to do something that he would not do in a competitive market." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984). When a customer is forced to buy a product that she "might have preferred to purchase elsewhere or on different terms . . . , competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Id.* at 12; Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 795 (1st Cir. 1988) (Breyer, J.).

[11] Line Sharing Order at paragraph 56.

[12] See Order at paragraph 273.

Because the physical arrangements are basically the same whether the ILEC or a CLEC provides voice service to a customer that purchases advanced services from the ILEC or an ILEC advanced services affiliate, there is no technical impediment.

C. The Commission should clarify and reconfirm the applicability of Rule 51.315(b) to ordinary combinations.

The Commission should make clear that Rule 51.315(b), as definitively construed by the Commission in the First Report and Order, and affirmed by the United States Supreme Court, continues to have the same meaning and effect it had when the Commission adopted the rule in 1996. In the First Report and Order, the Commission concluded that ILECs should be required to combine elements when technically feasible to do so at the request of CLECs, because CLECs often are not able to combine them for themselves.[13] The rules enforcing this obligation clarified that this obligation existed in two distinct situations: when the elements are "ordinarily combined" in the ILEC network, and when the elements are not ordinarily combined.[14] The former obligation is set out in Rule 51.315(b), and the latter, which potentially involved claims that the requested combinations were not technically feasible, in Rules 51.315(c)-(f). The actual language used in Rule 51.315(b) was that ILEC combination was required of elements that the ILEC "currently combines."

In paragraph 296 of the First Report and Order, the Commission first explained that "currently" was intended to mean "ordinarily." That explanation was hardly necessary; this understanding of "currently combines" is clear enough from the context of the rule itself. On its face, Rule 51.315 distinguishes between the types of combinations that ILEC "currently combine,

[13] First Report and Order at paragraphs 292-297.

[14] Id.

see Rule 51.315(b), and those the ILECs do not "ordinarily" combine, see Rule 51.315(c). The Commission distinguished between these two types of combinations because only the latter raised issues of technical feasibility — there is no question that a combination that currently or ordinarily exists in the ILECs' networks is technically feasible. Therefore only truly new types of combinations were intended to be addressed in Rules 51.315(c)-(f), which contain the rules to address claims of technical infeasibility.

As the Commission is well aware, currently Rule 51.315(b) has been reinstated by the Supreme Court, and the legality of Rules 51.315(c)-(f) is currently being addressed by the Eighth Circuit. MCI WorldCom agrees with the Commission that any disputes about the proper interpretation of Rules 51.315(c)-(f) should be considered only after the Eighth Circuit has addressed the legality of that provision.

However, several ILECs continue to challenge Rule 51.315(b), arguing that the term "currently" in Rule 51.315(b) refers to individual customer situations and means "preexisting" or "as is."[15] In other words, ILECs seek to limit available combinations to specific customer combinations that are presently in place, rather than the type of combinations that ILECs currently provide to themselves and customers as a matter of course. Such a narrow interpretation of Rule 51.315(b) would make no sense in light of the Commission's previous regulatory scheme and the sound policies behind it. Combining elements that are currently or normally combined in the ILEC network (a loop and a port, for example) raises no issues of technical feasibility, and plainly is

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[15] See, for example, Reply Comments of U S WEST Communications, Inc., In re Federal Court Remand of Issues Proceeding from the Interconnection Agreement between U S WEST Communications, Inc.. And AT&T, MCI, MFS and AT&T Wireless, Minnesota Public Utilities Commission Docket No. P421/CI-99-786 (August 16, 1999) ("U S WEST Minnesota Reply Comments"), at p. 4.

meant to be addressed in Rule 51.315(b), and not in the technical feasibility Rules 51.315(c)-(f).

Whether CLECs have access to this technically feasible combination should not depend on whether a particular customer previously has had the combination installed with the ILEC and now wants to change carriers. Rather, for all of the policy reasons behind the rule's initial adoption, ILECs should provide the type of combinations that ILECs currently provide to themselves and customers as a matter of course. If adopted, the ILEC's narrow construction would mean that in a great many situations the CLECs' right to access to unbundled network elements would be meaningless, as they would have no practical means of putting the leased elements to use to provide telecommunications services. Of course, that is the very reason the Commission enacted Rule 51.315(b) in the first place, and expended extraordinary efforts successfully to defend the rule's legality, all the way to the Supreme Court.

Additionally, the ILECs' narrow construction produces discriminatory results. For example, an ILEC so interpreting Rule 51.315(b) could deny a CLEC's request to provide a platform order to provide a new line to a customer who just moved to the area on the grounds that the elements requested by the CLEC are not currently combined for that particular customer. The ILEC, however, could provide the same combination of elements for itself to serve the same customer on the same day. This is discriminatory. The Commission recognized in paragraph 481 of the Order that the Supreme Court upheld Rule 51.315(b) "based on the nondiscrimination language of section 251(c)(3)" of the Act. Therefore, any interpretation of Rule 51.315(b) that produces such discriminatory results should be expressly rejected.

The Commission needs to reiterate its earlier interpretation of Rule 51.315(b) to avoid this result, particularly because this issue is not before the Eighth Circuit. That court is addressing only the legality of Rules 51.315(c)-(f), concerning <u>novel</u> combinations of elements and the issues of

technical feasibility that arise when CLECs' request such combinations.[16] It is not addressing Rule 51.315(b), the legality of which has been definitively established by the Supreme Court.

Nonetheless, in the Order, while the Commission did not accept the ILECs' interpretation of Rule 51.315(b), neither did it reject it out of hand, as it should have. Instead, the Commission acknowledged the ILECs' arguments, and stated: "because this matter is currently pending before the Eighth Circuit we decline to address these arguments at this time."[17] This statement suggest that the Commission may not have realized the extent to which ILECs are attempting to limit the scope of Rule 51.315(b), because the issue of availability of combinations that ILECs currently or ordinarily combine in their networks has been settled. Therefore, the Commission should withdraw this statement, and make clear that it has reinstated Rule 51.315(b) as it has consistently understood that provision.

D. The Commission should clarify that when a CLEC purchases an unbundled loop, by itself or as part of UNE-platform, the CLEC can use all the functionalities of that loop to provide both voice and high-speed data services, either by collocating its own DSLAM at the ILEC central office or by sharing that loop with a data CLEC that collocates a DSLAM at the ILEC central office. The Commission also should clarify that the ILEC must perform all the cross-connections and other activities required for the CLEC to fully utilize the functionalities of the loop and set non-recurring charges for these activities that are consistent with the Commission's pricing rules and principles.

The Commission has determined that requesting carriers are entitled to all the functionalities

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[16] See First Report and Order at paragraph 296 (explaining the purpose of Rules 51.315(c)-(f) as follows: "ILECs are also required to perform the functions necessary to combine elements, even if they are not ordinarily combined . . . in the ILECs' network, provided that such combination is technically feasible.").

[17] Order at paragraph 479.

of the ILECs' unbundled network elements.[18] In its Line Sharing Order,[19] the Commission stated:

> although we conclude that to the extent section 251(d) is satisfied requesting carriers may access unbundled loop functionalities, such as non-voiceband transmission frequencies, separate from other loop functions, they are also "entitled," at their option, to exclusive use of the entire unbundled loop facility.

At the same time, while the Commission has required the ILECs to provide as unbundled elements all the facilities required to provide mass markets voice services, it has decided to require CLECs to provide facilities other than the loop required to provide high-speed services, even while recognizing that CLECs will be impaired in their ability to offer high-speed services without access to such facilities. The distinction between its treatment of voice and high-speed data services is based on the Commission's overriding desire to foster the facilities-based provision of high-speed services. While MCI WorldCom disagrees with the latter decision, it clearly was the intent of the Commission to foster facilities-based provision of high-speed services and to remove all constraints to CLEC facilities-based provision of those services. Thus, any attempt to restrict CLECs' abilities to deploy and utilize DSLAMs and provide facilities-based high-speed services surely is inconsistent with Commission policy.

MCI WorldCom seeks clarification that if a requesting carrier leases an unbundled ILEC loop, by itself or as part of UNE-platform, that carrier is entitled to use both the voice and high-speed data functionalities of that loop, either by providing its own collocated DSLAM at the ILEC

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[18] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, released August 8, 1996, at paragraph 262.

[19] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, Released December 9, 1999, at paragraph 18.

central office or by "sharing the line" by cooperating with a third party data CLEC that provides a collocated DSLAM at the ILEC central office.[20] MCI WorldCom also seeks clarification that an ILEC cannot refuse to perform the cross-connections and other activities required to allow the requesting carrier to efficiently utilize both the voice and high-speed data functionalities of the unbundled loop or UNE-platform and that charges for those activities must be based on the pricing rules and principles already set out by the Commission.

In addition, MCI WorldCom seeks clarification that, where an ILEC sets up a separate subsidiary to provide high-speed services to end-user customers, a CLEC and that separate subsidiary must have exactly the same access to the functionalities of the loop (as an unbundled loop or as part of UNE-platform) and the ILEC must perform all the related cross-connection and other activities for the CLEC that it performs for its separate subsidiary. Further, MCI WorldCom seeks clarification that if an ILEC does not create a separate subsidiary for the provision of high-speed services to end-user customers, then the CLEC and the ILEC must have exactly the same access to the functionalities of the loop (as an unbundled loop or as UNE-platform) and the ILEC must perform all the related cross-connections and other activities for the CLEC that it performs for itself.

MCI WorldCom requests these clarifications because it is MCI WorldCom's experience that in order to make UNE functionalities available to requesting carriers in practice, and not just in principle, it is necessary to identify the activities that ILECs are required to perform upon request and to set limitations on the terms and conditions the ILECs can impose for performing these activities.

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[20] For example in the New York State Public Service Commission's collaborative proceeding, Bell Atlantic has taken the "legal" position that if a voice CLEC using UNEs engages in line sharing, that CLEC is no longer providing service via UNE-platform.

In the Order, the Commission readopted its finding from the Local Competition First Report and Order that ILECs "must provide cross-connect facilities between an unbundled loop and a requesting carrier's collocated equipment."[21] This requirement applies "at any technically feasible point that a requesting carrier seeks access to the loop."[22]

While it is beyond doubt that this interconnection obligation applies when a CLEC seeks to utilize an unbundled local loop, it is not entirely clear whether the Order intends for this obligation to apply when a CLEC utilizing UNE-platform seeks to interconnect the loop with the CLEC's advanced services equipment collocated in the ILEC's central office or to another CLEC's advanced services equipment collocated in the ILEC's central office. It also is unclear whether other ILEC obligations, such as OSS, trouble shooting, and trouble reporting, can be invoked for these network configurations.[23] This is not simply an academic issue: industry discussions with at least one ILEC have indicated that it may not permit UNE-platform CLEC line-sharing or the ability to provide data over the UNE-platform loop.

Because similar questions concerning ILEC obligations arose in the Commission's line sharing proceeding, MCI WorldCom filed a petition for clarification of the Line Sharing Order.[24] Given the obvious overlap of these issues, it remains unclear which of these two proceedings is the proper forum to seek clarification of these issues. Accordingly, and to the extent necessary, MCI WorldCom incorporates by reference those arguments contained in the Petition for Clarification of

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[21] Order at paragraph 178, citing Local Competition First Report and Order at paragraph 386.

[22] Order at paragraph 179.

[23] See, for example, Order at paragraph 427, discussing ILEC OSS obligations.

[24] Petition for Clarification of MCI WorldCom, Inc., CC Docket No. 98-147 and CC Docket No. 96-98, dated February 9, 2000.

the Line Sharing Order.

E. The Commission should make clear that an ILEC must unbundle packet switching in any location where it places advanced services equipment when a requesting carrier cannot collocate advanced services equipment in that location.

The Commission's intent in enacting Rule 51.319(c)(3)(B) is clear: to require ILECs to make unbundled packet switching available to CLECs when there are technical or space constraints that keep those CLECs from collocating their DSLAMs. The Rule, however, refers only to those situations in which the ILEC has deployed digital loop carrier or any other system in which fiber optic facilities replace copper facilities in the distribution section, and thus the technical or space constraint occurs at the remote terminal, pedestal, or environmentally controlled vault. An exactly analogous situation occurs if the ILEC has deployed home-run copper to the central office switch, but there is space exhaust at the central office that renders it impossible for a CLEC to collocate its DSLAM there. Thus, Rule 51.319(c)(3)(B) should be clarified and modified to read as follows:

> (B) An incumbent LEC shall be required to provide nondiscriminatory access to unbundled packet switching capability in any location where it places advanced services equipment when a requesting carrier cannot collocate advanced services equipment in that location.

Clarification of the Rule also should reduce the burden on CLECs and on state regulatory commissions having to convene an arbitration proceeding to settle collocation disputes that arise between ILECs and CLECs. If an ILEC were to claim that there were space or technical feasibility constraints that rendered CLEC collocation impossible, the CLEC would automatically have the right to gain access to the ILEC's advanced services equipment as UNEs at TELRIC rates.

F. The Commission should make clear that states have the authority to determine rates for line conditioning as long as their methodology is consistent with the FCC's forward-looking pricing rules.

States have the responsibility for setting line conditioning charges since the Commission

chose to "defer to the states to ensure that the costs incumbents impose on competitors for line conditioning are in compliance with our pricing rules for nonrecurring costs."[25] Rule 51.319(a)(3) requires ILECs to recover the cost of line conditioning from the requesting telecommunications carrier in accordance with both "the Commission's forward-looking pricing principles promulgated pursuant to section 252(d)(1) of the Act"[26] and "rules governing nonrecurring costs in § 51.507(e)."[27]

The Commission should make clear that in giving this responsibility to the states it did not intend to preempt state rulings that the appropriate charge for loop conditioning is zero, so long as those rulings are consistent with the Commission's forward-looking costing and pricing rules. Several states have declined to impose any line conditioning-specific charges on CLECs when ILECs are asked to bring their loop plant up to industry standards and make it DSL-compatible. These states already have made the determination that (1) the costs associated with removing load coils and other costs associated with conditioning loops that do not meet industry standards should not be included in recurring or nonrecurring loop charges based on forward looking costing and pricing principles,[28] or (2) the costs associated with removing load coils and other costs associated

[25] Order at paragraph 194.

[26] Rule 51.319(a)(3)(B).

[27] Rule 51.319(a)(3)(C).

[28] For example, in D. 99-11-050, the OANAD pricing decision, the California Public Service Commission ("CA PSC") found that Pacific Bell's proposed conditioning charges were based on embedded, not forward-looking costs. The CA PSC then rejected Pacific's line conditioning charge, finding such charges should be based on forward-looking costs. Slip Opinion at 94-95.

with conditioning loops already are included in the recurring charge for loops,[29] or (3) a combination of those two.[30]

In its Rules and the First Report and Order,[31] as well as in this Order,[32] the Commission has given broad deference to the states to implement its rules. Therefore, the Commission should clarify that it did not intend to preempt those states that have made the determination that ILECs should not be allowed to impose recurring or non-recurring charges to recover those line conditioning costs. This is critical because already state arbitrators in Texas have erroneously "overruled" their own decision on line conditioning charges based on the presumption of FCC pre-emption.[33]

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[29] For example, in Oregon Public Utilities Commission ("OPUC") Order No. 98-444, issued in UT 138/139, at pp. 93-94, the OPUC found that the costs associated with unloading loops were recovered in the recurring charges already adopted by the Commission. Moreover, the OPUC opined that costs associated with loop conditioning, like costs associated with other outside plant activities, are properly recovered in recurring, as opposed to nonrecurring, rates.

[30] For example, in Docket No. P-442, 5321, 3167, 466, 421/CI-96-1540, In the Matter of a Generic Investigation of U S West Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements, the Minnesota Public Utilities Commission ("MN PUC") adopted the option "Do not allow a separate price for loop conditioning," based on the staff recommendation, which states: "In this proceeding, the [MN PUC] chose the HAI model and the AT&T/MCI NRMC. Both of these models are forward looking models which assume the deployment of the most forward looking technology. As such, bridge taps and load coils are not a part of this forward looking network. The forward looking technology eliminates the need for bridge taps and load coils in providing quality service over longer loops. As such, approval of separate charges for loop conditioning will allow USWC to over recover its costs. This is possible given that the [MN PUC] approved cost model accounts for loop conditioning by assuming the most forward looking technology eliminating the need for loop conditioning. USWC is getting compensated for loop conditioning as part of the prices charged to CLECs for unbundled loops."

[31] Rule 51.507(e); First Report and Order at paragraph 749-751.

[32] Order at paragraph 194.

[33] Arbitration Award, Petition of Rhythms, Inc. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company; Petition of DIECA Communications, Inc., dba Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone

In construing the 1996 Act's "anti-preemption" provision,[34] the Commission has correctly recognized that the states have broad discretion to implement rules that take procompetitive steps beyond those ordered by the FCC.[35] Should the Commission decline to reconsider its determination that ILECs may impose line conditioning charges that are not based on forward looking costing and pricing principles, a state's decision to base line conditioning charges on such principles would represent a paradigmatic example of an occasion in which a state enacts regulations that are more pro-competitive than the FCC's rules.

G. The Commission should make clear that unless an ILEC that leases unbundled local switching to a requesting carrier provides a non-discriminatory, technically feasible, and efficient method for that requesting carrier to combine that switching with the requesting carrier's own OS/DA platform or with an available third-party OS/DA platform, the ILEC must make its own OS/DA platform available to the requesting carrier as an unbundled network element.

In the Order,[36] the Commission identifies a problem that MCI WorldCom and other parties raised in comments and in ex partes[37] — that currently, because of incompatibilities between the ILEC (and AT&T) networks that use the legacy Bell System MOSS signaling protocol and the CLEC networks that use more current Feature Group D ("FGD") signaling protocol, when CLECs use the ILECs' unbundled switching element (usually as part of the UNE-platform) they are not able to connect to their own OS/DA platform or to a third party OS/DA platform, and therefore they

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Company, Docket Nos. 20226 and 20272, pp. 96-121 (November 31, 1999).

[34] Section 251(d)(3).

[35] Order at paragraphs 153-154.

[36] Order at paragraph 463.

[37] Comments of MCI WorldCom at pp. 76-77 and attached Declaration of Stuart H. Miller at paragraphs 14-17; ex parte letter dated September 8, 1999 from Lori Wright, Senior Manager, Regulatory Affairs, MCI WorldCom, to Magalie Roman Salas, Secretary, Federal Communications Commission.

must rely on unbundled ILEC OS/DA.

In addressing this problem, the Commission, we believe, intended to set forth a straightforward solution, i.e., unless and until an ILEC that leases unbundled local switching to a CLEC is able to provide a non-discriminatory, technically feasible, and efficient method for that CLEC to combine the ILEC's switching with the CLEC's OS/DA platform or with an available third-party OS/DA platform, the ILEC must make its own OS/DA platform available to the CLEC as an unbundled network element.

Unfortunately, the Commission's formulation of this principle was less than clear because it referred to a particular proposed solution rather than providing general guidance. Specifically, the Order refers to a BellSouth ex parte filing dated July 26, 1999, in which "BellSouth...offers a technical solution to MCI WorldCom's concern...."[38] Clearly the Commission's intent was to rely on that (or another) technical solution to solve the problem, and to require ILECs to provide unbundled OS/DA where they do not provide a solution. The Order states:

> In instances where the requesting carrier obtains the unbundled switching element from the incumbent, the lack of customized routing effectively precludes requesting carriers from using alternative OS/DA providers and, consequently, would materially diminish the requesting carrier's ability to provide the services it seeks to offer. Thus, we require incumbent LECs, to the extent they have not accommodated technologies used for customized routing, to offer OS/DA as an unbundled network element.[39]

Similarly, Rule 51.319(f) states that ILECs must provide unbundled OS/DA:

> where the incumbent ILEC does not provide the requesting telecommunications carrier with customized routing or a compatible signaling protocol.

We seek clarification that the Commission intended the rule to cover all situations in which

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[38] Order at paragraph 463.

[39] Id.

it is not viable for CLECs to use their own or third party OS/DA platforms when using unbundled ILEC switching. Such clarification is needed because the language in paragraph 463 and Rule 51.319(f) inadvertently fails to provide sufficient guidance. As a result ILECs, already have begun to exploit the ambiguity in the language in ways that will deprive CLECs of cost-based access to this critical network element.

Some ILECs have cited the language in paragraph 463, which refers to customized routing, while ignoring the language in Rule 51.319(f), which also requires the provision of a compatible signaling protocol, to support their position that if they provide customized routing they need not provide unbundled OS/DA even if they fail to provide a compatible signaling protocol. They place the burden on the requesting CLEC to make its network and signaling protocol compatible with the ILEC signaling protocol.[40] Under Bell Atlantic's interpretation, for example, CLECs effectively cannot use their own OS/DA platforms or third party OS/DA platforms when they use Bell Atlantic's unbundled switching as part of the UNE-platform, yet Bell Atlantic nonetheless claims that it is under no obligation to lease its OS/DA platform as an unbundled network element. The

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[40] See, for example, Bell Atlantic's Comments on Unbundled Network Element Provisioning, dated December 1, 1999, filed with the Commonwealth of Masachusetts Department of Telecommunications and Energy, in D.P.U. Cases 96-73/74, 96-75, 96-80/81, 96-83, and 96-94, in which Bell Atlantic states "BA-MA offers customized routing in connection with its local switching offering, and therefore, OS/DA is not subject to the unbundling requirement of § 251(c)(3)." Bell Atlantic, however, does not provide the protocol conversion required by CLECs. Based on this same misinterpretation of the Rule, Bell Atlantic has argued to the New York State Public Service Commission that there is no need to determine a cost-based price for its OS/DA platform, since it is under no obligation to unbundle OS/DA. Specifically, Bell Atlantic argues that the New York Commission should not address OS/DA pricing issues at this time because:

> In the *UNE Remand Order*, the FCC concluded that incumbent LECs should not be required to provide unbundled access to OS/DA pursuant to § 251(c)(3) of the 1996 Act. Accordingly, OS/DA is not subject to the pricing requirements of § 252(d) of the Act, or to the TELRIC regulations promulgated by the FCC pursuant to that section.

Commission should clarify that the burden is on the ILEC to provide a technical solution that is compatible with the FGD protocol used by most CLECs.

Specifically, the Commission should clarify that ILECs have the obligation to provide unbundled OS/DA unless they provide customized routing and a compatible signaling protocol in a fashion that gives CLECs just as efficient access to their own OS/DA platforms (or third party platforms) as the ILECs have to their own OS/DA platforms. That is the only way to meet the just, reasonable, and non-discriminatory access obligations of sections 251(c)(3) of the 1996 Act and Rule 51.311.

It is unreasonable for an ILEC not to provide access using an industry-standard protocol that has been widely adopted by the CLECs, but rather to insist on using its own antiquated protocol. Moreover, as shall be explained more fully below, it is important that the Commission clarify that the provision of customized routing and a compatible signaling protocol are not sufficient if they are provided in a fashion that does not allow a CLEC efficiently to access its OS/DA platform or a third-party OS/DA platform.

ILECs route operator services and directory assistance calls from the point of origination to their OS and DA platforms. CLECs should have the same ability to route their traffic from the point of origination to their own OS and DA platforms, and to do so efficiently also requires conversion of the signaling protocol at the point of origination.

In sum, in order to carve out the proper exception to the ILEC requirement of providing unbundled OS/DA, it is essential that the rule make it clear that to take advantage of the exception the ILEC must provide customized routing and a compatible signaling protocol in a fashion that gives CLECs just as efficient access to their own OS/DA platforms (or third party platforms) as the ILECs have to their own OS/DA platforms. This requires both the customized routing and the

signaling protocol conversion to occur at the point of origination so that the CLECs need not create an overlay trunking network.

The Commission therefore should clarify its OS/DA discussion in the Order to ensure that it accomplishes its intended purpose. MCI WorldCom proposes the first sentence of Rule 51.319(f) should be changed to read as follows:

> An incumbent LEC shall provide nondiscriminatory access in accordance with § 51.311 and section 251(c)(3) of the Act to operator services and directory assistance on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service where the incumbent LEC does not provide the requesting telecommunications carrier with customized routing and conversion of signaling protocols to an industry-standard protocol in a fashion that allows CLECs just as efficient access to their own OS/DA platforms (or third party platforms) as the ILECs have to their own platforms.

H. The Commission should make clear that when ILECs challenge rebuttable presumptions relating to the technical feasibility of unbundling the subloop, this can be done within any acceptable state process, such as a collaborative process, not only in the context of a section 252 arbitration proceeding.

Rules 51.319(2)(B) and (C) create rebuttable presumptions that place the burden of proof on ILECs to demonstrate that subloop unbundling is not technically feasible. The Commission's intent that these rules have broad application is clear, but because the rules specify that these presumptions apply in state arbitration proceedings, they will be subject to misinterpretation. ILECs will wrongly claim that the presumptions should apply only in state arbitration proceedings. In implementing the provisions of the 1996 Act and Commission rules, many states have commenced collaborative processes or other processes that are fully consistent with the 1996 Act but are not arbitration proceedings. Subloop unbundling issues often are resolved in these or other state-created processes that are not formally section 252 arbitration proceedings. It would be contrary to the intent of the Commission to give the presumptions such an artificially narrow scope and preclude otherwise effective means of dispute resolution. In order to avoid needless disputes over this issue,

this Commission should make clear that its reference to state arbitrations proceedings was not meant to be exclusive.

MCI WorldCom therefore proposes that the phrase "pursuant to state arbitration proceedings under section 252 of the Act" in both rules be modified to read "pursuant to a state process consistent with the Act."

I. The Commission should make clear that requesting carriers are entitled to access to unbundled network elements in a fashion that allows them to commingle local and access traffic, or local and interstate traffic, for the efficient provision of telecommunications services.

In the Order, the Commission identified a number of unbundled network elements that ILECs must make available to requesting telecommunications carriers at TELRIC rates and determined that the ILECs must construct the operations support systems and other mechanisms needed for the requesting carriers to have efficient and nondiscriminatory access to these elements. In response, the ILECs have taken a number of actions to restrict the ability of requesting carriers to gain efficient access to these UNEs. One of the most invidious ILEC tactics has been to refuse to provide requesting carriers access to UNEs in a fashion that allows them to commingle local and access traffic, or local and interstate traffic. This illegal use restriction denies CLECs the ability to enjoy the same sorts of scale and scope economies that ILECs obtain by moving local and access traffic over the same facilities. It forces CLECs to pursue one of two inferior options that artificially raise costs: either use separate overlay networks for local and access traffic, with excess capacity on each or purchase transport and multiplexing used for local service through the ILECs' above-cost access tariffs rather than at the cost-based rates statutorily mandated for UNEs. Of course, each of these options often lead to a third result — lost business due to artificially high costs that must be passed through in prices.

For example, Bell Atlantic-Massachusetts' ("BA-MA") proposed extended link ("EEL") tariff restricts CLECs from commingling any amount of special access traffic with local traffic over its T-1s that are obtained under UNE-EEL pricing. This restriction is discriminatory: BA-MA itself commingle access traffic and local traffic over the same facilities. Although the Commission has chosen temporarily not to allow CLECs to use UNEs for special access, it still is consistent with the Commission's Supplemental UNE Remand Order[41] for CLECs to be able to commingle local and access circuits on the same facilities to allow them to take advantage of economies of scale and scope, so long as CLECs pay access rates for that portion of the facility that carries access traffic. The proposed BA-MA tariff violates Sections 202(a) and 201(b) of the 1996 Act in that it constitutes unjust and unreasonable discrimination in the provision of like communications services.[42]

ILECs have attempted to restrict other types of efficient commingling of traffic in other efforts illegally to impose use restrictions on UNEs. In California, MCI WorldCom tried to order a UNE DS-1 on behalf of one of its wholesale customers who provides DSL services to end users, in order to provide transport for that customer between Pacific Bell's central offices. MCI WorldCom sought to provide a metropolitan private line application from one collocation to another, not an interstate service. The intention was to transport the customer's traffic as far as possoble on the MCI WorldCom network, using DS-3s, and then leasing PacBell DS-1s to get the traffic to the customer's choice of destinations. To do this required multiplexing at our furthest collocation point. PacBell refused to let MCI WorldCom use the interstate multiplexer for the local

[41] CC Docket No. 96-98, FCC 99-370 (released November 24, 1999).

[42] MCI WorldCom has filed a complaint challenging Bell Atlantic's conduct, but the Commission has declined to address it.

traffic going over the DS-1 UNE — or MCI WorldCom could treat that traffic as interstate and pay the far higher interstate access rates rather than UNE-transport rates. Thus, MCI WorldCom was put in the position of maintaining separate local and interstate networks, with all the attendant inefficiencies, or accepting the higher access rates for all of our traffic. As a result of PacBell's restrictions on how MCI WorldCom could connect and use UNEs, MCI WorldCom is not able to serve that customer and like customers.

The Commission must make clear that ILECs must make UNEs available in a fashion that allows them to be used efficiently and does not impose use restrictions. In particular, the Commission should implement a rule requiring ILECs to allow requesting carriers to access UNEs in fashion that allows them to commingle local and access traffic, and local and interstate traffic, to optimize their network efficiency.

J. The Commission should make clear that requesting carriers are entitled to access to combinations of unbundled elements in a fashion that allows them to use those elements efficiently in the provision of telecommunications services and that creates minimum disruption to end-user customers.

In addition to refusing requesting carriers access to UNEs in a fashion that allows them to commingle local and access traffic, or local and interstate traffic, ILECs have taken a number of actions to restrict the ability of requesting carriers to gain efficient access to the UNEs — again pursuing tactics that effectively impose use restrictions on UNEs.

In the Supplemental Order,[43] the Commission explicitly stated that ILECs must allow CLECs to purchase unbundled EELs to provide local exchange service. Prior to that decision, many ILECs refused to make EELs available to CLECs at UNE rates, instead requiring the CLECs to purchase

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[43] Supplemental Order in the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No, 96-98, released November 24, 1999, at paragraph 5.

the loop-transport combinations out of access tariffs. Now that CLECs have the right to purchase UNE-EELs, ILECs are attempting to impose unlawful restrictions on CLEC access to UNE-EELs.

Two such restrictions in BA-MA's proposed tariff are typical of these unlawful restrictions. MCI WorldCom wants to convert its existing loop-transport arrangements used for the provision of local services to EEL arrangements. BA-MA has proposed numerous barriers to an orderly and efficient transition from BA-MA imposed access arrangements to EEL arrangements.

Under BA-MA's proposal, a CLEC having an existing loop-transport arrangement under the access tariff and wanting to convert to EEL pricing for that arrangement must (1) disconnect its existing loop-transport arrangement, (2) separate those facilities from existing multiplexing equipment and transport, and (3) then purchase separate multiplexing and transport equipment out of the EEL tariff, in order to provide the same combination. CLECs should not be required to uncombine the facilities that are currently being used to serve local exchange customers. Each time a CLEC were to convert a T-1 to EEL pricing, the CLEC would be required to disconnect the combination from its existing multiplexing, and then reconnect it again, incurring wasteful cost and almost certain disruption to its customers' service. Since the proposed tariff as written precludes loops purchased out of the EEL tariff from being combined with the transport and multiplexing purchased from the access tariff, this would be the result even if 100 percent of the traffic provided over the DS-1 loop transport is local. This limitation is not necessary as the access multiplexing and transport services associated with access are identical to the facilities used for local service. BA-MA's proposed restriction is especially unreasonable in light of the fact that it has been BA-MA's refusal to make available the EEL arrangement that forced CLECs like MCI WorldCom to obtain the same facilities under the BA-MA access tariffs (at substantially higher cost) in order to provide local exchange service. The Commission should issue a Rule explicitly stating that ILECs cannot

impose disconnect-reconnect requirements when no physical changes are required.

A second improper restriction proposed by BA-MA is the discriminatory, unnecessary, and costly requirement that CLECs collocate in order to access new EEL combinations. While a CLEC may choose to terminate a new EEL to a CLEC collocation, there is no technical reason why CLECs should be forced to terminate an EEL in a CLEC collocation. Indeed, BA-MA's sister company, BA-New York, does not impose this collocation requirement on CLECs in New York. Nor does it impose that requirement upon a CLEC that converts an existing access arrangement to an EEL arrangement. Collocation is not technically required either to convert existing T-1 arrangements to EEL or to provision new EEL arrangements.

The Commission should issue a Rule explicitly stating that ILECs cannot require CLECs to collocate in order to obtain EELs.

Respectfully submitted,
MCI WorldCom, Inc,

By: Chuck Goldfarb

Chuck Goldfarb
Richard Whitt
Cristin Flynn
MCI WorldCom, Inc.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-2199

Mark L Schneider
Jenner & Block
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6005

Anthony C. Epstein
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036
(202) 429-8065

February 17, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of December, 2004, served the true and correct original, along with the correct number of copies, of ***Verizon's Response to Petition for Review*** and a ***Certificate of Service*** upon the WUTC, via the method(s) noted below, properly addressed as follows:

Carole Washburn, Executive Secretary Washington Utilities & Transportation Commission 1300 S. Evergreen Park Drive SW Olympia, WA 98503-7250	___	Hand Delivered
	___	U.S. Mail (1st class, postage prepaid)
	X	Overnight Mail
	___	Facsimile (360) 586-1150
	X	Email (records@wutc.wa.gov)

I hereby certify that I have this 23rd day of December, 2004, served a true and correct copy of the foregoing documents upon parties noted below via E-Mail and U.S. Mail:

MICHAEL E. DAUGHTRY
United Communications, Inc., d/b/a UNICO
389 SW Scalehouse Court
Bend, OR 97702

Email: mike@ucinet.com

JUDITH ENDEJAN, ATTORNEY
Graham & Dunn PC
Representing Verizon Northwest, Inc.
Pier 70, Suite 300
2801 Alaskan Way
Seattle, WA 98121-1128
Email: jendejan@grahamdunn.com

LETTY FRIESEN
Attorney at Law
AT&T Communications of the Pacific North
1875 Lawrence Street, Floor 15
Denver, CO 80202

Email: lsfriesen@att.com

BROOKS HARLOW
Miller Nash LLC
Representing Advanced TelCom, Inc.
4400 Two Union Square
601 Union Street
Seattle, WA 98101-2352
Email: brooks.harlow@millernash.com

Donald Taylor, Director
Carriers Relationso & Regulatory Affairs
Tel West Communications, L.L.C.
3701 South Norfolk St., Suite 300
Seattle, WA 98118
Email: dtaylor@Telwestservices.com

David Mittle
Law Office of David E. Mittle
208 Maynard
Santa Fe, NM 87501

Email: dmittle@att.net

MICHEL SINGER NELSON
Worldcom, Inc.
Representing MCImetro Access Transmission
707 17th St., Suite 4200
Denver, CO 80202
Email: michel.singer_nelson@mci.com

DAVID RICE
Miller Nash LLC
Representing Advanced TelCom, Inc.
4400 Two Union Square
601 Union Street
Seattle, WA 98101-2352
Email: david.rice@millernash.com

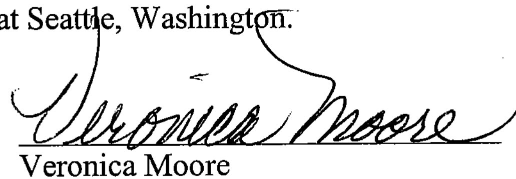
I hereby certify that I have this 23rd day of December, 2004, served a true and correct copy of the foregoing documents upon parties noted below via U.S. Mail:

MCIMETRO TRANSMISSION ACCESS CORP.
707 17th St., Suite 3600
MCI Tower
Denver, CO 80202

AT&T COMMUNICATIONS OF THE PACIFIC NORTH
2120 Caton Way S.W., Suite B
Olympia, WA 98502

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

DATED this 23rd day of December, 2004, at Seattle, Washington.



Veronica Moore