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July 15, 2004

VIA E-MAIL and FEDERAL EXPRESS

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
Post Office Box 47250
Olympia, WA 98504-7250

Re: *In the Matter of the Development of Universal Terms and Conditions for Interconnection and Network Elements to be Provided by Verizon Northwest Inc.*, Docket No. UT-011219

Dear Ms. Washburn:

On behalf of Verizon Northwest Inc. ("Verizon"), enclosed please find an original and twelve (12) copies of Verizon's Petition for Review of Order Denying Motion to Terminate Proceeding. An additional copy is enclosed to be file-stamped and returned in the self-addressed envelope provided. Thank you for your assistance in this matter.

Sincerely yours,

Charles H. Carrathers III

Charles H. Carrathers III

cc: All Parties of Record, via e-mail and Federal Express

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Development of Universal Terms and Conditions for Interconnection and Network Elements to be Provided by VERIZON NORTHWEST INC.	)	DOCKET NO. UT-011219 PETITION OF VERIZON NORTHWEST INC. FOR REVIEW OF ORDER DENYING MOTION TO TERMINATE PROCEEDING

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PETITION OF VERIZON NORTHWEST INC. FOR REVIEW OF ORDER DENYING MOTION TO TERMINATE PROCEEDING

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July 15, 2004

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STATUTES AND REGULATIONS

1. Verizon Northwest Inc. ("Verizon")[1/] respectfully requests that the Commission review an erroneous order of the Administrative Law Judge denying Verizon's Motion to Terminate this proceeding ("Order"). That Order, which misconstrues a number of dispositive federal decisions handed down since the Commission commenced this docket, compels Verizon to participate in "a proceeding which is intended to develop a universal statement of terms and conditions for interconnection agreements between CLECs and Verizon."[2/] This incorrect decision threatens to force Verizon and a number of competitive local exchange carriers ("CLECs") to continue to participate in lengthy negotiations and an arbitration in an illegal docket.

2. This proceeding lacks any basis in federal or state law. Section 252(g) of the Communications Act,[3/] which permits consolidation of existing proceedings brought by individual carriers under section 252, does not authorize the Commission to create an omnibus proceeding *on its own motion*. And the Order's proffered state law justification, RCW 80.36.140, cannot support this proceeding because the Commission has not conducted the hearing that section requires; and Verizon's existing interconnection agreements, which are available to CLECs generally, cannot be "unjust or unreasonable" by definition since the Commission has approved them.

1/ The address of Verizon Northwest Inc. is 1800 41st Street, Everett, WA 98201.

2/ Ninth Supplemental Order, *In the Matter of the Development of Universal Terms and Conditions for Interconnection and Network Elements to be Provided by Verizon Northwest Inc.*, Docket No. UT-011219, at ¶ 14 (July 6, 2004) ("Ninth Supplemental Order").

3/ Communications Act of 1934, Ch. 652, 48 Stat. 1064, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151, *et seq.*) ("Communications Act" or "Act").

3. Even if state law authorized this proceeding, the Communications Act preempts any state law justification that neglects the detailed procedures of the Act. Federal cases decided since the Commission initiated this matter make this clear. Most notably, in *Verizon North, Inc. v. Strand*[4/] and *Wisconsin Bell, Inc. v. Bie,*[5/] the United States Courts of Appeals for the Sixth and Seventh Circuits both held that the Communications Act preempts state proceedings, like this one, that bypass the detailed requirements of the Act. The recent decision of the Federal Communications Commission ("FCC") to abolish the "pick and choose" rule, moreover, defeats any claim that this proceeding survives preemption because, under the Administrative Law Judge's rationale, CLECs would incorporate select terms and conditions from the "universal statement of terms and conditions" into existing interconnection agreements.[6/] Accordingly, Verizon respectfully moves the Commission to terminate this proceeding.

BACKGROUND

4. This proceeding originated in the course of the Commission's generic cost proceeding, Docket No. UT-003013, in which the Commission ordered Verizon to file proposed terms and conditions regarding microwave entrance facilities.[7/] In compliance with that order, Verizon filed tariff sheets stating terms and conditions for microwave entrance facilities (Advice

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[4/] 309 F.3d 935 (6th Cir. 2002), *cert. denied*, 538 U.S. 946, 123 S.Ct. 1649 (2003).

[5/] 340 F.3d 441 (7th Cir. 2003), *cert. denied sub nom. WorldCom, Inc. v. Wisconsin Bell*, _ U.S. _, 124 S.Ct. 1075 (2004).

[6/] Second Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-164, CC Docket No. 01-338 (adopted July 8, 2004) ("FCC Order").

[7/] Twenty-Second Supplemental Order, *In the Matter of the Continued Costing and Pricing of Unbundled Network Elements and Transport and Termination*, Docket No. UT-003013 (June 14, 2001).

No. 997) on July 2, 2001. The Commission opened the present docket to review those tariff sheets.

5. On November 27, 2001, the Commission invited parties in this docket and in the generic cost proceeding to comment on whether the Commission should broaden the scope of issues to require Verizon to establish a tariff or other statement of generally available terms regarding its provisioning of other network elements.[8/] Verizon filed comments and reply comments directing the Commission's attention to section 252(f) of the Communications Act, which makes clear that section 252(f)(1)'s SGAT mechanism applies only to Bell operating companies, and in any event is completely voluntary.[9/] Verizon also informed the Commission that, as of December 2001, it had entered into over 100 agreements with CLECs through the negotiation or arbitration provisions of the Act. Verizon urged the Commission not to compel Verizon to adopt an SGAT, contrary to the plain language of section 252(f), particularly given that a CLEC lacking the resources to negotiate or arbitrate its own agreement had more than 100 existing agreements available for adoption.

8/ The Commission later described such a proceeding as "analogous to Commission Docket No. UT-003040 in which the Commission is reviewing Qwest Corporation's (Qwest) proposed Statement of Generally Available Terms and Conditions, colloquially abbreviated to SGAT." First Supplemental Order, *In the Matter of the Development of Universal Terms and Conditions for Interconnection and Network Elements to be Provided by Verizon Northwest Inc.*, Docket No. UT-011219, at ¶ 4 (March 1, 2002) ("First Supplemental Order").

9/ 47 U.S.C. § 252(f)(1) ("A *Bell operating company may* prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State . . . .") (emphasis added). *See* Comments of Verizon Northwest Inc., *In the Matter of the Continued Costing and Pricing of UNEs; In the Matter of Verizon Northwest Inc.'s Terms and Conditions Regarding Microwave Entrance Facilities*, Docket Nos. UT-003013, UT-011219, at 1-3 (filed Dec. 5, 2001); Reply Comments of Verizon Northwest Inc., *In the Matter of the Continued Costing and Pricing of UNEs; In the Matter of Verizon Northwest Inc.'s Terms and Conditions Regarding Microwave Entrance Facilities*, Docket Nos. UT-003013, UT-011219, at 1-2, 4-5 (filed Dec. 21, 2001).

6. Despite Verizon's comments, on March 1, 2002, the Commission issued its First Supplemental Order, broadening the scope of issues in this proceeding to include terms and conditions governing CLECs' interconnection with Verizon's network. In response to Verizon's argument that section 252(f) of the Act precluded the Commission from ordering Verizon to establish an SGAT, the Commission clarified that Staff was "not asking the Commission to literally establish an 'SGAT.'"[10/] Rather, the Commission stated that it was requiring Verizon to "establish tariffs made up of terms and conditions for select interconnection and network elements," pursuant to state law.[11/] And although the Commission's First Supplemental Order stated that neither the Commission nor Staff sought to require an "SGAT" per se, the Commission's Third Supplemental Order stated that this was precisely the goal of the proceeding. According to the Commission, "[t]he parties generally agreed that the goal of the process for this case would be to develop a statement of generally available terms (SGAT) for use in interconnection agreements between all interested CLECs and Verizon."[12/]

7. The parties proceeded with negotiations, over Verizon's objections, under the Commission's original and revised procedural schedules.[13/] As soon as the parties began

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10/ First Supplemental Order ¶ 9.

11/ *Id.*

12/ Third Supplemental Order, Prehearing Conference Order, *In the Matter of the Development of Universal Terms and Conditions for Interconnection and Network Elements to be Provided by Verizon Northwest Inc.*, Docket No. UT-011219, at ¶ 8 (Aug. 23, 2002) ("Third Supplemental Order").

13/ Currently, the parties are proceeding under the procedural schedule set forth in the Commission's recent Tenth Supplemental Order. In this order, the Commission continued the procedural schedule to allow the parties to conduct further negotiations in light of unresolved issues, recent decisions of the FCC and federal court and the need to devote resources to other proceedings involving the Commission and the parties. Tenth Supplemental Order, *In the Matter of the Development of Universal Terms and Conditions for Interconnection and Network*

negotiating the various sections of Verizon's model agreement in January 2003, problems with joint CLEC negotiations emerged. The participating CLECs attempted to submit a comprehensive replacement to Verizon's proposed terms, contrary to the Commission's First and Third Supplemental Orders and the parties' understanding of how negotiations would proceed.[14/] Participating CLECs also indicated that they wished to submit separate counterproposals to Verizon's proposed terms.

8. Once the parties resolved their issues regarding the procedure for negotiation, they attempted, with little success, to negotiate the individual sections of Verizon's proposal. As negotiation of each section concluded, a significant number of unresolved issues remained. Discussions stretched months later than the agreed-upon timeline, as a number of the participating CLECs missed deadlines, requiring the parties' deadlines to be extended again and again. On several occasions, an insufficient number of CLECs made themselves available for scheduled negotiation calls, requiring the calls to be postponed. Many issues continue to exist that could be resolved but for one CLEC's concern with language agreed to by every other participating party.

9. After two years and "completion" of the negotiation of the resale, interconnection, and general terms and conditions sections of Verizon's proposed agreement, the parties have close to 100 unique issues still in dispute. And the parties will most likely need to revisit these sections because they have not addressed these issues for several months, while the passage of

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Elements to be Provided by Verizon Northwest Inc., Docket No. UT-011219, at ¶ 4-5 (July 12, 2004).

14/ In the First and Third Supplemental Orders, the Commission ordered the parties to commence negotiations with Verizon's model interconnection agreement. Third Supplemental Order ¶ 20; First Supplemental Order ¶ 24.

time and rapid pace of change in the telecommunications industry may have altered the parties' positions on various issues.

10. Meanwhile, at least one other participating CLEC has simultaneously pursued separate negotiations with Verizon in Washington. During the time this proceeding has been pending, other participating CLECs have also negotiated and/or arbitrated agreements with Verizon for use in other states. This is particularly relevant because, as a result of the Bell Atlantic/GTE merger order, Verizon makes a template agreement that is suitable for multi-state negotiation available to CLECs and has now done so for the better part of four years.[15/] Verizon's one-on-one negotiations with the participating CLECs have proven much more fruitful than the negotiations in this proceeding, since the parties generally can address each other's concerns individually and come to a more expeditious resolution.

11. CLECs also have had the option not to negotiate with Verizon at all and instead adopt an existing agreement between Verizon and another carrier. In the State of Washington alone, there are numerous interconnection agreements with Verizon available for competing carrier adoption, providing more than a sufficient contracting opportunity for those CLECs lacking the resources or the desire to negotiate and arbitrate.[16/] Thus, as a practical matter, this

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15/ *See* Memorandum Opinion and Order, *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee; For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032 ¶ 306 (2000) (providing that, as a condition of the Bell Atlantic/GTE merger, "Bell Atlantic/GTE will make a sample generic multi-state agreement available to any requesting carrier no later than 60 days after the merger closing" and that "[c]arriers may elect that generic agreement for any number of Bell Atlantic/GTE states, or may negotiate a different multi-state agreement with Bell Atlantic/GTE.").

16/ Data published by the Commission demonstrate that CLECs have taken advantage of their adoption rights and the other options for interconnection that are permitted by the Act. *See* http://www.wutc.wa.gov/webdocs.nsf/0492664a7ba7ed8b88256406006bf2ca/4c477f1c1b35c215882566be0082e9ca!OpenDocument. This information shows that a majority of interconnection

proceeding has been unproductive and unnecessary since CLECs have ample options for interconnection, whether they desire to negotiate individually with Verizon or not.

12. On June 17, 2004, Verizon filed a Motion to Terminate this proceeding, arguing that the Communications Act provided no authority for this docket and preempted any state law justification for it.[17/] Only three CLEC participants filed a response requesting that this proceeding continue.[18/] Three others — WorldCom, Inc., Eschelon, and Fox Communications Corp. — declined even to submit a one-page response stating *any* opposition to Verizon's motion. AT&T, in its Response, recommended that "the Commission simply terminate this proceeding as duplicative of others currently pending before the Commission."[19/] Recognizing the proper functioning of the Act, AT&T explained that "[w]hen, and if, competitors are in a

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agreements are successfully negotiated, that relatively few must be arbitrated, and that virtually none have required arbitration in recent years. *Id.* The historical data also show that CLECs have taken advantage of the wide range of agreements available to them for adoption. *Id.*

17/ Motion of Verizon Northwest Inc. to Terminate Proceeding (June 17, 2004).

18/ Joint CLEC Response to Verizon Motion to Terminate Proceeding (June 28, 2004) ("Joint CLEC Response").

19/ AT&T Response to Verizon's Motion to Terminate Proceeding at 3 (June 28, 2004). While AT&T supported Verizon's efforts to end the proceeding as a practical matter, AT&T contended in its Response that Verizon's position here is inconsistent with the petition for arbitration it filed to amend existing interconnection agreements to reflect the rules promulgated in the *Triennial Review Order*, as later modified by the D.C. Circuit ("TRO Proceeding") (to the extent the new rules are not self-effectuating under particular contracts). This is plainly incorrect. In fact, Verizon attempted (and has continued to attempt) to negotiate with each CLEC individually and then sought arbitration only when negotiations were unsuccessful. Consolidating those individual disputes into a single proceeding to arbitrate the finite and common issues relating to the changes in unbundling rules is consistent with § 252(g), which permits such consolidation. In contrast, nothing in § 252 authorizes the Commission to conduct this "SGAT" proceeding. Aside from its inappropriate comparison with another proceeding, AT&T does not offer any reason why Verizon is not correct that federal law preempts this proceeding.

position to arbitrate interconnection agreements, they will bring their disputes to the Commission at the appropriate time."[20/] Staff also filed a response opposing Verizon's motion.[21/]

13. On July 6, 2004, the Administrative Law Judge denied Verizon's Motion to Terminate the proceedings.[22/] The Order stated that "[u]nder RCW 80.36.140, the Commission clearly has the authority to order a proceeding to determine universal terms and conditions for CLEC interconnection with Verizon."[23/] According to the Order, "[t]he Commission also found that this proceeding was consistent with Section 252(g) of the Act that allows for the consolidation of hearings to reduce administrative burdens on carriers and commissions."[24/] The Administrative Law Judge rejected Verizon's preemption claims by distinguishing as "tariff" cases the leading court decisions holding similar state regimes preempted..[25/] The Order concluded that "though not specifically provided for in the Act," it would uphold "this proceeding which is intended to develop a universal statement of terms and conditions for interconnection agreements between CLECs and Verizon."[26/]

14. For the reasons described below, Verizon seeks review of this Order by the full Commission. Review at this time is particularly appropriate because it will save the Commission

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20/ *Id.*

21/ Commission Staff's Response to Verizon Northwest Inc.'s Motion to Terminate Proceeding (June 28, 2004).

22/ Ninth Supplemental Order at ¶ 20.

23/ *Id.* at ¶ 11.

24/ *Id.*

25/ *Id.* at ¶ 14.

26/ *Id.*

and the parties the substantial effort and expense associated with arbitrating a "universal" agreement in contravention of Act.[27/] Review is also appropriate because, since the Order was decided, the FCC has instituted an "all-or-nothing" requirement for adopting interconnection agreements by abolishing the "pick-and-choose" rule.[28/] This FCC ruling, which constitutes federal law that preempts inconsistent state law, eviscerates any justification for this proceeding on the ground that CLECs could incorporate the resulting menu of "terms and conditions" into existing interconnection agreements.

ARGUMENT

I. This Proceeding Lacks Authority Under Federal or State Law

15. The Order denying Verizon's Motion to Terminate this proceeding fails to establish a basis for this proceeding under federal or state law. The only federal basis the Order relies on is section 252(g). But this provision does not furnish authority for the Commission to devise alternative methods for the negotiation and arbitration of interconnection agreements.[29/] Rather, section 252(g) allows a state commission, "where not inconsistent with the requirements of this Act . . . to consolidate proceedings . . . under this section." In other words, section 252 is a procedural mechanism that allows consolidation, under certain circumstances, *when parties have already commenced arbitrations under section 252*. Here, no party has commenced arbitrations according to the requirements of section 252, and the Commission has not relied on section 252 generally as an affirmative basis for this docket. Section 252(g) also expressly limits

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27/ WAC 480-07-810.

28/ FCC Order at 2.

29/ *See* First Supplemental Order ¶ 19 (suggesting that this proceeding is proper under section 252(g)).

its application to situations in which consolidation is "not inconsistent with the requirements of this Act."[30/] This proceeding, which seeks to create a regime alternative to sections 251 and 252, is inconsistent with the requirements of the Act.[31/]

16. The Order's state law justification for this proceeding also fails. RCW 80.36.140, which is the only state law provision the Administrative Law Judge discusses, provides that: "[w]henever the commission shall find, after [a hearing had upon its own motion or complaint] that the rules, regulations, or practices of any telecommunications company are unjust or unreasonable, . . . the commission shall determine the just [and] reasonable rules."[32/] Relying on this provision suffers from a number of problems. First, even assuming an interconnection agreement qualifies as a "rule[], regulation[], or practice[]" (which is far from clear), the

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30/ *See* 47 U.S.C. § 252(g).

31/ The Order did not rely on section 252(f) — another basis the Commission had previously offered, incorrectly, as a justification for this proceeding. Section 252(f) cannot justify a general SGAT-like proceeding because, as a former GTE company (rather than a former Bell Atlantic company), Verizon Northwest is not a "Bell operating company" subject to the SGAT provision of the Act. See 47 U.S.C. § 252(f). *See Verizon North, Inc. v. Strand*, 309 F.3d 935, 943 (6th Cir. 2002) ("§ 252(f) is not at issue in the present case, because Verizon is not a Bell operating company"). Even if it were, section 252(f) of the Act provides for the *voluntary* establishment of SGATs. 47 U.S.C. § 252(f) ("A Bell operating company *may* prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.") (emphasis added). Nothing in that section, or anywhere else in the Communications Act, authorizes a state commission to *compel* a company to prepare and file an SGAT. *See MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1178 (D. Or. 1999) (finding that § 252(f) gives a Bell operating company the option to file an SGAT, but does not authorize a Commission to compel such a filing, and noting that GTE is not an RBOC). From the outset, Verizon has made it clear that it does not voluntarily submit to this proceeding, and consequently this proceeding is not authorized under section 252(f).

32/ RCW 80.36.140. To the (unclear) extent the Order relies on any other state law basis by citing the Commission's earlier orders, those provisions are inapplicable because they concern either tariffs (which the Administrative Law Judge has insisted this proceeding will not produce), *see, e.g.*, RCW 80.36.100 to RCW 80.36.130, or purely procedural provisions, *see, e.g.*, RCW 34.05.452 (cross-examination).

Commission would be hard-pressed to claim that Verizon's interconnection agreements are not "just and reasonable." Under the Act, CLECs may opt into any of the interconnection agreements Verizon offers in Washington.[33/] And, under the Act, the Commission has already approved these interconnection agreements as being "consistent with the public interest, convenience and necessity" and nondiscriminatory.[34/] For any arbitrated agreement, the Commission has also found that the agreement complies with section 251, including the requirement that the "rates, terms and conditions" are "just" and "reasonable."[35/] Second, the Commission has never conducted the "hearing" required under this provision. Even if the Commission conducts a "hearing" as part of the anticipated arbitration of the "interconnection agreement," this proceeding has been ongoing — and Verizon already has been compelled to negotiate — for years without any hearing.

17. Thus, no authority relied on by the Administrative Law Judge supports conducting this proceeding. Moreover, the Communication Act preempts any state law basis for this proceeding, as explained further below.

33/ 47 U.S.C. § 252(i).

34/ 47 U.S.C. § 252(e)(2).

35/ 47 U.S.C. § 252(e)(2)(B); 47 U.S.C. § 251(c)(2)(D).

II. To the Extent Based on State Law, This Proceeding Is Preempted by the Communications Act.

18. This proceeding is preempted by the negotiation and arbitration procedures set out in sections 251 and 252 of the federal Communications Act. Any state law or regulation that conflicts with federal law is preempted, "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[36/] In either case, "[t]he central question in preemption analysis is always 'whether Congress intended that federal regulation supersede state law.'"[37/] In the Communications Act, Congress has been clear that any "state's requirement[]" is preempted if it is "inconsistent with" the Act.[38/] Since the initiation of this proceeding, two federal appellate courts have both held that state commission orders compelling local exchange carriers ("LECs") to engage in the kind of proceedings that the Commission has ordered here are inconsistent with, and therefore preempted by, the Communications Act.

A. *Verizon North, Inc. v. Strand*

19. In *Verizon North, Inc. v. Strand*,[39/] the court invalidated an order of the Michigan Public Service Commission ("MPSC") that, like the one at issue here, required Verizon to offer

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36/ *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (citation omitted); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("Even without an express provision for preemption, . . . state law is naturally preempted to the extent of any conflict with a federal statute.").

37/ 309 F.3d at 940 (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986)).

38/ 47 U.S.C. § 261(c). Section 261(b) applies this same "not inconsistent with" test to existing and new state regulation.

39/ 309 F.3d 935 (6th Cir. 2002).

interconnection agreement terms outside the process of the 1996 Act. In striking down the commission's order, the district court explained that, with the 1996 amendments, Congress designed a "deregulatory process" that relies "in the first instance on private negotiations to set the terms for implementing new duties under the Act."[40/] The court found that process compelled by the MPSC's order improperly allowed competing LECs to purchase Verizon's network elements and services from a set menu without ever having to use "the private, *party-specific* negotiation and arbitration system created by Congress" under sections 251 and 252.[41/] The MPSC process "evade[d] the exclusive process required by the 1996 Act, and effectively eliminate[d] any incentive to engage in private negotiation, which is the centerpiece of the Act."[42/] As a result, the court held that the order was inconsistent with and preempted by the Act.

20. The Sixth Circuit affirmed the district court, holding that while the Act "permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets in America," the MPSC tariff proceeding was inconsistent with the provisions of the Act.[43/] In invalidating the commission's order, *Strand* rejected the argument that the agreement process set out in section 252 is merely "one option for achieving

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[40/] *Verizon North, Inc. v. Strand*, 140 F. Supp. 2d 803, 810 (W.D. Mich. 2000), *aff'd in relevant part*, 309 F.3d 935 (6th Cir. 2002).

[41/] *Id.* (emphasis added).

[42/] *Id.*

[43/] *Verizon North, Inc.*, 309 F.3d at 944.

interconnection" and that state commissions are free to create and compel alternative methods for competitors to acquire network elements and services from incumbents.[44/]

B. *Wisconsin Bell, Inc. v. Bie*

21. In *Wisconsin Bell, Inc. v. Bie*,[45/] the U.S. Court of Appeals for the Seventh Circuit also held that a state commission could not impose a system that took a detour around the procedures of the Act. Outside of any particular contract dispute, Wisconsin's public utility commission ordered Wisconsin Bell to file tariffs setting forth the price and other terms on which competing LECs could contract for interconnection with Wisconsin Bell's local network. Judge Posner, writing for the panel, explained that whether states may create such alternative methods through which competitors can obtain interconnection rights again depends upon whether those alternative methods "interfere with" or are "inconsistent with" with the federal procedure: "if they are inconsistent, they are preempted."[46/]

22. The *Bie* court concluded that the Wisconsin commission's order "*has* to interfere with the procedures established by the federal act" in that it "places a thumb on the negotiating scales by requiring one of the parties to the negotiation, the local phone company, but not the other, the would-be entrant, to state its reservation price, so that bargaining begins from there."[47/] The court found that, in effect, the commission's tariff procedure "short-circuits negotiations,

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[44/] *Id.* at 941.

[45/] 340 F.3d 441 (7th Cir. 2003).

[46/] *Id.* at 443.

[47/] *Id.* at 444 (emphasis in original).

making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement."[48/]

C. *This Proceeding*

23. In this docket, the Commission has established a proceeding that, like the regimes under *Strand* and *Bie*, is inconsistent with the Communications Act. While the Act provides an arbitration option in cases in which negotiations fail, the parties must first negotiate for at least 135 days, underscoring the Act's "clear preference" for negotiated agreements.[49/] Only where, after 135 days, private negotiation fails to produce a satisfactory interconnection agreement does the Communications Act invite state commissions into the local competition contracting process as a binding arbitrator.[50/]

24. By contrast, the very purpose of this proceeding is to provide competing LECs with a way to bypass section 251 and 252's specific negotiation and arbitration requirements by creating a "universal" agreement through a state-run proceeding outside of the Act. But if Congress had wanted to use state-run proceedings to force all incumbent LECs to create and file a standard set of terms available to all CLECs, it could have done so. Congress chose instead to encourage the parties to determine the terms and conditions of interconnection through

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48/ *Id.* at 445.

49/ *MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 500 (3d Cir. 2001) ("The Act's clear preference is for such negotiated agreements."). *See also MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1270 (11th Cir. 2002) ("Negotiation is the preferred method for determining the proper level of access and price.").

50/ 47 U.S.C. § 252(b)(1). Even then, the state commission may become involved in the contracting process only if one of the parties to the negotiation expressly invites it to become involved via a petition under section 252(b)(1). Moreover, once invited, section 252(b)(4) limits the commission's role as arbitrator to consideration of just those issues set forth in the parties' petition and response, and section 252(c) provides that the arbitration must meet the standards set forth in section 251 and any regulations promulgated by the FCC pursuant to section 251.

individualized, private negotiation wherever possible, and for state regulatory forces to intervene only after those negotiations have been given a chance to succeed. As the U.S. Court of Appeals for the Ninth Circuit has explained, the very "point of § 252 is to replace the comprehensive state and federal regulatory scheme with a more market-driven system that is self-regulated through *negotiated interconnection agreements*."[51/]

25. Indeed, in their Response to Verizon's Motion, the Joint CLECs confirmed the inconsistency between the Act and this proceeding. The Joint CLECs stated that "[n]o arbitrations have been necessary in recent years because this docket has provided a forum in which the participating CLECs can negotiate and arbitrate their disputed issues while Verizon continues to honor existing interconnection Agreements."[52/] In other words, if the CLECs' statement is accurate, this proceeding — even before it has concluded — already has been subverting the proper procedures under the Act in Washington *for over two years.*

26. The decision of the Administrative Law Judge to limit *Strand* and *Bie* as "tariff" cases is wrong. Both decisions articulate a broad preemption standard and, in applying it to the facts of the respective cases, make clear that "the proper focus for the preemption analysis in this case is on the §252 process as a whole."[53/] In *Strand*, as in *Bie*, the court explained that "[e]ven in the case of a shared goal, the state law is preempted if it interferes with the methods by which the federal statute was designed to reach [its] goal."[54/] *Bie* also made clear that "[a]t the very

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51/ *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) (emphasis added).

52/ Joint CLEC Response at 3.

53/ 309 F.3d at 943.

54/ *Id.* at 940 (internal quotations omitted).

least, the tariff requirement complicates the contractual route by authorizing a parallel proceeding."[55/]

27. That preemption is not limited to state "tariff" regimes is confirmed by *Indiana Bell Telephone Co., Inc. v. Indiana Util. Regulatory Comm'n*,[56/] a case following *Bie*. In *Bell Telephone*, the Seventh Circuit ruled that the state commission could not impose a "performance assurance plan" as part of its section 271 review because such plans "are not creatures of the Act."[57/] In an analysis that closely parallels the present case, *Bell Telephone* stated that "what the [commission] has done is to parlay its limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order, ostensibly under state law, dictating the conditions on the provision of local service."[58/] The "problem" with this approach, the court explained, "is that the procedure for entry into the local-service market is spelled out in some detail in sections 251 and 252." Thus, the commission's "order bumps against those procedures and thus interferes with the method the Act sets out for . . . the process for interconnection agreements for local service under sections 251 and 252."[59/]

28. Here, the Commission has authorized a "parallel proceeding" that undermines the Act at least as much as the regime rejected in *Bie* and *Strand,* as further illustrated by *Bell Telephone*. The current proceeding "interferes with the methods of" and is "inconsistent with" the Act because requiring a "universal" agreement, arbitrated against multiple CLECs under state

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55/ 340 F.3d at 444.

56/ 359 F.3d 493 (7th Cir. 2004).

57/ *Id.* at 496.

58/ *Id.* at 497.

59/ *Id.*

law, runs roughshod over the detailed procedural requirements of sections 251 and 252. Moreover, *compelling* Verizon or any other company to produce an SGAT or similar filing is a direct and express conflict with section 252(f)(1). The Act provides for an SGAT option as part of its carefully designed procedures, under section 252(f)(1), as a *voluntary* option for certain incumbent carriers.[60/]

29. Moreover, contrary to the Order's contentions, adding some "short form" interconnection agreement that would incorporate the "universal" agreement cannot cure the proceeding's legal infirmities.[61/] The FCC, on July 8, 2004, eliminated the ability of carriers to "pick and choose" which terms and conditions of an agreement they wished to adopt.[62/] The FCC instead adopted "an 'all-or-nothing' rule that requires a requesting telecommunications carrier seeking to avail itself of terms in another carrier's interconnection agreement *to adopt the agreement in its entirety, taking all rates, terms, and conditions from the adopted agreement.*"[63/] "[T]his new all-or-nothing rule will promote more 'give-and-take' in negotiations," the FCC explained, "which will produce creative agreements that are better tailored to meet carriers'

60/ See note 31, *supra.*

61/ Ninth Supplemental Order at 14 (citing *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157 (D. Or. 1999)). In *MCI*, the U.S. District Court for the District of Oregon also rejected a system similar to the one the Commission is attempting to impose here. The Administrative Law Judge's contention that the *MCI* case supports this proceeding is based on dicta and is incorrect in any event. The *holding* of *MCI* is that the Act preempts the "off the rack" system at issue in that case. Because the "short form" interconnection agreement was not at issue there, any discussion of such an approach is purely dicta. 41 F. Supp. 2d at 1177-78. Even in its speculation, the court suggests that a "short form" would be primarily suitable for "resale" agreements, because of their greater simplicity. *Id.* at 1177. Finally, the tariff terms at issue in that case appear to have been determined through arbitration under the Act, while the terms here would all be arbitrated *outside* the Act.

62/ FCC Order at 2 ¶ 1.

63/ *Id.* (emphasis added).

individual needs."[64] Making clear that the current proceeding conflicts with the spirit as well as the letter of the new rule, the FCC declared "that an all-or-nothing rule would benefit competitive LECs because competitive LECs that are sensitive to delay would be able to adopt whole agreements, as is common practice today, while others would be able to reach agreements on individually tailored provisions more efficiently."[65]

30. The elimination of the "pick and choose" rule eliminates any justification, if any ever existed, for the current proceeding. Under the new federal rule, which preempts any inconsistent state law,[66] CLECs could incorporate the "universal statement" into an interconnection agreement, if at all, only on an all-or-nothing basis. In other words, the "universal statement" would *be* the interconnection agreement, and any pretense that it would merely supplement existing agreements has disappeared. Because the "universal statement" would be determined outside the Act, as the Order and prior Commission decisions effectively

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[64] *Id.* The FCC also found that "disputes over obligations under the pick and choose rule have become a significant obstacle to efficient negotiations of interconnection between incumbent LECs and requesting carriers." *Id.* In her supporting statement, Commissioner Abernathy further explained how the "pick and choose rule" — which underlies the regime the Commission apparently envisions here — "impedes marketplace negotiations." FCC Order, Separate Statement of Commissioner Kathleen Q. Abernathy. Commissioner Abernathy explained that "[i]n enacting the Telecommunications Act of 1996, Congress envisioned a sharing regime built primarily upon negotiated access arrangement, rather than governmental mandates." *Id.* However, as Commissioner Abernathy indicated, "this vision has not been realized" and "new entrants almost never engage in true give-and-take negotiations" because "incumbent LECs have proven reluctant to make significant concessions as long as third parties can later come along and avail themselves of the benefit without making the same trade-off as the contracting party." *Id.*

[65] FCC Order at 11 ¶ 15.

[66] *See, e.g., Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 700 (1984) ("Therefore, if the FCC has resolved to pre-empt an area of cable television regulation and if this determination 'represents a reasonable accommodation of conflicting policies' that are within the agency's domain, we must conclude that all conflicting state regulations have been precluded.") (internal citation omitted).

concede, all the provisions of any resulting "interconnection agreement" would be determined outside the procedures of the Act.[67] The Act therefore preempts these procedures.

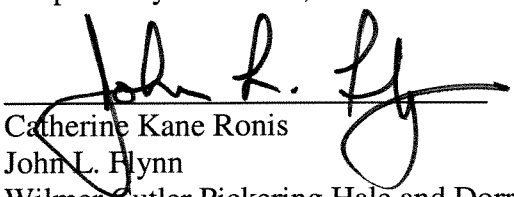
31. Thus, the Commission should terminate this proceeding because, like the regimes invalidated in the cases discussed above, this proceeding is unlawful under the Communications Act.

CONCLUSION

32. The Commission should cease to pursue this inefficient and legally unsound alternative to the procedures contemplated by sections 251 and 252 of the Communications Act and immediately terminate this proceeding.

July 15, 2004

Respectfully submitted,



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[67] *U.S. West Communications, Inc. v. Sprint Communications Co., L.P.*, 275 F.3d 1241 (10th Cir. 2002), therefore, does not support the current proceeding. In *U.S. West*, the parties arbitrated agreements *under the provisions of the Act*. The arbitrator permitted those agreements to include certain tariff terms, which already existed at the time of arbitration and litigation. *Id.* at 1247-49. This is no different from arbitrating a particular requested term in a bilateral arbitration under the Act. Instead of proposing the terms in the first instance, the CLECs simply requested terms that could be found elsewhere, and the arbitrator agreed that they were reasonable, as he or she would in any Act arbitration. In *U.S. West*, no party challenged the establishment of the tariff terms in the first instance. Here, by contrast, Verizon is challenging the establishment of these terms because the process for doing so, and the possibility that CLECs could adopt them wholesale without an arbitration, violates the Act.

CERTIFICATE OF SERVICE

I hereby certify that an original and twelve (12) copies of the foregoing Petition of Verizon Northwest Inc. for Review of Order Denying Motion to Terminate Proceeding were sent by overnight mail and one copy was sent by electronic mail to Ms. Carole J. Washburn, Executive Secretary, Washington Utilities & Transportation Commission, 1300 S. Evergreen Park Drive SW, Post Office Box 47250, Olympia, WA 98504-7250; and one copy was sent by overnight mail and electronic mail to the following :

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