

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of)	
	)	DOCKET NO. UT-041127
THE JOINT PETITION FOR)	
ENFORCEMENT OF	)	ORDER NO. 03
INTERCONNECTION)	
AGREEMENTS WITH VERIZON	)	ORDER GRANTING, IN PART,
NORTHWEST, INC.	)	AT&T, MCI, AND TEL WEST'S
	)	PETITIONS FOR REVIEW;
	)	MODIFYING PRICING
	)	REQUIREMENTS OF ORDER
	)	NO. 10 IN DOCKET NO.
	)	UT-043013; REQUIRING BRIEFS
	)	ADDRESSING REMEDIES FOR
	)	BREACH (Due by Tuesday,
	)	March 15, 2005).
.....)	

1 **SYNOPSIS.** *In this Order, the Commission grants in part the petitions for review of AT&T, MCI, and Tel West. While the Commission finds that packet switches are not subject to unbundling, the Commission rejects the finding in Order No. 02 that ILECs may replace circuit switches with packet switches to avoid unbundling obligations. The Commission also finds that Verizon's action to replace its circuit switch in the Mount Vernon central office with a new switch that does not allow circuit switching violated MCI's and AT&T's interconnection agreements with Verizon. The Commission requests additional briefing and affidavits concerning the capabilities of the new switch and concerning appropriate penalties for Verizon's breach of the interconnection agreements. Until these matters are determined, the Commission finds that the remedy granted in Order No. 10 in Docket No. UT-043013 is appropriate, and that Verizon may only charge affected CLEC's beginning March 11, 2005, the UNE-P transition rate recently adopted by the FCC for resale service provided out of the Mount Vernon switch.*

PROCEDURAL BACKGROUND

- 2 **Nature Of Proceeding.** This proceeding involves a petition filed by Advanced TelCom, Inc. (ATI), AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle (collectively AT&T), MCImetro Access Transmission Service, LLC (MCI), and United Communications, Inc., d/b/a UNICOM (UNICOM), collectively the Joint Petitioners, seeking enforcement of their interconnection agreements with Verizon Northwest, Inc. (Verizon).
- 3 **Procedural History and Background Facts.** On June 8, 2004, Verizon issued a Notice of Network Change informing competitive local exchange carriers (CLECs) in Washington State that Verizon intended to replace the existing Nortel DMS 100 switch, a circuit switch, in Mount Vernon, Washington, with a Nortel Succession switch, which Verizon describes as a packet switch.¹ Verizon notified all affected CLECs that unbundled packet switching would not be available at the Mount Vernon switch beginning on September 10, 2004, but that Verizon would convert existing unbundled network element platform, or UNE-P, service to resale service.²
- 4 On August 31, 2004, ATI, AT&T, Covad Communications Company (Covad), MCI, and UNICOM, collectively the Competitor Group, filed with the Commission in Docket No. UT-043013 a motion for enforcement of Order No. 05 in that proceeding, the CLECs' interconnection agreements and the Federal Communications Commission's (FCC) Triennial Review Order.³ The Competitor

¹ See Exhibit A to Joint CLECs' Petition for Enforcement, at 1.

² *Id.*, at 2.

³ *In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96098, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. August 21, 2003) [hereinafter "*Triennial Review Order*"], *aff'd in part*

Group asserted that Verizon's planned conversion from a circuit switch to a packet switch at its Mount Vernon, Washington, central office on September 10, 2004, violated these orders and agreements.

5 The Commission heard argument on the motion at a prehearing conference in Docket No. UT-043013 held on September 7, 2004. Based upon concerns raised by the CLECs that Verizon's planned switch conversion might cause disruption to customers, the Commission held a hearing on September 9, 2004, to determine whether the switch conversion would affect customers served by the switch or was purely a matter of pricing.

6 On September 10, 2004, Verizon replaced the Mount Vernon DMS 100 circuit switch with a Nortel Succession switch. Verizon's action in Washington is unique, as Verizon has not replaced a circuit switch with a packet switch in any other location in the United States.⁴

7 On September 13, 2004, Administrative Law Judge (ALJ) Ann E. Rendahl entered Order No. 10 in Docket No. UT-043013 allowing the switch conversion to proceed but requiring Verizon to charge affected CLECs the UNE-P rate for resale service provided out of the Mount Vernon switch. Order No. 10 also directed the Competitor Group to file a petition for enforcement with the Commission to allow the Commission to address the issue of whether the

and rev'd and vacated in part, United States Telecom Association v. FCC, 359 F.3d 554 (D.C. Cir. 2004) [hereinafter "*USTA II*"].

⁴ Although Verizon has installed packet switches in California to replace circuit switches, the packet switches are not in use and have not replaced circuit switches. See Joint CLECs Response to Verizon's Motion, Attachment 3 at 4. On September 15, 2004, the California Public Utilities Commission entered an order restraining Verizon from converting Class 5 circuit switches to packet switches in two central offices. See Exhibit H to Joint Petition, *AT&T Communications of California, Inc. (U 5002 C)*, *TCG Los Angeles, Inc. (U 5462 C)*, *TCG San Diego (U 5389 C)* and *TCG San Francisco (U 5454 C) v. Verizon California Inc. (U 1002 C)*, Assigned Commissioner and Administrative Law Judge's Ruling on AT&T's Emergency Motion For Order Maintaining the Status Quo Pending Resolution of the Complaint, California Public Utilities Commission Case No. 04-08-026 (Sept. 15, 2004) [hereinafter "*California Decision*"].

provisions of the FCC's Triennial Review Order, other FCC Orders, and interconnection agreements allow the replacement of existing circuit switches used for voice service with packet switches, rather than the mere deployment of packet switching.

- 8 On September 20, 2004, ATI, AT&T, MCI, and UNICOM, collectively the Joint Petitioners, filed with the Commission a Joint Petition for Enforcement of their interconnection agreements with Verizon.
- 9 On September 24, 2004, Tel West Communications, L.L.C. (Tel West), filed with the Commission a petition to intervene in the proceeding.
- 10 On September 28, 2004, Verizon filed with the Commission a motion for judgment on the pleadings and a motion to strike certain portions of the Joint Petition and supporting affidavits.
- 11 The Commission convened a prehearing conference on October 11, 2004, before ALJ Rendahl. Order No. 01, a prehearing conference order, was entered in this proceeding on October 14, 2004, granting Tel West's petition for intervention and establishing a procedural schedule for the proceeding.
- 12 On October 27, 2004, Commission Staff filed a Response to Verizon's Motion for Judgment on the Pleadings and Declaration of Robert Williamson. On the same day, ATI, MCI and UNICOM filed a joint response to Verizon's motion, attaching the Affidavits of Jeff Haltom, and Sherry Lichtenberg. AT&T and Tel West also filed responses to Verizon's motion on October 27, 2004.
- 13 On October 27, 2004, counsel for ATI and UNICOM and counsel for MCI submitted e-mails to the ALJ and the Commission concerning Verizon's motion to strike.

- 14 On November 12, 2004, Verizon filed a Reply to the Answers of Staff and the CLECs, attaching the affidavit of Danny Peeler.
- 15 On November 23, 2004, Verizon filed a letter supplementing its November 12, 2004 reply. On November 29, 2004, Tel West filed a letter in response to Verizon's supplemental letter.
- 16 On December 3, 2004, ALJ Rendahl entered Order No. 02, Recommended Decision Granting Verizon's Motion for Judgment on the Pleadings and Denying, in Part, Verizon's Motion to Strike.
- 17 On December 13, 2004, AT&T and MCI collectively filed the Joint CLECs' Petition for Review of Order No. 02 in Docket No. UT-041127. On that same day, Tel West filed a Petition for Review of Order No. 02, and Commission Staff filed Comments on the Recommended Decision. Counsel for ATI and UNICOM filed a statement indicating support for the petitions for review, but notifying the Commission that they will not participate further in the proceeding.
- 18 On December 16, 2004, AT&T and MCI filed a Corrected Joint CLEC Petition for Review of Order No. 02.
- 19 Verizon filed its response to the petitions for review and Staff comments on December 27, 2004.
- 20 On January 3, 2005, the Commission notified all parties that the Commission would consider the petitions for review of the Recommended Decision without oral argument or hearing in accordance with WAC 480-07-650(5)(c). The Commission also notified the parties that it extended the time for entering a final order on the petition for enforcement until January 31, 2005, due to the press of business before the Commission.

- 21 On January 7, 2005, Tel West filed with the Commission a Statement of Supplemental Authority, attaching an order issued by an administrative law judge of the California Public Utilities Commission entitled "Administrative Law Judge's Ruling Confirming Hearings and Amending Schedule." On January 28, 2005, Verizon filed a motion to strike Tel West's statement of supplemental authority.
- 22 On January 31, 2005, the Commission further extended the time for issuance of a final order until February 18, 2005, and on February 15, 2005, extended the time until February 23, 2005.
- 23 On February 4, 2005, the FCC entered its Order on Remand following the D.C. Circuit's decision in *USTA II* vacating in part and remanding in part the FCC's Triennial Review Order.⁵ In its Order on Remand, the FCC determined that, effective March 11, 2005, ILECs are no longer obligated to provide unbundled local circuit switching to requesting CLECs.⁶ The FCC established a twelve-month period for CLECs to transition to alternative facilities and arrangements, allowing ILECs to charge CLECs for existing service during this period the UNE-P rate, plus one dollar.⁷
- 24 **Appearances.** Letty S. D. Friesen, AT&T Law Department, Denver, Colorado, represents AT&T. Michel Singer Nelson, Senior Regulatory Attorney, Denver, Colorado, represents MCI. Brooks Harlow, Miller Nash LLP, Seattle, Washington, represents ATI and UNICOM. David E. Mittle, Santa Fe, New Mexico, represents Tel West. Timothy J. O'Connell and John H. Ridge, Stoel Rives LLP, Seattle, Washington, and Charles H. Carrathers, III, Vice President

⁵ *In the Matter of 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, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) [hereinafter "*Order on Remand*"].

⁶ *Id.*, ¶ 199.

⁷ *Id.*, ¶¶ 227-28.

and General Counsel for Verizon Northwest Inc. and Verizon Southwest Inc., Irving, Texas, represent Verizon.

MEMORANDUM

- 25 The Corrected Joint CLEC Petition for Review of Order No. 02 raises the following issues for consideration:
- Whether the Joint CLECs have established a basis for seeking interlocutory review and whether the Commission should accept review;
 - Whether Order No. 02 erred in applying a standard of review applicable to motions to dismiss rather than the standard for motions for summary judgment in concluding that material disputes of fact are not relevant;
 - Whether Order No. 02 erred in resolving an issue of fact, *i.e.*, whether the new switch is a packet switch, based on the pleadings and affidavits of the parties;
 - Whether Order No. 02 erred in striking the Affidavit of MCI witness Ms. Lichtenberg;
 - Whether Order No. 02 erred in finding that the FCC's Triennial Review Order allows ILEC replacement of local circuit switches with packet switches to avoid unbundling obligations;
 - Whether Order No. 02 erred in interpreting the definition of "local switching" in MCI's and AT&T's interconnection agreements; and
 - Whether Order No. 02 erred in not resolving whether UNE-P should continue to be available in Verizon's remote switches.
- 26 Tel West and Staff address in their pleadings only the last issue: Whether Order No. 02 erred in finding that the FCC's Triennial Review Order allows ILEC replacement of local circuit switches with packet switches to avoid unbundling obligations. We address Tel West's petition and Staff's comments on this issue together with the Joint CLEC Petition.

27 We also address in this Order Verizon's motion to strike Tel West's statement of supplemental authority.

28 **A. Interlocutory Review.** The Joint CLECs request that the Commission accept review of Order No. 02, asserting that the Order terminates their participation in the proceeding by dismissing the petition for enforcement, causes substantial and irreparable harm by terminating the Joint Petitioners' rights under the federal Telecommunications Act of 1996 (Act)⁸ and their interconnection agreements, affecting their ability to provide local service to residential and small business customers in the Mount Vernon area.⁹ The Joint CLECs also assert that the Order will severely hinder the development of local service competition if the Commission does not reject the findings in the Order.¹⁰

29 Tel West asserts that, if final, Order No. 02 would terminate its ability to address the issue of whether an ILEC may block unbundled network access to the public switched network by replacing a voice circuit switch with a packet switch.¹¹

30 Neither Staff nor Verizon address whether the Commission should accept review.

31 **Decision.** This proceeding is governed by the Commission's procedural rules addressing petitions for enforcement of interconnection agreements in WAC 480-07-650. As provided under WAC 480-07-650(5)(b), the presiding officer entered a recommended decision in the proceeding. The Commission's rules provide for review of a recommended decision either on a paper record or after hearing, and allow for parties to file written comments on the recommended decision "on a schedule established in the recommended decision."¹²

⁸ Public Law No. 104-104, 101 Stat. 56 (1996); 47 U.S.C. § 153 *et seq.*

⁹ Joint CLEC Petition, ¶¶ 7-9.

¹⁰ *Id.*, ¶ 11.

¹¹ Tel West Petition at 2-3.

¹² WAC 480-07-650(5)(c).

32 Order No. 02, the recommended decision, identified interlocutory review pursuant to WAC 480-07-810 as the procedure for parties to comment on the Order. Under Commission rule, review of interlocutory orders is a matter of discretion for the Commission.¹³ The Commission may accept review under WAC 480-07-810(2) after finding that:

- (a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;
- (b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or
- (c) A review could save the commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review.¹⁴

A petition must state why the ruling is in error and why interlocutory review is necessary.¹⁵

33 The Joint CLECs and Tel West establish a sufficient basis for accepting review under WAC 480-07-810(2)(a). Order No. 02 terminates their participation in the proceeding by dismissing the petition for enforcement and reaches a conclusion of law that could cause substantial and irreparable harm.

34 **B. Standard of Review for Considering Verizon's Motion.** The Joint Petition for Enforcement alleges that Verizon breached the provisions of its interconnection agreements to provide local circuit switching.¹⁶ Verizon's motion asserts that the proceeding requires the Commission to decide only an issue of law, *i.e.*, whether the FCC has determined that ILECs are not required to

¹³ WAC 480-07-810(2).

¹⁴ *Id.*

¹⁵ WAC 480-07-810(3).

¹⁶ Joint Petition for Enforcement, ¶¶ 5, 18, 26.

unbundle packet switches, and by extension, whether the Joint CLECs' interconnection agreements are consistent with and conform to the FCC's decisions on packet switching.

35 In their response to Verizon's motion, the Joint CLECs assert three issues of material fact: the capabilities of the new Nortel Succession switch; the nature of local switching required by the Joint CLECs' interconnection agreements; and whether Verizon has in place the Operations Support Systems (OSS) necessary to support unbundled local switching on the new switch.¹⁷

36 Order No. 02 characterized the issue for determination in the proceeding as a narrow question of law, "whether the provisions in the Triennial Review Order, other FCC Orders, and interconnection agreements allow the replacement of existing circuit switches used for voice service with packet switches, rather than the mere deployment of packet switching".¹⁸ The Order determined that Verizon's motion for judgment on the pleadings was a motion to dismiss governed by Rule 12(b), rather than a motion for summary judgment, and could be determined as a matter of law.¹⁹

37 The Joint CLECs assert that Order No. 02 improperly applied the standard for motions to dismiss under Rule 12(c).²⁰ The Joint CLECs assert that the proper standard for determining a motion to dismiss, or motion on the pleadings, is to accept the allegations in the complaint as true, and grant relief only if the plaintiff or complainant cannot prove facts that would entitle them to relief.²¹

¹⁷ Joint CLECs' Response to Verizon Motion, ¶¶ 3-6.

¹⁸ *In the Matter of the Joint Petition for Enforcement of Interconnection Agreements with Verizon Northwest, Inc.*, Order No. 02; Recommended Decision Granting Verizon's Motion for Judgment on the Pleadings and Denying, in Part, Verizon's Motion to Strike, WUTC Docket No. UT-041127, ¶ 77 (Dec. 3, 2004) [hereinafter "Order No. 02"].

¹⁹ *Id.*, ¶¶ 73-75.

²⁰ Joint CLEC Petition, ¶¶ 12-14.

²¹ *Id.*, ¶ 14, citing *Hodgson v. Bicknell*, 49 Wn.2d 130, 136, 298 P.2d 844 (1956); *Loger v. Washington Timber Prod. Inc.*, 8 Wn. App. 921, 924, 509 P.2d 1009 (1973).

The Joint CLECs assert that the Order assumes incorrectly that the facts presented in Verizon's pleadings are true.²²

38 The Joint CLECs assert that the ALJ considered matters outside of the pleadings, *i.e.*, the affidavits and declarations presented by Verizon and other parties, and that Verizon's motion should be treated as one for summary judgment pursuant to Rule 56.²³ The Joint CLECs assert that under Rule 56, a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."²⁴ The Joint CLECs assert that Order No. 02 did not apply this standard and concluded that material facts in dispute are not relevant.²⁵ The Joint CLECs request that the Commission reject this recommendation of Order No. 02, and find that material facts exist that prevent granting summary judgment in Verizon's favor.²⁶

39 Verizon asserts that there is no merit to the Joint CLECs' argument that the ALJ applied the wrong standard in deciding Verizon's motion.²⁷ Verizon asserts that the Joint CLECs' petition raises only a discrete question of federal law, *i.e.*, whether packet switches must be unbundled, and that the CLECs only raised issues of fact in response to Verizon's motion.²⁸ Verizon asserts that the Order's conclusions are correct even if the summary judgment standard were applied to its motion.²⁹ Verizon asserts that a party opposing a motion for summary judgment cannot rely on the allegations in their pleadings, but must identify in

²² *Id.*, ¶ 14.

²³ *Id.*, ¶ 16.

²⁴ *Id.*, ¶ 18, *quoting* CR 56(c); *citing* *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

²⁵ *Id.*, ¶ 19.

²⁶ *Id.*

²⁷ Verizon Response, ¶ 42.

²⁸ *Id.*, ¶¶ 10, 12.

²⁹ *Id.*, ¶ 42.

affidavit specific facts showing a genuine issue of fact.³⁰ Verizon asserts that there is no genuine issue of material fact, arguing that the three affidavits filed in the proceeding identify the Nortel Succession switch as a packet switch providing the functions of a packet switch.³¹

40 **Decision.** We find the Joint CLECs' argument persuasive that Order No. 02 incorrectly applied the standard for considering Rule 12(b) motions. Rule 12(c) provides that if "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56."³² The ALJ considered the matter one solely of law, as narrowly defined by Verizon, but considered the declaration of Mr. Williamson and the affidavits of Mr. Haltom and Mr. Peeler in considering whether there was a factual dispute as to the technical capabilities of the switch.³³ As the Joint Petition for Enforcement and Verizon's motion raise issues of both law and fact, and require consideration of the affidavits and declarations filed in the proceeding, the proper standard for considering Verizon's motion is the standard for a motion for summary judgment.

41 We also find that paragraph 75 of Order No. 02 improperly concluded that consideration of material disputes of fact is not relevant to whether the Commission may decide the issue on the pleadings. Whether there are material issues of fact in dispute is central to the determination of a motion for summary judgment. Under Rule 56(d), the moving party is entitled to judgment as a matter of law, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." As the Joint CLECs note, "[a] material fact

³⁰ *Id.*

³¹ *Id.*, ¶¶ 43-44.

³² CR 12(c).

³³ Order No. 02, ¶ 76.

is one upon which the outcome of the litigation depends in whole or in part.”³⁴ A moving party bears the burden of showing the absence of disputed material facts, and all reasonable inferences are resolved against the moving party.³⁵ A motion for summary judgment “should be granted if, from all the evidence, a reasonable person could reach only one conclusion.”³⁶ As Order No. 02 did not apply the appropriate standard for considering a motion for summary judgment, we reverse the recommended decision in paragraph 75 of Order No. 02.

42 **C. Nature of the Switch as a Material Fact.** The Joint CLECs assert that Order No. 02 erred in concluding that the declaration and affidavits filed in the proceeding show no dispute as to whether the Nortel Succession switch installed in the Mount Vernon central office is a packet switch as defined by the FCC.³⁷ The Joint CLECs assert that the Order erred in resolving a factual dispute in favor of the moving party, contrary to the rules for summary judgment.³⁸

43 The Joint CLECs assert that the Williams declaration and Haltom affidavit identify that the new switch is a hybrid circuit/packet switch that can be deployed to support circuit switching.³⁹ The Joint CLECs assert that the Peeler affidavit, offered by Verizon, confirms that the switch can be deployed to allow circuit switching.⁴⁰ The Joint CLECs assert that the Peeler affidavit is not clear as to whether the new switch was deployed without the “circuit switching fabric,” or whether Verizon has just not enabled it.⁴¹ The Joint CLECs further assert that, based on information obtained through discovery in a simultaneous proceeding before the California Commission, it appears that Verizon intends to install

³⁴ Joint CLEC Petition, ¶ 18, quoting *Samis v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477 (2001).

³⁵ *Folsom*, 135 Wn.2d at 663.

³⁶ *Id.*

³⁷ Joint CLEC Petition, ¶¶ 20-21.

³⁸ *Id.*, ¶ 21.

³⁹ *Id.*, ¶ 22.

⁴⁰ *Id.*, ¶ 23.

⁴¹ *Id.*, ¶ 24

similar Nortel Succession switches in California that do contain the circuit switching fabric, referred to as the enhanced network, or ENET, module.⁴²

44 The Joint CLECs assert that whether the Nortel Succession switch is a circuit switch or a packet switch is a material fact in dispute.⁴³ The Joint CLECs' request that the Commission determine the exact configuration of the switch before concluding that the switch performs "solely packet switching functions."⁴⁴

45 Verizon asserts that Order No. 02 properly concluded that the only relevant fact in dispute is whether the Nortel Succession switch is a packet switch, and that the parties' declarations show that there is no dispute as to the nature and functions of the switch.⁴⁵ Verizon objects to the Joint CLECs presenting new evidence on review, *i.e.*, the Haltom declaration filed in California, attached as Attachment A to the Joint CLECs' petition.⁴⁶ Verizon asserts that it is irrelevant whether Verizon could have deployed the new switch to provide circuit switching, as it has no legal obligation to do so.⁴⁷ Verizon asserts that the Joint CLECs are barred from introducing new evidence on review.⁴⁸

46 **Decision.** We find that whether the Nortel Succession switch is a packet switch is not a material issue of fact as to the question of whether ILECs may replace circuit switches with packet switches under federal law. As we discuss in Section E, below, we reverse the finding in Order No. 02 that the Triennial Review Order allows such replacement of switches to avoid unbundling obligations, but find that the FCC has determined that a packet switch need not be unbundled, even if the switch provides voice grade switching services.

⁴² *Id.*, ¶ 25.

⁴³ *Id.*, ¶ 31.

⁴⁴ *Id.*, ¶ 26.

⁴⁵ Verizon Response, ¶ 41.

⁴⁶ *Id.*, ¶ 47.

⁴⁷ *Id.*

⁴⁸ *Id.*, citing RCW 34.05.464(5); *Towle v. Dept. of Fish & Wildlife*, 94 Wn. App. 196, 205 (1999).

47 On the other hand, we find that the nature and functions of the Nortel Succession switch are material issues of fact in connection with the interpretation of the definition of “local switching” in the Joint CLECs’ interconnection agreements. We address the issue of whether Verizon has breached the Joint CLECs’ interconnection agreements in Section F, below.

48 **D. Lichtenberg Affidavit.** The Joint CLECs assert that Order No. 02 erred in striking Ms. Lichtenberg’s affidavit and portions of the Joint CLECs’ response pleading that rely on Ms. Lichtenberg’s affidavit by finding that material issues of fact are not relevant.⁴⁹ The Joint CLECs assert that Ms. Lichtenberg’s affidavit rebuts Verizon’s claim that unbundled circuit switching is no longer available at the Mount Vernon central office and responds to Verizon’s claim that Verizon cannot support unbundled local circuit switching as it has no OSS to provide the back office functions necessary to provision UNE-P from the new switch.⁵⁰ The Joint CLECs also claim that it was improper to strike Ms. Lichtenberg’s affidavit while allowing Verizon to submit the transcript of the September 9, 2004, hearing held in Docket No. UT-043013.⁵¹

49 Verizon asserts that the Joint CLECs waived any argument that Order No. 02 erred in striking the affidavit of Ms. Lichtenberg, asserting that the CLECs notified the ALJ that they did not oppose the motion.⁵² Verizon also asserts that the Order did not err in admitting the transcript of the September 9 hearing, as the ALJ admitted the testimony on condition that the Commission may find in favor of the Joint CLECs.⁵³

⁴⁹ Joint CLEC Petition, ¶ 33.

⁵⁰ *Id.*, ¶ 34.

⁵¹ *Id.*, ¶ 35.

⁵² Verizon Response, ¶ 53.

⁵³ *Id.*, ¶ 54.

50 **Decision.** Order No. 02 denied Verizon’s motion to strike portions of the affidavits of Mr. Wigger, on behalf of ATI, Mr. Daughtry, on behalf of UNICOM, and Ms. Lichtenberg, on behalf of MCI, which relate to allegations of harm.⁵⁴ The Order accepted Verizon’s alternative proposal of including the entire transcript of the September 9 hearing.⁵⁵ In its Reply to the Answers of Staff and CLECs, Verizon requested that the Commission strike Ms. Lichtenberg’s affidavit as the discussion of OSS deployment to support local switching from the new switch was not relevant to its motion.⁵⁶ Finding that there was no dispute of material fact requiring affidavits and declarations, Order No. 02 struck portions of Ms. Lichtenberg’s affidavit relating to the OSS necessary to support unbundled local switching from the new Mount Vernon switch, as well as portions of the Joint CLECs’ response relating to this issue.⁵⁷

51 Consistent with our decision above that Order No. 02 erred in concluding that any material issue of fact was irrelevant to the legal matters at issue, we reverse the decision in paragraph 89 of Order No. 02 striking the affidavit of Ms. Lichtenberg. We find that Ms. Lichtenberg’s affidavit does not identify material issues of fact in connection with an ILEC’s obligations under federal law to unbundle packet switching, but may identify material issues of fact in connection with the interpretation of the definitions of “local switching” in the Joint CLECs’ interconnection agreements with Verizon.

52 **E. Packet Switch Deployment.** Order No. 02 finds that the Triennial Review Order allows ILECs to “deploy packet switches without requiring unbundled access, and may upgrade switches with packet switches to avoid the unbundling requirement.”⁵⁸

⁵⁴ Order No. 02, ¶ 88.

⁵⁵ *Id.*

⁵⁶ Verizon Reply, ¶ 42.

⁵⁷ Order No. 02, ¶ 89.

⁵⁸ Order No. 02, ¶ 81.

- 53 The Joint CLECs request that the Commission reject the Order's recommendation, asserting that it effectively terminates their rights to purchase UNE-P from Verizon based on dicta.⁵⁹ The Joint CLECs dispute that the portions of the Triennial Review Order on which the Order rests apply to the factual situation presented by the pleadings.⁶⁰ The Joint CLECs assert that the FCC has not addressed whether ILECs must provide unbundled local switching where the ILEC installs a switch that can support both circuit and packet-based features and functions and removes all stand-alone circuit switches that support analog voice grade traffic.⁶¹ The Joint CLECs assert that the FCC's Local Competition Order,⁶² UNE Remand Order,⁶³ and Triennial Review Order do not address the present situation.⁶⁴
- 54 Tel West requests the Commission reject the decision in paragraph 81 of Order No. 02, asserting that the decision is based on dicta and speculation, and that Verizon should not be allowed to block access to the voice capabilities of the public switched telephone network.⁶⁵ Tel West asserts that the decision is not consistent with the public interest, and imposes an undue and unreasonable prejudice on Tel West contrary to RCW 80.36.170.⁶⁶
- 55 Commission Staff asserts that Order No. 02 erred in concluding that federal law does not require Verizon to unbundle the narrowband switching function

⁵⁹ Joint CLEC Petition, ¶ 54.

⁶⁰ *Id.*, ¶ 55.

⁶¹ *Id.*

⁶² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket No. 96-98, CC Docket No. 95-185, 11 F.C.C.R. 15,499 (Aug. 8, 1996) [hereinafter "*Local Competition Order*"].

⁶³ *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, 16 F.C.C.R. 1724 (Nov. 5, 1999) [hereinafter "*UNE Remand Order*"].

⁶⁴ Joint CLEC Petition, ¶¶ 56-74.

⁶⁵ Tel West Petition at 2-4.

⁶⁶ *Id.*, at 4.

provided by the new Mount Vernon switch.⁶⁷ Staff asserts that the FCC has addressed packet switching as a means to deliver broadband services or advanced services, and defines packet switching as including DSLAM packet switching functions.⁶⁸ Staff asserts that the Nortel Succession switch deployed in the Mount Vernon exchange has no DSLAM functionality, provides no advance services, and carries only narrowband or voice grade traffic.⁶⁹

56 Staff asserts that Order No. 02 takes the FCC's statements in paragraphs 447, 448, and footnote 1365 of the Triennial Review Order out of context.⁷⁰ Staff asserts that the new Mount Vernon switch is not part of an advanced network as the FCC uses the term, and that the switch is not what the FCC meant by a packet switch.⁷¹ Staff asserts that there is a question of fact as to whether the switch is capable of carrying broadband traffic.⁷²

57 Verizon asserts that the decision in Order No. 02 is correct. Verizon also asserts that the legal question is moot now that the FCC has adopted new rules eliminating any obligation for ILECs to provide unbundled access to local circuit switching, and allowing a 12-month transition period for existing end-user customers.⁷³ Verizon asserts that the FCC's ruling confirms that packet switches are not subject to unbundling.⁷⁴ Verizon disputes the Joint CLECs' and Staff's argument that the definition of local circuit switching is "function oriented" and that Verizon must allow CLECs unbundled access to packet switches that switch voice traffic.⁷⁵

⁶⁷ Staff Comments, ¶ 1.

⁶⁸ *Id.*, ¶¶ 2, 5.

⁶⁹ *Id.*, ¶¶ 4-7.

⁷⁰ *Id.*, ¶ 7.

⁷¹ *Id.*, ¶ 10.

⁷² *Id.*, ¶ 11.

⁷³ Verizon Response, ¶ 13.

⁷⁴ *Id.*, ¶ 14.

⁷⁵ *Id.*, ¶¶ 16-17.

58 Verizon asserts that the FCC has consistently determined that packet switches are not subject to an unbundling requirement.⁷⁶ Verizon asserts that the FCC declined to require unbundling of packet switching in the Local Competition Order.⁷⁷ Verizon asserts that, because the FCC declined to declare packet switching subject to unbundling, none of the features, functions, or capabilities of packet switching were required to be unbundled.⁷⁸ Similarly, Verizon asserts that the FCC refused to impose an unbundling obligation on packet switching in its UNE Remand Order, with the sole exception for DSLAMs at remote terminals.⁷⁹ Verizon asserts that the FCC affirmed its decision not to require unbundling of packet switches in its Triennial Review Order and recent Section 271 Forbearance Order.⁸⁰ Verizon asserts that the FCC specifically rejected in the Triennial Review Order MCI's claim that ILECs make packet switching available when the ILEC is using it to provide voice services.⁸¹

59 Verizon asserts that Order No. 02 correctly determined that "a network element is a facility or equipment, of which the features and functions are a part," and that where the FCC has not unbundled packet switches as a network element, "the ILECs are not required to unbundled the features and functions of the packet switch."⁸² Verizon asserts that the CLECs appear to request access to the functionality of packet switching, even though the network element providing the functionality is not required to be unbundled.⁸³

⁷⁶ *Id.*, ¶ 19.

⁷⁷ *Id.*, ¶ 20, citing *Local Competition Order*, ¶ 427.

⁷⁸ *Id.*, ¶ 21.

⁷⁹ *Id.*, ¶ 22, citing *UNE Remand Order*, ¶ 306.

⁸⁰ *Id.*, ¶¶ 23, 24, citing *Triennial Review Order*, ¶ 539; see also *In the Matter of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 169(c), et al.*, WC Docket No. 01-338, Memorandum Opinion and Order, FCC 04-254, ¶ 1 (rel. Oct. 27, 2004).

⁸¹ *Id.*, ¶¶ 26-27, citing *Triennial Review Order*, ¶ 288, n. 833.

⁸² *Id.*, ¶¶ 29-31.

⁸³ *Id.*, ¶ 32.

60 Finally, Verizon asserts that Order No. 02 correctly determined that ILECs may replace a circuit switch with a packet switch even if the deployment allows the ILEC to avoid its unbundling obligations.⁸⁴ Verizon asserts that, while the FCC required ILECs deploying new fiber loops to maintain old copper loops for narrowband service, the FCC did not require ILECs to maintain old circuit switches when replacing them with packet switches.⁸⁵

61 **Decision.** First, we find that the FCC's Order on Remand does not render the issues in this proceeding moot. The FCC has determined that ILECs are no longer obligated to provide unbundled local circuit switching.⁸⁶ While the FCC found that ILECs did not have to accept new orders for such service, the FCC implemented a 12-month transition period for existing service at current UNE-P rates plus one dollar.⁸⁷ Thus, the FCC's Order on Remand does not moot the issues presented in this proceeding affecting existing service.

62 First, we uphold the finding in Order No. 02 that the FCC has determined that packet switches are not subject to unbundling obligations. The FCC has consistently stated in the UNE Remand Order and the Triennial Review Order that packet switches and the features and functions of packet switching are not subject to unbundling obligations.⁸⁸

63 We also find that ILECs are not required to provide access to voice grade service provided by a packet switch. In the Triennial Review Order, the FCC denied an MCI petition seeking clarification that ILECs must make packet switching available to requesting carriers when ILECs carry voice-grade or narrowband traffic on the packet switch.⁸⁹ The FCC specifically refers to pages 2 through 15

⁸⁴ *Id.*, ¶¶ 33-34, quoting *Triennial Review Order*, ¶ 447, n. 1365.

⁸⁵ *Id.*, ¶ 35.

⁸⁶ *Order on Remand*, ¶ 199.

⁸⁷ *Id.*, ¶¶ 227-28.

⁸⁸ *UNE Remand Order*, ¶¶ 306; *Triennial Review Order*, ¶¶ 448, 539.

⁸⁹ *Triennial Review Order*, n.1649 (¶ 538).

of MCI's petition, which include the portion of MCI's petition at which MCI requests "that packet switching must be made available as a UNE when the ILEC is using it to provide voice services."⁹⁰ Thus, we reject the arguments of the Joint CLECs and Staff that the Nortel Succession switch is not a packet switch where it provides voice grade service.

64 Order No. 02 interprets footnote 1365 and a portion of paragraph 448 to mean that ILECs may replace circuit switches with packet switches to avoid unbundling obligations.⁹¹ Footnote 1365 provides, in relevant part, that:

Moreover, the dissents fail to consider the incentives created by our decision on packet switching and advanced services. Specifically, we no longer unbundle packet switching and the advanced networks used with such switching. This means that to the extent there are significant disincentives caused by 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.⁹²

The FCC further provides: "In fact, given that we do not require packet switches to be unbundled, there is little, if any, basis for argument that our treatment of circuit switches gives LECs a disincentive to upgrade their switches."⁹³

65 We find these scant references by the FCC provide an insufficient basis for the rash notion that ILECs may replace existing circuit switches with new technology to avoid existing unbundling obligations. We believe the FCC would have stated

⁹⁰ *In the Matter of Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, CC Docket No. 96-98, Petition of MCI WorldCom for Clarification, at 2 (filed Feb. 17, 2000); see Exhibit B to Verizon Response.

⁹¹ Order No. 02, ¶¶ 79-81.

⁹² *Triennial Review Order*, ¶ 447, n.1365.

⁹³ *Id.*, ¶ 448.

such an important policy decision in more than a few sentences and a footnote. The FCC has consistently promoted the deployment of new technology for the purpose of advancing facilities-based competition and development of broadband networks. We read the references in paragraph 448 and footnote 1365 of the Triennial Review Order to refer to new deployment rather than the replacement of existing circuit switches. Where ILECs have contractual obligations to provide local circuit switching, they may not breach these agreements by replacing existing switches with new technology not subject to unbundling, unless the FCC provides otherwise. ILECs must work through the processes set forth for amending such agreements *before* replacing unbundled elements.

66 **F. Definition of “Local Switching” in Interconnection Agreements.** After finding that the FCC allows ILECs to replace switches, Order No. 02 finds that Verizon has demonstrated its compliance with the terms in its interconnection agreements for upgrading equipment and discontinuing service, and finds that Verizon has not breached or failed to comply with its interconnection agreements with the Joint Petitioners.⁹⁴

67 The Joint CLECs object to the conclusion in paragraph 80 of Order No. 02 that the features and functions of a packet switch need not be unbundled where the network element itself is not required to be unbundled.⁹⁵ The Joint CLECs assert that this conclusion is inconsistent with the definition of “local switching” contained in the Joint CLECs’ interconnection agreements, and excludes from the definition switches that contain the capability of providing packet switching.⁹⁶ The Joint CLECs request the Commission reject the recommendation in Order No. 02, asserting that it rewrites their interconnection agreements.⁹⁷

⁹⁴ *Id.*

⁹⁵ Joint CLEC Petition, ¶ 36.

⁹⁶ *Id.*, ¶¶ 36, 41.

⁹⁷ *Id.*, ¶ 41.

68 The Joint CLECs assert that Verizon has a clear obligation under its interconnection agreements with the Joint CLECs to provide access to unbundled local switching, and that the definition of local switching in the agreements is based on function, not the type of switch used to provide the UNE.⁹⁸ MCI's and AT&T's agreements define local switching as follows:

Definition: Local Switching is the Network Element that provides the functionality required to connect the appropriate originating lines or trunks wired to the Main Distributing Frame (MDF) or Digital Signal Cross Connect (DSX) panel to a desired terminating line or trunk. Such functionality shall include all of the features, functions, and capabilities of the Verizon switch including but not limited to: line signaling and signaling software, digit reception, dialed number translations, call screening, routing, recording, call supervision, dial tone, switching, telephone number provisioning, announcements, calling features and capabilities (including call processing), CENTRANET, Automatic Call Distributor (ACD), Carrier pre-subscription (e.g., long distance carrier, intraLATA toll), Carrier Identification Code (CIC) portability capabilities, testing and other operational features inherent to the switch and switch software. Local Switching provides access to transport, signaling (ISDN User Part (ISUP) and Transaction Capabilities Application Part (TCAP), and platforms such as adjuncts, Public Safety Systems (911), operator services, directory services and Advanced Intelligent Network (AIN). Remote Switching Module functionality is included in the Local Switching function. The switching capabilities used will be based on the line side features they support where technically feasible.⁹⁹

⁹⁸ *Id.*, ¶ 37.

⁹⁹ *Id.*, quoting MCImetro Access Transmission Services, LLC, Interconnection Agreement with Verizon, Attachment 2, page 11 Section 47.1 (Exhibit F-1 to Joint CLECs' Enforcement Petition); AT&T Interconnection Agreement with Verizon, § 47.1 (Exhibit C-4 to Joint CLECs' Enforcement Petition).

69 The Joint CLECs assert that nothing in the definition limits provisioning of local switching to certain types of switches or facilities.¹⁰⁰ The Joint CLECs assert that Verizon cannot retroactively limit its contractual obligations under the agreements by asserting a limitation on the type of switch used to provide local switching.¹⁰¹ The Joint CLECs assert that their agreements provide that all material terms and conditions are included within the agreement itself.¹⁰² The Joint CLECs assert that Verizon would have included an express provision in the agreement limiting the local switching UNE to circuit switches if it believed the law was as unambiguous as Verizon claims.¹⁰³ The Joint CLECs assert that they have not agreed to modify their agreements to limit local switching to a particular type of switch.¹⁰⁴

70 The Joint CLECs specifically object to the acceptance in Order No. 02 of Verizon's distinction between network facilities and functions. The Joint CLECs assert that the function of local switching can be provided as a UNE, regardless of whether the facility providing the functionality is designated as a UNE.¹⁰⁵ The Joint CLECs assert that the definition of "network element" in the Act and the Triennial Review Order support an interpretation that network unbundling obligations apply not just to the equipment itself, but can also apply separately to the features and functions of network elements.¹⁰⁶ The Joint CLECs assert that the FCC rejected Verizon's interpretation regarding functions and capabilities in the Triennial Review Order, which provides that:

[W]e 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,

¹⁰⁰ *Id.*, ¶ 38.

¹⁰¹ *Id.*

¹⁰² *Id.*, ¶ 39.

¹⁰³ *Id.*, ¶¶ 39-40.

¹⁰⁴ *Id.*, ¶ 40.

¹⁰⁵ *Id.*, ¶¶ 42-45.

¹⁰⁶ *Id.*, ¶¶ 42-43.

and capabilities of a physical facility or equipment, such as a portion of the available bandwidth of a loop. Several courts, including the Supreme Court, have previously considered and rejected this argument. Indeed, the Supreme Court stated that “[g]iven the breadth of [Congress’s network element] definition, it is impossible to credit the incumbents’ argument that a ‘network element’ must be part of the physical facilities and equipment used to provide local telephone service.” [Footnotes omitted]¹⁰⁷

71 Verizon asserts that the Joint CLECs simply repeat their functionality argument in the context of interconnection agreements in arguing that the definition of “local switching” is based on function, not specific equipment.¹⁰⁸ Verizon requests the Commission reject the argument. Verizon asserts that interconnection agreements are “federal mandates, entered and enforced by state commissions under federal law,” and cannot require more unbundling than is required under federal law.¹⁰⁹

72 Verizon asserts that the definition of local switching in the interconnection agreements is “merely the FCC’s ‘local *circuit* switching’ rule written into the ICA.”¹¹⁰ Verizon asserts that the Local Competition Order refers to “local switching,” but that later FCC orders, *i.e.*, the UNE Remand Order and Triennial Review Order, refer to the UNE and its definition as “local circuit switching.”¹¹¹ Verizon rejects as nonsensical the assertion that any local switching function of packet switches are included in the agreement.¹¹² Verizon asserts that the FCC’s definition of local switching is not technologically neutral, but is “tied to ILEC ‘circuit switching technologies’.”¹¹³ Verizon also asserts that the FCC’s local

¹⁰⁷ *Id.*, ¶ 44, quoting *Triennial Review Order*, ¶ 58.

¹⁰⁸ Verizon Response, ¶ 36.

¹⁰⁹ *Id.*, ¶ 37.

¹¹⁰ *Id.*, ¶ 38 (emphasis in original).

¹¹¹ *Id.*, citing *Local Competition Order*, ¶ 412, *UNE Remand Order*, ¶ 244; *Triennial Review Order*, ¶ 433.

¹¹² *Id.*

¹¹³ *Id.* ¶ 39, citing *UNE Remand Order*, ¶ 245.

switching rule has never required unbundling of packet switches, and that the FCC has defined packet switches and its functions as something very different from circuit switching.¹¹⁴

73 **Decision.** The Joint CLECs contest the conclusion in the Order that network equipment must be unbundled in order for the features and functions of the equipment to be unbundled. The Joint CLECs further contest the application of that conclusion to packet switches, asserting that this conclusion rewrites the definition of local switching in their interconnection agreements.

74 We agree with the Joint CLECs that network equipment itself need not be unbundled to allow features, functions or capabilities of the equipment to be unbundled, and reverse that portion of paragraph 80 of Order No. 02. The FCC, as well as the Supreme Court and the D.C. Circuit court of appeals, have interpreted the definition of network element in this manner.¹¹⁵ On the other hand, consistent with our discussion above of the FCC's decisions concerning unbundling of packet switching, we uphold that portion of Order No. 02 that finds that the FCC has not required the unbundling of features or functions of packet switching.

75 We reject the Joint CLECs' assertion that Order No. 02 rewrites their interconnection agreements with Verizon. While the definition of local switching in the agreements is a functionally based definition, we agree with Verizon that the definition addresses the features and functions of circuit switching and is based on circuit switching technology. The definition parallels the definition of "local *circuit* switching" adopted by the FCC, and does not include the definition of packet switching adopted by the FCC.

¹¹⁴ *Id.*, ¶ 40.

¹¹⁵ *Triennial Review Order*, ¶ 58, quoting *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 387 (1999); citing *USTA v. FCC*, 290 F.3d 415, 430 (2002).

76 We find, however, that Verizon has breached the terms of its interconnection agreements with the Joint CLECs to provide unbundled local switching, and reverse paragraph 82 of Order No. 02. That paragraph finds without any analysis that Verizon complied with the terms of the agreements for upgrading equipment. Because we find that ILECs may not replace circuit switches with packet switches to avoid unbundling requirements, we find Verizon in breach of its agreements with the Joint CLECs by replacing a circuit switch without making unbundling switching available, as required under its interconnection agreements. The question of the appropriate remedy for this breach must take into consideration the harms to the affected CLECs as well as the present factual situation.

77 Verizon has replaced the existing circuit switch with a Nortel Succession switch. A material issue of fact exists as to whether the switch is a packet switch, as Verizon claims, or a variety of circuit switch, as the Joint CLECs and Staff assert. If the switch is a packet switch, the Commission may not require unbundling of the narrowband capabilities of the switch, as discussed above. If we find that the Nortel Succession switch is a circuit switch, we must determine whether the switch includes the TDM switching fabric that the Haltom affidavit and Williamson declarations discuss, and whether Verizon has the OSS capability of providing unbundled local switching at the Nortel Succession switch, as discussed in Ms. Lichtenberg's affidavit.

78 In addition, the FCC has determined that ILECs are only obligated to provide local circuit switching as a UNE for existing customers for a 12-month transition period at UNE-P rates plus one dollar.

79 Given these circumstances, there are a number of possible remedies the Commission could order to address Verizon's breach of the interconnection agreements, including penalties, use of the voice-grade capabilities of the switch for the transition period at UNE-P transition rates, or maintaining the status quo

under Order No. 10 in Docket No. UT-043013 by allowing Verizon to provide resale service at the UNE-P transition rates, or any combination of these remedies. We request that the parties address the issue of the appropriate remedy or remedies for Verizon's breach, including the options discussed above. Parties may include affidavits and exhibits with their pleadings on the appropriate remedy. **Parties must file pleadings with the Commission addressing the appropriate remedy by Tuesday, March 15, 2005.**

80 Until we resolve the issue of the appropriate remedy, we require Verizon to charge affected CLECs no more than the UNE-P transition rate for resale services provided out of the Mount Vernon switch, beginning on March 11, 2005, the effective date for the transition rate.

81 **G. Availability of UNE-P in Remote Switches.** The Joint CLECs assert that Order No. 02 erred by failing to resolve the issue of whether Verizon must continue to make UNE-P available in Verizon's remote switches connected to the Mount Vernon switch.¹¹⁶ The Joint CLECs raised the issue in paragraphs 40 and 41 of their response to Verizon's motion.¹¹⁷ They assert that Verizon defaulted on the issue by not addressing this argument in its reply.¹¹⁸

82 The Joint CLECs assert that the scope of the Joint Petition includes breach of contract of Verizon's obligations to provide UNE switching at remote switches.¹¹⁹ The Joint CLECs assert that their petition incorporates Verizon's June 8, 2004, notice, which described Verizon's plan to cease providing unbundled local switching to the Mount Vernon switch and any remote switches connected to the switch.¹²⁰ The Joint CLECs request that Order No. 02 be modified to require

¹¹⁶ Joint CLEC Petition, ¶ 46.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*, ¶¶ 48-50.

¹²⁰ *Id.*, ¶ 48.

Verizon to continue providing local switching in all of the remote switches connected to the Mount Vernon switch.¹²¹

83 Verizon asserts that Order No. 02 properly declined to consider whether Verizon must allow unbundled local switching at remote switches served by the Mount Vernon switch.¹²² Verizon asserts that the remotes only provide “intra-remote circuit switching” on an emergency basis and that all traffic is switched at the Mount Vernon switch.¹²³ Verizon further explains that the June 8 notice provided that remote switches would be affected by the conversion “to the extent that they rely on access to unbundled switching at the host.”¹²⁴

84 **Decision.** In their response to Verizon’s motion, the Joint CLECs assert “the Commission should deny Verizon’s Motion with regard to the remote switches connected to the Mount Vernon central office.”¹²⁵ The Joint CLECs assert that Verizon has no basis for converting all CLEC customers served by remotes from UNE-P to a resale platform as Verizon has not demonstrated that the remote switches are within the FCC’s definition of a packet switch.¹²⁶ The Joint CLECs assert that the remote switches may be capable of functioning as local circuit switches, to the extent that they have traditional circuit switch architecture.¹²⁷

85 We reject Verizon’s argument that the Joint CLECs did not address the issue of the remote switches in their petition, and find that the issue is properly raised in the Joint Petition for Enforcement. Similar to our discussion of Verizon’s obligations to provide local circuit switching in Section F, above, we find that to the extent that Verizon has ceased to provide unbundled switching at remote

¹²¹ *Id.*, ¶¶ 51-53.

¹²² Verizon Petition, ¶ 45.

¹²³ *Id.*

¹²⁴ *Id.*, n.14.

¹²⁵ Joint CLEC Response to Verizon’s Motion, ¶ 41.

¹²⁶ *Id.*, ¶ 41.

¹²⁷ *Id.*, ¶¶ 40-41.

switches connected to the Mount Vernon switch, Verizon has breached its agreement with the Joint CLECs. We request briefing on the remedies for this breach, as discussed above.

86 **H. Verizon’s Motion to Strike.** On January 7, 2005, Tel West filed with the Commission a Statement of Supplemental Authority, attaching an order issued by an administrative law judge of the California Public Utilities Commission entitled “Administrative Law Judge’s Ruling Confirming Hearings and Amending Schedule.” Tel West requests that the Commission take notice of the California ALJ’s ruling, asserting that Order No. 2 incorrectly resolved a material factual dispute, *i.e.*, whether the Nortel Succession switch is a packet switch, and by striking Ms. Lichtenberg’s affidavit.

87 Verizon moved to Strike Tel West’s Statement of Supplemental Authority, asserting that Tel West improperly presents argument in submitting the statement of supplemental authority, contrary to Washington law.¹²⁸ Verizon asserts that the California ALJ’s order is an interlocutory discovery order, and not proper authority that may be submitted to supplement authority in the record.¹²⁹ Lastly, Verizon asserts that Tel West’s submission requests the Commission consider a discovery matter arising in another matter in another state, contrary to the rule in Washington that reviewing officers may only consider evidence in the record.¹³⁰

88 **Decision.** We grant Verizon’s motion to strike Tel West’s statement of supplemental authority. The Commission’s procedural rules allow the Commission discretion in taking official notice of “any judicially cognizable fact,” including “administrative rulings and orders, exclusive of findings of fact,

¹²⁸ Verizon Motion to Strike, ¶ 2.

¹²⁹ *Id.*, ¶ 3.

¹³⁰ *Id.*, ¶ 4.

of the commission and other governmental agencies.”¹³¹ While we could, under our procedural rules, take official notice of the California ALJ’s discovery order in this proceeding, we find that it does not assist in the determination of the pending petitions for review. In addition, we find that Tel West improperly submitted argument in its statement of supplemental authority.

FINDINGS OF FACT

89 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

90 (1) Verizon Northwest Inc. is an incumbent local exchange company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.

91 (2) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.

92 (3) Advanced TelCom, Inc. (ATI), AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle (collectively AT&T), Covad Communications Company (Covad),

¹³¹ WAC 480-07-495(2)(a)(i)(A).

MCImetro Access Transmission Service, LLC (MCI), and United Communications, Inc., d/b/a UNICOM (UNICOM), are local exchange carriers within the definition of 47 U.S.C. § 153(26), providing local exchange telecommunications service to the public for compensation within the state of Washington, or are classified as competitive telecommunications companies under RCW 80.36.310 - .330.

- 93 (4) On June 8, 2004, Verizon issued a Notice of Network Change informing CLECs in Washington that Verizon intended to replace the existing Nortel DMS 100 switch in Mount Vernon, Washington, with a Nortel Succession switch. The notice also informed CLECs that it would cease providing unbundled switching at the Mount Vernon switch as of September 10, 2004.
- 94 (5) On August 31, 2004, the Competitor Group filed with the Commission in Docket No. UT-043013 a motion for enforcement of Order No. 05 in that proceeding, the CLECs' interconnection agreements and the FCC's Triennial Review Order, asserting that Verizon's planned switch conversion violated these orders and agreements.
- 95 (6) On September 10, 2004, Verizon replaced the Mount Vernon DMS 100 circuit switch with a Nortel Succession switch.
- 96 (7) Administrative Law Judge Rendahl entered Order No. 10 in Docket No. UT-043013 on September 13, 2004, allowing the switch conversion to proceed, requiring Verizon to charge affected CLECs the UNE-P rate for resale service provided out of the Mount Vernon switch, and directing the Competitor Group CLECs to file a petition for enforcement with the Commission to allow the Commission to address the merits of the issues raised in the motion.

- 97 (8) On September 20, 2004, ATI, AT&T, MCI, and UNICOM, collectively the Joint Petitioners, filed with the Commission a Joint Petition for Enforcement of their interconnection agreements with Verizon.
- 98 (9) On September 24, 2004, Tel West filed with the Commission a petition to intervene in the proceeding.
- 99 (10) On September 28, 2004, Verizon filed with the Commission a motion for judgment on the pleadings and a motion to strike certain portions of the Joint Petition and supporting affidavits.
- 100 (11) Following a prehearing conference held on October 11, 2004, ALJ Rendahl entered a prehearing conference order, Order No. 01, granting Tel West's petition for intervention and establishing a procedural schedule for the proceeding.
- 101 (12) Commission Staff filed a Response to Verizon's Motion for Judgment on the Pleadings and Declaration of Robert Williamson on October 27, 2004. On the same day, ATI, MCI and UNICOM filed a joint response to Verizon's motion, attaching the Affidavits of Jeff Haltom, and Sherry Lichtenberg. AT&T and Tel West also filed responses to Verizon's motion on October 27, 2004.
- 102 (13) Verizon filed a Reply to the Answers of Staff and the CLECs on November 12, 2004, attaching the affidavit of Danny Peeler.
- 103 (14) On December 3, 2004, ALJ Rendahl entered Order No. 02, Recommended Decision Granting Verizon's Motion for Judgment on the Pleadings and Denying, in Part, Verizon's Motion to Strike.

- 104 (15) Order No. 02 identified that parties should follow the procedure for interlocutory review pursuant to WAC 480-07-810 to comment on the recommended decision.
- 105 (16) On December 13, 2004, AT&T and MCI collectively filed the Joint CLECs' Petition for Review of Order No. 02 in Docket No. UT-041127. On that same day, Tel West filed a Petition for Review of Order No. 02, and Commission Staff filed Comments on the Recommended Decision.
- 106 (17) On December 16, 2004, AT&T and MCI filed a Corrected Joint CLEC Petition for Review of Order No. 02.
- 107 (18) Verizon filed its response to the petitions for review and Staff comments on December 27, 2004.
- 108 (19) On January 7, 2005, Tel West filed with the Commission a Statement of Supplemental Authority. On January 28, 2005, Verizon filed a Motion to Strike Tel West's Statement of Supplemental Authority.
- 109 (20) On February 4, 2005, the FCC entered its Order on Remand following the D.C. Circuit's decision in *USTA II* vacating in part and remanding in part the FCC's Triennial Review Order. The FCC determined that, effective March 11, 2005, ILECs are no longer obligated to provide unbundled local circuit switching to requesting CLECs. The FCC established a twelve-month transition period for CLECs to transition to alternative facilities and arrangements, allowing ILECs to charge CLECs for existing customers during this period the current UNE-P rate, plus one dollar.

CONCLUSIONS OF LAW

110 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

111 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

112 (2) Petitions for enforcement of interconnection agreements are governed by the Commission's procedural rules in WAC 480-07-650. These rules allow for a presiding officer to enter a recommended decision, for Commission review of a recommended decision either on a paper record or after hearing, and for parties to file written comments on the recommended decision "on a schedule established in the recommended decision." *See WAC 480-07-650(5)(b), (c).*

113 (3) Interlocutory review, the review of orders entered during the course of a proceeding, is a matter of discretion to the Commission. *WAC 480-07-810(2)*. The Commission may accept review if a petition identifies certain criteria set forth in the Commission's rules, including termination of a party's participation in the proceeding and substantial prejudice not remediable by post-hearing review. *See WAC 480-07-810(2)*.

114 (4) The Joint CLECs and Tel West establish a sufficient basis for accepting review under WAC 480-07-810(2)(a), as Order No. 02 terminates their participation in the proceeding by dismissing the petition for enforcement and reaches a conclusion of law that could cause substantial and irreparable harm.

- 115 (5) Court rules governing motions to dismiss are applicable to such motions before the Commission, and provide that if “matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56.” *See CR 12(c); WAC 480-07-380(1)(a).*
- 116 (6) Order No. 02 incorrectly applied the standard for a motion to dismiss by considering the declaration of Mr. Williamson and the affidavits of Mr. Haltom and Mr. Peeler in determining whether there was a factual dispute as to the technical capabilities of the switch, but not following the rules for summary judgment.
- 117 (7) The proper standard for considering Verizon’s motion is the standard for summary judgment motions under CR 56 and WAC 480-07-380(2)(a). A party moving for summary judgment is entitled to judgment as a matter of law, “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” *CR 56(d); see also WAC 480-07-380(2)(a).*
- 118 (8) “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Samis v. City of Soap Lake, 143 Wn.2d 798, 803, 23 P.3d 477 (2001).* Whether there are material issues of fact in dispute is central to a determination of a motion for summary judgment.
- 119 (9) As Verizon’s motion is best characterized as one requesting summary judgment, Order No. 02 improperly concluded in paragraph 75 that consideration of material disputes of fact is not relevant to whether the Commission may decide the issue on the pleadings.

- 120 (10) Order No. 02 erred in striking the affidavit of Ms. Lichtenberg on the basis that material issues of fact were not relevant to the legal matters at issue.
- 121 (11) Ms. Lichtenberg's affidavit does not identify material issues of fact in connection with the question of an ILEC's obligations under federal law to unbundle packet switching, but may identify material issues of fact in connection with the interpretation of the definition of "local switching" in the Joint CLECs' interconnection agreements with Verizon.
- 122 (12) The FCC's recent Order on Remand does not render moot the issues in this proceeding addressing existing customers. While the FCC found that ILECs do not have to accept new orders for unbundled local circuit switching, the FCC allows CLECs to serve existing customers for a 12-month transition period at existing UNE-P rates plus one dollar. *Order on Remand*, ¶¶ 199, 227-28.
- 123 (13) Packet switches, and the features and functions of packet switching, are not subject to unbundling obligations, even if the switch provides voice grade switching services. *See UNE Remand Order*, ¶ 306; *Triennial Review Order*, ¶¶ 448, 538-539, n.1649.
- 124 (14) Given the FCC's determination that ILECs are not obligated to unbundle packet switches even if they provide voice grade switching services, we find that whether the Mount Vernon Nortel Succession switch is a packet switch is not a material issue of fact as to the question of whether ILECs may replace circuit switches with packet switches under federal law.
- 125 (15) The nature and functions of the Mount Vernon Nortel Succession switch are material issues of fact in interpreting the definition of "local switching" in the Joint CLECs' interconnection agreements.

- 126 (16) Paragraph 448 and footnote 1365 of the Triennial Review Order provide an insufficient basis for finding that ILECs may replace circuit switches with new technology to avoid existing unbundling obligations. The FCC's references more reasonably refer to the deployment of new packet switches rather than the replacement of existing circuit switches with packet switches.
- 127 (17) Where ILECs have contractual obligations to provide unbundled circuit switching, they may not breach their interconnection agreements by replacing existing unbundled switching with network elements not subject to unbundling, unless the FCC provides otherwise. ILECs must work through the processes set forth for amending such agreements *before* replacing unbundled elements.
- 128 (18) Network equipment itself need not be unbundled to allow the features, functions or capabilities of the equipment to be unbundled. *See Triennial Review Order*, ¶ 58, *quoting AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 387 (1999); *citing USTA v. FCC*, 290 F.3d 415, 430 (2002).
- 129 (19) The definition of "local switching" in the Joint CLECs' agreements is a functional definition based on circuit switching technology, and addresses the features and functions of circuit switching. The definition parallels the definition of "local *circuit* switching" adopted by the FCC, and does not include the definition of packet switching adopted by the FCC.
- 130 (20) Order No. 02 erred in finding, without analysis, that Verizon did not breach its interconnection agreements as it complied with requirements in the agreements for discontinuing and upgrading equipment.
- 131 (21) By replacing a circuit switch without making unbundling switching available, as required under its interconnection agreements, Verizon has

breached the terms of its interconnection agreements with the Joint CLECs to provide unbundled local switching.

- 132 (22) The question of the appropriate remedy for Verizon's breach must take into consideration the harms to the affected CLECs as well as the present factual situation.
- 133 (23) The issue of access to remote switches connected to the Mount Vernon switch is properly raised in the Joint Petition for Enforcement. To the extent that Verizon has ceased to provide unbundled switching at these remote switches, Verizon has breached its agreement with the Joint CLECs.
- 134 (24) The Commission's procedural rules allow the Commission discretion in taking official notice of "any judicially cognizable fact," including "administrative rulings and orders, exclusive of findings of fact, of the commission and other governmental agencies." WAC 480-07-495(2)(a)(i)(A).
- 135 (25) Applying discretion under WAC 480-07-495(2)(a), we do not take official notice of Tel West's statement of supplemental authority as it does not assist in the determination of the pending petitions for review.
- 136 (26) Tel West improperly submitted argument in its statement of supplemental authority.

ORDER

THE COMMISSION ORDERS:

- 137 (1) The Joint CLECs' Petition for Review of Order No. 02 is granted, in part.

- 138 (2) Paragraphs 75, 76, 80, 81, 82, 89, 98, 99, 100, 101, and 102 of Order No. 02 are reversed.
- 139 (3) Pleadings addressing the appropriate remedies for Verizon Northwest Inc.'s breach of interconnection agreements must be filed with the Commission by the close of business on **Tuesday, March 15, 2005**.
- 140 (4) Until the Commission resolves the issue of the appropriate remedies for Verizon Northwest Inc.'s breach of interconnection agreements, the Commission modifies the remedy determined in Order No. 10 in Docket No. UT-043013 to allow Verizon Northwest Inc., beginning on March 11, 2005, to charge affected CLECs the UNE-P transition rate, established in the Federal Communication Commission's Order on Remand, for resale service provided out of the Mount Vernon switch.
- 141 (5) Verizon Northwest Inc.'s Motion to Strike Tel West Communications, L.L.C.'s, Statement of Supplemental Authority is granted.

Dated at Olympia, Washington, and effective this 22nd day of February, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner