BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Review of the Development of Universal Terms and Conditions for Interconnection and Network Elements to be Provided by VERIZON NORTHWEST, INC.	)	Docket No. UT-011219
	)	JOINT CLEC RESPONSE TO VERIZON PETITION FOR REVIEW OF ORDER DENYING MOTION TO TERMINATE PROCEEDING

Integra Telecom of Washington, Inc., Time Warner Telecom of Washington, LLC, and XO Washington, Inc. ("Joint CLECs") provide the following response to the Petition of Verizon Northwest Inc. ("Verizon") seeking review of the Ninth Supplemental Order ("Order")denying Verizon's motion to terminate this proceeding ("Petition"). The Petition further rehashes the arguments that Verizon previously made in opposition to the Commission's establishment of the scope of this docket and which the Commission previously rejected. The Commission should once again reject those arguments and deny the Petition.

Discussion

1. The Petition repeats the same arguments that Verizon made in its motion to terminate this proceeding. The Joint CLECs will not repeat their response to those arguments but refer the Commission to their previously filed Response to Verizon Motion to Terminate Proceedings. The Joint CLECs will use this Response to address new or different arguments that Verizon makes in the Petition. These new or different arguments, like Verizon's previous arguments, fail to support termination of this proceeding.

A. The Commission Has Ample Authority to Conduct This Proceeding.

2. Washington law provides the Commission with all the authority it needs to undertake this proceeding. Verizon disagrees, contending that reliance on RCW 80.36.140 "suffers from a number of problems." Petition ¶ 16. Verizon identifies two such "problems,"[1] neither of which withstands scrutiny.

3. First, Verizon contends that "the Commission would be hard-pressed to claim that Verizon's interconnection agreements are not 'just and reasonable.'" *Id*. This argument is premature at best. The statute expressly contemplates such a finding *after* a hearing, and hearings in this case will not be conducted until May 2005. Verizon should save this argument for its post-hearing brief.

4. Nor is the Commission precluded from making such a finding as a matter of law, to the extent that Verizon is making such a claim. The Commission will be reviewing Verizon's template agreement (as modified by the parties' negotiations prior to the hearings), not any existing interconnection agreement between Verizon and a competing local exchange company ("CLEC"). The Commission has never approved this template as "just and reasonable," and even if it had, the Commission always can revisit such a finding in light of current circumstances. Indeed, Verizon should be well aware of this aspect of the Commission's authority in light of its finding in Docket No. UT-020406 that Verizon's switched access

[1] Verizon also "assum[es] an interconnection agreement qualifies as a 'rule[], regulation[], or practice[]' (which is far from clear)." Petition ¶ 16. An interconnection agreement clearly includes rules, regulations, and practices governing Verizon's provisioning of service to a local competitor, and Verizon could not plausibly maintain otherwise.

charges were unlawful, even though the Commission had previously approved those rates as "just and reasonable" in the past under different circumstances.

5. The other "problem" Verizon identifies is that "the Commission has never conducted a 'hearing' required under this provision." *Id*. This argument is simply puzzling. The Commission will be conducting a hearing next year and has not made (and presumably will not make) any finding on Verizon's template agreement before then. Verizon is fully aware of that fact, having participated in every scheduling conference that has been conducted in this proceeding. Equally mystifying is Verizon's further contention that "this proceeding has been ongoing – and Verizon already has been compelled to negotiate – for years without any hearing." *Id*. Nothing in RCW 80.36.140 requires the Commission to undertake a hearing *before* undertaking any investigation, nor would such a procedure make any sense. The Commission previously considered and rejected at the outset of this docket Verizon's objections to this proceeding, and Verizon does not even attempt to identify what additional hearing the Commission should, much less could, have conducted. Verizon thus has failed to raise any legitimate argument that RCW 80.36.140 does not authorize the Commission to undertake this proceeding.

B. Federal Law Does Not Preempt This Proceeding.

6. The Act provides that a state commission retains authority to establish and enforce obligations for access to, and interconnection with, local exchange company networks as long as those obligations are consistent with the requirements in Section 251 and do "not substantially prevent implementation of the requirements of [Section 251] and the purposes of [the Act]."[2] Verizon continues to argue that federal law preempts Commission action in this proceeding because such action allegedly is inconsistent with the Telecommunications Act of 1996 ("Act"). The case law that Verizon cites still does not support this contention.

7. The Order correctly concludes that in contrast to each of the cases on which Verizon relies, this proceeding does not involve a state commission attempt to *tariff* rates, terms, and conditions for access to, and interconnection with, the incumbent local exchange carrier's ("ILEC's") network or to eliminate the need for interconnection agreements.[3] Verizon maintains that the Sixth and Seventh Circuit cases "articulate a broad preemption standard," Petition ¶ 16, which applies to any state commission proceeding that "'interferes with the methods of' and is 'inconsistent with' the Act." *Id.* ¶ 28. This proceeding, Verizon asserts, runs afoul of that standard because it "requir[es] a 'universal' agreement, arbitrated against multiple CLECs under state law, [and] runs roughshod over the detailed procedural requirements of sections 251 and 252." *Id.* Verizon further contends that "*compelling* Verizon or any other

[2] 47 U.S.C. § 251(d)(3); *accord id.* § 261.

[3] *Verizon North, Inc. v. Strand*, 309 F.3d 935, 943 (6th Cir. 2002); *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 442 (7th Cir. 2003).

company to produce an SGAT or similar filing is a direct and express conflict with section 252(f)(1)." *Id*. ¶ 28 (emphasis in original). Finally according to Verizon, the Federal Communications Commission's ("FCC's") revised "pick and choose" rule "eliminates any justification, if any ever existed, for the current proceeding." *Id*. ¶ 30. Verizon is wrong on all counts.

8. Not only are the Sixth and Seventh Circuit decisions not binding on this Commission but their holdings are specific to the tariff filing requirements at issue in each case.[4] Verizon cites an additional case as authority for the alleged broad sweep of the Seventh Circuit's preemption analysis, but again, the factual circumstances are not analogous to this proceeding. In that case,[5] the court concluded that the state commission could not require the ILEC to adopt a performance assurance plan as part of the commission's review of an application for interLATA long distance authority under Section 271. As the court stated, "what the [state commission] has done is to parlay its limited role in issuing a recommendation under section 271, involving long-distance service, into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service."[6] The Commission is taking no such action here.

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[4] Indeed, Verizon inconsistently dismisses as "dicta" language from the Oregon District Court decision in *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157 (D. Or. 1999), while simultaneously contending that the Commission should extend the rationale in *Verizon North* and *Wisconsin Bell* far beyond the factual circumstances in which those cases were decided.

[5] *Indiana Bell Telephone Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493 (7th Cir. 2004).

[6] *Id*. at 497.

9. The Commission also is not "run[ning] roughshod over the detailed procedural requirements of sections 251 and 252," as Verizon claims. The Joint CLECs previously explained in their response to Verizon's underlying motion that the Commission contemplates that the document that results from this proceeding, like Qwest's statement of generally available terms ("SGAT"), will form the basis for interconnection agreements between Verizon and CLECs, which is fully consistent with the Section 251 and 252 process. Verizon's actions, moreover, speak louder than its words. Section 251(c)(6) expressly requires Verizon to provide collocation to CLECs, yet Verizon has filed with the Commission and continues to maintain a *tariff* governing CLEC access to collocation. All of Verizon's interconnection agreements do little, if anything, more than refer to the tariff for collocation terms and conditions. Nothing in Sections 251 or 252 contemplates such a procedure, and the Sixth and Seventh Circuit cases actually preclude it. Verizon nevertheless apparently believes that *Verizon* may "subvert" the Section 252 process by maintaining a tariff with the Commission that establishes standard collocation terms and conditions, but any *Commission* attempt to require Verizon to file and maintain other standard terms and conditions is an unlawful departure from Congressional intent. Such an argument is not even facially plausible.

10. Similarly implausible is Verizon's contention that this proceeding "is a direct and express conflict with section 252(f)(1)." Petition ¶ 28. Section 252(f) authorizes a Bell Operating Company ("BOC") to file an SGAT, but Verizon has heatedly maintained that it is not operating as a BOC in Washington. Verizon cannot claim on one hand that Section 252(f) is inapplicable to Verizon, while on the other hand contending that this proceeding conflicts with

Section 252(f). Even were that not the case, Congress in Section 252(f) expressly established a procedure that would enable both ILECs and CLECs to rely on state commission-approved standard terms and conditions to create an interconnection agreement. The fact that the Commission, rather than the ILEC, initiates development of those standard terms and conditions does not conflict with Section 252(f) or make that process any less consistent with the procedures that Congress established in the Act.

11. Finally, the FCC's new all-or-nothing "pick and choose" rule has no impact on this proceeding whatsoever. The rule, as well as Section 252(i) on which the rule allegedly is based, applies to "any agreement . . . to which the incumbent LEC is a party and that is approved by the state commission pursuant to section 252."[7] The product of this proceeding will be a Commission-approved template for an interconnection agreement, not an effective agreement to which Verizon and a CLEC are parties and that has been approved by the Commission pursuant to Section 252(e). The FCC's "pick and choose" rule thus applies only to effective and approved interconnection agreements and does not limit the extent to which a CLEC can adopt all or part of the *template* to create its own interconnection agreement with Verizon. Indeed, the FCC was well aware of the existence of SGATs and expressly declined to permit the prior "pick and choose" rule to continue to apply if the ILEC had not filed an SGAT.[8] The FCC would have included SGATs (or comparable template agreements) within its new rule if the FCC had

[7] 47 C.F.R. § 51.809(a); *accord* 47 U.S.C. § 252(i).

[8] *In re Review of the Section 251 Unbundling Obligations of ILECs*, CC Docket No. 01-338, FCC 04-164, Second Report and Order ¶¶ 25-26 (rel. July 13, 2004).

intended to limit the utility of SGATs or other generally applicable terms and conditions. Verizon's arguments to the contrary lack any support in the plain language of the FCC rule, the statute, or Congressional or FCC intent.

Conclusion

12. Washington law authorizes the Commission to establish standard terms and conditions for access to, and interconnection with, Verizon's local exchange network in Washington, and establishment of such terms and conditions is consistent with the language and purpose of the Act. Verizon has failed to identify any basis on which the Commission should overturn the Order denying Verizon's motion to terminate this proceeding. The Commission, therefore, should deny the Petition.

DATED this 29th day of July, 2004.

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By _____
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