BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

In the Matter of THE JOINT PETITION FOR ENFORCEMENT OF INTERCONNECTION AGREEMENTS WITH VERIZON NORTHWEST INC.	)	DOCKET NO. UT-041127 **PETITION OF RESPONDENT VERIZON NORTHWEST INC. FOR RECONSIDERATION OF ORDER NO. 03**

I. PRELIMINARY STATEMENT.

1. Verizon Northwest Inc. ("Verizon") brings this petition pursuant to WAC 480-07-850 to urge reconsideration of the Commission's Order No. 03, dated February 22, 2005. The result reached by the Commission is decidedly backward-looking, violates federal telecommunications law and policy, and is impossible to reconcile with the carefully crafted unbundling framework established by Congress and the FCC to encourage precisely the kind of network upgrade from legacy to advanced packet technology that Verizon has embarked upon in Washington and nationwide.

2. Order No. 03 correctly determines that

- "The FCC has consistently promoted the deployment of new technology for the purpose of advancing facilities-based competition and deployment of broadband networks," *id.* ¶ 65;
- Verizon's packet switches "are not subject to unbundling obligations," *id.* ¶¶ 62; *see also id.* ¶¶ 46, 74;
- Verizon is "not required to provide access to voice grade service provided by a packet switch," *id.* ¶ 63; and

- the definition of "local switching" in the interconnection agreements to which Verizon is a party "addresses the features and functions of circuit switching . . . *based on circuit switching technology*," and "*does not include the definition of packet switching adopted by the FCC.*" *Id.* ¶ 75 (emphases added).

3. Nonetheless, *Order No. 03* turns federal unbundling law on its head by erroneously concluding that the FCC has been silent on the precise question presented – whether an ILEC that upgrades from a legacy circuit switch to a packet switch is relieved of unbundling obligations for local circuit switching. The FCC has already affirmatively answered this question, and the Commission's conclusion to the contrary is incorrect. Any confusion on this point has been eliminated by the FCC's recent *Triennial Review Remand Order*, in which the FCC again expressly noted that ILECs "are not required to build TDM capability into new packet-based networks or existing packet-based networks that never had TDM capability."[1] The Commission's decision is directly at odds with this binding FCC determination, since *Order No. 03* affirmatively requires Verizon to maintain the TDM capability of its legacy circuit switches when it deploys a packet switch, *even though the TDM circuit switch equipment that supported those obligations no longer exists in Verizon's network.*[2]

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[1] Order on Remand, *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313 (rel. February 4, 2005), ¶ 18, n. 49. ("*Triennial Review Remand Order*").

[2] Specifically, *Order No. 03* holds:

- FCC precedents "provide an insufficient basis for finding that ILECs may replace circuit switches with new technology to avoid existing unbundling obligations";
- "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"; and
- "ILECs must work through the processes set forth for amending such agreements before replacing unbundled elements."

Order No. 03 ¶¶ 126-127.

4. The issue presented is not, as the Commission repeatedly phrases it, whether federal law "allows ILEC replacement of local circuit switches with packet switches *to avoid unbundling obligations*," *Order No. 03* ¶ 25 (emphasis added); *see also id.* ¶¶ 46, 65, 126, but whether, incident to an ILEC's substantial capital investment in packet switch upgrades, the ILEC is relieved of the unbundling obligations associated with the outmoded local circuit switching equipment that the packet switches replace. *See Order No. 02* ¶ 77. At the risk of stating the obvious, Verizon invested in packet switch deployment in Washington because the Mt. Vernon switch was at exhaust and it was only prudent to replace it with the most advanced technology. Indeed, just last month, the FCC expressly eliminated unbundled circuit switching (effectively ending UNE-P), in large part because CLECs "have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches . . . ."[3] Rather, Verizon is investing in packet switch deployment to upgrade its network to facilitate the delivery of advanced telecommunications, internet and video services. Construction of Verizon's advanced network cannot be finished until it is started, and it starts with the replacement of Verizon's local circuit switches with packet switches, one at a time. But this Commission has stopped the very first steps of this deployment in Washington with its decision. *Order No. 03* thus threatens the advanced products and services that the next-generation network would provide Washington consumers.

5. The elimination of Verizon's legacy circuit switch unbundling obligations is a logical and legally required consequence of packet switch deployment, a deployment that has been expressly promoted by federal law and policy. Moreover, even assuming that the FCC failed to express its views on the legal ramifications of packet switch deployment with sufficient specificity (which it has not), the 1996 Act makes clear that unbundling *of any kind* is not permitted *absent a specific FCC directive, supported by a finding of impairment. See* 47 U.S.C. § 251(d)(2); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391-92 (1999); *United States Telecom*

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3 *TRRO* ¶ 199.

Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004) ("*USTA II*") (Section 251(d)(2) "instructs 'the [FCC]' to 'determine' which network elements shall be made available to CLECs on an unbundled basis"). Thus, in effect, the Commission has erroneously grafted a burdensome, mandatory unbundling requirement on Verizon's deployment of packet switches in the absence of any basis in federal law to support such an extraordinary result.

6. *Order No. 03* puts Verizon in the untenable position of either (1) asking the permission *of its competitors* before upgrading its network for the benefit of its Washington customers, or (2) maintaining *a duplicate outmoded legacy network in parallel with* its new advanced packet switch network for the sole purpose of permitting CLECs to cling to unbundled local circuit switching for a few more months. Common sense dictates that the CLECs will never consent to Verizon's network upgrades, not only because it is not in the CLECs' financial interest, but also because preventing Verizon's network upgrades gives CLECs a competitive edge over Verizon, which also has the unfortunate consequence of depriving Verizon's Washington customers of the most advanced network. The notion that Verizon must maintain an outmoded circuit switching technology simply to preserve the CLECs' access to UNE rates is not only technologically backward-looking, it also sacrifices the long-term interest of Washington consumers in the benefits of an advanced network to the narrow short-term interest of a few competitors in preserving for a few months their subsidized use of older technology. This result is both profoundly in conflict with the public interest and irreconcilable with the FCC's repeated statements encouraging the deployment of advanced packet technologies free of unbundling obligations. Accordingly, Verizon's petition for reconsideration should be granted.

II. BACKGROUND.

7. This proceeding requires the Commission to address the viability of advanced network deployments in Washington: will ILECs like Verizon be permitted to upgrade to advanced packet-based networks consistent with federal law and policy, or will this Commission bar the introduction of new technology in order to protect the competing carriers' continued access to

below cost services? Verizon respectfully submits that the mandatory unbundling obligations imposed by *Order No. 03* are wrong as a matter of federal law and FCC policy, and that the retrograde tenor of *Order No. 03* is impossible to reconcile with Washington's well-deserved reputation as a world leader in technological innovation and development.

A. Procedural History.

8. On June 7, 2004, consistent with Verizon's nationwide plan to upgrade its network to facilitate the delivery of advanced telecommunications, internet and video services, Verizon issued a notice required by FCC rules informing the Joint CLECs and others that it intended to replace its existing circuit switch in Mount Vernon, Washington with a packet switch, and that unbundled local circuit switching would not be available at the Mount Vernon switch beginning on September 10, 2004. *Order No. 03* ¶ 3. Verizon's notice stated: "Verizon will replace the existing Mount Vernon class 5 Nortel DMS-100 switch with a Nortel Succession packet switch." *See* Joint Pet. for Enforcement of Interconnection Agreements, Docket No. UT-041127, at Exh. A (filed Sept. 17, 2004) ("Joint Pet. for Enforcement"). Verizon's notice expressly referenced the FCC's repeated finding that packet switches are not subject to unbundling, and invited the CLECs to work with Verizon to shift their present customer base to a resale platform – a platform the CLECs themselves had used to serve retail customers in Washington State and elsewhere in the past. *Id.*

9. Verizon's switch replacement at Mount Vernon was not optional, but was required by the fact that there was no longer adequate capacity for continued customer growth on the circuit switch. Verizon Reply to Motion for Enforcement of Order No. 5, Docket No. UT-043013, at 21-22 (filed Sept. 9, 2004). Given that circumstance, it made more sense for Verizon to increase capacity for its Mount Vernon customers by replacing the inadequate legacy circuit switch with a next-generation packet switch that would support a full range of advanced services in addition to plain old telephone service.

10. Before these proceedings started, the only CLEC to respond to Verizon's notice was AT&T. *See* Joint Pet. For Enforcement ¶ 16. AT&T did not dispute that the Nortel Succession switch was a packet switch, which used an entirely different routing technology than a circuit switch, and was capable of providing new services such as VoIP, high-speed data transmission, and video programming. *See* Joint Pet. For Enforcement at Exh. C-1 (raising change of law and notice issues regarding Verizon's claim that federal law "relieves Verizon of its obligation to provide packet switches as a UNE").

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

12. On August 31, 2004, the CLECs, including the Joint CLECs, filed a motion in Docket No. UT-043013 asking the Commission to enforce *Order No. 5*, the CLECs' interconnection agreements in that docket, and the FCC's *Triennial Review Order*, asserting "that Verizon's planned conversion from a circuit switch to a packet switch in Mount Vernon, Washington, on September 10, 2004, violated these orders and agreements." *Order No. 03* ¶ 4.[4]

13. Deferring consideration of the merits of the CLECs' claims, the ALJ held a hearing to determine whether any "immediate harm" to the CLECs would result if Verizon converted its Mount Vernon switch and did not unbundle it. The ALJ concluded there was no such harm, *see Order No. 10*, Docket No. UT-043013, ¶ 31 (Sept. 13, 2004) ("The testimony and evidence

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[4] The CLECs specifically argued that Verizon's refusal to unbundle its Mount Vernon packet switch "is contrary to the plain language in the agreements." Motion For Enforcement of Order No. 5, For Enforcement of Interconnection Agreements and Enforcement of *TRO*, Docket No. UT-043013, ¶ 14 (filed Aug. 31, 2004) ("Joint CLEC Motion"). The motion then quoted what the CLECs claimed to be the relevant provisions of the various interconnection agreements. *Id.* ¶¶ 13-24. Nowhere did the CLECs claim that the agreements were ambiguous or that facts were in dispute. *See id.* ¶ 13 ("Verizon, through its proposed substitution of packet switches for circuit switches, intends to cease the provision of unbundled switching and UNE-P to the Competitive Group.").

presented at the hearing demonstrate that there is no immediate harm to the public welfare in that the CLECs' existing customers are in no danger of disconnection as a result of the switch conversion."), and she instructed the CLECs to file a separate petition for enforcement of their interconnection agreements, *id.* ¶ 37.

14. The CLECs filed their petition in this docket on September 17, 2004.[5] Verizon filed its Motion for Judgment on the Pleadings and Answer on September 27, 2004. *See* Verizon's Motion for Judgment on the Pleadings of, and Answer to, Joint Petition for Enforcement of Interconnection Agreements, Docket No. UT-041127 (filed Sept. 27, 2004) (the "Verizon Motion"). There, Verizon explained: (1) that its interconnection agreements are creatures of federal law, incorporating the FCC's definition of local circuit switching; (2) that federal law, including the FCC's binding interpretation of Section 251(d)(2) and its definition of local circuit switching, precludes packet switch unbundling; and, therefore (3) that Verizon is exercising its federal right to upgrade its network and nothing in its interconnection agreements eliminated that right. *See, e.g.*, Verizon Motion ¶¶ 18-28 (describing how the various agreements reflect federal law); *id.* ¶ 44 (explaining how federal law does not now require, and never has required, packet switch unbundling).[6]

15. Given that the parties' positions presented only the legal issue of whether packet switches must be unbundled, Verizon asked the Commission to decide the case on the pleadings. At the October 11, 2004 scheduling conference, however, MCI and the other CLECs indicated *for the*

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[5] There, the CLECs argued once again that Verizon's position "is contrary to the plain language in the agreements." Joint Pet. for Enforcement ¶ 12. As before, they relied on the "Local Switching" definitions in the agreements to support their position. *Id.* ¶¶ 12-19. They also stated that "the FCC's definition of local switching is consistent with the [agreements'] definitions and supports the Joint Petitioners' arguments." *Id.* ¶ 19. Nowhere in their petition did they present anything other than legal arguments or in any way allege that the agreements are ambiguous or that facts are in dispute.

[6] Significantly, the parties do not dispute that the interconnection agreements are intended to (and do) reflect federal law, but disagree over what federal law requires.

first time that facts might be at issue and that they needed to conduct discovery.[7] At the October 11, 2004 conference, the ALJ asked the parties to try and resolve their discovery dispute, stating that the CLECs had the right to pursue discovery on new factual issues, if any, raised by Verizon's Motion. The parties did so.[8] At no time during this process did the CLECs indicate to Verizon or the ALJ that they were claiming the Mount Vernon switch was not a packet switch.

16. After additional briefing, *see Order No. 03* ¶¶ 12-15, the ALJ entered *Order No. 02* on December 3, 2004, rejecting the CLECs' contention that Verizon cannot upgrade its network and convert from a circuit switch to a packet switch without continuing to provide unbundled local circuit switching. On December 13, 2004, the Joint CLECs filed a Petition for Review of *Order No. 02*,[9] to which Verizon responded on December 27.[10] Following two extensions of time, *Order No. 03* was issued on February 22, 2005, reversing *Order No. 02* in significant part and ruling that Verizon is in breach of its interconnection agreements notwithstanding that the Joint CLECs have not affirmatively moved for such relief.

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[7] To support this claim, they pointed to a single paragraph in the "Introduction" section to Verizon's Motion. There, Verizon made the common-sense statement that, "Saddling the deployment of new technology with burdensome new unbundling duties, including the development of the necessary wholesale operations support systems (OSS), is not only unnecessary and unlawful, but would render these upgrades uneconomic." Verizon Motion ¶ 4. Based on this single sentence, the CLECs claimed that they needed to conduct discovery on Verizon's OSS before they could respond to Verizon's Motion.

[8] For example, Verizon responded to the CLECs' OSS argument by stating that, "Verizon is not asserting that changes to its OSS, if any, relating to the switch replacement are relevant to Verizon's Motion." Verizon's Response to MCI DR #1. Verizon also responded to numerous other Joint CLEC discovery requests. The Joint CLECs did not object to Verizon's responses or file a motion to compel, even though the ALJ made clear she would be ready at a moment's notice to resolve any discovery disputes.

[9] *See* Joint CLEC Petition for Review of Order No. 2A, Docket No. UT-041127 (filed Dec. 13, 2004) ("Joint CLEC Petition for Review").

[10] *See* Verizon's Answer to Petitions for Review, Docket No. UT-041127 (filed Dec. 27, 2004) ("Verizon Answer to Petitions for Review").

B. FCC Policy Promoting The Deployment Of Advanced Networks Including Packet Switches Unencumbered By Unbundling Requirements Is Clear.

17. As *Order No. 03* recognizes, *Order No. 03* ¶¶ 62-63, 123-124, an unbroken ten-year line of FCC decisions confirms that packet switches are not subject to unbundling, regardless of the functionalities they may provide. As Verizon has explained, on four separate occasions the FCC has done precisely what the 1996 Act requires the FCC to do – the FCC has examined packet switches and concluded that competing carriers would not be impaired without unbundled access to them. *See* Verizon Motion ¶¶ 8-17; Verizon's Reply to the Answers of Staff and the CLECs, Docket No. UT-041127, ¶¶ 13-17 (filed Nov. 12, 2004) ("Verizon Reply"). At the same time, the FCC has made clear that its decision to keep packet switches free from unbundling obligations has been motivated by the Congressional directive – found in Section 706(a) of the 1996 Act – that "[t]he [FCC] and each State Commission with regulatory jurisdiction over telecommunications services shall encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing . . . regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157 nt (a).[11]

1. The 1996 *Local Competition Order.*

18. When the issue first arose in 1996, the FCC *rejected* the CLECs' request to unbundle packet switches:

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

[11] The 1996 Act defines "advanced telecommunications capability" "without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." 47 U.S.C.. § 157 nt (c)(1).

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

2. The 1999 *UNE Remand Order*.

19. In 1999, the FCC again refused to impose a general unbundling requirement on packet switches. *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 15 F.C.C.R. 3696, ¶ 306 (Nov. 5, 1999) ("*UNE Remand Order*"). Indeed, as the D.C. Circuit has explained, the *UNE Remand Order* only directed the unbundling of "packet switches in a *few* circumstances." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 421 (D.C. Cir. 2002) ("*USTA I*") (emphasis added). The sole and very limited exception to the blanket rule that packet switches are not subject to unbundling concerned DSLAMs (devices used to provide DSL service) at remote terminals, which are not at issue here. *See id.* at 420; Verizon Motion ¶ 10 n.2.

20. In its unbundling analysis, the FCC expressly considered the promotion of facilities-based competition, investment, and innovation,[12] as well as the statutory mandate, expressed in Section 706, 47 U.S.C. § 157 nt, to encourage the deployment of advanced services capabilities:

> Our overriding objective, consistent with the congressional directive in section 706, is to ensure that advanced services are deployed on a timely basis to all Americans so that consumers across America have the full benefits of the "Information Age." The advanced services marketplace is a nascent one. Although some investment has occurred to date, much more investment in the future is necessary in order to ensure that all Americans will have access to these services. We remain concerned about the lack of deployment in rural areas. We note that we will carefully monitor the deployment of broadband services to ensure that the objectives of section 706 and the Act are being met. We decline to

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[12] *UNE Remand Order* ¶ 110 ("A fundamental goal of the Act is to promote investment and innovation by all participants in the telecommunications marketplace, and, in particular, to encourage rapid deployment of new telecommunications technologies. As the Commission has stated, the construction of new local exchange networks 'will not only lead to innovation by the new competitors, but should also spur the incumbent LECs to upgrade their systems and offer a broader array of desired service options to meet consumers' demands.'" (footnotes omitted)).

> unbundle packet switching at this time, except for the limited exception [for DSLAMs].

UNE Remand Order ¶ 317 (footnote omitted). Thus, the FCC decision in the *UNE Remand Order* not to unbundle packet switches was premised on the desire to encourage exactly the kind of facilities-based investment and innovation – and, in particular, deployment of advanced packet switches – that Verizon has started in Mount Vernon.

3. The 2003 *Triennial Review Order.*

21. In the *Triennial Review Order*, the FCC affirmed its longstanding determination that ILECs are not required to unbundle packet switches:

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

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16,978, ¶ 539 (Aug. 21, 2003) (emphases added) (footnotes omitted) ("*Triennial Review Order*").

22. This decision, too, was guided by Congress's directive in Section 706 to encourage the investment in and deployment of packet-based infrastructure:

> Finally, because packet switching is used in the provision of broadband services, our decision not to unbundle stand-alone packet switching is also guided by the goals of, and our obligations under, section 706 of the 1996 Act. In order to ensure that both incumbent LECs and competitive LECs retain sufficient incentives to invest in and deploy broadband infrastructure, such as packet switches, we find that *requiring no unbundling* best serves our statutorily-required goal. Thus, we decline to require unbundling on a national basis for stand-alone packet switching because it is the type of equipment used in the delivery of broadband.

Triennial Review Order ¶ 541 (emphasis added) (footnote omitted); *see also id.* ¶ 290 ("[B]y prohibiting access to the packet-based networks of incumbent LECs, we expect that our rules will stimulate competitive LEC deployment of next-generation networks.").

23. The FCC also made clear in the *Triennial Review Order* that the replacement of a circuit switch with a packet switch eliminates any circuit switch unbundling requirement, which is not only the logical upshot of such a network upgrade but also part of the incentive structure set by the FCC to encourage the deployment of packet switches:

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

Id. ¶ 447 n.1365 (emphasis added). The FCC explicitly recognized that in "deploying more advanced packet switching," *id.,* the ILECs would be *replacing* existing circuit switches because "the incumbents already operate ubiquitous legacy circuit switching networks." *Id.* ¶ 448. As a result, "given that we do not require packet switches to be unbundled, there is little, if any, basis for an argument that our treatment of circuit switches gives LECs a disincentive to *upgrade* their switches." *Id.* (emphasis added).

24. Finally, the FCC explicitly rejected the idea that a packet switch should be subject to unbundling if it is used to provide the same traditional local switching *functionality* as a legacy circuit switch. The FCC unequivocally 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." *Order No. 03* ¶ 63. *See Triennial Review Order* ¶ 288 n.833 ("Because we decline to require unbundling of *packet-switching equipment*, we deny WorldCom's petition[] for . . . clarification requesting that we unbundle packet-switching equipment . . . ." (emphasis added) (citing MCI Petition for Clarification[13] at 2)).

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[13] Petition of MCI Worldcom, Inc. for Clarification, CC Dkt. No. 96-98 (filed on Feb. 17, 2000) (footnote omitted) ("MCI Petition for Clarification"), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6010955528.

4. The 2005 *Triennial Review Remand Order.*

25. Finally, only last month, the FCC reiterated that packet switches are not subject to unbundling requirements and that ILECs – with their ubiquitous switching networks – can act on the FCC's explicit incentives to deploy packet switches to replace or upgrade an existing circuit switch:

> [T]he incumbent LECs already operate ubiquitous legacy circuit switching networks . . . . In fact, given that we do not require packet switches to be unbundled, there is *no basis* for an argument that our treatment of circuit switches gives incumbent LECs a disincentive to *upgrade* their switches.

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, CC Docket No. 01-338, WC Docket No. 04-313, Order on Remand, ¶ 220 n.598 (rel. Feb. 4, 2005) (emphasis added) ("*Triennial Review Remand Order*"). In other words, the FCC in the *Triennial Review Remand Order* recognized again that ILECs have every incentive to replace existing circuit switches with packet switches, eliminating unbundling obligations at those locations. And in the *Triennial Review Remand Order*, the FCC reiterated its prior conclusion that ILECs "are not required to build TDM capability into new packet-based networks or into existing packet-based networks that never had TDM capability." *Triennial Review Remand Order* ¶ 18, n. 49.

III. ARGUMENT.

26. In *Order No. 03*, the Commission correctly determined that Verizon has the right to upgrade its network by deploying packet switch technology and that, consistent with the FCC's pronouncements on the subject, packet switches are not subject to unbundling under any circumstances. *Order No. 03* at ¶¶ 46, 62-63, 74. Despite these rulings, however, *Order No. 03* stops short of the inescapable conclusion that Verizon's packet switch upgrade relieves Verizon of local circuit local switch unbundling requirements, and instead finds that Verizon must get its competitors' permission before upgrading its network:

> 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 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.

Id. ¶ 65; *see also id.* ¶¶ 126-127.

27. The Commission's determination that, post-deployment, Verizon remains saddled with mandatory local circuit switching unbundling requirements should be reversed for at least three reasons.[14] *First*, contrary to the Commission's analysis, FCC precedent and policy make clear that network upgrades to packet switches not only are free of the unbundling obligations that have attended legacy technologies, but are actively encouraged by federal regulators. The FCC record is bereft of any suggestion that ILECs are required to maintain redundant legacy infrastructure solely for the purpose of preserving CLEC access to UNE rates, and it is impossible to imply the existence of such an onerous technology- and investment-killing requirement from FCC silence.

28. *Second*, even if the FCC's views on the precise question presented were not clear from the FCC's packet switch precedents (and they are), it is a bedrock principle of federal communications law that an unbundling obligation cannot be imposed on an ILEC in the absence of an express, affirmative FCC determination supported by a finding of impairment. *See* 47 U.S.C. § 251(d). Thus, given this Commission's unqualified recognition that there is no FCC

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[14] By this petition for reconsideration, Verizon specifically challenges in whole or in part the findings and conclusions reached in *Order No. 03* ¶¶ 1, 33, 40-41, 46-47, 50-51, 65, 74, 76-77, 79-80, 84-85, 114, 116-117, 119-121, 125-128, 130-133, and 137-139. *See* WAC 480-07-850(2).

precedent to support the imposition of unbundling obligations on packet switches, there is no legal basis for concluding that Verizon can be so burdened, particularly where Verizon's replacement of the Mount Vernon circuit switch was prompted by switch exhaust and – as the Commission acknowledges, *see Order No. 03* ¶¶ 123-124 – the enforcement of an unbundling obligation would compel Verizon to maintain in place outmoded legacy circuit switching equipment until its competitors consent to its removal.

29. *Third*, as Verizon has argued and as the Commission implicitly holds, *see Order No. 03* ¶ 76, Verizon cannot be required to confer any greater benefits on CLECs under its interconnection agreements than those required by federal law. The FCC has never stated or implied that an ILEC that invests in upgrading to an advanced, packet switch network is also required to preserve outmoded circuit-switching technology in parallel for the sole purpose of giving CLECs unbundling at below-cost TELRIC rates. Indeed, the FCC has expressly determined that packet switch upgrades do not present any risk of impairment, and the CLECs themselves have publicly touted their own planned transitions to advanced platforms. Accordingly, at the core, *Order No. 03* produces a result that is as absurd as it is unlawful: the Commission has constructively barred ILECs like Verizon from bringing their networks into the 21st century without CLEC consent, while CLEC advanced network plans progress unencumbered.

A. Verizon's Upgrade From Circuit Switches To Packet Switches Is Not Only Permitted But Affirmatively Promoted By Controlling Federal Law And FCC Policy.

30. The Commission correctly determined that, consistent with the FCC's repeated pronouncements encouraging the unfettered deployment of advanced networks, "[p]acket switches, and the features and functions of packet switching, are not subject to unbundling obligations, even if the switch provides voice grade switching services." *Order No. 03* ¶ 123; *see also id.* ¶¶ 62-63. At the same time, however, the Commission refused to endorse what it characterized as the "rash notion" that "ILECs may replace existing circuit switches with new

technology to avoid existing unbundling obligations." *Id.* at ¶ 65. The "rash notion" criticized by the Commission, however, is a common sense conclusion squarely compelled by almost a decade of FCC precedent.

31. The circuit switch unbundling requirement at issue in this proceeding does not exist in a vacuum, but reflects the FCC's judgment pursuant to 47 U.S.C. § 251(d) that CLEC access to legacy *circuit switches* was impaired and that, as a consequence, it was appropriate to grant CLECs unbundled access to *circuit switches*.[15] By contrast, when the ILEC facility to which a CLEC seeks access (*e.g.*, Mount Vernon) has been upgraded to a *packet switch*, the underlying rationale for the unbundling requirement evaporates because the circuit switch equipment to which the unbundling requirement relates is now gone. Here, Verizon complied with its notice obligations and, once Verizon disconnected the Mount Vernon circuit switch, there was no longer a circuit switch available for unbundling. Accordingly, the Commission's holding that an ILEC must keep outmoded legacy circuit switch equipment in place following a network upgrade to a packet switch does not withstand scrutiny.[16]

32. The FCC has never said – or even hinted – that ILECs are required to run legacy circuit switches in parallel with packet switches solely to preserve CLECs' unbundled access to local circuit switching. Though the CLECs complain that Verizon is deploying new technologies that are not subject to legacy switching obligations,[17] *that is precisely what federal law allows and*

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[15] In the *Triennial Review Remand Order*, however, the FCC has finally eliminated even the requirement that legacy circuit switches be unbundled and required the termination of all such involuntary unbundling arrangements within twelve months. *Triennial Review Remand Order* ¶ 5 ("Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundled mass market local circuit switching.").

[16] For the reasons set forth below, *see* discussion *infra* Section III.F, the Commission erred in finding that there is a material issue of disputed fact regarding the character or capabilities of the Mount Vernon packet switch. In any event, the Commission acknowledged, *see Order No. 03* ¶¶ 47, 77, 125, this question has nothing to do with the threshold legal question of whether a network upgrade to a packet switch relieves an ILEC of legacy circuit switch unbundling obligations.

[17] The Joint CLECs claim that Verizon "could have chosen to leave in place its existing circuit switch," or could have added a module to its packet switch that would allow it "to support

encourages. The freedom to upgrade – by incrementally replacing the currently ubiquitous legacy circuit switches with packet switches – is integral to the FCC's decision to encourage investment in next-generation networks. By consistently encouraging the deployment of packet switches and other network elements that are the building blocks of advanced networks, the FCC has sought to promote the upgrade to advanced communications networks, not require the retention of old and increasingly obsolete ones. *See, e.g., Triennial Review Order* ¶ 290 ("[B]y prohibiting access to the packet-based networks of incumbent LECs, we expect that our rules will stimulate competitive LEC deployment of next-generation networks."); *id.* ¶ 541.

33. Denying ILECs the ability to upgrade unless they preserve outdated legacy equipment for unbundled CLEC access would effectively nullify the FCC's consistent refusals to subject packet switches to unbundling and its promotion of the deployment of advanced packet switching. As the FCC made clear in the *Triennial Review Order*, ILECs have the unqualified right to replace a circuit switch with a packet switch and leave behind the unbundling obligations that attend superseded technologies:

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

Id. ¶ 447 n.1365; *see also id.* at ¶ 541 ("In order to ensure that both incumbent LECs and competitive LECs retain sufficient incentives to invest in and deploy broadband infrastructure, *such as packet switches*, we find that *requiring no unbundling* best serves our statutorily-required goal." (emphasis added)).

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end-to-end circuit switching." Joint CLEC Response to Verizon's Motion for Judgment on the Pleadings, Docket No. UT-041127, at 19, ¶ 34 (filed Oct. 27, 2004); Haltom Declaration at 7, ¶ 38. In a related argument, AT&T claims that Verizon cannot avoid its obligations to provide local switching by simply replacing a circuit switch with a packet switch, and AT&T "challenges Verizon's claim of switch exhaust," apparently assuming that Verizon could not lawfully deploy a packet switch without proving switch exhaustion. AT&T's Response to Verizon's Motion for Judgment on the Pleadings, Docket No. UT-041127, at 5, ¶ 10 n.12 (filed Oct. 27, 2004).

34. Furthermore, in its last *two* unbundling orders, the FCC has emphasized that, because "incumbent LECs already operate ubiquitous legacy circuit switching networks" and "[the FCC] do[es] not require packet switches to be unbundled," ILECs have every incentive "to *upgrade* their switches." *Triennial Review Remand Order* ¶ 220 n.598 (emphasis added); *accord Triennial Review Order* ¶¶ 447 n.1365, 448. Thus, under controlling FCC precedent, ILECs "can avoid" the "unbundling of circuit switching" by "deploying more advanced packet switching," *id.* ¶ 447 n.1365, and there is no need to preserve legacy equipment to maintain ubiquitous CLEC access to unbundled local circuit switching.

35. The Commission's conclusions in *Order No. 03* that ILECs may not "replace[] existing switches with new technology not subject to unbundling," and that the FCC's promotion of "the deployment of new technology for the purpose of advancing facilities-based competition and development of broadband networks" refers to "new deployment rather than the replacement of existing circuit switches," *Order No. 03* ¶ 65, are flatly inconsistent with the incentive structure that the FCC has erected. Because ILECs "operate ubiquitous legacy circuit switching networks," *Triennial Review Remand Order* ¶ 220 n.598; *Triennial Review Order* ¶ 448, the FCC has expressly recognized that ILECs "pursue their construction and network modification projects in incremental ways." *Triennial Review Order* ¶ 285; *see also Triennial Review Remand Order* ¶ 28 n.80 ("Incumbent LECs' networks have been constructed incrementally over the course of decades, and thus generally incorporate outdated legacy technology, which is not the situation for facilities-based competitive LECs."); *Triennial Review Remand Order* ¶ 220, n. 598 (noting that ILECs "already operate ubiquitous legacy circuit switching networks")..

36. The logical implication of *Order No. 03*, however, is that ILECs are required to retain their circuit switches in their network and deploy their advanced packet switches *in parallel to the outmoded legacy circuit switches*. Thus, *Order No. 03* forces ILEC to maintain *two* networks – one based on advanced packet switch deployments, and a second based on legacy circuit switches. This is absurd, uneconomic, and totally inconsistent with the FCC's statements that "there is *no basis* for an argument that our treatment of circuit switches gives incumbent LECs a

disincentive to *upgrade* their switches," *Triennial Review Remand Order* ¶ 220 n.598 (emphases added), that "to the extent that there are significant disincentives caused by the unbundling of circuit switching, incumbents can *avoid them* by deploying more advanced packet switching," and that "[t]his would suggest that incumbents have *every incentive* to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage." *Triennial Review Order* ¶ 447 n.1365 (emphases added). It defies common sense to conclude that ILECs are forced to operate and maintain *two redundant networks* – something no rational business person would ever contemplate.

37. If the FCC intended that ILECs incur the extraordinary burden of maintaining their old circuit switches, it would have said so, but it did nothing of the kind. Instead, the FCC's *Triennial Review Order* and *Triennial Review Remand Order* recognize that extending unbundling requirements to next-generation technology would deter deployment, as have the federal courts. *See, e.g., USTA I*, 290 F.3d at 427 ("Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."); *id.* at 424 ("If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines."); *USTA II*, 359 F.3d at 572 (noting that the FCC's impairment rule "must take into account not only the benefits but also the costs of unbundling (such as the discouragement of investment in innovation)"); *id.* at 580 ("We therefore hold that the [FCC] reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment."). Similarly, a requirement that next-generation technology can only be deployed if the legacy network is preserved in parallel for CLEC use would negate the efficiency benefits of new technology and stop deployment in its tracks.

38. Indeed, when the FCC intends for ILECs to preserve legacy technology for the benefit of CLECs, it knows how to do so and does so expressly. For example, where an ILEC deploys a new fiber loop, the FCC's rules require the ILEC to maintain and make available to CLECs on

an unbundled basis the old copper loop under very limited circumstances. See 47 C.F.R. § 51.319(a)(3)(ii). The FCC did not establish a similar rule when ILECs replace circuit switches with packet switches nor, as the Commission recognizes, *see Order No. 03* ¶¶ 123-124, did the FCC require the ILECs to configure or deploy packet switches to include a circuit switching functionality. In the absence of such an FCC requirement, this Commission may not invent one, as *Order No. 03* does.

B. *Order No. 03* Turns Federal Law On Its Head By Erroneously Implying A Rule That ILECs May Not Upgrade Their Switches Unless They Remain Shackled To Legacy Circuit Switch Unbundling Requirements.

39. *Order No. 03* reasons that the FCC's "scant references" are insufficient to support the conclusion that Verizon's packet switch upgrade terminates Verizon's legacy circuit switch unbundling obligations. *Id.* ¶ 65; *see also id.* ¶ 126. The Commission's analysis, however, turns federal law on its head by starting from the faulty premise that a network upgrade that replaces a circuit switch with a packet switch interferes with the CLECs' "right" to local circuit switching over Verizon's network at bargain rates. As the D.C. Circuit has made plain, "the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price the government may lawfully mandate." *USTA II*, 359 F.3d at 576. Moreover, the federal courts have consistently rejected the premise that there is "some underlying duty to make all network elements available," or that the FCC may only then create "isolated exemptions" from this "duty." *Iowa Utilities Bd.*, 525 U.S. at 391-92.

40. Absent an express FCC finding to the contrary, the default rule is that a business's private property is *not* subject to forced sharing with its competitors. *See, e.g.*, *Bell Atlantic Tel. Cos. v. FCC,* 24 F.3d 1441, 1445-47 (D.C. Cir 1994) (holding that, absent express authorization granted by Congress, the FCC could not engage in "an allocation of property rights" and force LECs to allow physical collocation in their central offices, because such an act would "directly implicate[] the Just Compensation Clause of the Fifth Amendment"). As the United States Supreme Court has explained:

> [T]he [interconnection] services allegedly withheld are not otherwise marketed or available to the public. The sharing obligation imposed by the 1996 Act created "something brand new" – "the wholesale market for leasing network elements." The unbundled elements offered pursuant to § 251(c)(3) exist only deep within the bowels of Verizon; *they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort.*

Verizon Communications Inc. v. Trinko, 540 U.S. 398, 410 (2004) (emphasis added) (quoting *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 528 (2002)).

41. The 1996 Act thus created from whole cloth the Section 251(c)(3) duty of ILECs to unbundled certain network elements for competitors. But no part of an ILEC's network is subject to forced sharing unless and until the FCC "determin[es]" that it both is a "network element" and "should be made available for purposes of [Section 251(c)(3)]" only if the requesting carrier is "impaired" without access to it from the ILEC. 47 U.S.C. § 251(d)(2); *see Iowa Utils. Bd.*, 525 U.S. at 391-92 (holding that Section 251(d)(2) "requires the [FCC] to determine on a rational basis *which* network elements must be made available").[18] Far from compelling competitive access of any kind, the FCC has explicitly found that the required impairment test is not met as to packet switches, and that other goals of the 1996 Act – in particular, the promotion of the deployment of packet switches – are served by *exempting* packet switches from any unbundling obligations. Furthermore, as set forth more fully below, neither the terms of an individual interconnection agreement, nor any putative state law unbundling obligation, can override the FCC's determination under Section 251(d)(2) that packet switches are not subject to unbundling.

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[18] Indeed, it was precisely because the FCC misread the 1996 Act to create a non-existent presumption in favor of unbundling that the Supreme Court vacated the first set of federal unbundling rules. *Iowa Utils. Bd.*, 525 U.S. at 391 (rejecting the notion that there is "some underlying duty to make all network elements available"). Thus, even if the FCC's position were unclear as to whether unbundling requirements in any form survive packet switch deployment, any ambiguity or uncertainty would fatally undermine *Order No. 03*.

C. The Commission Has No Authority To Impose Unbundling Obligations Or Network Upgrade Restrictions On Verizon That Conflict With Or Frustrate The Purpose Of Federal Law.

42. In the absence of any support in FCC precedent or logic for the proposition that an ILEC can be compelled to maintain legacy circuit switches in parallel with packet switches for the sole purpose of affording CLECs continued unbundled access to local circuit switching, this Commission has no residual authority to impose a legacy unbundling requirement on Verizon.

43. With the passage of the 1996 Act, Congress "unquestionably" took the regulation of local telephone competition away from the states. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. As the Ninth Circuit has observed, "[u]nder this new scheme, the state commissions are 'deputized federal regulators,' and are confined to the role that the Act delineates." *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 n.10 (9th Cir. 2003) (citations omitted). Section 251(d)(2) expressly assigns the task of "determin[ing] which network elements shall be made available to CLECs on an unbundled basis" *solely to the FCC. See USTA II*, 359 F.3d at 565 (noting that Section 251(d)(2) "instructs 'the Commission [FCC]' to 'determine[] which network elements shall be made available to CLECs on an unbundled basis"); *id.* at 574 ("[T]he [FCC] may not subdelegate its § 251(d) authority to state commissions.").

44. This Commission has no power to order unbundling requirements that are inconsistent with federal law, let alone graft legacy unbundling requirements on packet switch deployment that make an end-run around federal law. Under the Supremacy Clause, "[t]he statutorily authorized regulations of a [federal] agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC,* 486 U.S. 57, 64 (1988); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000) (states may not depart from "deliberately imposed" federal standards). Thus, "[w]ith regard to the matters addressed by the Act," including unbundling determinations, this Commission is not "allowed to do [its] own thing." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. The FCC's decision not to require unbundling constitutes "a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute" and thus preempts inconsistent state regulation. *Bethlehem Steel Co. v.*

N. Y. State Labor Relations Bd., 330 U.S. 767, 774 (1947); *United States v. Locke*, 529 U.S. 89, 110 (2000).

45. As the Supreme Court's decision in *Iowa Utilities Board* and the D.C. Circuit's decisions in *USTA I* and *USTA II* make clear, part and parcel of this determination is the FCC's "balancing" between Congressional directives that promote entry into the telecommunications market through infrastructure sharing and Congressional directives that create incentives to invest in new facilities and equipment. *Iowa Utils. Bd.*, 525 U.S. at 429-30 (Breyer, J., concurring in part and dissenting in part); *accord USTA II*, 359 F.3d at 582 (emphasizing that, "while declining to unbundle hybrid loops might reduce broadband competition, the Commission reasonably concluded that such a decision might be effective in stimulating investment in all-fiber loops"); *USTA I*, 290 F.3d at 427 (recognizing that "unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation," but that "a broad mandate can facilitate competition by eliminating the need for separate construction of facilities," and mandating that *the FCC* strike the "'balance' between these competing concerns" (citation omitted)).

46. No state can upset this balance by rendering decisions that contradict or otherwise undermine the FCC's determination that a "network element" does not create an unbundling obligation. *See, e.g.*, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (obstacle preemption where the "somewhat delicate balance of statutory objectives" could "be skewed by allowing" state law claims); *see, e.g.*, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-52, 156-57 (1989) (state law preempted where it contravened the bargain struck by federal law, even though Congress was silent on the particular subject matter); *Edgar v. Mite Corp.*, 457 U.S. 624, 634 (1982) (state law preempted by federal law where it "upset the careful balance struck by Congress"). Thus, any attempt to upset the delicate balance struck by federal law and usurp the Section 251 authority expressly granted only to the FCC must fail. Quite simply, an FCC decision refusing to declare a particular type of facility a network element

subject to unbundling preempts and prohibits any state from imposing its own unbundling requirement.[19]

47. Indeed, the FCC itself has emphasized the preemptive force of its unbundling determinations. In the *Triennial Review Order,* the FCC admonished that "setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers, including small carriers," and thus "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations." *Triennial Review Order* ¶ 187. Accordingly, the FCC specifically rejected arguments by some carriers that "states may impose any unbundling framework they deem proper under state law, without regard to the federal regime." *Id.* ¶ 192; *see also* Brief for Respondents United States Dep't of Justice and FCC at 93, *United States Telecom Ass'n v. FCC,* No. 00-1012 (D.C. Cir. filed Jan. 16, 2004) ("FCC *USTA II* Brief") ("[A] decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element. Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption." (citation omitted)).

D. *Order No. 03* Errs In Concluding That Verizon Has Breached Its Interconnection Agreements.

48. Relying upon its erroneous determination that federal law bars Verizon and other ILECs from shedding legacy circuit switch unbundling obligations following a network upgrade to packet switches, the Commission further concluded that Verizon's proposed course of action constitutes a breach of Verizon's interconnection agreements:

> We find, however, that Verizon has breached the terms of its interconnection agreements with the Joint CLECs to provide

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[19] Nor can a general "savings clause" such as that found in 47 U.S.C. § 261(c) negate the presence of conflict preemption where state action conflicts with or frustrates the purposes of federal law or regulation. *Geier*, 529 U.S. at 869 (savings clauses "[do] not bar the ordinary working of conflict pre-emption principles").

> 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.

Order No. 03 ¶ 76; *see also id.* ¶¶ 130-131. For the reasons set forth above, because the Commission's construction of federal law is erroneous, the Commission's conclusion that the interconnection agreements perpetuate Verizon's local circuit switching unbundling obligations after the deployment of a replacement packet switch is also incorrect. Moreover, the Commission's ruling cannot be squared with the language of the interconnection agreements themselves, which expressly recognize Verizon's right to perform network upgrades.

1. The Interconnection Agreements Cannot And Do Not Impose Unbundling Obligations On Verizon In Excess Of Those Mandated By Federal Law.

49. This Commission has no authority to impose unbundling requirements on Verizon that are unsupported by federal law under the guise of construing or enforcing Verizon's interconnection agreements. The interconnection agreements at issue explicitly restrict Verizon's unbundling obligations to those required by federal law. Accordingly, in the absence of any FCC precedent that supports grafting a continuing unbundling requirement on a deployment of packet switch upgrades, the Commission cannot construe Verizon's interconnection agreements to impose such a requirement.

50. *First*, interconnection agreements are federal mandates, entered and enforced by state commissions under federal law, with terms that would never be arrived at by arms-length bargaining in private transactions. They are, as the federal courts have recognized, a "creation of federal law, specifically the 1996 Act," and "are the tools through which the 1996 Act is implemented and enforced." *Verizon Md., Inc. v. Global NAPs, Inc.*, 377 F.3d 355, 364 (4th Cir.

2004) (quotations omitted); *see also BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278 (11th Cir. 2003) (en banc) ("Interconnection agreements are tools through which the [Act is] enforced."). The unbundling provisions of these interconnection agreements therefore do not reflect voluntary commitments on Verizon's part, but instead "represent nothing more than an attempt to comply with the requirements of the 1996 Act." *AT&T Communications of the S. States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000).[20]

51. In reviewing an interconnection agreement through binding arbitration, this Commission must ensure that its resolution and the resulting interconnection agreement "meet the requirements of Section 251 of [Title 47], *including* the regulations prescribed by the Commission pursuant to section 251 of this title." 47 U.S.C. § 252(c)(1) (emphasis added). Any doubt that state commissions can act only to effectuate federal regulations in this area is eliminated by the judicial review provisions of Section 252(e)(6), which authorize review in federal district court to ensure that an agreement comports with federal law. In short, state commissions are acting solely as federal agents in this area, and their role is to apply federal law and federal regulations. *Iowa Utils. Bd.*, 525 U.S. at 384.

52. *Second*, federal law makes clear that a state cannot accomplish by contract (or interpretation of a contract by its adjudicatory bodies) what it is preempted by federal law from doing by affirmative regulation. Federal courts have consistently looked askance at a state's use of a "contract" to achieve regulatory goals in conflict with federal law. For example, in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), the Supreme Court held that a state contract regarding the sale of timber violated the Commerce Clause: "The State may not impose conditions, whether by statute, regulation, *or contract*, that have a substantial regulatory

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[20] Even if the interconnection agreements in question were treated as freestanding contracts uninformed by federal unbundling law, it is hornbook law that in interpreting contracts, "the legal framework that existed at the time of a contract's execution must bear on its construction. Contracts are presumed to be written in contemplation of the existing applicable law." *Florida E. Coast Ry. v. CSX Transp., Inc.*, 42 F.3d 1125, 1129 (7th Cir. 1994).

effect outside of that particular market." *Id.* at 97 (emphasis added). *See, e.g., Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579, 580 (1981) ("It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do."); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307-08 (1935) ("Contracts, however express, cannot fetter the constitutional authority of the Congress. . . . Parties cannot remove their transactions from the reach of the dominant constitutional power by making contracts about them."). Accordingly, the Commission erred in adopting a construction of the interconnection agreements that effectively conditions Verizon's deployment of packet switches on the preservation of legacy circuit switches.

2. Verizon's Interconnection Agreements Do Not Restrict Verizon's Ability to Upgrade Its Network.

53. Though *Order No. 03* criticizes the ALJ's *Order No. 02* for "finding, without analysis, that Verizon did not breach its interconnection agreements as it complied with requirements in the agreements for discontinuing service," *Order No. 03* ¶ 130, by its terms *Order No. 03* does not undertake any review of the specific provisions in the interconnection agreements that recognize Verizon's right to upgrade its network.[21] As a result, *Order No. 03* completely ignores the various provisions of Verizon's interconnection agreements that – consistent with the FCC's decision to encourage network upgrades from legacy technologies to advanced, packet-based technologies – confirm Verizon's unfettered right to upgrade its network.

54. The Tel West and UNICOM interconnection agreements, for example, expressly allow Verizon to upgrade its network *at its discretion* and, therefore, to replace legacy circuit switches with packet switches, and in no way require Verizon to deploy or maintain legacy technology to perpetuate legacy unbundling requirements:

> Notwithstanding any other provision of this Agreement, Verizon shall have the right to deploy, upgrade, migrate and maintain its

[21] The Commission's analysis of the language of the interconnection agreements in *Order No. 03* is limited to the definition of "Local Switching." *See Order No. 03* ¶ 68.

> network at its discretion. . . . Nothing in this Agreement shall limit Verizon's ability to modify its network through the incorporation of new equipment or software or otherwise. [TelWest/UNICOM] shall be solely responsible for the cost and activities associated with accommodating such changes in its own network.

Amended, Extended and Restated Agreement by and between Tel West Communications, LLC and Verizon Northwest Inc. at 24, § 42 (entitled "Technology Upgrades") ("Tel West ICA"); Agreement by and between United Communications, Inc. and Verizon Northwest Inc. at 23, § 42 (entitled "Technology Upgrades") ("UNICOM ICA").[22] Similarly, the ATI interconnection agreement puts no restrictions on Verizon's ability to upgrade its network.[23]

55. Moreover, each of the Tel West, UNICOM, and ATI interconnection agreements make clear that Verizon is not required to provide an unbundled network element (like local circuit switching) if the requisite "equipment and facilities" are no longer available in Verizon's network, and, furthermore, that Verizon is not obligated to construct any new "facilities or equipment" to offer an unbundled network element.[24]

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[22] *See generally* Verizon Motion at 9-14, 28-31 (discussing interconnection agreements, including network upgrade provisions).

[23] *See* Interconnection and Unbundling Agreement between GTE Northwest Incorporated and Advanced Telcom Group, Art. V, § 4.4 ("ATI ICA") (contemplating network upgrades and requiring that Verizon "make best efforts to notify [ATI] of any [Verizon] network redesigns/reconfigurations that will affect [ATI]'s facilities sufficiently in advance to enable [ATI] to accommodate such network redesigns/reconfiguration").

[24] *See* Tel West ICA at 80, Network Elements Atchmt. § 1.2 ("Except as otherwise required by Applicable Law: (a) Verizon shall be obligated to provide a UNE or Combination pursuant to this Agreement only to the extent such UNE or Combination, and the equipment and facilities necessary to provide such UNE or Combination, are available in Verizon's network; and (b) Verizon shall have no obligation to construct or deploy new facilities or equipment to offer any UNE or Combination."); UNICOM ICA at 78, Unbundled Network Elements Atchmt. § 1.2 (same); Supplemental Agreement No. 3 Regarding Unbundled Network Elements by and between Verizon Northwest Inc. and Advanced TelCom, Inc. at 1-2, § 1.2 (same) ("ATI UNE Agmt.").

Moreover, each of the Tel West, UNICOM, and ATI agreements provide that "notwithstanding any other provision of this Agreement, Verizon shall be obligated to provide unbundled Network Elements (UNEs) and Combinations to [TelWest/UNICOM/ATI] *only to the extent required by Applicable Law* and *may decline to provide UNEs* or Combinations to [Tel West/UNICOM/ATI] to the extent that provision of such UNEs or Combinations is not required by Applicable Law." Tel West ICA at 80, Network Elements Atchmt. § 1.1 (emphases added); UNICOM ICA at 78, Unbundled Network Elements Atchmt. § 1.1 (same); ATI UNE Agmt. at 1,

56. The AT&T/MCI interconnection agreement similarly contemplates that Verizon will engage in network upgrades, and expressly allows Verizon to "discontinue any unbundled Network Element . . . to the extent required by network changes or upgrades, in which event [Verizon] will comply with the network disclosure requirements stated in the Act and the FCC's implementing regulations." AT&T/MCI ICA at 4, § 3.3.[25] Verizon has complied with the relevant network disclosure requirements, and the FCC has made very clear that *federal law requires no unbundling* when ILECs deploy packet switches in their networks. *See Triennial Review Order* ¶ 541 ("In order to ensure that both incumbent LECs and competitive LECs retain sufficient incentives to invest in and deploy broadband infrastructure, such as packet switches, we find that *requiring no unbundling* best serves our statutorily-required goal." (emphasis added)); *id.* ¶ 290 ("[B]y *prohibiting* access to the packet-based networks of incumbent LECs,

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§ 1.1 (same); *see also* Tel West ICA at 110, Network Elements Atchmt. § 10.1 ("Subject to the conditions set forth in Section 1 of this Attachment, Verizon shall make available to Tel West the local switching element . . . . Verizon shall provide Tel West with access to the local switching element . . . *in accordance with, but only to the extent required by*, Applicable Law." (emphasis added)); UNICOM ICA at 100, Unbundled Network Elements Atchmt. § 10 (same except for company name); ATI UNE Agmt. at 22, § 10 (same except for company name). Because established FCC precedent affirmatively encourages ILECs to upgrade their circuit switches with packet switches that carry no unbundling obligations, *see* discussion *supra* Sections II.B & III.A, Verizon is not required under applicable law to continue to provide unbundled local circuit switching after it upgrades to a packet switch.

Finally, the Tel West and UNICOM agreements also make clear in Section 50 – captioned "Withdrawal of Services" – that Verizon is free to discontinue its unbundling of circuit switches when new packet switches are deployed:

> Notwithstanding anything contained in this Agreement, except as otherwise required by Applicable Law, Verizon may terminate its offering and/or provision of any Service under this Agreement upon thirty (30) days prior written notice to [Tel West/UNICOM].

Tel West ICA at 25, § 50.1; UNICOM ICA at 24, § 50.1. "Service" is defined as "[a]ny . . . Network Element . . . or other service, facility or arrangement, offered . . . by a Party under this Agreement," Tel West ICA at 38, Glossary § 2.83; UNICOM ICA at 36, Glossary § 2.84, and "Network Element," in turn, "[s]hall have the meaning stated in the Act," Tel West ICA at 35, Glossary § 2.65; UNICOM ICA at 34, Glossary § 2.65.

[25] MCI adopted the terms of AT&T's interconnection agreement. *See* Verizon Motion at 13.

we expect that our rules will stimulate competitive LEC deployment of next-generation networks." (emphasis added)).

57. Thus, contrary to the Commission's conclusion, the ALJ was entirely correct "in finding . . . that Verizon did not breach its interconnection agreements as it complied with requirements in the agreements for discontinuing service." *Order No. 03* ¶ 130; *see Order No. 02* ¶¶ 82, 101. Verizon did, in fact, comply with the provisions in the interconnection agreements for discontinuing the provision of local circuit switching, and did not breach those agreements when it did precisely what the FCC encouraged it to do – *i.e.*, upgrade the Mount Vernon facility by replacing a legacy circuit switch with an advanced packet switch.

E. *Order No. 03* Effects An Unconstitutional Taking.

58. To the extent that *Order No. 03* requires Verizon to maintain parallel circuit switches in place to afford CLECs continued access to unbundled local circuit switching, *Order No. 03* effects an unconstitutional taking of Verizon's property in violation of the Fifth and Fourteenth Amendments. There can be no doubt that Verizon's switching equipment is Verizon's property, and that any Commission action requiring Verizon to offer CLECs continued unbundled access to redundant, outmoded circuit switching facilities is a "taking" within the meaning of the Takings Clause. *See, e.g., Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-1446 (D.C. Cir. 1994) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). Even where just compensation is proffered (and, of course, no "just compensation" is contemplated by *Order No. 03*), a taking is unconstitutional where it does not "substantially advance legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *see, e.g., Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-835 (1987). Because the Commission lacks any authority to engage in this taking and, to the contrary, is prohibited by federal law from imposing the unbundling requirement at issue, *Order No. 03* should be reversed.

F. The Commission Erred In Finding That A Material Issue Of Fact Exists As To Whether The Newly-Deployed Nortel Succession Switch Is A Packet Switch.

59. *Order No. 03* correctly holds that "whether the Nortel 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," but "find[s] 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." *Order No. 03* ¶¶ 46-47; *see also id.* ¶¶ 124-25. Specifically, *Order No. 03* explains that "[t]he question of the appropriate remedy for Verizon's breach must take into considerations the harms to the affected CLECs as well as the present factual situation." *Id.* ¶ 132.

60. Under a correct interpretation of federal law, the CLECs have no right to burden Verizon's packet switch deployment with a requirement that Verizon preserve legacy unbundling requirements, rendering the question of what "remedy" the CLECs might be entitled to moot. Furthermore, to the extent that *Order No. 03* suggests that "[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," *Order No. 03* ¶ 77, the Commission is mistaken.

61. *Order No. 02* correctly determined that "[e]ven if the Commission were to consider the CLECs' arguments that there are material facts in dispute, the only relevant factual dispute would be whether the Nortel Succession switch is a packet switch," and that the parties' declarations showed that "there is no[] dispute as to the nature and functions of the new switch: Verizon has deployed a packet switch using solely packet switching functions." *Order No. 02* ¶ 76.

62. Only three declarations (or affidavits) were before the ALJ: the declaration of Robert Williamson on behalf of Staff; the affidavit of Jeff Haltom on behalf of the Joint CLECs; and the affidavit of Danny Peeler from Nortel Networks (the manufacturer of the Mount Vernon switch) on behalf of Verizon, which responded to Williamson and Haltom. The Williamson declaration stated that the Nortel Succession switch "is a type of packet switch," Williamson Decl. ¶ 6, that

relies on ATM technology that uses "'packet like' cells" instead of "packets," *id.* ¶ 11. In response, the Peeler affidavit explained that a cell is a type of packet and that ATM networks are packet networks. Peeler Aff. ¶ 12. And, in any event, Williamson's "cell" distinction is irrelevant because the FCC defines "packet switching" to include "the routing or forwarding of packets, frames, *cells* or other data units based on address or other routing information contained in the packets, frames, *cells* or other data units." 47 C.F.R. § 51.319(a)(2)(i) (emphasis added). Thus, there is no dispute regarding these facts; indeed, Staff's Comments on the Recommended Decision acknowledges that the Nortel switch "'packetizes' the narrowband traffic for its own internal purposes, within the switch itself." Staff Comments on Recommended Decision, Docket No. UT-041127, ¶ 10 (filed Dec. 13, 2004). (Staff, of course, disagrees with Verizon and the Commission on the *legal* issue of whether the FCC requires the unbundling of packet switching for narrowband traffic, but there is no dispute over the fact that the Nortel switch is a packet switch.)

63. Similarly, the Haltom affidavit does not state that the Nortel Succession switch is not a packet switch; instead, it states that Verizon "is not necessarily *using* its Nortel switch to provide packet switching," Haltom Aff. ¶¶ 4, 7-11, (emphasis added), and that the Nortel switch *could be* deployed to provide circuit switching, *id.* ¶¶ 35-43. In response, the Peeler affidavit acknowledges that the Nortel switch *could be* deployed in a hybrid fashion to provide circuit switching, but confirms that Verizon did not deploy the switch in this fashion and that "All subscribers in the Mt. Vernon deployment are served through a packet fabric." Peeler Aff. ¶ 11. Here, too, there is no conflict between the affidavits. *See Order No. 02* ¶¶ 76, 98. Indeed, MCI itself has characterized the Nortel switch as a packet switch. *See* Verizon Reply ¶ 30.

64. Similarly misplaced is the Commission's suggestion that there is a material issue of fact related to the characteristics of certain remotes served by the Mount Vernon switch. *Order No. 03* ¶¶ 84-85. The remotes in question do not provide intra-remote circuit switching – all traffic is switched in the Mount Vernon packet switch. The only exception is if an emergency occurs and

the Mount Vernon switch is temporarily disconnected or non-operable. In this event, the remotes provide intra-remote switching only for the duration of the emergency.[26]

65. In sum, contrary to the Commission's determination in *Order No. 03*, the record fully supports *Order No. 02*'s conclusion that there are no material facts in dispute:

> The declaration of Mr. Williamson and the affidavits of Mr. Haltom and Peeler squarely address the issue of the technical capabilities of the Nortel Succession switch and make clear that Verizon has options in deploying the switch as a hybrid packet switch or fully packetized switch. *Williamson Declaration, ¶¶ 11, 18-19; Haltom Affidavit, ¶¶ 9-11, 22-32; Peeler Affidavit, ¶¶ 5, 11.* Mr. Peeler makes clear in his affidavit that Verizon has chosen to deploy and install the Nortel switch not as a hybrid packet switch, but as a pure packet switch using packet switching functions to switch voice grade traffic. *Peeler Affidavit, ¶¶ 5, 9-11. Thus, there is not [sic] dispute as to the nature and functions of the new switch: Verizon has deployed a packet switch using solely packet switching functions.*

Order No. 02 ¶ 76 (emphasis added).[27]

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[26] Verizon's June 8, 2004 Notice – the record evidence upon which the Joint CLECs expressly rely, *see* Joint CLEC Petition for Review ¶ 48 – makes clear that the affected remotes are at issue "to the extent that they rely on access to unbundled switching at the host." *Id.*, Exh. A at 2. The Joint CLECs provided no *evidence*, as opposed to speculation in their briefing, that any unbundled switching is provided solely by the remotes without reliance on the Mount Vernon packet switch. Such baseless speculation is not a reason to overturn the ALJ's Order. Furthermore, as Verizon previously argued, the Joint CLECs' claims regarding the remotes were not raised until they filed their response to Verizon's Motion, *i.e.*, it was not part of the Joint CLECs' Petition for Enforcement or Verizon's Answer. *Id.* ¶ 46. Thus, *Order No. 02* properly declined to consider it.

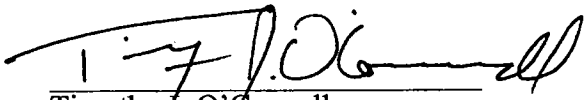
[27] The Joint CLECs' collateral arguments based on the configuration of the Verizon's proposed packet switch deployments in California were out-of-time, cumulative and immaterial. The declaration that Mr. Haltom filed in a California proceeding discussing the "ENET module" simply states that Verizon California's packet switches "could be deployed" to provide circuit switching, Haltom Aff. ¶¶ 23-33, the same claim Haltom made in his declaration on this proceeding. Again, Verizon acknowledges that it "could have" deployed a circuit switch, but that point is irrelevant because it has no legal obligation to do so. More importantly, as a matter of law the Joint CLECs should have been barred from introducing new evidence on review. Under the APA, review by the Commission of an ALJ's order disposing of the proceeding is limited to "the whole record or such portions of it as may be cited by the parties." RCW 34.05.464(5). If there were any doubt about the issue, the Court of Appeals has been explicit: "The statute does not provide that the reviewing officer may go outside the record or take additional evidence." *Towle v. Dep't of Fish & Wildlife*, 94 Wash. App. 196, 205 (1999). The rationale under the APA is simple: when the administrative agency reviews a dispositive ruling from an administrative law judge, the "reviewing scheme mirrors the manner in which an

IV. CONCLUSION.

66. For the reasons set forth herein, the Commission should grant Verizon's petition for reconsideration and hold that, consistent with federal law and policy, Verizon has an unencumbered right to upgrade its network to packet switches free of any legacy unbundling obligations, including but not limited to any continuing obligations to preserve CLECs' access to outmoded, legacy circuit switches at TELRIC rates.

Dated this 4th day of March, 2005 at Seattle, Washington.

Respectfully submitted,



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

Counsel for Verizon Northwest Inc.

appellate court reviews and is confined to the trial court record." *Id.* at 206 n.10; *see* Verizon Answer to Petitions for Review ¶¶ 47-48.

CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of March, 2005, served the true and correct original, along with 7 copies, of ***Petition Of Respondent Verizon Northwest Inc. For Reconsideration Of Order No. 03 and this Certificate of Service*** upon the WUTC, via the method(s) noted below, properly addressed as follows:

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

I hereby certify that on this 4th day of March, 2005, the enclosed document was sent via First Class U.S. Mail and electronic mail to the following:

LETTY FRIESEN
Attorney at Law
AT&T Communications of the Pacific North
1875 Lawrence Street, Suite 1575
Denver, CO 80202

Email: lsfriesen@att.com

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

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

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

Email: dmittle@att.net

Charles H. Carruthers III
Vice President & General Counsel
Verizon Southwest Inc. & Verizon Northwest Inc.
600 Hidden Ridge
Mail Code HQE02H45
PO Box 152092
Irving, TX 75015-2092
Email: chuck.carrathers@verizon.com

Jonathan Thompson
Assistant Attorney General
1400 S Evergreen Park Dr. SW
PO Box 40128
Olympia, WA 98504-0128

Email: jthompso@wutc.wa.gov

Ann E. Rendahl
Administrative Law Judge
1300 S Evergreen Park Drive SW
PO Box 47250
Olympia, WA 98504-0128
Email: arendahl@wutc.wa.gov

Donald Taylor, Director
Carriers Relations & Regulatory Affairs
Tel West Communications, L.L.C.
3701 South Norfolk Street, Suite 300
Seattle, WA 98118
dtaylor@telwestservices.com

Michael E. Daughtry
United Communications, Inc., d/b/a UNICO
389 SW Scalehouse Court
Bend, OR 97702
mike@ucinet.com

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

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

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

DATED this 4th day of March, 2005, at Seattle, Washington.

Heidi L. Wilder

Heidi L. Wilder