BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE CONTINUED COSTING AND PRICING OF UNBUNDLED NETWORK ELEMENTS, TRANSPORT, TERMINATION, AND RESALE	Docket No. UT-003013 (Part B) JOINT RESPONSE TO VERIZON'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF PORTIONS OF THE 32ND SUPPLEMENTAL ORDER

Covad Communications Company and WorldCom, Inc., on behalf of its regulated subsidiaries (collectively, the "CLECs") respectfully submit this Joint Response to Verizon's Motion for Reconsideration and Clarification of Portions of the 32nd Supplemental Order. As grounds in support of this Response, the CLECs state as follows:

I. INTRODUCTION

Verizon Northwest Inc.'s Motion for Reconsideration is nothing more than a thinly veiled attempt to shut down its competitors. Put simply, Verizon seeks to stymie any attempt by this Commission to create a fully competitive local exchange market, by seeking to undo, delay or stop any of the Commission's decisions with respect to xDSL and related UNEs, including line shared loop UNEs and packet switching. This Motion, which typifies the strategy of "wearing down the regulator," is not well-founded in law and, in fact, grossly misstates the status of current law. The Verizon Motion must be rejected to the extent it seeks reconsideration of any Commission decision on line shared or line split loop UNEs and packet switching.

II. ARGUMENT

A. The *USTA* Decision Does Not Impact The Commission's Ability to Proceed With Adjudication of Line Shared Loop Issues.

Verizon's reliance on the D.C. Circuit Court's remand of the FCC's *UNE Remand Order* and the *Line Sharing Order*[1] in *United States Telecom Ass'n v. Federal Communications Commission*[2] to reconsider and/or suspend indefinitely consideration of line shared loop and packet switching UNE issues is without foundation or merit. With respect to line shared loop UNE issues, Verizon argues that the Commission should undo and suspend its consideration of these issues because the Thirty-Second Supplemental Order assumes the existence of a line shared loop UNE. Verizon argues incorrectly that, because the D.C. Circuit remanded the *Line Sharing Order*, there presumptively is no obligation to provide the line shared loop UNE. Verizon is wrong.

Contrary to Verizon's assertion, the FCC's *Line Sharing Order* is not the sole source of Verizon's obligation to provide line sharing UNEs to CLECs. The FCC ordered Verizon, as one of the conditions of the Bell Atlantic/GTE Merger, to continue to provide the line shared loop UNE, priced at total element long run incremental cost ("TELRIC") rates, under the *exact* circumstances cited by Verizon in its Motion. Specifically, the FCC decreed:

> In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, from now until the date on which the Commission's orders in those proceedings, and any subsequent proceedings, become final and non-appealable, Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs

[1] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (rel. Dec. 9, 1999) ("*Line Sharing Order*").

[2] 2002 WL 1040574, No. 00-1012, Slip opinion (D.C. Cir. May 24, 2002).

> in all or a portion of its operating territory. This condition only would have practical effect *in the event that our rules adopted in the UNE Remand and Line Sharing proceedings are stayed or vacated.* Compliance with this condition includes pricing these UNEs at cost-based rates in accordance with the forward looking cost methodology first articulated by the Commission in the Local Competition Order, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide such UNEs at cost-based rates.[3]

These merger conditions sunset 36 months after the Bell Atlantic/GTE merger closed, or June 2003. Thus, Verizon is under a continuing obligation to provide line sharing until the FCC issues its order on remand (in the Triennial Review) and until that remand order becomes final and non-appealable. Moreover, the FCC stated unequivocally, following the *USTA* decision, that "[w]hile we continue to evaluate the Court's opinion and consider all the Commission's options, in the meantime, the current state of affairs for access to network elements remains intact."[4] Accordingly, Verizon has a continuing obligation to provide line sharing, and its Motion must therefore be denied.

Even if Verizon were not required to provide line sharing pursuant to the FCC's Merger Order, this Commission could (and should) proceed with its consideration of line sharing over DLC for several additional reasons, which are discussed more fully below. First, the D.C. Circuit's Opinion cannot become effective until the D.C. Circuit issues its Mandate, which *may* not occur until some unknown time in the future, since the FCC has sought reconsideration of the *USTA* decision. Even after issuance of the reconsideration decision, the D.C. Circuit's Opinion may not become effective until an even later date, because parties to the Court's Judgment have stated they may seek Supreme Court review and/or a stay pending Supreme Court review. Second, the ILECs have contractual obligations under their Interconnection Agreements to

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[3] *In Re Application Of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, FCC 00-221 (rel. June 16, 2000), ¶ 316, ("Merger Order") (emphasis added).

[4] Statement of Chairman Michael Powell, available at www.fcc.gov/Speeches/Powell/Statements/2002/stmkp212.html.

provide line sharing. Third, the Commission has independent authority to require access to and set TELRIC rates for the line shared loop UNE (including a line shared loop over DLC UNE) under the Telecommunications Act of 1996,[5] the FCC rules, federal court decisions, RCW 80.36.080, .140, .160, .170, .180, .186 and 300, and Commission precedent. Fourth, other state commissions have determined that independent authority exists to adopt UNEs. Finally, strong public policy considerations require continued provision of the line shared loop UNE. For these reasons, this Commission should continue its consideration of the line shared loop over DLC UNE and continue to provide Washington consumers the benefits of line sharing in both Verizon's and Qwest's serving areas in the state.

1. The D.C. Circuit Ruling Did Not Eliminate the ILECs' Continuing Legal Obligation to Provide Line Shared Loop UNEs.

a. The D.C. Circuit's Ruling Is Not Yet Effective

At best, Verizon's Motion is premature because the D.C. Circuit's Opinion cannot become effective until the D.C. Circuit issues its Mandate, which will not occur until some time after July 8, 2002.[6] Indeed, even though the Mandate originally was set to issue on July 8, 2002, the D.C. Circuit's Opinion will not become effective until well after that date because the FCC has sought reconsideration of the *USTA* decision, which automatically "stays the mandate until disposition of the petition or motion."[7] Likewise, the FCC may, and if not, parties to the proceeding may, seek Supreme Court review of the D.C. Circuit's Opinion. Parties have 90 days

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[5] Pub. L. 104-104, Title VII, § 252(d)(1), Feb. 8, 1996, 110 Stat. 153 (codified in scattered sections of Title 47 of the United States Code) (hereinafter referred to as the "Act" or "Telecom Act").

[6] Federal Rule of Appellate Procedure 41(b) provides: "The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later." Federal Rule of Appellate Procedure 40(a)(1) provides: "a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time." Accordingly, because a U.S. agency, the FCC, is a party to the D.C. Circuit's judgment, the parties have 45 days to file a petition for rehearing. The D.C. Circuit's Opinion was issued on May 24, 2002 and the FCC filed its petition for reconsideration on July 8, 2002.

[7] FED. R. APP. PROC. 41(d)(1).

from the denial of a petition for rehearing in which to seek *certiorari* before the United States Supreme Court.[8] Finally, the FCC may, and if not, parties to the proceeding may seek a stay of the Mandate pending Supreme Court review. Accordingly, Verizon's Motion is premature and should not be considered by the Commission now, if ever.

b. ILECs Have Continuing Contractual Obligations to Provide Line Sharing UNEs Pursuant to Their Interconnection Agreements.

The D.C. Circuit's Opinion does not automatically affect the ILECs' contractual obligation to provide line shared loop/DLC loop UNEs to CLECs. The line sharing agreements appended to CLECs' interconnection agreements remain binding and in force unless and until the ILECs invoke "change of law" provisions to alter contractual provisions to reflect the effect of the D.C. Circuit's Opinion. Clearly, the ILECs may not invoke such change of law provisions until the D.C. Circuit's Opinion becomes final. The D.C. Circuit's Opinion remanded the *Line Sharing Order* back to the FCC to reexamine whether CLECs are "impaired" without access to line sharing as a UNE considering the existence of intermodal competition. There will be no change in law unless the FCC decides on remand (in the Triennial Review Docket) that line sharing is not a UNE. Even then, there is no change of law until the FCC's Order in the Triennial Review Docket becomes final and unappealable. Accordingly, any "change of law" would occur in the distant future.

2. The *Line Sharing Order* Is Not the Sole Basis Upon Which States Can Order ILECs to Provide Line Sharing as a UNE

a. This Commission Has Independent Authority to Establish Line Shared Loop UNEs.

Verizon's Motion proceeds on the flawed presumption that the Commission does not have authority to unbundle the line shared loop UNEs in the absence of the *Line Sharing Order*. Contrary to that assertion, however, the Commission has authority under at least two additional

[8] U.S. SUP. CT. R. 13.1 and 13.3.

bodies of law—FCC Rule 51.317 and Washington statutory law—to require access to the line shared loop UNEs (line shared copper loops and line shared DLC loops) and to set TELRIC-based rates for these UNEs in Washington. This authority is separate from, and independent of, the FCC's *Line Sharing Order*.

i. Authority Under Federal Law

As an initial matter, the Commission should be clear as to the scope of the *USTA* decision. At no point in its decision did the D.C. Circuit vacate Section 51.317 of the FCC's rules, by which the FCC explicitly gave states the authority to further unbundle incumbent carrier's networks. The D.C. Circuit, therefore, did not and could not affect this state's authority under the 1996 Act, or currently binding FCC regulations. Thus, with respect to the source of its power to unbundle, the Commission has independent authority under federal law to establish and set a TELRIC rate for line shared loop and line shared DLC loop UNEs in this proceeding. Specifically, FCC Rule 51.317 and the *UNE Remand Order* authorize this Commission to unbundle the ILECs' networks beyond the FCC's minimum list of UNEs upon an independent finding that such unbundling meets the "necessary and impaired" standard.[9] This authority is independent of any minimum line sharing requirements set out by the FCC in the *Line Sharing Order*. Thus, the Commission has the independent authority to require ILECs to provide line sharing in Washington *and* the corresponding authority to set a TELRIC-based rate in this proceeding.

This independent authority is firmly grounded in the Telecom Act, the FCC's implementing orders, and the controlling case law. Section 251(d)(3) of the Telecom Act

[9] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, ¶ 153 (rel. November 5, 1999) ("*UNE Remand Order*") (finding that § 251(d)(3) provides state commissions with the ability to establish additional unbundling obligations); *id*. ¶ 155 ("[s]ection 51.317 of the Commission's rules codifies the standards state commissions must apply to add elements to the national list of network elements we adopt in this order…[m]odification of this rule will enable state commissions to add additional unbundling obligations consistent with sections 251(d)(3)(B) and (C) of the Act").

provides that the FCC shall not preclude the enforcement of any state commission regulation, order or policy that (A) establishes access and interconnection obligations of ILECs; (B) is consistent with the requirements of § 251; and (C) does not substantially prevent implementation of this section and the purposes of §§ 251-261. Similarly, § 261(b) of the Telecom Act states:

> Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulation after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.[10]

On the specific issue of line sharing, the FCC's *Advanced Services Order* states "nothing in the Act, our rules, or case law precludes states from mandating line sharing, regardless of whether the incumbent LEC offers line sharing to itself or others, and regardless of whether it offers advanced services."[11] Accordingly, the Telecom Act and the FCC's implementing orders clearly authorize this Commission to establish unbundling obligations, including line sharing, that may exceed the FCC's currently effective minimum requirements. It necessarily follows that, if the Commission has the independent authority to require line sharing generally, then the Commission has the corresponding authority to set a rate for line shared DLC loop UNEs in this proceeding.

Importantly, Section 251(d)(3) does not authorize the FCC to preempt state unbundling obligations merely because they may or do differ from those established by the FCC, as Verizon implies. This principle was established by the *Iowa Utilities Board* litigation. In 1996, despite the clear language of Section 251(d)(3), the FCC nevertheless concluded that state unbundling rules that were inconsistent with its own unbundling rules were preempted. The Eighth Circuit reversed, stating that the "FCC's blanket statement that state rules must be consistent with the

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[10] "This part" is "Part II – Development of Competitive Markets," including 47 U.S.C. §§ 251-261.

[11] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, FCC 98-48, ¶ 98 (rel. Mar. 31, 1999) ("*Advanced Services Order*").

Commission's regulations promulgated pursuant to Section 251 is not supportable in light of subsection 251(d)(3)."[12] Rather, the court held, that provision was meant to "shield state access and interconnection orders from FCC preemption."[13] In reaching that conclusion, the Eighth Circuit contrasted Section 251(d)(3) with sections 252(c)(1) and 261(c) of the Act, which require other state rules to conform to FCC regulations. The court accordingly struck down the FCC's conclusion that "merely an inconsistency between a state rule and a Commission regulation under section 251 is sufficient for the FCC to preempt the state rule."[14]

The Eighth Circuit's decision makes federal preemption of a state commission unbundling determination difficult, if not impossible. In the interpretation of section 251(d)(3) that was struck down by the Eighth Circuit, the FCC had "assert[ed] that a state policy that is inconsistent with an FCC regulation is necessarily also inconsistent with the terms of section 251 and substantially prevents the implementation of section 251."[15] The Eighth Circuit rejected that assertion, finding that the "FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical. It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and to be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251."[16] The FCC did not challenge that holding in the Supreme Court, and it therefore stands.

Reviewing courts have repeatedly upheld the broad interpretation of the independent unbundling and ratemaking authority of state commissions. At the highest level, the U.S.

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[12] *Iowa Utils. Bd. V. FCC*, 120 F.3d 753, 807 (8th Cir. 1997), *not rev'd by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[13] *Id.*

[14] *Id.*

[15] *Id.* at 806.

[16] *Id.*

Supreme Court reviewed and implicitly approved independent state authority pursuant to FCC Rule 51.317. In *AT&T Corp. v. Iowa Utilities Bd.*, the Supreme Court noted that "[i]f a requesting carrier wants access to additional elements, it may petition the state commission, which can make other elements available on a case-by-case basis."[17] This implicit affirmation is entirely consistent with the Ninth Circuit's more explicit affirmation in *MCI v. US West*:

> The [FCC] is charged with the responsibility of promulgating regulations necessary to implement the Act itself, but the Act reserves to states the ability to impose additional requirements so long as the requirements are consistent with the Act and "further competition."[18]

Accordingly, as confirmed by Supreme Court and the Ninth Circuit, this Commission has the federal authority—independent of the *Line Sharing Order*—to impose additional unbundling requirements, including line sharing, and to set corresponding rates in this proceeding.

The Commission itself recently recognized that it has the independent authority to unbundle UNEs beyond those on the national UNE list. In connection with the review of Qwest's application for Section 271 relief in this State and its finding that there was merit to Covad's argument that remote terminal access, and the ability to access customers served off of remote terminals, constituted a significant competitive issue that required attention by the Commission[19], the Commission made equally clear that it possessed the power under federal law to require unbundled access beyond that required by the FCC.

ii. Authority Under State Law

The Commission has independent authority under state law to order ILECs to unbundle the HUNE. Even prior to the FCC's *Line Sharing Order*, the Commission, generally speaking,

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[17] *AT&T Corp. v. Iowa Utilities Bd*., 525 U.S. 366, 388 (1999) (*AT&T v. IUB*). While the Supreme Court remanded FCC Rule 51.319 (the necessary and impair standard) back to the FCC for further justification, it did *not* remand or note with any disfavor FCC Rule 51.317.

[18] *MCI Telecommunications Corp. v. US West Comm*., 204 F.3d 1262, 1265 (9th Cir. 2000) (*MCI v. US West*); *cert denied Qwest v. MCI WORLDCOM Network Services*, 531 U.S. 1001 (2000) (citing 47 U.S.C. § 251(d)); *see also* 47 C.F.R. § 51.317.

[19] Docket Nos. UT-003022 and UT-003040, 20th and 28th Supplemental Orders.

had the broad authority to regulate the rates, services, facilities and practices of telecommunications companies in the public interest, and to promote competition in the provision of telecommunications services.[20] In order to ensure the advancement of the public interest and competition in Washington, the Commission is charged with the power to prohibit any phone company practice that unduly or unreasonably prejudices or disadvantages any corporation.[21] Conversely, the Commission has the power to issue an order compelling the provision of service or facilities in a just, reasonable efficient and adequate manner:

> Whenever the commission shall find, after such hearing that the rules, regulations or practices of any telecommunications company are unjust, unreasonable, or that the equipment, facilities or services of any telecommunications company is inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities and service to be thereafter installed, observed and used, and fix the same by order or rule as provided in this title.[22]

The Commission's general authority is buttressed by a broad, public policy mandate, first articulated in 1985, pursuant to which the Commission must act and rule in order to, *inter alia*:

> (1) Maintain and advance the efficiency and availability of telecommunications service;
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> (2) Ensure that customers pay only reasonable charges for telecommunication service;
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> (3) Ensure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of regulated telecommunications companies; and

[20] RCW 80.36.080, .140, .160, .170, .180, .186 and 300.

[21] RCW 80.36.170; *see also* RCW 80.36.180 ("No telecommunications company shall …unduly or unreasonably demand … compensation … than it …charges … for doing a like and contemporaneous service with respect to communications by telecommunications under the same or substantially the same circumstances and conditions. . .").

[22] RCW 80.36.140; *see also* RCW 80.36.80 (telecommunications contracts for services rendered or equipment and facilities supplied "shall be rendered and performed in a prompt, expeditious and efficient manner . . . ").

(4) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state.[23]

These legislative policies are, in turn, guided by provisions of the state constitution that protect the rights of all companies to provide telecommunications services (Const. Art. 12, § 19), and declare Washington's abhorrence of monopolies. (Const. Art. 12, §22).

The Commission has utilized the statutory powers enumerated above to facilitate competition in the local exchange market even prior to promulgation of the Act. For instance, in 1995, the Commission rejected Qwest's (then US WEST) tariff filing because it contained provisions that did not permit interconnection at any convenient meet point and did not permit "ALECs" (the precursor to CLECs) to interconnect with the Qwest network in the same manner as it did with other ILECs.[24] In so doing, the Commission expressly referred to the statutory provisions cited above, and recognized that competition makes telecommunications services more affordable. After the enactment of the Act, the Commission has continued to insist on the imposition of pro-competitive practices by the ILECs, including ordering Qwest and GTE to provide cageless collocation.

3. CLECs Are Impaired Without Access To The Line Sharing UNE

The Commission should consider another key factor in rendering its decision on the Verizon Motion: the fact that the ILEC data affiliates/subsidiaries can, and indeed are, line sharing with Verizon. Section 251(c)(3) of the Telecom Act requires ILECs to provide "non-discriminatory access to network elements on an unbundled basis at any technically feasible point at rates, terms and conditions that are just, reasonable, and nondiscriminatory." Thus, so long as the ILECs are able to use the line shared loop UNE to provide DSL-based services, CLECs are entitled to access the line shared loop UNE. If the ILEC has a separate data affiliate (*e.g.*, VADI) that leases the HUNE like other CLECs, then the Commission can easily ensure

[23] RCW 80.36.300 (2)-(5).
[24] Docket No. UT-941464, 4th Supplemental Order.

that nonaffiliated CLECs have access to the HUNE on the same terms as the ILEC data affiliate. If, however, the ILECs dissolve the separate affiliate structure (as Verizon already intends to do), then the Commission may have little insight into the terms and conditions under which the ILEC uses the HUNE for its own operations. Thus, the Commission should require that the HUNE be made available as a UNE, and should set reasonable terms and conditions for the UNE in order to ensure that CLECs will not be disadvantaged compared to the ILECs' own operations.

Moreover, it is equally important to keep in mind the fact that Qwest is providing xDSL services to its own end user over a line shared DLC loop. Qwest publicly announced almost a year and an half ago a massive expansion of its service area for its line shared DSL services.[25] This expansion was driven solely by the use of remote DSLAMs located at thousands of field distribution interfaces both in this state and throughout its incumbent region. Thus, in the absence of requiring access to the line shared loop UNEs, there is no doubt whatsoever that CLECs will be disadvantaged relative to the ILECs and thus will not be able to provide a competitive xDSL offering to consumers in this state, to the detriment of competition and to consumers seeking competitive, reasonably priced alternatives.

4. Supplementing the Record and Maintaining Line Sharing During Any Remand Proceedings

One issue merits special attention, namely, the continuation of line sharing during any limited remand of the line sharing issues. CLECs currently provide DSL-based service on line-shared loops to tens of thousands of customers in Washington. Disconnection of those circuits or discontinuation of line sharing on a prospective basis would be an economic and regulatory nightmare. The Commission must use its general regulatory authority discussed above, to require Qwest and Verizon to continue providing line sharing during the pendancy of the limited remand. Indeed, any discontinuation of Qwest's and Verizon's obligations under the

[25] According to Qwest's witnesses in the Section 271 and SGAT proceedings, Qwest provides only a line shared DSL service to its end user customers.

Commission-approved line sharing agreements and amendments would constitute a breach of the governing interconnection agreements. The harm of such an action would be magnified even further by the fact that Verizon's data subsidiaries/affiliates would presumably continue to benefit from line sharing during the same time period.

5. Other States Have Exercised Authority to Establish Additional UNEs[26]

Notwithstanding the D.C. Circuit's Opinion, this Commission has the independent state law authority to unbundle and establish cost-based pricing for the line shared loop UNEs. Indeed, just a few weeks ago, the Michigan Public Service Commission stated, "Although the decision in *United States Telecom Ass'n v Federal Communications Comm*, opinion of the United States Court of Appeals for the District of Columbia Circuit, decided May 24, 2002 (Docket No. 00-1012 et al.), remanded the Federal Communications Commission's line-sharing rules, it did not go so far as to hold that, as a matter of federal law, there is no obligation to provided nondiscriminatory access to the high- or low- frequency portions of the loop. Moreover, the holding does not affect the Commission's authority with respect to line sharing under Section 305 and other provisions of the MTA."

Not only do states have the authority to add UNEs to the list promulgated by the FCC, states have ordered UNEs even before the FCC adopted them. For example, the State of Minnesota ordered the line sharing UNE prior to its adoption by the FCC.[27] Although the Minnesota PUC noted its authority pursuant to Section 251(c) and Section 706(a) of the Act to mandate line sharing, the "Commission decline[d] to rule on these possible sources of authority under Federal Law, having found adequate state authority for its actions herein." This

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[26] *In the Matter of the Complaint of the Competitive Local Exchange Carriers Association of Michigan, CMC Telecom, Inc., et al., against SBC Ameritech Michigan for anti-competitive acts and acts violating the Michigan Telecommunications Act*, Case No. U-13193 and can be found at: http://cis.state.mi.us/mpsc/orders/comm/2002/u-13193b.pdf.

[27] *In the Matter of a Commission Initiated Investigation into the Practices of Incumbent Local Exchange Companies Regarding Shared Line Access*; Docket No. P-999/CI-99-678 (Oct. 8, 1999) ("*Minnesota Line Sharing Order*").

Commission, like the Minnesota PUC "has ample authority to mandate line sharing under state law."

Similarly, the Texas PUC not only has unbundled UNEs in addition to those promulgated by the FCC, but also it has informed the FCC that it "strongly believes that State regulatory agencies are better positioned to conduct a detailed review of additional unbundling requirements for their state."[28] As set forth in its recent Reply Comments to the FCC:

> [T]he Texas PUC has had occasion to expand the original list of UNEs. For example, the Texas PUC determined that dark fiber and sub loops constituted UNEs at a time when those elements were not included on the national list, thereby increasing an incumbent's unbundling obligations while also increasing competitor's choice of UNEs in Texas.[29]

Likewise, "[t]he Texas PUC concluded, among other things, that local switching should be available to CLECs on an unbundled basis without restriction, as should operator service and directory assistance."[30] Finally, the Texas PUC was the first of several PUCs to order unbundling of the ILEC owned splitter in the line-splitting context. [31] In sum, the Texas PUC unbundled UNEs independent of the FCC and has required ILECs to unbundle UNEs to a greater

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[28] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Notice of Proposed Rulemaking, Reply Comments of the Public Utility Commission of Texas (May 9, 2002) ("Reply Comments of the Texas PUC"), at 5.

[29] Reply Comments of the Texas PUC, at 9, (citing *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, Docket No. 16189, *et al*. Award as sections III.A.4 and III.A.6 (Nov. 8, 1996)).

[30] *Id*. at 2, (citing *Petition of MCIMetro Access Transmission Services LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, Docket No. 24542 (May 1, 2002)).

[31] *Petition of IP Communications Corporation to Establish Expedited Public Utility Commission of Texas Oversight Concerning Line Sharing Issues*, Docket No. 22168 and *Petition of Covad Communications Company and Rhythms Links, Inc. Against Southwestern Bell Telephone Company for Post-Interconnection Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line Sharing*, Docket No. 22469, Final Arbitration Award (July 13, 2001).

degree than that ordered by the FCC. This Commission can, and should, follow the pro-competitive example set by the Texas PUC.[32]

In another example of a state requiring unbundled access prior or over and above that required by the FCC, the Vermont Supreme Court recently affirmed the Vermont Public Service Board's ("PSB's") authority to impose additional unbundling obligations upon Verizon as part of a condition to its approval of the merger between Bell Atlantic Vermont (BAVT) and NYNEX.[33] The Court held that the PSB has the power under Vermont law to order nondiscriminatory access to combinations of UNEs not currently combined, and that this power under state law is in no way preempted by federal law. The Vermont Supreme Court stated, "Regardless of whether 47 C.F.R. sec. 51.315(c) is valid, there is nothing [in] this regulation, or any other, or in the Act itself that prevents a state from requiring BAVT to provide combinations of UNEs. For even if we assume that federal law does not require such combinations, and we assume that sec. 51.315(c) remains invalid as per *Iowa Utilities*, nothing in federal law *prohibits* the PSB [from] ordering such combinations to facilitate competition in local markets."[34] The Court therefore concluded that, "Thus, we hold that this element of the PSB's order is not inconsistent with the Act and is therefore not preempted by federal law."[35] The power of this Commission to confirm Verizon's obligation to provide CLEC's line sharing and set the price for the HUNE is certainly not inconsistent with the Act.

[32] At the June 6th Open Meeting, the Texas commissioners orally indicated their intent to proceed with a state unbundling case to examine line sharing and NGDLC issues under FCC Rule 51.317. The Texas PUC is going to issue a procedural order shortly requesting briefing on the proper standards that it should use in light of the DC Circuit's opinion.

[33] *In re Petition of Verizon New England Inc. d/b/a Verizon Vermont*, 795 A.2d 1196 (Vt. 2002).

[34] 795 A.2d, at 1204.

[35] *Id*.

B. The *USTA* Decision Does Not Impact The Commission's Ability to Proceed With Adjudication of Line Splitting Issues.

Verizon is also wrong in implicitly arguing that the FCC's requirement that it allow carriers to engage in line splitting relies on the underlying validity of the *Line Sharing Order*.[36] In its *Line Sharing Reconsideration Order*,[37] the FCC made clear that the obligation to allow carriers to engage in line splitting derived from the FCC rules that "require incumbent LECs to provide competing carriers with access to unbundled loops in a manner that allows the competing carriers 'to provide any telecommunications service that can be offered by means of that network element.'"[38] Critically, the FCC specifically stated that the obligation to provide line splitting did not derive from its *Line Sharing Order*: "independent of the unbundling obligations associated with the high frequency portion of the loop that are described in the *Line Sharing Order*, incumbent LECs must allow competing carriers to offer both voice and data service over a single unbundled loop."[39] To the extent that loops are available under the *UNE Remand Order*, which they are, line splitting is also available. The line splitting portion of the *Line Sharing Reconsideration Order* was not on appeal before the D.C. Circuit. The Commission should move forward with line splitting issues.

C. The *USTA* Decision Does Not Impact The Commission's Ability to Proceed With Adjudication of Packet Switching Issues.

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[36] Although Verizon did not address line splitting in its Motion, during the July 11, 2002 prehearing conferences in Docket Nos. UT-003013 and UT-023003, Verizon indicated that line splitting issues also should be deferred because of the uncertainty stemming from the *USTA* decision.

[37] *In the Matter of Deployment of Wireline Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Third Report and Order On Reconsideration in CC Docket No. 98-147, Fourth Report and Order On Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (rel. January 19, 2001) ("*Line Sharing Reconsideration Order*"). .

[38] *Line Sharing Reconsideration Order* at ¶ *18*.

[39] *Id.* (emphasis added).

Verizon's Motion wholly ignores what the *USTA* decision did *not* do. Significantly, the *USTA* decision did *not* vacate the FCC's *UNE Remand Order*. That order remains in full force and effect today. This fact alone frees the Commission to move forward with the packet switching issues for which Verizon seeks a delay or denial. Thus, notwithstanding Verizon's suggestion that the *USTA* decision somehow undid the requirement to provide access to packet switching, that requirement remains in place and is in no way altered, impacted or obviated until the FCC renders its decision in the Triennial Review.

Beyond this principal position, Covad has set forth above all the reasons why the Commission should not delay addressing the issues critical to the development of competition in the advanced services market and should exercise its authority under federal and state law to make the decisions it deems in the public interest.

III. CONCLUSION

Ever since the passage of the 1996 Act, the ILECs have appealed every court or commission decision that unbundled anything. The ILECs have had some limited success in stalling the eventual outcomes of those appeals. The ILECs certainly have had significant success in using the litigation and appeal process as a means to create large-scale uncertainty for CLECs seeking to enter the market, thereby staving off CLEC entry into the local exchange market.

As ILEC appeals and intervening court decisions have come and gone, this Commission, like almost every other, has steadfastly moved forward with its agenda to promote competition and bring to Washington consumers the benefits of the 1996 Act. When the Eighth Circuit -- at the invitation of the ILECs -- first struck the FCC's TELRIC pricing rules on jurisdictional grounds, this Commission, like others, moved forward with their TELRIC pricing cases. The United States Supreme Court eventually reversed that Eighth Circuit decision. When the Eighth

Circuit later struck the FCC's TELRIC rules on substantive grounds, again at the invitation of the ILECs, this Commission continued to promote TELRIC pricing. The United States Supreme Court, again, (just this May) reversed that Eighth Circuit decision. When the Supreme Court remanded to the FCC its original list of UNEs, this Commission continued to enforce that list until such time as the FCC addressed those issues in its *UNE Remand Order*. On remand, the FCC re-instated almost all of its original UNE list.

Each time this Commission has faced legal uncertainty, it has moved forward to open Washington's local exchange market to competition, just as the 1996 Act and Washington law require. History has affirmed the logic of this Commission's judgment. Now – based on a D.C. Circuit Opinion remanding the FCC's decision establishing a UNE list – Verizon argues that the Commission should stop its work and/or await the FCC's treatment of the D.C. Circuit's remand before moving forward on a host of important issues concerning access to line shared and line split loop UNEs and packet switching. Verizon argues that there is much uncertainty concerning what the FCC might do on remand and, therefore, that this Commission should await further direction before moving forward here. What Verizon should know is that at no time in the last five plus years has any commission had the luxury of making a decision free of uncertainty. If legal uncertainty was a valid reason for a state commission not to act, we should have stopped attempting to implement the Act in 1997. The Commission should take it as a given that no matter what decision it issues in this case, whether now or later, Verizon is sure to appeal it.

The present uncertainty should lead the Commission to action, not inaction. Now is the time that carriers seeking to enter Washington need the Commission to step in and provide certainty to an industry that appears to be headed into uncertainty until the FCC's Triennial

Review is complete, which is not expected until at least the end of this year, but may not be complete until well into 2003. Washington consumers have waited long enough to reap the benefits of the 1996 Act.

This is just the situation contemplated by the 1996 Act -- to allow state commissions to step in where the FCC has left off and promote the pro-competitive intentions of the 1996 Act. The Commission should use the authority given to it and act decisively now to make line sharing over both copper and DLC loops, line splitting, and packet switching available to CLECs seeking to provide competitive alternatives to Washington consumers. If and when the FCC acts in the triennial review, the Commission can then open a generic case to determine whether the FCC's decision affects the Commission's actions here. Waiting another year will simply result in another year of lost opportunities. While the ILECs can afford to wait, CLECs cannot. With the increasing constraints of the capital markets, it is essential that CLECs have the opportunity to execute their business plans now, not at some undetermined time in the future. The Washington Commission should step in to remove the uncertainty engendered by the ILEC interpretation of D.C. Circuit decision and then move forward with this matter.

For all the reasons discussed above, Verizon's Motion for Reconsideration and Clarification of Portions of the 32nd Supplemental Order should be denied to the extent it seeks reconsideration of any decision contained in the 32nd Supplemental Order relating to the issues of the line shared loop UNEs and packet switching.

Dated: July 16th, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE
UT-003013, Part B

I hereby certify that on this day I served a true and correct copy of the foregoing *Covad Communications Company's Response to Verizon's Motion for Reconsideration and Clarification of Portions of the 32nd Supplemental Order* in this docket on the following persons by electronic mail and U.S. Mail unless otherwise indicated:

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