BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the	)	
	)	Docket No. UT-003013 PART B
Continued Costing and Pricing of	)	
Unbundled Network Elements, Transport,	)	AT&T/XO RESPONSE TO
Termination, and Resale	)	QWEST AND VERIZON
	)	RECONSIDERATION PETITIONS

AT&T Communications of the Pacific Northwest, Inc. ("AT&T"), and XO Washington, Inc., ("XO") (collectively "AT&T/XO") submit the following response to the petitions of Qwest Corporation ("Qwest") and Verizon Northwest Inc. ("Verizon") for reconsideration of the Commission's Thirty-Second Supplemental Order (June 21, 2002) ("Order").

I. QWEST PETITION

1. Qwest requests reconsideration of only one issue – the Commission's determination that Qwest may not charge CLECs to inspect every single manhole or pole on a route to which the CLEC has requested access to poles, ducts, or conduits. The basis for Qwest's request, however, is factual assertions that have no support in the record. Qwest had every opportunity to provide testimony or other evidence in support of its cost study assumptions regarding manhole and pole inspection. Qwest refused or failed to do so. The only evidence in the record on Qwest's alleged need to inspect every manhole and every pole was the testimony of Mr. Knowles that no such inspection is necessary. Tr. at 3125 (XO Knowles). The Commission's decision was based on that record evidence, and Qwest cites no record evidence to support its request that the Commission reconsider that decision. Qwest's request for reconsideration thus is contrary to the record evidence, and accordingly, the Commission should deny that request.

II. VERIZON PETITION

2. Verizon raises several issues in its Motion for Reconsideration and Clarification ("Verizon Motion"). Most of these issues arise from Verizon's position that the Commission should establish prices based on Verizon's embedded costs. Congress, the FCC, the United States Supreme Court, and this Commission have repeatedly rejected that position. Verizon's continuing disagreement with the law does not justify reconsideration of the Commission determinations of which Verizon requests reconsideration. Verizon also continues to maintain that the Telecommunications Act of 1996 ("Act") represents a ceiling on its obligations to competitors, rather than a floor, and that the Commission lacks authority independently to impose unbundling requirements. Verizon's claims are contrary to federal and state law, as well as the record in this proceeding. Accordingly, the Commission should deny Verizon's Motion.

A. Commission Authority to Require Additional Unbundling.

3. The Commission concluded that it would address in Part E the factual and legal issues concerning Verizon's obligations and costs to provide unbundled packet switching. Order ¶ 438. Verizon takes issue not only with this determination, but with the broader ability of the Commission to impose unbundling requirements in addition to those adopted by the FCC in light of the DC Circuit's decision in *United States Tel. Ass'n v. FCC*, 290 F.3d 415 (DC Cir. 2002). Verizon's arguments are inconsistent with the plain language of the Act, the FCC's interpretation of that language, and judicial decisions interpreting the same or similar statutory provisions.

4. The plain language of the Act establishes that states have authority to impose unbundling requirements in addition to those imposed by the FCC. Section 251(d)(3) – entitled "Preservation of State Access Regulations" – expressly states that the FCC "*shall not preclude the enforcement* of any regulation, order, or policy of a State commission that establishes access and interconnection obligations of local exchange carriers," as long as those obligations are

"consistent with the requirements of [Section 251]" and do not "substantially prevent implementation of [Section 251] and the purposes of this part." 47 U.S.C. § 251(d)(3) (emphasis added). The Act thus recognizes – and Congress took pains to make it express – that states may adopt additional unbundling requirements above and beyond the FCC's national list. Accordingly, Congress "explicitly disclaimed any intent categorically to pre-empt state law" in the manner proposed by Verizon. *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987).

5. Indeed, Sections 251(d)(2) and (d)(3) together establish a scheme of concurrent authority in which both the FCC and the states have authority to adopt unbundling obligations in certain circumstances, and Section 251(d)(3) establishes a specific rule of pre-emption that governs those state "access and interconnection obligations." *See, e.g.*, *English* v. *General Electric Co.*, 496 U.S. 72, 78-79 ("[p]re-emption is fundamentally a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the court's task is an easy one"). Under Section 251(d)(2), the FCC establishes a national list of network elements to be made available for purposes of Section 251(c)(3). This national list has pre-emptive effect in the states, and functions as a "floor," listing the minimum UNEs that must be made available in any state. Section 251(d)(3), however, provides that the FCC "shall not preclude the enforcement" of additional state unbundling obligations, so long as those additional obligations are consistent with the statute. Verizon's contention that Commission has no authority to adopt additional rules because Congress did not expressly provide such authority is simply incorrect. Section 251(d)(3) "explicitly" recognizes and protects a separate sphere of state authority over interconnection and network element access requirements.

6. Similarly in *Iowa Utilities Board*, Verizon and other ILECs claimed that the FCC

had authority to implement only those provisions of the Act that separately and explicitly grant such authority. The Court flatly rejected that argument, explaining, "[t]he fallacy in this reasoning is that it ignores the fact that [the general rulemaking provision of] § 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 380, 119 S. Ct. 721, 142 L. Ed. 2d 834, 850 (1999) (emphasis in original). Section 251(d)(3) is likewise an "explicit" recognition of state authority.

7. By contrast, if the FCC's rules implementing the requirements of Section 251 were to serve as both a "floor" *and* a "ceiling," as Verizon proposes, there would be no room at all for the additional state regulations Section 251(d)(3) plainly contemplates, so that Section 251(d)(3) would be read out of the Act. That would impermissibly "render Congress' specific grant of power to the States . . . meaningless." *Northwest Central Pipeline v. State Corp. Comm'n*, 489 U.S. 493, 515 (1989); *cf. California Federal Savings. and Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (finding that, under similar anti-preemption provision that preserved State law "unless . . . inconsistent" with the purposes and provision of the federal law, "Congress intended the [federal Act] to be a floor beneath which [state law] benefits may not drop – not a ceiling above which they may not rise").

8. The FCC has therefore consistently and properly construed the Act since the *Local Competition Order* to permit such additional state regulations. In that order, the FCC concluded that "state commissions may impose additional unbundling requirements pursuant to section 252(d)(3)" and that allowing states the ability to add UNEs provided "necessary flexibility" to accommodate local conditions. *Local Competition Order* ¶ 244. And in the *UNE Remand Order* the FCC reaffirmed this holding. *UNE Remand Order* ¶ 154 (section 251(d)(3) "grants state commissions the authority to impose additional obligations upon incumbent LECs

beyond those imposed by the national list").

9. Verizon ignores these FCC conclusions and the plain language of Section 251(d)(3) and focuses its attention on Section 251(d)(2). Verizon contends that the FCC's specific findings under the "necessary" and "impair" standards that a network element need not be made available under federal law is binding on any state's subsequent unbundling inquiry under state law. According to Verizon, "states cannot 'reverse preempt' the FCC's determinations by considering access to unbundled elements when the FCC has considered access to the same elements." Motion at 6. Verizon's interpretation of the Act is untenable.

10. Section 251(d)(2) has no bearing on states' authority to adopt additional UNEs under state law. That section provides only that the FCC, when it is establishing the minimum national list (which will have pre-emptive authority in the states as a floor), must apply the necessary and impair standards. By its plain terms, Section 251(d)(2) does *not* apply to the states; it applies only to the FCC, and states therefore cannot "violate" it. The states' unbundling decisions are governed by Section 251(d)(3), which expressly permits them to adopt additional "access and interconnection obligations" pursuant to state law, and thus without regard to the federal "necessary" and "impair" standards.

11. Accordingly, and contrary to Verizon's claims, the Supreme Court's opinion in *Iowa Utilities Board* does not remotely support its attempt to use Section 251(d)(2) to trump the plain language of Section 251(d)(3). The Supreme Court had no occasion to consider state authority under Section 251(d)(3). The Court was considering only the federal rules promulgated by the FCC and held merely that the FCC, when adopting the national list, must adhere to the "limits" prescribed in Section 251(d)(2) (*i.e.*, the impairment standard). By its plain terms, however, the impairment standard of Section 251(d)(2) applies only to the FCC. By

contrast, the Court expressly recognized – and did not disapprove – the established process: "[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." *Iowa Utils. Bd.*, 525 U.S. at 388.

12. To be sure, the states are also free to act pursuant to the FCC's regulations that delegate authority to the states to act pursuant to federal law and impose additional network element unbundling obligations applying the "necessary" and "impair" standards. *See* 47 C.F.R. § 51.317(d). Clearly, however, such a process does not bind the state when acting pursuant to state law.[1] Nor does it require a state to reach the same *results* as the FCC, but merely to apply the same *standards*. A state applying that standard to a record focused on state-specific evidence could certainly reach a different conclusion than the FCC did in examining a national record without "violating" either Section 251(d)(2) or any FCC regulation.[2]

---

[1] As explained above, the plain terms of Section 251(d)(2) establish that the "necessary" and "impair" standards apply only to the FCC. Section 251(d)(3) preserves state authority to adopt additional unbundled elements and expressly holds the States to a different, less stringent standard (which is set forth in subsections (B) and (C)). Therefore, Rule 317(d) could not be read as a limitation on all state authority to adopt unbundling requirements without violating the express terms of Section 251(d)(3). Indeed, such a reading would be absurd because it would have the effect of aggressively preempting numerous state telecommunications laws, passed by the legislatures of the several states. Rather, the purpose and effect of Rule 317(d) is to provide state commissions the option of proceeding under federal law in the absence of a state statute. In essence, the FCC will recognize the validity of additional unbundled elements in a particular state – as a matter of federal law – if the state commission finds that the federal "necessary" and "impair" test has been satisfied in its jurisdiction.

[2] Indeed, in recent years a number of states have passed legislation that provides their state commissions with broad authority to adopt additional UNEs, and those commissions have ordered outcomes that differ in some ways from those reached by the FCC. For example, Texas has adopted legislation that permits the Texas PUC to adopt additional unbundling requirements, and specifies that "[b]efore ordering further unbundling, the commission must consider the public interest and competitive merits of further unbundling." Texas Public Utility Regulatory Act, Chapter 60, Subchapter B, § 60.021. Pursuant to this authority, the Texas PUC recently ordered that the switching element be made available without limitation. See Arbitration Award,

13. Verizon also erroneously claims that Section 251(d)(3) supports its position. This claim does not withstand scrutiny. Section 251(d)(3)(B) makes clear that states may adopt additional "access and interconnection obligations" as long as they are "consistent with the *requirements* of this section" – *i.e.*, the explicit duties and obligations that the section imposes upon incumbents. Where Section 251 does not impose a "requirement" (*i.e.*, does not mandate action), states may adopt additional requirements (*i.e.*, mandate additional actions). As long as an incumbent can comply with both federal and state requirements, Section 251(d)(3)(B) does not authorize the FCC to pre-empt the state policy. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977) ("Since it would be possible to comply with the state law without triggering federal enforcement action we conclude that the state requirement is not inconsistent with federal law").

14. Verizon thus incorrectly states that if the FCC "has made a non-impairment finding with respect to a particular network element (or has found impairment but has declined to mandate unbundling under the Act due to other considerations), then any state action to mandate access to that UNE would likewise be inconsistent with Section 251." Motion at 6-7. First, the "impair" standard of Section 251(d)(2) does not apply to states operating under state law. Second, the mere fact that the FCC has examined nationwide evidence and has concluded that there is no impairment for purposes of establishing the *national* list does not mean that the Commission could not examine state-specific evidence and conclude that, within this state,

---

Petition of MCIMetro Access Transmission Services, et al., For Arbitration With Southwestern Bell Telephone Company Under the Telecommunications Act of 1996, PUC Docket No. 24542 (Tex. PUC, issued April 29, 2002) ("*Texas PUC Order*"). Similarly, the Illinois Commerce Commission recently ordered Ameritech, pursuant to its authority under both federal and state law, to provide combinations of unbundled network elements, including both UNE-P and EELs, in order to promote competition in Illinois residential and small business markets.

CLECs are in fact impaired. Third, when the FCC decides *not* to unbundle a network element, it does not create any "requirement" at all under the Act – to the contrary, it *declines* to create a requirement – and therefore there can be no resulting "inconsistency" between the state law and any federal law "requirement."

15. Subsection (C) similarly offers no basis for preemption. That subsection pre-empts State requirements only if they would "substantially prevent implementation of [Section 251] and the purposes of this part." The purpose of this part [*i.e.*, Sections 251-61] is to promote local competition. *See, e.g., Iowa Utils. Bd.*, 525 U.S. at 371 (the 1996 Act creates duties that are "intended to facilitate market entry," and "foremost among these duties is the LEC's obligation under 47 U.S.C. § 251(c) . . . to share its network with competitors"). Moreover, the Supreme Court has recognized that "elimin[ation of] the [ILECs'] monopolies" is "an end in itself" of the Act, and that the Act is "designed to give aspiring competitors every possible incentive to enter local telephone markets, short of confiscating the incumbents' property." *Verizon Communications, Inc. v. FCC*, 535 U.S. ___, 122 S. Ct. 1646, 1654 & 1661, 152 L. Ed. 2d 701, 716 & 724 (2002). Congress, in enacting Section 251(d)(3), has expressly permitted states to pursue regulatory philosophies and approaches that differ from the FCC's, as long as they "share a common goal" to promote competition generally and do not directly conflict with or prevent implementation of the requirements of section 251. *California Federal*, 479 U.S. at 288. To equate each of the Commission's specific regulations with the general "purposes of this part" would also read Section 251(d)(3) out of the Act and leave no room for the role that Congress expressly gave the states.

16. Indeed, Verizon's theory appears to presume that any federal law that imposes limits on the scope of a federal regulatory obligation necessarily preempts state laws that go

beyond those limits as in that sense "inconsistent" with federal law. But Congress frequently enacts schemes that contain federal "limits" that states may exceed under state law.[3] That is why, when Congress instead determines that a federal regulatory standard is to be not only a "floor" but also a "ceiling," it generally says so expressly.[4]

17. The DC Circuit's recent decision in *USTA v. FCC* thus is irrelevant to the Commission's determination of the ILECs' unbundling obligations in Washington under state law. That court vacated and remanded the FCC's articulation of the Act's "impairment" standard for unbundling, but as discussed above, that standard applies only to the FCC, not to

---

[3] *See, e.g., Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) (locality's more stringent blood plasma regulations not pre-empted by less stringent federal law); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963) (state's more stringent agricultural regulations not pre-empted by less stringent federal regulations); *Atherton v. FDIC*, 519 U.S. 213 (1997) (federal law imposing gross negligence standard of care on savings and loan officers did not pre-empt state law imposing a stricter standard of simple negligence); *Watson v. Buck*, 313 U.S. 387, 403 (1941) (state antitrust laws that prohibit conduct that the federal antitrust laws permit not pre-empted); *see also New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 415 (1973) ("[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem").

[4] *See, e.g.*, 49 U.S.C. § 30103(b) (National Traffic and Motor Vehicle Safety Act)(providing that whenever a federal motor vehicle safety standard is in effect, no State may establish a standard that is not identical to the federal one); 49 U.S.C. § 20106 (West 1995) (Federal Railway Safety Act) (permitting a State to adopt a railroad safety rule more stringent than that adopted by the Secretary of Transportation only in specified circumstances); 15 U.S.C. § 1334 (Public Health Cigarette Smoking Act) ("No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter"); 7 U.S.C. 136v(b) (Supp. 1995) (Federal Insecticide, Fungicide, and Rodenticide Act) (State "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter"); 46 U.S.C. § 4306 (Federal Boat Safety Act) ("Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title").

individual state determinations. Indeed, the DC Circuit's opinion actually *supports* individual state determinations, having found the FCC's national analysis too generic. The FCC, moreover, has petitioned the court for rehearing of its decision, and has been urged by many parties to appeal to the Supreme Court in the event that rehearing is denied. With federal law in a continued state of flux more than six years after passage of the Act, the Commission's role in bringing the consumer benefits of effective local exchange competition in Washington is all the more critical. Accordingly, the Commission should refuse to reconsider its conclusion that it has the authority and the independent obligation to consider and potentially require unbundling in Washington above and beyond the unbundling that the FCC has required on a national basis.

B. Loop Conditioning

18. The Commission rejected Verizon's cost estimates for loop conditioning, specifically Verizon's inflated engineering work times. Order ¶ 59. Verizon characterizes the Commission's decision as "solely because Verizon NW did not explain how its engineering activities to remove load coils and bridged taps from its network differ from those on Qwest's network." Motion at 7. The Commission's decision was not so limited. Rather, the Commission concluded that Verizon failed to demonstrate that its engineering cost estimates were reasonable. Having reviewed Qwest's cost estimates for undertaking exactly the same activity, the Commission properly compared those estimates to Verizon's estimates to gauge the reasonableness of Verizon's proposals. The Commission undertook exactly the same comparison in the context of collocation in Part A of this docket and required Qwest to reduce its cost estimates for various elements because Verizon's estimates for the same activities were significantly lower.

19. Such comparisons do not alter the ILECs' burden of proof, as Verizon claims (Motion at 8). Verizon is not entitled to recover its embedded, or necessarily its actual, costs but

only those costs that an efficient provider would incur on a forward-looking basis. Verizon produced no evidence to demonstrate that the costs it allegedly actually incurs are such costs. Nor did Verizon even attempt to explain why its estimated costs are so much higher than Qwest's costs when the functions each company is performing are exactly the same. To the contrary, Verizon's own witness conceded that the engineering work activities are the same for both companies and could not explain why Verizon's estimates of the costs of those activities are so much higher than Qwest's cost estimates. Tr. at 2578-84 (Verizon Richter Cross). Verizon thus failed to prove that its estimates reflect the costs that a reasonably efficient provider would incur on a forward-looking basis, and the Commission properly required Verizon to use Qwest's cost estimates for the same activities.

C. Non-Recurring Cost Studies

20. The Commission required both Verizon and Qwest to "file updated nonrecurring cost studies supported by time and motion studies." Order ¶ 51. Verizon objects to the requirement to undertake time and motion studies, preferring to provide evidence of "actual data collected through Verizon NW's experience in receiving and processing UNE and resale orders." Motion at 8. Neither time and motion studies nor Verizon's "actual data" address the issue of whether Verizon's estimates represent the costs that a reasonably efficient provider would incur on a forward-looking basis. Time and motion studies conducted by an independent third party, however, at least have the benefit of being based on a neutral observation of Verizon's work activities, as opposed to self-reporting by employees that have every incentive to overestimate the time required to perform any particular task. Particularly if, as the Order appears to indicate, the Commission will no longer credit expert witness testimony on the reasonableness of ILEC

cost estimates, the Commission should not permit the ILECs to rely on second- or third-hand opinion of their own employees to support their cost estimates.

21. Verizon also asks the Commission to reconsider its requirement to use the work times from the Arthur Anderson time and motion studies, Order ¶ 277, because those times reflect only access service request ("ASR") order processing, not local service request ("LSR") processing. Again, Verizon misses the point. The fact that Verizon has established separate service centers and processes for ASRs and LSRs does not justify different cost estimates for the same functionality. Indeed, Verizon would be unlawfully discriminating against CLECs ordering services using an LSR if Verizon processes ASRs for interexchange carriers ("IXCs") and other CLECs more efficiently. The Commission, therefore, properly required Verizon to use the same time and motion study for processing both types of orders.

22. Finally, Verizon takes issue with the Commission's requirement to establish the same non-recurring charge for converting special access services to enhanced extended links ("EELs") and unbundled loops, Order ¶ 324, claiming that the FCC has authorized Verizon not to permit conversions of special access circuits to unbundled loops. Motion at 10. The FCC order on which Verizon relies is not even arguably subject to Verizon's interpretation. Nowhere in its Supplemental Order Clarification does the FCC affirm any "general prohibition on converting special access services to UNEs," *id.*, because the FCC has never adopted such a general prohibition. The FCC has only restricted conversion of special access circuits to *combinations* of UNEs, specifically EELs.[5] The FCC has never authorized ILECs to refuse to convert special access circuits to unbundled loops. Indeed, such a blanket prohibition would be nonsensical when the FCC *requires* ILECs to convert special access circuits to EELs when that

combination of loop and transport carries a "significant amount of local exchange service." The Commission, therefore, properly required Verizon to establish a nonrecurring charge for *all* conversions of special access circuits to unbundled loops, whether in combination or individually.

D. Recurring Cost Studies/Common Cost Factor

23. The Commission made some effort to require that the cost studies Verizon submitted in this proceeding are consistent with Commission determinations in prior Commission proceedings. Verizon seeks reconsideration of these requirements, contending that "each change to ICM ordered by the Commission decreases the likelihood that the model will be consistent with the statewide average cost adopted in UT-960369." Motion at 11. Verizon's contentions only underscore the need for reevaluation of that statewide average cost.

24. This docket was not established to relitigate the costs established in the initial generic cost proceeding. Verizon presented a new cost model to estimate the costs of the UNEs at issue in this proceeding and bore the burden and the risk to demonstrate that the model was consistent with prior Commission findings and conclusions. Verizon failed to carry that burden, and the Commission properly found that Verizon's cost model fails to incorporate the inputs and assumptions that the Commission established in Docket No. UT-960369. Verizon's motion for reconsideration represents nothing less than a request that the Commission abandon its prior decisions and adopt all of the inputs and assumptions that Verizon proposed in this proceeding. Such arguments may be appropriate to pose in the new cost proceeding, Docket No. UT-023003, but those arguments are wholly inappropriate in this proceeding.

[5] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, Supp. Order Clarification (June 2, 2000).

25. Even if the Commission were to consider establishing entirely different costs in this proceeding for common network facilities for which the Commission previously has established costs, Verizon has failed to justify its proposals. Verizon repeatedly contends that the Commission's determinations do not reflect Verizon's "actual network," but Verizon's arguments are with the total element long-run incremental cost ("TELRIC") methodology itself, not the Commission's implementation of that methodology.[6] Verizon has already lost that argument at the Supreme Court and is not entitled to relitigate it before this Commission.

26. The Commission has required that Verizon's cost model incorporate the inputs, assumptions, and cost estimates that the Commission previously adopted in the prior cost docket. If Verizon cannot adjust its model to do so, the Commission should reject that model for purposes of this proceeding and should establish interim rates for Verizon's high capacity loops equal to the rates that Qwest has included in its compliance filing for comparable UNEs. Verizon should then be permitted to submit its cost model, with the inputs and assumptions (including common cost factor) that Verizon believes are appropriate, in the new cost proceeding.

E. Reciprocal Compensation

27. Verizon takes issue with the Commission's decision that a CLEC is entitled to the tandem reciprocal compensation rate when its switch is functionally equivalent to the ILEC tandem as well as when the CLEC switch serves a geographic area comparable to the area served

[6] Paradoxically, Verizon recognizes that "the TELRIC methodology leads to a modeled network that does not match Verizon's actual network" in support of Verizon's argument that "modeled loop lengths should not be expected to equal actual loop lengths" and that, accordingly, Verizon should not be required to modify its cost model to reflect its actual loop lengths. Motion at 13. Verizon thus seeks to have the Commission permit Verizon to rely on its "actual network" only when Verizon chooses to do so.

by an ILEC tandem. Again, Verizon's position relies on its mischaracterization of applicable legal authority. Neither the FCC nor the Ninth Circuit *precludes* the CLEC from receiving the tandem rate when the CLEC's switch does not serve a geographic area comparable to the area served by an ILEC tandem. Both the FCC rule and the Ninth Circuit opinion only state that where the CLEC' switch *does* serve such an area, the tandem rate applies.[7] Such a determination does not include or imply the proposition that under any other scenario, the CLEC is entitled only to the end office rate. The Commission, therefore, properly concluded that a CLEC is entitled to the tandem rate both when its switch serves a geographic area comparable to an ILEC tandem and when the CLEC switch is functionally equivalent to an ILEC tandem.

III. CONCLUSION

28. Neither the record evidence nor applicable law support Qwest's and Verizon's requests for reconsideration of the Order. The Commission, therefore, should deny both the Qwest Petition and Verizon Motion.

RESPECTFULLY SUBMITTED this 18th day of July, 2002.

DAVIS WRIGHT TREMAINE LLP
Attorneys for AT&T Communications of the Pacific Northwest, Inc., and XO Washington, Inc.

By _____
Gregory J. Kopta
WSBA No. 20519

[7] 47 C.F.R. § 51.711(a)(3); *U S WEST Communications v. WUTC*, 255 F.3d 990, 996-97 (9th Cir. 2001).