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June 2, 2004

VIA FACSIMILE AND FEDERAL EXPRESS

Ms. Carole Washburn, Executive Secretary
Washington Utilities & Transportation Committee
1300 Evergreen Park Drive, SW
Olympia, WA 98504

Re: Docket No. UT-043013 –

Dear Ms. Washburn:

Enclosed please find for filing Verizon's Response to Joint CLEC Motion, and the accompanying Declaration of David Valdez. Please note that these documents are confidential pursuant to WAC 480-07-160. This is because these documents contain valuable commercial information, including trade secrets or confidential marketing, costs or financial information, or customer-specific usage and network configuration and design information. The non-redacted versions of these documents are included in the hard copy of this letter.

If you have any questions or concerns, please do not hesitate to call.

Sincerely,

Timothy J. O'Connell

Enclosures

cc: Hon. Ann Rendahl
Parties of Record

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment for Interconnection Agreements of VERIZON NORTHWEST INC. with COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN WASHINGTON Pursuant to 47 U.S.C. Section 252(b), And the *Triennial Review Order*	Docket No. UT-043013 VERIZON'S RESPONSE TO JOINT CLEC MOTION **REDACTED VERSION**

1 Verizon Northwest Inc. ("Verizon") hereby responds to the motion filed on May 20, 2004, by Eschelon Telecom of Washington, Inc. ("Eschelon"), Integra Telecom of Washington, Inc. ("Integra"), Pac-West Telecomm, Inc. ("Pac-West"), Time Warner Telecom of Washington, LLC ("Time Warner"), and XO Washington, Inc. ("XO"), collectively the "Joint CLECs." The Joint CLECs seek an order unlawfully abrogating existing interconnection agreements by requiring Verizon to provide access to UNEs at TELRIC rates, even where *not* required under the terms of those agreements, pending resolution by the Federal Communications Commission ("FCC") or this Commission of certain legal issues that will arise following the issuance of the D.C. Circuit's mandate in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

2 As an initial matter, the Joint CLECs' claim that they and their current customers will suffer a "devastating impact" without issuance of such an order is plainly false. Joint CLEC Mot. ¶ 4. In fact, despite their unsupported assertions, each of the Joint CLECs currently obtains from Verizon *no* or *virtually no* UNE-P arrangements, high-capacity

UNE loops and transport, or UNE dark fiber. *See* Declaration of David Valdez (Attach. 1). The immediate elimination of these UNEs, therefore, could impose no material harm to these CLECs or their existing customers. But Verizon has made clear that it will continue to provide existing services to CLECs either on a resale basis under § 251(c)(4) or pursuant to commercial agreements. And, moreover, Verizon will provide these CLECs with 90 days' notice, from the issuance of the D.C. Circuit's mandate, before transitioning the Joint CLECs' *de minimis* base of existing customers and will continue accepting orders for new service during those 90 days. Thus, Verizon will not cause any disruption to local service to CLECs' end users when the mandate is issued.

3 In addition, although the Joint CLECs style their motion as one to preserve the "status quo," what the CLECs actually seek is to *change* the status quo — and, therefore, seek relief *beyond that* provided by Order No. 4 in this proceeding — by asking this Commission to relieve them from the terms of interconnection agreements that they signed and this Commission approved. Verizon is committed to maintaining the *true* status quo — adhering to federal law and existing, applicable rights and obligations under interconnection agreements, which include Verizon's right to cease providing unbundled access to the network elements affected by the D.C. Circuit's decision vacating certain of the UNE rules promulgated in the *Triennial Review Order*[1] and to transition CLECs to alternatives to those UNEs. This Commission has no authority to issue any order preventing Verizon from complying with the terms of its agreements or purporting to impose unbundling requirements in the absence of a valid finding of impairment by the FCC that is consistent with federal law. The Joint CLECs' motion should be denied.

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*").

ARGUMENT

4 In the *Triennial Review Order*, the FCC promulgated new unbundling regulations to replace the regulations that the D.C. Circuit vacated in *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"). *See Triennial Review Order* ¶ 705 (finding that, as a result of *USTA I*, the prior rules "no longer exist"). Most, if not all, of Verizon's interconnection agreements in Washington expressly permit Verizon, either immediately or after a specified notice period, to discontinue UNEs that it is no longer legally required to provide. Nonetheless, on February 26, 2004, Verizon filed a petition initiating this consolidated arbitration proceeding to amend all of its existing agreements so that they would contain uniform language expressly reflecting rules established in the *Triennial Review Order*, including those rules that impose new obligations on Verizon. That amendment was also intended to clarify the consequences of any subsequent legal developments during the course of federal court review of the FCC's decision.

5 On March 2, 2004, the D.C. Circuit issued its decision in *USTA II*. The D.C. Circuit affirmed the FCC's decision in substantial part and rejected virtually every challenge the CLECs raised. The D.C. Circuit also vacated certain of the FCC's determinations: specifically, its rules requiring incumbents to unbundle, under 47 U.S.C. § 251(c)(3), mass market circuit switching, high-capacity loops and transport, and dark fiber. *See USTA II*, 359 F.3d at 568, 594.[2] The D.C. Circuit stayed the vacatur of those rules for 60

[2] The Joint CLECs assert that the D.C. Circuit left intact the FCC's rules requiring unbundling of high-capacity loops. *See* Joint CLEC Mot. at 2 n.3. But the D.C. Circuit made clear that it was vacating *all* of the FCC's attempts to delegate impairment determinations to the states, *see USTA II*, 359 F.3d at 568, and the FCC made such a delegation in the context of both high-capacity loops and transport, *see Triennial Review Order* ¶¶ 328, 394. Moreover, the D.C. Circuit made clear that it was using the term "transport" to refer to "transmission facilities dedicated to a single customer" — that is, what the FCC defines as "loops" — as well as to facilities dedicated to a "carrier." *USTA II*, 359 F.3d at 573; 47 C.F.R. § 51.319(a) (defining "loop"). The D.C. Circuit's treatment of high-capacity loops and transport was consistent with the manner in which the ILECs briefed the issue, by addressing both simultaneously. And the two substantive flaws the D.C. Circuit identified with respect to the FCC's analysis of high-capacity facilities — considering impairment on a route-specific basis and the failure to consider the availability of special access, *see USTA II*, 359 F.3d at 575, 577 — apply equally to the FCC's determinations as to both loops and transport, *see Triennial Review Order* ¶¶ 102, 332, 341, 401, 407.

days and later extended that stay for another 45 days, so that its mandate is now scheduled to issue on June 15, 2004. *See USTA II*, 359 F.3d at 595; Order, *USTA II*, Nos. 00-1012 *et al.* (D.C. Cir. Apr. 13, 2004). On March 19, 2004, Verizon submitted an updated TRO Amendment, revised to account for the possibility that the D.C. Circuit's mandate would take effect, as well as other potential developments resulting from further judicial review of the *Triennial Review Order*.[3]

6 On May 7, 2004, Verizon requested a temporary abeyance of this proceeding, which the Hearing Examiner granted on May 21, 2004. *See* Order No. 4, Docket No. UT-043013 (Wash. UTC May 21, 2004). The Hearing Examiner made clear that, pending the amendment of existing agreements, Verizon must "continu[e] to offer UNEs consistent with [the terms of] those agreements." Order No. 4, ¶ 18.

7 The Joint CLECs, however, seek to require Verizon to continue offering certain network elements — mass market circuit switching, high capacity loops and transport, and dark fiber — as UNEs *notwithstanding* the terms of their existing agreements. That is, they seek a *change* to the status quo and relief in addition to that provided in Order No. 4. Specifically, they request a ruling that Verizon must continue providing these elements as UNEs "until final federal unbundling rules are in place or until the Commission can undertake a generic proceeding to determine the impact of the D.C. Circuit's decision." Joint CLEC Mot. at 8.

[3] For this reason, the Joint CLECs' statement that Verizon might "seek[] to require CLECs to amend their existing interconnection agreements" to reflect the consequences of *USTA II* is puzzling. Joint CLEC Mot. ¶ 6. That is precisely what Verizon's updated TRO Amendment is designed to do. It is also what the FCC held that the CLECs must engage in good faith negotiations to accomplish. *See Triennial Review Order* ¶ 706. Of course, as discussed herein, most, if not all, of Verizon's interconnection agreements in Washington expressly permit Verizon to discontinue UNEs that it is no longer legally required to provide, either immediately or after a specified notice period. Verizon does not waive such rights under existing agreements.

8 That request must be rejected. *First*, the Joint CLECs seek rights that are contrary to the terms of their interconnection agreements. Having voluntarily signed agreements, which this Commission approved, that expressly entitle Verizon to cease providing access to UNEs in the event of a decision vacating a federal unbundling rule, these CLECs have no legitimate grounds for complaint. *Second*, this Commission has no authority — under federal or state law — to modify the terms of these "binding" agreements that it has already approved. Nor can the Commission purport to do so under the guise of "interpreting" those agreements. Indeed, the Ninth Circuit has made clear that a state commission violates federal law when it engages in the type of generic "interpretation" of interconnection agreements that the Joint CLECs request. *Third*, the Commission has no authority — again, under federal or state law — to require unbundling in the absence of a valid finding of impairment by the FCC that is consistent with federal law. The D.C. Circuit held that a finding of impairment *by the FCC* is a necessary precondition to any requirement that Verizon provide a UNE. Unless and until the FCC makes such a finding, any Commission decision requiring unbundling — let alone re-imposing the statewide unbundling requirements that the D.C. Circuit vacated — would be contrary to federal law and preempted.

Under the Terms of the Agreements, the D.C. Circuit's Vacatur Is Self-Effecting

9 It is telling that the Joint CLECs do not cite the change-of-law provisions of any of their existing agreements.[4] Those provisions expressly permit Verizon, at a minimum, to cease providing, as UNEs, mass market circuit switching, high-capacity loops and

[4] The Joint CLECs, however, make reference to obligations supposedly imposed under Verizon's SGAT. *See* Joint CLEC Mot. ¶ 5. As this Commission is aware, Verizon does not have an effective SGAT in Washington. *See Development of Universal Terms and Conditions for Interconnection and Network Elements to be Provided by Verizon Northwest Inc.*, Docket No. UT-011219.

transport, and dark fiber, either immediately upon the issuance of the D.C. Circuit's mandate or shortly thereafter.[5] Those agreements provide, in pertinent part:

a. XO: "if Verizon provides a UNE or Combination to [XO], and . . . a court . . . determines . . . that Verizon is not required by Applicable Law to provide such UNE or Combination, *Verizon may terminate its provision of such UNE or Combination.*"[6]

b. Integra: "[Verizon] and [Integra] agree that the terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time the Agreement was produced. Any modifications to those requirements will be deemed to *automatically supersede* any terms and conditions of this Agreement. . . . In the event [Verizon] is *permitted . . . to discontinue any Unbundled Network Element* . . . , [Verizon] shall provide [Integra] *30 days advance written notice of such discontinuance.*"[7]

c. Eschelon: "The terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time this Agreement was produced, and shall be subject to any and all . . . judicial decisions . . . that subsequently may be prescribed by any federal . . . authority having appropriate jurisdiction. Except as otherwise expressly provided herein, such subsequently prescribed . . . judicial decisions . . . will be deemed to *automatically supersede* any conflicting terms and conditions of this Agreement."[8]

d. Time Warner and Pac-West: "[T]he terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time the Agreement was produced. Any modifications to those requirements that subsequently may be prescribed by final and effective action of any federal . . .

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[5] Because the FCC's attempts to expand unbundling beyond the reach of the statute have now been struck down by the federal courts three times, there have never been lawful § 251 unbundling rules binding the ILECs and obligating them to provide local mass market switching, high-capacity loops and transport, and dark fiber as UNEs. Accordingly, upon issuance of the mandate, there will not be a "change of law" to eliminate previously lawful rules requiring provision of UNEs, but merely an affirmation that there have never been lawful UNEs rules to change. Verizon does not waive this argument by choosing to follow the administrative processes set forth in its interconnection agreement that apply to actual changes in law.

[6] XO Agreement, Network Elements Attach. § 1.5 (emphasis added).

[7] Integra Agreement §§ 32.1, 32.2 (emphases added).

[8] Eschelon Agreement Art. II, § 1.2 (emphasis added).

> governmental authority will be deemed to *automatically supersede* any terms and conditions of this Agreement."[9]

10 Although the Joint CLECs complain (¶ 6) that Verizon might "act unilaterally" once the D.C. Circuit's mandate is issued, this is simply wrong: Verizon would be acting pursuant to terms to which both parties agreed, in interconnection agreements this Commission approved. For example, XO voluntarily agreed to be bound by a provision stating that Verizon "may terminate" provision of a UNE once "a court . . . determines . . . that Verizon is not required" to provide that UNE. And Integra, Eschelon, Time Warner, and Pac-West all opted in to agreements providing that a decision of a federal court eliminating an FCC-established unbundling obligation would "automatically supercede" contrary provisions of the agreement.[10]

11 Each of the Joint CLECs voluntarily opted in to its existing agreement. Although they may now wish they had exercised their rights under 47 U.S.C. § 252 to negotiate and arbitrate their own agreement, their current dissatisfaction with the agreements they selected provides no basis for relieving them of the consequences of the choices they made.

The Commission Has No Authority To Modify the Terms of Binding Agreements

12 Under federal law, an interconnection agreement, once approved, is "binding." 47 U.S.C. § 252(a). This Commission has no authority to override the terms of any interconnection

[9] Time Warner Agreement § 32 (emphasis added); Pac-West Agreement § 32 (emphasis added).

[10] Once the D.C. Circuit's mandate issues, *USTA II* will be a "final and effective action of any federal . . . governmental authority" for purposes of the Time Warner and Pac-West Agreements. Those agreements cannot be read to require *USTA II* to become final and *non-appealable* before the change-of-law provision is triggered. As the FCC recognized, some "change of law provision[s] provide[] for interconnection agreement modification pursuant to '. . . final and unappealable [judicial] orders.'" *Triennial Review Order* ¶ 705. But that is not what these agreements provide. *Cf. id.* ¶ 705 (rejecting any reading of change-of-law provisions "as being triggered only after all appeals of this Order become final and unappealable"). And a court of appeals decision is "final and effective" upon the issuance of the mandate, regardless of the possibility of further judicial review by the Supreme Court. *See In re Chambers Development Co., Inc.*, 148 F.3d 214, 224 (3d Cir. 1998) ("The mandate of an appellate court establishes the law binding further action in the litigation by another body subject to its authority.").

agreement by requiring Verizon to continue to provide access to UNEs in circumstances where the parties' interconnection agreements authorize Verizon to stop providing such access.

13 Moreover, a state commission decision purporting to interpret such an agreement that "effectively changes [its] terms" "contravenes the Act's mandate that interconnection agreements have the binding force of law." *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003). Thus, this Commission cannot, despite the Joint CLECs' request (Mot. ¶ 5), resolve "generic[ally]" whether "existing [agreement] provisions requiring Verizon to provide UNEs" will remain effective after the issuance of the D.C. Circuit's mandate. Indeed, the Ninth Circuit has directly rejected that proposition, holding that a state commission that "promulgat[es] a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements," "act[s] contrary to the [1996] Act's requirement that interconnection agreements are binding on the parties." *Pacific Bell*, 325 F.3d at 1125-26. As that court explained, "[t]o suggest that [a state commission] could interpret an agreement without reference to the agreement at issue is inconsistent with [its] weighty responsibilities of contract interpretation under § 252." *Id.* at 1128.

14 Nor could the Commission rely on a four-year old condition in the *Bell Atlantic/GTE Merger Order*[11] to find that Verizon must continue to provide access to UNEs under FCC regulations that were vacated more than fourteen months ago notwithstanding the change-of-law provisions of its interconnection agreements. *See* Joint CLEC Mot. ¶ 5. As an initial matter, although the Joint CLECs' argument about this merger condition is incorrect, the Commission need not rule on that claim here. The merger conditions

[11] Memorandum Opinion and Order, *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent To Transfer Control*, 15 FCC Rcd 14032 (2000) ("*Bell Atlantic/GTE Merger Order*").

reflect "commitments of Bell Atlantic and GTE" and are "express conditions of [*the FCC's*] approval of the" merger. *Bell Atlantic/GTE Merger Order* ¶ 250 (emphasis added). Not only was this Commission not a party to those conditions, but also enforcement of the merger conditions is *the FCC's* responsibility, not this Commission's. The FCC made this clear, explaining that, "[i]f Bell Atlantic/GTE does not . . . perform each of the conditions, . . . *we must take action* to ensure that the merger remains beneficial to the public." *Id.* ¶ 256 (emphasis added). Other state commissions have likewise recognized that interpretation and enforcement of the merger conditions is a matter for the FCC. *See, e.g.*, Examiner's Report, *Verizon Maine Petition for Consolidated Arbitration*, Docket No. 2004-135, at 10-11 (Me. PUC filed May 6, 2004).

15 Nonetheless, if the Commission addresses this issue, it should reject the CLECs' interpretation of the merger condition, as did a Hearing Examiner in Rhode Island (indeed, no state commission has accepted it). *See* Procedural Arbitration Decision, *Petition of Verizon Rhode Island*, Docket No. 3588, at 14-15 (R.I. PUC Apr. 9, 2004); *see also* Verizon Response to Motions to Dismiss, Docket No. UT-043013, at 12-17 (Wash. UTC filed Apr. 27, 2004). Under its plain terms, Verizon's obligation to provide access to UNEs pursuant to the rules promulgated in the *UNE Remand Order*[12] and *Line Sharing Order*[13] ended as of "the date of a final, non-appealable judicial decision providing that th[ose] UNE[s] . . . [are] not required to be provided." *Bell Atlantic/GTE Merger Order* App. D, ¶ 39. The D.C. Circuit's decision in *USTA I*, which took effect in February 2003 and became final and non-appealable on March 24, 2003, was just such a decision: as the

[12] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *vacated and remanded, United States Telecomm. Ass'n v. FCC*, 290 F. 3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

[13] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, ¶¶ 158-160 (1999) ("*Line Sharing Order*"), *vacated and remanded, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

FCC itself found, when *USTA I* became "final and no longer subject to further review . . . the legal obligation [to provide UNEs] upon which the existing interconnection agreements are based *will no longer exist*." *Triennial Review Order* ¶ 705 (emphasis added). In 2000, the Chief of the FCC's Common Carrier Bureau reached precisely the same interpretation of this very merger condition in analogous circumstances, finding that a final and non-appealable court of appeals decision vacating and remanding the FCC's TELRIC rules would eliminate Verizon's obligation under that condition to offer UNEs at TELRIC prices. *See* Letter to Verizon from Dorothy T. Attwood, Chief, Common Carrier Bureau, FCC, 15 FCC Rcd 18327 (2000).

The Commission Has No Authority To Re-Impose the Vacated Unbundling Obligations

16 The Joint CLECs assert that the Commission can require Verizon, pursuant to state law, to continue to provide mass market circuit switching, high-capacity loops and transport, and dark fiber as UNEs after issuance of the D.C. Circuit's mandate. *See* Joint CLEC Mot. ¶¶ 5, 8-9 (citing RCW 80.36.140). Any such authority, however, has been preempted by federal law and, in particular, by the D.C. Circuit's decision in *USTA II*.

17 As an initial matter, courts of appeals have repeatedly found that the 1996 Act preempts state commission attempts to impose unbundling obligations outside of the § 252 process that Congress established. *See, e.g.*, *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003); *Pac West*, 325 F.3d at 1126-27; *Verizon North Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002). In the face of existing, binding agreements that affirmatively eliminate certain unbundling obligations once the *USTA II* mandate issues, the Commission could not re-impose those unbundling requirements consistent with the § 252 process. And the Joint CLECs, in any event, provide no indication they are willing to follow that process — instead, they seek an immediate order requiring unbundling *before* either the FCC or the Commission has issued an order finding that unbundling is required consistent with binding judicial interpretations of the 1996 Act.

18 Such an order would violate not only the procedural requirements of the 1996 Act, but also its substantive standards. As both the Supreme Court and the D.C. Circuit made clear in vacating the FCC's first two attempts to issue UNE rules, Congress did not require "blanket access to incumbents' networks" or determine that "more unbundling is better." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999); *USTA I*, 290 F.3d at 429. Instead, those cases make clear that "'impairment' [is] the touchstone" to any requirement of unbundling. *USTA I*, 290 F.3d at 429. Therefore, under federal law, there must be a valid finding of impairment under § 251(d)(2) *before* an incumbent may be ordered to provide access to a network element as a UNE, at TELRIC rates. And in *USTA II*, the D.C. Circuit held that this impairment determination must be made *by the FCC* and that the authority cannot be exercised by state commissions. *See* 345 F.3d at 565-68. Accordingly, in the absence of a lawful FCC finding of impairment, any state commission order requiring unbundling would be fundamentally *inconsistent* with federal law by requiring unbundling where the 1996 Act, by its terms, does not.

19 Nor could any unbundling requirement be based on the self-serving and unsupported assertion that the lack of the UNEs at issue "would have a devastating impact." Joint CLEC Mot. ¶ 4. The Joint CLECs offer no support for this Chicken Little claim. And the Joint CLECs' claim that they "currently obtain" from Verizon "local switching, dark fiber, transport or high capacity loops as UNEs . . . and use those UNEs to provide service to end user customers" is a blatant falsehood. *Id.* In fact, as of April 2004, the Joint CLECs currently obtain *** **[REDACTED]** *** UNE-P arrangements, *** **[REDACTED]** *** high-capacity UNE transport, and *** **[REDACTED]** *** UNE dark fiber from Verizon, and, therefore, provide service to *** **[REDACTED]** *** end-user customers using such UNEs. *See* Valdez Decl. ¶ 3. Two of the Joint CLECs — *** **[REDACTED]** *** — currently obtain *** **[REDACTED]** *** high-capacity UNE loops from Verizon. *See id.* The other three Joint CLECs, *combined*, currently have only

*** **[REDACTED]** *** high-capacity UNE loops that they obtained from Verizon, all of which are at the *** **[REDACTED]** *** level. *See id.*

20 In short, the Joint CLECs have no or virtually no customers using the UNEs affected by the issuance of the D.C. Circuit's mandate; any such customers could easily be transitioned to alternative, lawful arrangements such as special access; and any conceivable impact on their business would be *de minimis*. Indeed, virtually all of Verizon's carrier customers already purchase some special access services from Verizon, and then use those services, either alone or in combination with their own facilities, to compete successfully with Verizon to serve end-user customers. Verizon's wholesale customers typically purchase these services under volume and term discount plans, either directly from Verizon's tariffs or under contract arrangements that Verizon is permitted to enter into in areas where the FCC has determined that the special access business is sufficiently competitive to grant us pricing flexibility for these services. The typical discount that Verizon's wholesale customers receive under these plans is in the range of approximately 35 to 40 percent off the basic monthly rates for these services.

21 In any event, Verizon has no intention of disconnecting any CLEC's services upon issuance of the D.C. Circuit's mandate, unless, of course, the CLEC chooses that option.[14] At that time, all CLECs in Washington can continue providing service to end-user customers on a resale basis under § 251(c)(4) or pursuant to commercial agreements. As a framework for commercial negotiations, Verizon has announced its Wholesale Advantage, which provides end-to-end service like that available today under UNE-P arrangements — plus additional services, including voice mail and DSL — at a

[14] Of course, Verizon retains its existing rights to discontinue service to CLECs that fail to pay undisputed charges for the services they use or that otherwise materially violate the terms of their interconnection agreements.

commercially reasonable price. Wholesale Advantage will remain available after the unbundling requirements are vacated.

22 Verizon will, moreover, give CLECs ample notice — after issuance of the mandate — of the transition to service at resale rates, in the event a CLEC does not opt for a commercially negotiated arrangement. In fact, Verizon will give more notice than its interconnection agreements require. Specifically, Verizon will give CLECs 90 days' notice, from the issuance of the D.C. Circuit's mandate, of the transition mechanism and will continue accepting orders for the affected services during those 90 days. The service alternatives Verizon is making available, along with the generous customer notice periods, will ensure uninterrupted service to CLECs and their customers. If customer disruptions and marketplace confusion occur, the CLECs, not Verizon, will be the cause.

23 Finally, notwithstanding the preemptive force of federal law, there is no basis to the Joint CLECs' assertion that state law permits the imposition of the unbundling requirements that they seek here. *See* Joint CLEC Mot. ¶¶ 7-9. The Joint CLECs claim that this state law authority derives from RCW 80.36.140.[15] *See* Joint CLEC Mot. ¶ 8. But that provision expressly requires that the Commission first conduct a "hearing" as to the allegedly unjust or unreasonable practices at issue. The Commission did just that in the Interconnection Order, on which the Joint CLECs also rely, ruling only after an extensive hearing with hundreds of pages of testimony. As a matter of *Washington* law, therefore, the Commission could not impose the obligations sought by the Joint CLECs without first conducting a full hearing. Thus, the Joint CLECs have it backwards when they seek an order requiring unbundling first and a hearing second.

[15] The authority on which the Joint CLECs rely also primarily relied on RCW 80.36.140. *See* Interconnection Order, Fourth Supplemental Order, *WUTC v. U.S. West Communications*, Docket Nos. UT-941454 *et al.*, at 52 (Wash. UTC Oct. 31, 1995) ("Interconnection Order").

24 The Joint CLECs' reliance on state law is misplaced for an additional, independent reason. In the Interconnection Order, the Commission noted that unbundling of network elements other than the local loop might be necessary, but only "where complications with right-of-way and conduit access makes duplicating the incumbent's network not only economically, but technically, impossible." Interconnection Order at 54. Thus, months before the 1996 Act, this Commission anticipated the standard that Congress would ultimately require the FCC to apply in deciding which elements must be unbundled: whether lack of unbundled access to an element would impair competitors' ability to compete. *See* 47 U.S.C. § 251(d)(2)(B). Even if the 1996 Act did not preempt the Commission's authority to make such a determination, as shown above the Joint CLECs have made no showing that a lack of unbundled access would impair their ability to compete, especially given the numerous alternatives available for their use, such as Verizon's Wholesale Advantage, resale, and special access. Nothing in Washington law would have permitted the Commission, in the absence of any evidentiary record demonstrating impairment, to order Verizon to offer unbundled access to any network element.

Respectfully submitted,

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June 2, 2004

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment for Interconnection Agreements of VERIZON NORTHWEST INC. with COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN WASHINGTON Pursuant to 47 U.S.C. Section 252(b), And the *Triennial Review Order*	Docket No. UT-043013 DECLARATION OF DAVID S. VALDEZ

1 My name is David S. Valdez. I am Vice President - Public Policy and External Affairs for Verizon Northwest Inc.

2 I have reviewed Verizon's records to assess the validity of the assertion that Eschelon Telecom of Washington, Inc. ("Eschelon"), Integra Telecom of Washington, Inc. ("Integra"), Pac-West Telecomm, Inc. ("Pac-West"), Time Warner Telecom of Washington, LLC ("Time Warner"), and XO Washington, Inc. ("XO"), collectively the "Joint CLECs," "currently obtain" from Verizon "local switching, dark fiber, transport or high capacity loops as UNEs . . . and use those UNEs to provide service to end user customers" Joint CLEC Mot. ¶ 4.

3 My review revealed that, as of April 2004, *** **REDACTED – CONFIDENTIAL PER WAC 48-0-07-160** ***

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4 This concludes my declaration.

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

Executed on _____, 2004
Executed at _____, Washington.

_____

***

***

***

This concludes my declaration.

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

Executed on 6/2, 2004
Executed at Olympia, Washington.

CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of June, 2004, served the true and correct original, along with the correct number of copies, of ***Verizon's Response to Joint CLEC Motion*** and ***Declaration of David Valdez*** 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	___ Hand Delivered ___ U.S. Mail (1st class, postage prepaid) _X_ Overnight Mail _X_ Facsimile (360) 586-1150 ___ Email (records@wutc.wa.gov)

I hereby certify that I have this 2nd day of June, 2004, served a true and correct redacted copy of the foregoing document upon parties noted below via E-Mail and U.S. Mail:

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

DATED this 2nd day of June, 2004, at Seattle, Washington.

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