[Service Date September 10, 2004]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Development of	)	
Universal Terms and Conditions for	)	DOCKET NO. UT-011219
Interconnection and Network	)	
Elements to be Provided by	)	
	)	ELEVENTH SUPPLEMENTAL
VERIZON NORTHWEST, INC.	)	ORDER
	)	
	)	GRANTING PETITION FOR REVIEW
	)	OF NINTH SUPPLEMENTAL ORDER
. . . .	)	AND TERMINATING PROCEEDING

1 ***Synopsis:*** *The Commission grants Verizon's petition for review of the Ninth Supplemental Order, an interlocutory order denying Verizon's motion to terminate proceeding. The Commission reverses the interlocutory order and grants Verizon's motion to terminate this proceeding.*

2 **Proceeding.** The purpose of this proceeding is to establish a set of universal terms and conditions under which competitive local exchange carriers (CLECs) may enter into interconnection agreements with Verizon Northwest, Inc.

3 **Appearances.** Catherine Kane Ronis and John Flynn, attorneys, Washington, D.C., represent Verizon Northwest Inc. (Verizon). Letty S.D. Friesen, attorney, Denver, Colorado, and Gregory J. Kopta, attorney, Seattle, WA, represent AT&T Communications of the Pacific Northwest, Inc. Gregory J. Kopta represents Integra Telecom of Washington, Inc. (Integra), Time Warner Telecom of Washington, LLC (Time Warner); and XO Washington, Inc. (XO)(Collectively referred to as Joint CLECs). Gregory J. Kopta also represents Fox Communications Corp., (Fox). Dennis D. Ahlers, attorney, Minneapolis, MN, represents Eschelon Telecom, Inc. (Eschelon). Michel Singer-Nelson, attorney, Denver, CO, represents WorldCom, Inc. (WorldCom). Gregory Trautman, Assistant Attorney General, represents Washington Utilities and Transportation Commission Staff (Commission Staff).

4 **Background.** The Commission initiated this proceeding in March 2002.[1] Since that time, the schedule of proceedings has been continued several times to accommodate the parties' negotiations and the Commission's Triennial Review Order[2] proceedings. The evidentiary hearing is now scheduled to take place in May 2005.[3]

5 On June 18, 2004, Verizon brought a motion to terminate the proceeding on the basis that the Commission lacked authority to conduct it and that federal law preempted it. Commission Staff and the Joint CLECs opposed the motion. AT&T disagreed with the premise of the motion, but agreed that the Commission should terminate the proceeding because little progress had been made in negotiating and because the proceeding was duplicative of others before the Commission and therefore unnecessary. MCI, Eschelon and Fox filed no response.

6 On July 6, 2004, the Administrative Law Judge entered the Ninth Supplemental Order, an interlocutory order denying the motion on the grounds that the Commission had the authority to conduct such a proceeding and that the proceeding was not preempted by federal law.

7 On July 16, 2004, Verizon filed a petition for review of the interlocutory order under WAC 480-07-810 which provides for review of such orders. Verizon contends that review and reversal of the interlocutory order will save the

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[1] *In the Matter of the Development of Universal Terms and Conditions for Interconnection and Network Elements to be Provided by Verizon Northwest Inc.,* Docket No. UT-011219, First Supplemental Order (March 1, 2002).

[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98m 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16987, 16984, para. 3 (2003) (*Triennial Review Order).*

[3] *Tenth Supplemental Order*, July 12, 2004.

Commission and the parties "substantial effort and expense associated with arbitrating a 'universal' agreement in contravention of the [Telecommunications] Act [of 1996]." In their responses to the petition, Commission Staff and the Joint CLECs continued their opposition to termination. AT&T, MCI, Eschelon and Fox did not respond.

8 Verizon requested and was granted an opportunity to file a reply that specifically addressed the impact of the July 8, 2004 Federal Communication Commission's Order reinterpreting Section 251(i) ("pick and choose") of the Act.

9 **Interlocutory review.** The ultimate issue before us is whether to reverse the interlocutory order and grant Verizon's motion for termination. In order to decide this, we must first determine whether our review of the interlocutory order is appropriate.

10 WAC 480-07-810(2)(c) provides that the Commission may review an interlocutory order "when it would save the Commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review."

11 No party objected to Commission interlocutory review.

12 If we terminate this proceeding, all parties and the Commission would obviously save considerable time and effort. In addition, "other factors" support review of the interlocutory order. For example, termination would allow the Commission to focus its limited resources on other proceedings pending before it, including other Verizon proceedings, such as the pending Verizon rate case[4] and the Verizon consolidated arbitration proceeding.[5] For these reasons, we find that

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[4] *Docket No. UT-040788.*

[5] *Docket No. UT-043013.*

Verizon's petition meets the standard for review established in WAC 480-07-810(2)(c) and review is granted.

13 We turn now to the question whether we should terminate the proceeding, and if so, on what basis.

14 **Termination.** Verizon contends that the Commission has no federal or state authority to conduct this proceeding and that the proceeding is preempted because it conflicts with federal law. Verizon cites several federal appeals court cases holding that state proceedings that attempt to establish a method for interconnection apart from the negotiation and arbitration system found in Sections 251[6] and 252[7] of the Telecom Act, are subject to federal preemption.

15 Verizon also asserts that the FCC's July 8th "pick and choose" order[8] precludes this proceeding. Verizon contends in that order, the FCC eliminated CLECs' ability to select an individual provision of another interconnection agreement for inclusion in their own agreements, because doing so was discouraging CLECs from true "give and take" negotiations with incumbent local exchange carriers.[9] Verizon argues that, similarly, the instant proceeding has discouraged such negotiations and would be prohibited by the FCC for that reason.

16 The Joint CLECs and Commission Staff disagree with Verizon. They argue that the Commission has ample state and federal authority for conducting this proceeding. They point out that the federal cases cited by Verizon do not originate in the Ninth Circuit and so do not govern Commission action.

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[6] Section 251 generally sets forth the obligations of local exchange carriers with regard to interconnection with other carriers, including the duty to negotiate interconnection agreements.
[7] Section 252 generally sets forth procedures for the negotiation, arbitration and approval of interconnection agreements.
[8] *In re Review of the Section 251 Unbundling Obligations of ILECs*, CC Docket No. 01-338, FCC 04-164, Second Report and Order (rel. July 13, 2004).
[9] *Id at ¶ 1.*

Moreover, they argue that the cases are distinguishable because they preempt tariffing requirements, not template agreements, such as the one that will result from this case.

17 The Joint CLECs and Staff also argue that the FCC's new "pick and choose" order would not affect this proceeding. Staff argues that the order interprets Section 252(i), a provision that has no bearing on the Commission's authority to act under Section 251(d)(3).[10] The Joint CLECs contend that the new order was not intended to apply to universal or template agreements, but rather to already existing and approved interconnection agreements.[11]

18 AT&T, MCI, Eschelon and Fox did not respond to the petition. However, in response to the underlying Verizon motion to terminate, AT&T recommended the motion be granted for reasons other than those advanced by Verizon. AT&T contended that the proceeding had achieved no practical result to date and was duplicative of other proceedings currently before the Commission.[12] AT&T asserted that the Commission could still arbitrate disputes about interconnection agreements brought to them by CLECs, and that the instant proceeding was unnecessary.[13]

19 **Discussion and decision.** The Commission initiated this proceeding on its own motion in March 2002. Since that time, much has occurred in the regulation of the telecommunications industry. The FCC issued its *Triennial Review Order* (*TRO*) in August 2003. The *TRO* revised the standard for impairment;[14]

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[10] Section 251(d)(3) provides that states have the authority to establish access and interconnection obligations consistent with the requirements of Section 251. *See Staff Response to Verizon's Petition for Review of Order Denying Motion to Terminate Proceeding at ¶ 3.*

[11] *Joint CLEC response to Verizon Petition for Review of 9th Supplemental Order at ¶ 11.*

[12] *AT&T's response to Verizon motion to terminate at ¶ 4.*

[13] *Id.*

[14] *TRO ¶ 7.* Section 251(d)(2) requires the FCC to consider whether failure to provide access to local exchange carrier network elements (unbundled network elements or UNEs) impairs the ability of competing carriers to provide services to their customers.

established new rules removing certain unbundled network elements (UNEs) from the list required to be unbundled;[15] and established a procedure whereby the states would engage in more granular determinations whether competitive local exchange carriers (CLECs) were impaired without access to other UNEs.[16]

20 Subsequent to entry of the *TRO*, the Washington D.C. Circuit Court of Appeals entered its order in *USTA II*.[17] In that order the D.C. Circuit vacated significant portions of the *TRO* and affirmed others. Ultimately, the mandate of the Circuit Court issued and the FCC is now required to issue new rules governing unbundling of UNEs. However, some parties to *USTA II* have petitioned the U.S. Supreme Court to review the *USTA II* decision.[18]

21 Pursuant to the court's order in *USTA II*, on July 21, 2004 the FCC issued interim rules[19] that instituted a six-month freeze period during which incumbent local exchange carriers are to continue providing "unbundled access to switching, enterprise market lops and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004."[20] The only exceptions to the freeze are changes due to voluntarily negotiated agreements, intervening FCC orders affecting specific unbundling obligations, or state utility commission orders increasing UNE rates.[21] The interim rules further order that after the six-month freeze expires, if the Commission has not issued final unbundling rules, incumbent carriers must

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[15] *TRO ¶ 7.*
[16] *Id at ¶¶ 179-196.*
[17] *359 F. 3d 554 (D.C. Circuit 2004) (USTA II),* pets. for cert. filed, Nos. 04-12, 04-15, 04-18 (June 30, 2004). See also United States Telecom Ass'n v. FCC, No. 00-102, Order, (D.C. Cir. Apr. 13, 2004) (granting stay of court's mandate through June 15, 2004). The USTA II mandate issued on June 16, 2004.
[18] *Id.*
[19] *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179, adopted July 21, 2004, released August 20, 2004 (Interim Rules).
[20] *Id* at ¶ 1.
[21] *Id.*

continue to provide UNEs at slightly higher rates than were in effect as of June 15, 2004.[22]

22 As these events transpired on the national level, Verizon filed a consolidated arbitration case[23] with this Commission. In the state arbitration proceeding, Verizon expects to arbitrate interconnection agreement provisions reflecting the FCC's TRO holdings for all those interconnecting CLECs whose agreements do not contain automatic change of law provisions.[24] All the CLECs that are parties to the instant proceeding have interconnection agreements that Verizon initially sought to amend in the consolidated arbitration proceeding.[25]

23 In light of these events and the uncertainty they engender regarding the status of unbundling, we find that termination of this proceeding would be the most reasonable and practical course of action at this time.

24 Termination also avoids the potential for duplicative proceedings. When Verizon initiated the consolidated arbitration case, it included the interconnection agreements of all the CLECs that are parties to this proceeding. Since then, Verizon has filed a motion contending that some of the agreements permit modification without arbitration and Commission approval. The Commission required Verizon to file copies of those agreements it believes should be exempted from the arbitration proceeding. The Commission is currently awaiting Verizon's filings after which it will enter an order exempting interconnection agreements if it is appropriate to do so. In any event, in order to

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[22] *Id. See* ¶29 for specific rate increase methodology to be applied to June 15, 2004 rates.
[23] Docket No. UT-043013, filed February 26, 2004.
[24] *Id.*, Order No. 8, Granting Interlocutory Review of Order No. 5; Denying in Part Verizon's Petition for Review; Requiring Verizon to File Copies of Individual Interconnection Agreements (August 13, 2004). This order upholds Order No. 5 requiring Verizon to maintain the status quo under existing agreements in Washington State until the Commission concludes the arbitration proceeding or the FCC acts to eliminate uncertainties arising from the USTA II decision. *Order No. 8 at ¶ 1.*
[25] Verizon Petition for Arbitration, Exhibit 1.

avoid duplication of effort by conducting both an arbitration and a template agreement proceeding, when it is unclear whether the template agreement will ever be necessary, we will terminate the template agreement proceeding.

25 In light of our decision to terminate this proceeding, we do not need to address the jurisdictional arguments. Nor does this order preclude resurrection of a similar proceeding at a later time. In the meantime, the parties may continue to negotiate and arbitrate agreements under the Act (subject to the FCC's interim rules) and the Commission will continue to perform its role in reviewing and approving negotiated and arbitrated interconnection agreements as identified in Section 252 of the Act.

ORDER

26 The Commission grants Verizon's petition for review of the Ninth Supplemental Order denying Verizon's motion to terminate and reverses the Order. The Commission grants Verizon's motion to terminate this proceeding.

DATED at Olympia, Washington, and effective this 9th day of September 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.