**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| Petition of Verizon Northwest Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Washington Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order | ) | Docket No. UT-043013 |

**RESPONSE OF ADVANCED TELECOM GROUP INC., COMCAST PHONE OF WASHINGTON LLC; AND DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY IN SUPPORT OF THE JOINT CLEC MOTION FOR AN ORDER REQUIRING VERIZON TO MAINTAIN THE STATUS QUO PENDING RESOLUTION OF LEGAL ISSUES**

*1* Advanced Telecom Group, Inc., Comcast Phone of Washington LLC, and DIECA Communications, Inc. d/b/a Covad Communications Company (collectively the "Parties") by their attorneys and in response to the Washington Utilities and Transportation Commission's ("Commission's") Notice of Opportunity to Respond to the Joint CLEC Motion,[1] respectfully submit this Response in Support of the Joint CLEC Motion and request that the Commission grant the relief requested by the Joint CLECs for all CLECs in the State of Washington.[2]

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[1] Notice of Opportunity to Respond to Respond to Joint CLECs' Motion to Maintain the Status Quo, Docket No. UT-043013 (issued May 25, 2004).

[2] Motion of Eschelon Telecom of Washington, Inc., Integra Telecom of Washington, Inc., Pac-West Telecomm, Inc., Time Warner of Washington, LLC and XO Washington, Inc. (the "Joint CLECs") For an Order Requiring Verizon to Maintain the Status Quo Pending Resolution of Legal Issues, Docket No. UT-043013 (filed May 20, 2004) ("Joint CLEC Motion").



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## I. INTRODUCTION AND SUMMARY

*2* The Parties support the Joint CLEC Motion requesting that this Commission order Verizon Northwest, Inc. ("Verizon") to continue to maintain the status quo, pending resolution of the Federal Communications Commission's ("FCC's") Triennial Review Order ("TRO")[3] and any resulting action or additional FCC action. Like the Joint CLECs, the Parties are properly concerned that Verizon may attempt to take unilateral action to modify the availability, terms, conditions and/or pricing of UNEs required by their interconnection agreements. Specifically, as stated by the Parties as well as other members of the Competitive Carrier Group in their Answer to Verizon's Motion to hold this proceeding in abeyance, "[t]he members of the CCG are rightfully concerned that Verizon may attempt to take unilateral action to modify the availability, terms and conditions, and/or pricing of UNEs offered pursuant to their interconnection agreements. To say that the parties must abide by their current interconnection agreements is not sufficient. Rather, Verizon must be specifically ordered not to attempt to modify, in any way, UNEs or UNE combinations currently offered under existing interconnection agreements or to increase any rates set forth in those agreements. . . ."[4]

*3* Accordingly, in order to ensure that Verizon does not engage in any self-help actions and to maintain market stability in Washington, this Commission should order Verizon to maintain the status quo and honor all of its obligations under existing interconnection agreements at the rates prescribed therein for all CLECs in Washington

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[3] *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, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17125-26, ¶ 242 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003) (collectively "TRO"), *reversed and remanded*, *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases) (decided March 2, 2004) ("Triennial Review Order").

[4] *See* Answer of the Competitive Carrier Group to Verizon's Motion to Hold the Proceeding in Abeyance at 4 (filed May 18, 2004).



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until final federal unbundling rules are in place or until the Commission can undertake to determine the impact of the D.C. Circuit's *USTA II* decision if and when it becomes effective.

## II. COMMISSION HAS AUTHORITY UNDER STATE LAW TO GRANT THE RELIEF REQUESTED IN THE JOINT CLEC MOTION

*4* The Commission is well within its authority to grant the relief requested by the Joint CLECs for all *CLECs* in Washington. It is important for the Commission to note that an order maintaining the status quo is imperative now as well as when the *USTA II* decision is scheduled to issue on June 15. It is important to recognize that even if the *USTA II* decision becomes effective on June 15 it does not "invalidate" any UNEs that Verizon must provide; nor does it change the terms and conditions pursuant to which Verizon must provide such UNEs under existing interconnection agreements, at least until there is a subsequent finding that CLECs are not impaired without access to certain UNEs.

### A. STATES SHOULD IMPLEMENT THE UNBUNDLING REQUIREMENTS OF THE ACT IF *USTA II* BECOMES EFFECTIVE ON JUNE 15.

*5* The Communications Act remains applicable, with or without implementing federal rules (as we have now witnessed several times). The Telecommunications Act of 1996 requires ILECs to interconnect with and make unbundled network elements available to competitive carriers. The Act stated – and still requires – that access to elements is mandated wherever necessary and where carriers would be impaired without such access.[5] Only Congress may amend the Act, and it has not done so. Thus, the Act still governs, and it requires access to network elements on an unbundled basis.

*6* The fact that the FCC's rules were, in substantial part, vacated and remanded in *USTA II* is of little or no consequence in terms of the ILEC obligation to provide access

[5] 47 U.S.C. § 252



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to network elements. Since the Act itself contains the requirement that ILECs provide "nondiscriminatory access to network elements," any lack of implementing rules does not mean that the ILEC can deny access to the UNEs.

*7* It is beyond dispute that the Commission's independent state law authority is not preempted by the Federal Telecommunications Act. Section 252(e)(3) of the Act, entitled "Preservation of authority" explicitly states that:

> *[N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.*[6]

Thus, in terms of filling the void that may be created by vacatur of the federal rules, the states have authority to act. Congress, in fact, envisioned that both the FCC and state commissions would take action to implement the access obligations. Section 251(d)(3) of the Act, entitled "Preservation of State access regulations" provides as follows:

> *In prescribing and enforcing regulations to implement the requirements of this section, the [Federal Communications] Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that*
>
> *(A)* **establishes access and interconnection obligations** *of local exchange carriers;*
>
> *(B) is consistent with the requirements of this section; and*
>
> *(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.*[7]

*8* Accordingly, the Act protects state action that promotes the unbundling objectives of the statute, and prohibits the FCC from interfering with such action. If *USTA II* should become effective on June 15, 2004, there is no question that this Commission can and should fill any resulting void by preserving the status quo under its authority to order unbundling under the Act.

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[6] 47 U.S.C. § 252(e)(3).

[7] 47 U.S.C. § 251(d)(3).



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## B. STATE LAW AUTHORITY TO ORDER UNBUNDLING

*9* The Parties reiterate the Joint CLECs' position that the Commission has independent state authority to require Verizon to continue to provide existing UNE and UNE combinations pursuant to existing interconnection agreements.[8] Moreover, the Commission has broad authority and jurisdiction under Washington law to order Verizon to provide UNEs or their state-law equivalent. Indeed, before the passage of the Federal Telecommunications Act, the Washington Commission brushed aside US West's and GTE's arguments that it lacked the authority to order unbundling of their services beyond that voluntarily offered by ILECs:

> The Commission has carefully and thoroughly considered the incumbent LECs' arguments that we lack authority to order any interconnection terms or conditions other than those they are offering. We believe that the incumbent LECs' interpretation of the Commission's authority, and USWC's interpretation in particular, are unreasonably restrictive. The Commission has broad authority to regulate the rates, services, facilities, and practices of telecommunications companies in the public interest. See, POWER v. Utilities & Transp. Comm'n, 104 Wn.2d 798, 808, 711 P.2d 319 (1985); State ex rel. American Telechronometer Co. v. Baker, 164 Wash. 483, 491-96, 2 P.2d 1099 (1931); State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co., 85 Wash. 29, 36, 147 P. 885 (1915).
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> . . .
>
> The first paragraph of RCW 80.36.140 (quoted in the Commission Jurisdiction section of this order) gives the Commission broad authority over rates. The second paragraph, quoted above, gives the Commission broad authority over practices and services as well. The way in which services are offered, on a bundled or unbundled basis, certainly falls within the scope of the second paragraph. See, e.g., State ex rel. American Telechronometer Co. v. Baker, 164 Wash. 483, 491-96, 2 P.2d 1099 (1931) (citing earlier version of above quoted provision); State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co., 85 Wash. 29, 36, 147 P. 885 (1915)(describing Commission's power to regulate public utilities as "plenary").

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[8] *See* Joint CLEC Motion at 6.



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Fourth Supplemental Order Rejecting Tariff Filing and Ordering Refilings; Granting Complaints, In Part ("Interconnection Order"), WUTC v. US West Communications, Inc., WUTC Docket No. UT-94164, et al. at 15 and 51 ("Interconnection Case") (Oct. 30, 1995).

*10* The Commission decided its Interconnection Case under state law the year before the Federal Act was passed. It based its decision in large part on RCW 80.36.140, which provides, in relevant part:

> Whenever the commission shall find, after such hearing that the rules, regulations or practices of any telecommunications company are unjust or unreasonable, or that the equipment, facilities or service 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.

*11* In addition to the provisions mentioned above, there are a number of other provisions that the Commission can rely on to require Verizon to continue to offer UNEs under existing interconnection agreements. For example, RCW 80.36.200 states:

> Every telecommunications company operating in this state shall receive, transmit and deliver, without discrimination or delay, the messages of any other telecommunications company.

Another statute to which the Commission might look is RCW 80.36.260, which provides:

> Whenever the commission shall find, after a hearing had on its own motion or upon complaint, that repairs or improvements to, or changes in, any telecommunications line ought reasonably be made, or that any additions or extensions should reasonably be made thereto in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for telecommunications communications, the commission shall make and serve an order directing that such repairs, improvements, changes, additions or extensions be made in the manner to be specified therein.

The Commission can order "repairs, improvements, and changes" to promote the "convenience of the public." The provision of UNEs has been proven to be essential to promoting competition in Washington and therefore in the public interest.



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*12* Likewise, another provision in Washington law requires that:

> All rates, tolls, contracts and charges, rules and regulations of telecommunications companies, for messages, conversations, services rendered and equipment and facilities supplied, whether such message, conversation or service to be performed be over one company or line or over or by two or more companies or lines, shall be fair, just, reasonable and sufficient, and the service so to be rendered any person, firm or corporation by any telecommunications company shall be rendered and performed in a prompt, expeditious and efficient manner and the facilities, instrumentalities and equipment furnished by it shall be safe, kept in good condition and repair, and its appliances, instrumentalities and service shall be modern, adequate, sufficient and efficient.[9]

Services provided by Verizon must be "modern, adequate, sufficient, and efficient." It would not be "adequate," "sufficient" or "efficient" for Verizon to withdraw or modify any UNEs until Federal and state proceedings have concluded, since many or all of the very same UNEs could be required by this Commission under state law, by the Supreme Court, or perhaps reinstated by the FCC on remand from the D.C. Circuit.

## C. WASHINGTON'S AUTHORITY TO PRESERVE TELRIC RATES UNDER EXISTING INTERCONNECTION AGREEMENTS

*13* This Commission has repeatedly embraced TELRIC and its approximate equivalent, TSLRIC, as the appropriate cost methodology for non-competitive services. For example, in the first generic cost docket, the Commission stated that "We agree that [TELRIC] is the correct costing standard." Eighth Supplemental Order, *In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket No. UT-960369 ¶38 (April 16, 1998). Later, the Commission adopted UNE prices based on TELRIC costs plus a "reasonable allocation of forward-looking common costs." *Id.*, 17th Supplemental Order, ¶41 (Sept. 23, 1999).

*14* This Commission made it clear--at a time when the validity of the FCC's rules requiring TELRIC pricing were in question--that the WUTC had independent authority to

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[9] RCW 80.36.080



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implement TELRIC pricing under state law." *Id.*, Eighth Supplemental Order, Note 4.[10] Accordingly, the Commission should order not only that Verizon continue to provide existing UNEs and UNE combinations under state law, but that such elements and combinations be provided at current TELRIC-based rates.

## D. THIS COMMISSION HAS AUTHORITY TO GRANT RELIEF REQUESTED BY THE JOINT CLECS AS MOTION FOR SUMMARY DETERMINATION

*15* The Commission has authority to grant the relief requested by the Joint CLECs as a Motion for Summary Determination, under WAC 480-07-380. Under this rule, "[a] party may move for summary determination ... if the pleadings filed in the proceeding … show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[11] The issues raised by the Joint CLECs in their Motion are purely legal issues, and therefore can and should be resolved through the motion process. Furthermore, there are no issues as to any material fact that the Joint CLECs, as well as all CLECs in the State of Washington, are entitled to continue to receive the same terms of service and associated rates under their existing interconnection agreements. Such a result is in the interest of telecommunications market stability in Washington and, accordingly, in the public interest.

16 By requesting the status quo, the Joint CLECs are seeking to maintain the rates, terms and conditions of service currently offered in their existing interconnection agreements and are not seeking the commission to establish any new rates or terms of service that would be more appropriate through a notice-and-comment proceeding. Accordingly, the Joint CLECs properly requested status quo as a motion and the Commission should grant the relief requested for all affected CLECs in Washington.

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[10] "While this proceeding implements the 1996 Act, the Commission also acts under authority of Title 80 RCW and Title 480 WAC. See, Fourth Supplemental Order, Docket No. UT-941465 [*sic*, should be 941464], *et seq*."

[11] WAC 480-07-380 (2)(a).



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## III. CONCLUSION

*17* Consistent with the foregoing, the Commission should grant the Joint CLEC Motion and order Verizon to maintain the status quo under existing interconnection agreements for all CLECs in Washington pending the judicial review of the FCC's TRO and any resulting action or additional Commission action.

*18* Respectfully submitted this 2nd day of June, 2004.

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