BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment to 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 JOINT CLEC REPLY IN SUPPORT OF MOTION FOR AN ORDER REQUIRING VERIZON TO MAINTAIN STATUS QUO

Eschelon Telecom of Washington, Inc., Integra Telecom of Washington, Inc., Pac-West Telecomm, Inc., Time Warner Telecom of Washington, LLC, and XO Washington, Inc. (collectively "Joint CLECs"), provide the following reply to the response of Verizon Northwest Inc. ("Verizon") in opposition to the Joint CLECs' Motion for an order requiring Verizon to continue to maintain the status quo of its obligations under existing Commission-approved interconnection agreements ("ICAs") with any competing local exchange carrier ("CLEC") pending resolution of judicial review of the Federal Communications Commission's ("FCC's) Triennial Review Order ("TRO")[1] and any resulting FCC action or additional Commission action.

[1] *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand (rel. Aug. 21, 2003).

DISCUSSION

1. Verizon opposes the Joint CLECs' Motion on several grounds, none of which withstand scrutiny. Verizon maintains that the Motion lacks substance and any demonstration of necessity, based largely on Verizon's claims to have provided adequate assurances of the continued availability of unbundled network elements ("UNEs") or equivalent services and offers to negotiate commercial agreements. Verizon also claims that federal law preempts any authority that the Commission has to require Verizon to continue to unbundle its network, even on an interim basis. None of these arguments provide sufficient justification to deny the Motion.

2. Verizon first contends that CLECs are bound by their existing interconnection agreements, including the change of law provisions. The Joint CLECs do not dispute that contention, but it misses the point. The Joint CLECs take the position that the D.C. Circuit's decision in *USTA II*,[2] if and when it becomes effective, does not represent a change of law that requires amendment to the existing ICAs. The Court vacated some of the rules that the FCC established in the TRO, but that decision has no impact whatsoever on the requirements of the Telecommunications Act of 1996 ("Act"), including Section 251, or on Verizon's obligations under Washington law. The Joint CLECs continue to believe that the provisions of their existing ICAs properly reflect those legal requirements, even in the absence of the FCC rules that the D.C. Circuit has vacated.

3. The Joint CLECs' position thus is fundamentally different than Verizon's stated position. The parties do not even agree on whether there will have been a change of law that triggers the applicable provisions of the ICAs, much less how any such change should be implemented. Given

[2] *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

that Verizon interprets its ICAs to require changes of law to "automatically supercede" contrary provisions of the ICAs, Verizon has effectively stated that it will unilaterally implement its interpretation of the D.C. Circuit's decision. Such action would require virtually all CLECs to file petitions with the Commission for enforcement of their ICAs, leading to the very waste of Commission and party resources that gave rise to the Motion. The Joint CLECs do not request that the Commission abrogate any party's contractual rights. Rather, the Joint CLECs request only that the Commission maintain the status quo until the Commission has determined, in a generic proceeding in which all interested parties may participate, whether and to what extent a change of law has occurred.

4. Verizon also claims that the relief that the Joint CLECs have requested is unnecessary because CLECs are not in jeopardy of losing access to UNEs to which they are lawfully entitled. The Joint CLECs find little solace in Verizon's representations, particularly when Verizon interprets the change of law provisions in its ICAs to automatically incorporate changes of law into the agreements. Verizon's interpretation of the change of law provisions in the ICAs as well as its interpretation of the D.C. Circuit's decision in *USTA II* guarantee that UNE-P, high capacity loops[3] and transport, and dark fiber will no longer be available after the D.C. Circuit issues its mandate.

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[3] Although the D.C. Circuit's opinion addresses only unbundled local switching and transport, Verizon and other ILECs have sought to expand the ruling by taking the position that the court's decision also vacates the FCC's unbundling rules for high capacity loops. *See, e.g., In re Qwest Communications Int'l Petition for Rulemaking to Adopt Interim Unbundling Rules Following Remand of the Triennial Review Order* at i (filed March 29, 2004) ("As of May 1, 2004, or shortly thereafter, when the D.C. Circuit's mandate will issue, the Commission's impairment findings regarding mass market switching, shared and dedicated transport, *and high-capacity loops* will be vacated.") (emphasis added). Joint CLECs in no way concede that the D.C. Circuit decision applies to high capacity loops, but recognize that Verizon's interpretation of the decision in *USTA II* would make it applicable to such UNEs.

5. Verizon's offer to negotiate commercial arrangements for services comparable to the UNEs that Verizon believes it will no longer be obligated to provide similarly does not assuage the Joint CLECs' concerns. The services that Verizon is offering are primarily Verizon's special access services, the rates for which are substantially higher than the UNE prices that the Commission has established. The enormous price increases this represents will be just as disruptive to CLECs' ability to serve customers as Verizon's immediate discontinuance of those UNEs would be.

6. Nor does the relatively low level at which the Joint CLECs individually obtain UNEs from Verizon undermine the need for the requested relief. As the comments in support of the Motion demonstrate, other CLECs are similarly adversely affected by Verizon's threat to discontinue providing UNEs should *USTA II* become effective. Commission Staff, moreover, recently determined in a separate case that Verizon continues to retain a 97% share of the local exchange market in Verizon's Washington service territory.[4] That translates into competitors, including wireless service providers providing primary local telephone service, serving approximately 30,000 access lines, compared to Verizon's one million access lines. At such miniscule levels of competitive penetration, Verizon's discontinuance of UNEs threatens to virtually eliminate wireline competition for local exchange service in Verizon service territory, even at the Joint CLECs' relatively low usage of Verizon UNEs.

7. Finally, Verizon contends that the Commission lacks authority under federal law, including the Bell Atlantic/GTE Merger Order, and state law to require Verizon to continue to unbundle its network beyond the unbundling required under effective FCC rules. The Joint CLECs have not

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[4] Docket No. UT-023003, Rebuttal Testimony of Thomas Spinks on Behalf of Commission Staff.

sought a ruling from the Commission on any of these issues. Rather, the Joint CLECs' discussion of federal and Washington law was addressed to the Commission's authority to order the relief that the Joint CLECs' requested, *i.e*., to require all parties to ICAs to maintain the status quo until the Commission (or the FCC or the courts) has clarified Verizon's unbundling obligations under the Act or Washington law. Verizon's arguments, therefore, should be made in response to a Commission inquiry to examine the extent to which Verizon must continue to unbundle its network if *USTA II* becomes effective, not in the context of the Joint CLECs' Motion for interim relief.

8. To the extent that Verizon's comments apply to the Commission's authority to require Verizon to continue its current level of unbundling on an interim basis, Verizon has stated no basis for that position. Verizon proposes immediately to implement its interpretation of *USTA II* under the change of law provisions in its ICAs. The Joint CLECs deny that any such change of law has occurred, even if the D.C. Circuit issues its mandate. The Commission has essentially the same authority as would a court under the same circumstances, *i.e*., to require the parties to continue to operate under their ICAs as they have been until the issue of whether and to what extent there has been a change of law is determined.

9. *USTA II* does not preempt such authority. The D.C. Circuit vacated and remanded the FCC's determinations that CLECs would be impaired without access to unbundled mass market switching, high capacity transport, and dark fiber. The Court did not find that no impairment existed, or that these elements could not be considered UNEs as a matter of law. The Court merely required the FCC to undertake an impairment analysis under different standards than the federal agency used.

The Act, on the other hand, expressly preserves state unbundling requirements that are consistent with, and do not substantially prevent implementation of, the requirements of Section 251 of the Act.[5] As even Verizon implicitly concedes,[6] the vacatur and remand of FCC rules on these UNEs does not even arguably create an inconsistency with Section 251 or substantially prevent implementation of its

[5] 47 U.S.C. § 251(d)(3).

[6] *See* Verizon Response at 14 ("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.").

requirements if the Commission were to order that these UNEs continue to be available while the Commission determines Verizon's unbundling obligations under federal and Washington law. The Commission thus has more than ample authority under both federal and state law to grant the relief that the Joint CLECs have requested.

CONCLUSION

10. For the foregoing reasons, as well as the reasons set forth in the Motion and the responses of other parties in support of the Motion, the Commission should issue an order requiring Verizon to continue to maintain the status quo of its obligations under existing Commission-approved ICAs with any CLEC pending resolution of judicial review of the TRO and any resulting FCC action or additional Commission action.

DATED this 8th day of June, 2004.

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