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June 8, 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 Reply to Responses 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 REPLY TO RESPONSES TO JOINT CLEC MOTION **REDACTED VERSION**

1 On May 20, 2004, the "Joint CLECs" filed a Motion Requiring Verizon to Retain the Status Quo.[1] After the Commission issued a Notice of Opportunity to Respond to that motion, only four of the seventy-seven CLECs that Verizon named as parties to this docket filed responses supporting that motion. Three CLECs — Advanced Telecom Group, Inc. ("Advanced"), Comcast Phone of Washington LLC ("Comcast"), and DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), collectively "ATG" — jointly filed a response; Sprint Communications Co. L.P. ("Sprint") filed a separate response.

2 Neither response provides any basis for granting the Joint CLECs' motion. As an initial matter, neither ATG nor Sprint makes any claim of irreparable harm, or of injury at all, in the absence of that relief. Nor do they make any allegation that they currently *use* any of the UNEs affected by the D.C. Circuit's mandate. In fact, as of April 2004, *all* CLECs in

[1] The Joint CLECs are Eschelon Telecom of Washington, Inc., Integra Telecom of Washington, Inc., Pac-West Telecomm, Inc., Time Warner Telecom of Washington, LLC, and XO Washington, Inc.

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Washington currently provide service to *no* or *virtually no* customers using the affected UNEs. *See* Reply Declaration of David S. Valdez ¶ 3. In particular, neither *** **[REDACTED]** *** buys any UNE-P from Verizon, and *** **[REDACTED]** *** buys no UNEs at all. *See id.* In any event, Verizon has already explained that it does not intend to discontinue service immediately upon issuance of the mandate, that its CLEC customers can migrate to wholesale service at a substantial resale discount or to commercial arrangements, and that Verizon intends to give 90 days' notice (rather than just 30) to the CLECs before any service arrangements are moved. *See* Verizon Response at 11-13. In these circumstances, neither ATG nor Sprint can plausibly claim that they will suffer any harm.

3 Moreover, like the Joint CLECs, both ATG and Sprint seek not to retain the status quo, but to *change* it. Though they claim that their preferred relief is consistent with this Commission's Order No. 4,[2] this is not true. In that order, the Commission said that Verizon must "offer UNEs consistent with [the terms of] those agreements." Order No. 4, ¶ 18. But that means consistent with *all* of the terms of those agreements, including the terms — that ATG and Sprint agreed to and that this Commission approved — that at a minimum permit Verizon to cease providing access to UNEs when federal law no longer requires it to do so. As Verizon has explained, this Commission has no authority to disregard those terms, or to rewrite them in the guise of "interpreting" the agreements. *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1125-26 (9th Cir. 2004).[3]

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[2] Order No. 4 Granting Motion to Hold Proceeding in Abeyance Until June 15, 2004; Suspending Procedural Schedule, Canceling May 25, 2004, Prehearing Conference, at ¶ 18, Docket No. UT-043013 (May 21, 2004) ("Order No. 4").

[3] As Verizon has explained, 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.

ATG and Sprint Seek To *Change* the Status Quo, Not To Maintain It

4 ATG and Sprint argue that Verizon must continue to offer UNEs as "required by their interconnection agreements." ATG Response at 2. As Verizon has explained, this is what Verizon has stated that it will do.[4] But as noted above, this means that Verizon will also follow the provisions in the interconnection agreements that allow Verizon to cease offering those UNEs when it is under no legal obligation to do so.[5]

5 Like the Joint CLECs, ATG and Sprint make no mention of the change-of-law provisions in their agreements, which this Commission approved. The provisions in the ATG and Sprint agreements are identical to, or substantively indistinguishable from, those in the Joint CLECs' agreements and likewise expressly permit Verizon, at a minimum, to cease providing, as UNEs, mass market circuit switching, high-capacity loops and transport, and dark fiber, either immediately upon the issuance of the D.C. Circuit's mandate or shortly thereafter. In relevant part, these provisions state:

a. ATG: "[I]f Verizon provides a UNE or Combination to ATG, and the Commission, the FCC, a court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not required by Applicable Law to provide such UNEs or Combination, Verizon *may terminate* its provision of such UNE or Combination to ATG."[6]

b. Comcast: "In the event . . . a final order [of a court] allows but does not require discontinuance [of a UNE], [Verizon] shall make

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[4] In fact, by giving CLECs 90 days' notice and moving the CLECs to alternative serving arrangements instead of discontinuing their service, Verizon is forbearing from applying some of the terms of its interconnection agreements, which often require shorter notice or none at all and do not require Verizon to find alternative serving arrangements when a UNE is discontinued.

[5] Contrary to Sprint's claim, a recent order of the Texas commission did not require SBC to provide UNEs notwithstanding the change-of-law provisions of its agreements. *See* Sprint Response at 3 (citing Order Abating Proceeding at 1, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821 (Tex. PUC May 5, 2004)). Indeed, just as Verizon has done here, SBC there assured the Texas commission that it would "maintain the status quo of the parties' existing contractual rights." Letter from M.T. VanBebber, SBC attorney, to Texas P.U.C. Judges Cooper and Kang (Apr. 28, 2004).

[6] ATG Supplemental Agreement No. 3 Regarding Unbundled Network Elements § 1.5 (emphasis added).

a proposal for [Comcast's] approval[7] . . . . [Verizon] will not discontinue any Local Service or Combination of Local Services without providing 45 days advance written notice to [Comcast]."[8]

c. Covad: "[Verizon] and Covad 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 Covad *30 days advance written notice of such discontinuance.*"[9]

d. Sprint: "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 . . . governmental 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."[10]

6 Thus, like the Joint CLECs' agreements, these provisions allow Verizon to stop providing the UNEs at issue in *USTA II* either immediately upon issuance of the D.C. Circuit's mandate or shortly thereafter.[11] This Commission has no authority to modify the terms of these agreements by granting the relief that the Joint CLECs requested and that ATG and Sprint support. *See* Verizon Response ¶¶ 12-15.[12]

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[7] Verizon has complied with this condition, through its TRO Amendment.

[8] Comcast Agreement § 3.3.

[9] Covad Agreement §§ 32.1, 32.2 (emphases added).

[10] Sprint Agreement, Art. II, § 1.2 (emphasis added).

[11] Sprint claims that *USTA II* did not vacate the high-capacity loop rules, and complains that Verizon has refused to commit to keep providing those loops. *See* Sprint Response at 2-3. But as Verizon explained, the D.C. Circuit vacated the FCC's impairment finding as to high-capacity loops, and nothing in Sprint's Response calls that conclusion into question. Verizon Response ¶ 5 n.2.

[12] ATG argues that, even when the *USTA II* mandate issues, the D.C. Circuit's decision does not "invalidate" any UNEs nor does it "change the terms and conditions" of any agreement. ATG Response at 3. Contrary to ATG's claim, *USTA II* invalidated the FCC's finding of impairment as to mass-market circuit switching, high-capacity loops and transport, and dark fiber. And as Verizon has explained, and is

The 1996 Act Does Not Require Unbundling in the Absence of an FCC Determination of Impairment

7 ATG argues that, even after the D.C. Circuit's mandate issues, the 1996 Act itself "still governs" and that it requires continued unbundling of mass-market circuit switching, high capacity loops and transport, and dark fiber even though the FCC regulations imposing those unbundling obligations have been vacated. ATG Response at 3; *see id.* at 3-4 (asserting that the fact that the FCC's rules were "vacated" is "of little or no consequence in terms of the ILEC obligation" to provide UNEs).

8 But the very text of § 251(d)(2) makes clear that the unbundling obligation is not self-effectuating. Instead, as the Supreme Court held in 1999, Congress required the FCC to promulgate lawful rules identifying "*which* network elements must be made available." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391-92 (1999). The D.C. Circuit reconfirmed this in *USTA II*, when it held that only the FCC can make the impairment determinations that trigger the requirement to provide UNEs. *See USTA II*, 359 F.3d at 594. Without a lawful finding of impairment, therefore, there is no unbundling obligation. *See* Verizon Response ¶ 18.

9 Contrary to ATG's claims, nothing in §§ 251(d)(3) or 252(e)(3) permit this Commission to grant the Joint CLECs' motion and require Verizon to provide UNEs when its interconnection agreements impose no such obligations. *See* ATG Response at 4. Neither provision addresses this Commission's authority to interpret agreements that it previously approved. As the FCC and numerous courts of appeals have held, that authority is conferred by § 252(e)(6); and, as Verizon has explained, the Ninth Circuit has held that the 1996 Act requires this Commission to give effect to the terms of these "binding" agreements.

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discussed further below, without a valid finding of impairment by the FCC, ILECs are not required to provide UNEs. *See* Verizon Response ¶ 18. Moreover, given that there has *never* been a valid finding of impairment with respect to these UNEs, these facilities never qualified as UNEs in the first place.

10 In any event, § 251(d)(3) makes clear that the only state requirements that are preserved are those that are both "consistent" with federal law and do "not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3). Where the D.C. Circuit has vacated the FCC's own rules and held that an impairment finding *by the FCC* is a prerequisite for any lawful unbundling, any state commission decision purporting to reimpose such rules would necessarily be inconsistent with the 1996 Act and invalid.

11 Section 252(e)(3) is similarly irrelevant to the Joint CLECs' request. Not only is it limited to the Commission's authority in approving new agreements, but also it does not provide any authority to impose unbundling requirements. Instead, after making clear that a state commission, in arbitrating a new agreement, must apply "the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251," Congress provided that a state commission may also establish or enforce "*other* requirements of State law," such as "intrastate . . . service quality standards." 47 U.S.C. § 252(e)(2)(B), (e)(3) (emphasis added). Thus, § 252(e)(3) pertains to matters that are not covered by § 251 and the FCC's implementing regulations, which include any ILEC obligations (or lack thereof) to offer UNEs.

The Commission Has No Authority Under State Law To Grant the Joint CLECs' Motion

12 Like the Joint CLECs, ATG asserts that RCW 80.36.140 and the Interconnection Order[13] provide the Commission with the authority necessary to grant the Joint CLECs' motion. As Verizon has already shown, even aside from the fact that any pre-existing state law authority to require unbundling has been preempted, even under RCW 80.36.140 (1) the Commission could not impose unbundling requirements without a hearing, and (2) even *after a hearing*, the Commission could not lawfully impose unbundling requirements

[13] 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").

without an extensive evidentiary record, which is absent here. *See* Verizon Response ¶¶ 23-24.

13 ATG also cites three state statues not cited by the Joint CLECs, but none of these have any relationship to the relief the Joint CLECs requested. *See* ATG Response at 6-7. Those sections, instead, require telephone companies to transmit messages from any other company (§ 80.36.200); to make repairs or improvements to telecommunications lines (§ 80.36.260); and to ensure that quality of their services is "modern, adequate, sufficient, and efficient" (§ 80.36.080). An obligation to unbundle does not fall within any of these provisions. The requirement imposed on carriers to transmit messages across their networks is known as interconnection, not unbundling — indeed, the two are covered in separate subsections of the 1996 Act. *See* 47 U.S.C. § 251(c)(2), (3). Nor is the obligation to offer a UNE a "repair" or an "improvement" — and ATG does not even attempt to argue that it is. But, in any event, such repairs and improvements can be ordered "after a hearing," RCW 80.36.260, which has not occurred here.[14]

14 Similarly, RCW 80.36.080 provides no support for the relief the Joint CLECs seek. That provision authorizes the Commission to require that a service "*by* any telecommunications company" be "rendered and performed in a prompt, expeditious and efficient manner." RCW 80.36.080 (emphasis added). This provision does not require any particular service to be rendered and, therefore, provides no basis to disregard either controlling federal law or the terms of interconnection agreements that this Commission has approved under federal law.[15] In any event, RCW 80.36.080 does not permit the Commission to act — as the CLECs here request — in reliance on wholly unsupported

[14] Contrary to ATG's claims (at 7-8), any authority the Commission has over the prices of UNEs relevant to the question of which UNEs Verizon is required to provide in the first place.

[15] No CLEC has claimed in this dispute that either Verizon's current provision of UNEs or its provision of arrangements to replace UNEs, such as resale at the statutory discount rate, does not meet the "prompt, expeditious and efficient" standard.

allegations of harm and "a total lack of any proof or finding." *Jewell v. WUTC*, 90 Wn.2d 775, 777, 585 P.2d 1167 (1978) (construing RCW 80.36.080).

15 ATG also argues that the Commission has authority to grant the relief requested by treating the Joint CLEC Motion as a "Motion for Summary Determination," which can be granted if there is no "genuine issue as to any material fact." ATG Response at 8. Tellingly, ATG makes an argument the Joint CLECs did not; on its face the Joint CLECs' motion was *not* filed as a motion for summary determination pursuant to WAC 480-07-380(2). In any event, even if construed as such a motion, the Joint CLECs' motion would fail under WAC 480-07-380(2) for at least three independent reasons.

16 First, although ATG asserts that "there are no issues as to any material fact" related to the Joint CLECs' motion, *id.*, this ignores that neither the Joint CLECs nor ATG provided *any* factual evidence at all. WAC 480-07-380(2)(a), however, expressly calls for any claim for judgment as a matter of law to be based on "properly admissible evidentiary support." Where, as here, parties seek interim relief based on a claim of irreparable harm, that claim must be supported by competent evidence rather than the bare allegations that the Joint CLECs provided (as noted above, ATG makes no claim of harm, let alone irreparable harm, if the requested relief is not granted). *See Dioxin/Organochlorine Center v. Dep't of Ecology*, 119 Wn.2d 761, 837 P.2d 1007 (1992).

17 Second, ATG ignores that there *are* disputes over dispositive material facts. Most obviously, the parties dispute whether CLECs' competitive efforts are impaired without access to the UNEs affected by the issuance of the D.C. Circuit's mandate. Indeed, even assuming that the Commission could rely on the factual record that the FCC compiled,[16] the D.C. Circuit *vacated* the FCC's impairment determinations based on those facts and

[16] In ruling on a motion for summary determination, the Commission may consider "matters of which official notice may be taken." WAC 480-07-380(2)(a).

this Commission articulated a *more stringent* standard for unbundling prior to the 1996 Act, finding that unbundling for facilities other than loops is appropriate only when competitive services might be "not only economically, but technically impossible."[17] Accordingly, it is necessarily the case that there is a factual dispute as to whether there is any need for unbundling of the facilities affected by the *USTA II* mandate.

18 Third, insofar as the Joint CLECs' motion rests on RCW 80.36.140 — the only state law provision the Joint CLECs cited — the Commission cannot use the summary determination process to evade the express statutory requirement that any order be issued *after* a hearing. *See WITA v. WUTC*, 110 Wn. App. 147, 160-61, 39 P.3d 342 (2002), *rev'd on other grounds* 148 Wn.2d 887, 64 P.3d 606 (2003) (Commission must comply with procedure by statute).

19 Finally, denial of the Joint CLECs' motion could not plausibly give rise to any harm either to ATG and Sprint or to the other CLECs that chose not to file in support of the Joint CLECs' motion. Indeed, Verizon has already shown that, as to the Joint CLECs, any customers receiving service using the UNEs affected by the issuance of the D.C. Circuit's mandate could easily be transitioned to alternative, lawful arrangements such as special access, and any conceivable impact on their business would be *de minimis*. The same is true of *all* CLECs in Washington. As of April 2004, all CLECs in Washington were obtaining from Verizon a total of only about *** **[REDACTED]** *** UNE-P arrangements, as compared to more than *** **[REDACTED]** *** voice-grade UNE loop arrangements and more than *** **[REDACTED]** *** resale arrangements, both of which are unaffected by the issuance of the D.C. Circuit's mandate. *See* Valdez Reply Decl. ¶ 3. In addition, as of that date, all CLECs in Washington were obtaining a total of only about *** **[REDACTED]** *** high-capacity UNE loops and only about ***

[17] Interconnection Order at 54. As Verizon has explained, the 1996 Act has preempted the Commission's pre-1996 Act authority to require unbundling in the absence of a lawful FCC finding of impairment.

[REDACTED] *** high-capacity UNE transport facilities (including dark fiber). *See id.* *** **[REDACTED]** *** were purchasing dark fiber as of that date. *See id.*

Conclusion

20 Neither ATG nor Sprint provides any valid reason for granting the additional relief, beyond that provided in Order No. 4, that the Joint CLECs request here. The Commission should deny the Joint CLECs' motion.

Respectfully submitted,

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June 8, 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 REPLY DECLARATION OF DAVID S. VALDEZ **REDACTED VERSION**

1 My name is David S. Valdez. I am the same David S. Valdez who filed a declaration in this docket on behalf of Verizon Northwest Inc. ("Verizon") on June 2, 2004.

2 The purpose of my reply declaration is to provide information on the UNE mass-market circuit switching and high-capacity loops and transport facilities (including dark fiber) that *all* CLECs in Washington were obtaining from Verizon as of April 2004, which is the most recent data Verizon has available.

3 A review of Verizon's records revealed that, as of April 2004, all CLECs in Washington were obtaining from a total of *** **[REDACTED]** *** UNE-P arrangements, *** **[REDACTED]** *** voice-grade UNE loops, and *** **[REDACTED]** *** resale arrangements for residential and business customers. In addition, as of that date, all CLECs in Washington were obtaining a total of *** **[REDACTED]** *** high-capacity UNE loops and a total of *** **[REDACTED]** *** high-capacity UNE transport facilities. *** **[REDACTED]** *** in Washington were purchasing dark fiber loop

or transport facilities from Verizon as of that date. In addition, among the CLECs that filed in response to the Joint CLECs' motion, neither *** **[REDACTED]** *** buys any UNE-P from Verizon, and *** **[REDACTED]** *** buys no UNEs at all.

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

_____
David S. Valdez

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

Executed on 6/8/04, 2004
Executed at _____, Washington

David S. Valdez

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of June, 2004, served the true and correct original, along with the correct number of copies, of ***Verizon's Reply to Responses to Joint CLEC Motion*** and ***Reply Declaration of David S. Valdez*** upon the WUTC, via the method(s) noted below, properly addressed as follows:

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I hereby certify that I have this 8th 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 hereby certify that I have on the 8th day of June, 2004, served a true and correct redacted copy of the foregoing document upon parties noted below via U.S. Mail:

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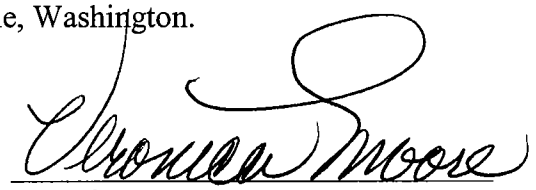
I declare under penalty under the laws of the State of Washington that the foregoing is correct and true.

DATED this 8th day of June, 2004, at Seattle, Washington.



Veronica Moore