

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

In the Matter of

THE JOINT PETITION FOR)
ENFORCEMENT OF)
INTERCONNECTION)
AGREEMENTS WITH)
VERIZON NORTHWEST, INC.)
(a/k/a GTE)In the Matter)

DOCKET NO. UT- 041127

**JOINT RESPONSE TO
VERIZON’S PETITION FOR
RECONSIDERATION OF
ORDER NO. 3**

of

AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle (collectively “AT&T”) and MCI, Inc. (“MCI”), collectively the Joint Respondents, hereby submit this Response in Opposition to Verizon’s Petition for Reconsideration (“Petition”) of Order No. 3. The Commission should deny Verizon’s Petition because it does not identify any factual or legal error in Order No. 3. Verizon merely re-submits the same arguments it has already made repeatedly in this proceeding. It is not legal error for the Commission to reject Verizon’s strained interpretation of federal and state rules regarding unbundling obligations. The Commission fully considered and rejected Verizon’s arguments, thus reconsideration is unnecessary, and would be a waste of the Commission’s resources. In addition, as the Joint Respondents demonstrate below, the Commission should deny Verizon’s Petition because it

misstates the facts and law in this case. As grounds therefore, the Joint Respondents state as follows:

I. INTRODUCTION AND SUMMARY

1. In its Petition for Reconsideration, Verizon Northwest, Inc. (“Verizon”) continues its improper efforts to frame this case in an unreasonably narrow manner in order to achieve its anti-competitive objective of prematurely unilaterally eliminating UNE-P. Verizon’s Petition and its earlier pleadings focus exclusively on rules regarding the unbundling of packet switches, even though such rules do not address all of the legal and factual issues necessary to resolve the disputes in this proceeding.¹ In order to have found in Verizon’s favor, the Commission would have had to ignore or misconstrue federal law requiring Verizon to provide unbundled local switching, at least on circuit switches, and at least for another year. Further, the Commission would have had to ignore the binding interconnection agreements (“ICAs”) of Joint Respondents that require the provision of unbundled local switching, and would have had to dismiss the fact that Verizon has deployed a dual function switch capable of fulfilling this ICA obligation using circuit switching. Such approach would clearly be legal error.

2. Order No. 3 correctly declined to put on blinders, and correctly held that, based on *all* of the relevant law and facts, Verizon had and has an

¹ See Verizon Motion for Judgment on the Pleadings, Sept. 27, 2004, at p. 4-8 [“cited hereinafter as Verizon JOP Motion”].

existing and binding ICA requirement to provide unbundled local switching, and that Verizon breached that requirement when it unilaterally discontinued providing such switching. Further, Order No. 3 correctly held there is no rule or law that excuses Verizon's performance under its ICA; neither the *Triennial Review Order*² nor the *Triennial Review Remand Order*³ contain any express holding that would allow Verizon unilaterally to abrogate its ICA obligation to provide unbundled local switching. Indeed, outside of Washington, Verizon has admitted this. In a brief in a similar proceeding in California, Verizon admitted that the FCC has not expressly authorized Verizon to evade its unbundling obligations by replacing circuit switches with "packet"⁴ switches. Verizon stated:

Given the FCC's oft-repeated statements about creating incentives for ILEC packet switch deployment, the TRRO makes clear that there is no need for the FCC to issue an express ruling repeating what it has already

² *In the Matter of 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, 96098, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (Rel. Aug. 21, 2003) ("*Triennial Review Order*" or "*TRO*").

³ *In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (Rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*").

⁴ As the evidence in this record demonstrates. Verizon has not deployed a pure packet switch at Mt. Vernon. Rather, the Nortel switch has dual functionality and can support both circuit switching and packet switching. Therefore, any reference to the Nortel switch as a "packet" switch is incorrect from a technical and factual standpoint.

made clear through incentives. Rather, incentives are assumed to be self-executing⁵

Assumed self-executing incentives provide no legal authority for Verizon to abrogate its ICAs. Absent a valid reason to refuse to perform under its ICAs, Verizon is in breach, and Order No. 3 rules correctly on this key issue.

3. In its Petition, Verizon fails to identify any legal or factual error in Order No. 3, but instead attacks the result (*i.e.*, the Commission's determination that Verizon's excuses provided no basis for it to refuse to perform the unbundling obligations set forth in its ICAs). Perhaps because Verizon can find no legal error, Verizon attempts to convince the Commission to reconsider Order No. 3 based on erroneous public policy arguments that are untrue, and unsupported by the record. For example, Verizon claims that Order No. 3 errs because it "sacrifices the long-term interest of Washington consumers in the benefits of an advanced network to the narrow short-term interest of a few competitors in preserving *for a few months*"⁶ their contracted circuit switching rights. But the record is clear that Washington consumers will be unaffected by Verizon's Nortel deployment because Verizon does not intend to offer any new

⁵ Additional Opening Brief of Verizon California, Inc. (U 1002 C) on the Triennial Review Remand Order, California Public Utilities Commission Docket No. 04-08-026 et al., at p. 7 (Feb. 28, 2005). For the convenience of the Commission, a copy of Verizon's Additional Opening Brief is provided as Attachment 1 to this Response. Joint Respondents request the Commission of this party admission to a sister Commission pursuant to RCW 34.05.452 and WAC 480-07-490(4).

⁶ Verizon Petition, at ¶ 6.

or advanced services at Mt. Vernon; rather, Verizon intends to use the Nortel switch to offer only POTS initially.⁷ Further, requiring Verizon to fulfill its legal obligation to continue providing unbundled local switching for at least another year in order to avoid serious disruption for customers and carriers in the marketplace is hardly a “narrow short-term interest of a few competitors.”

4. Similarly, Verizon claims that Order No. 3 sets bad public policy because it either requires Verizon to ask the permission of its competitors before upgrading its network, or to maintain a “duplicate” legacy network to provide unbundled local switching “for a few months.” However, the facts in this case prove otherwise. Verizon has already been allowed unilaterally, without “asking” CLECs, to deploy its Nortel switch and to remove the legacy circuit switch. Further, the Nortel switch is a dual function switch capable of providing both circuit and packet switching. Thus, Order No. 3 does not establish a requirement to maintain a “duplicate” network. Finally, as discussed above, Verizon is obligated by the TRRO to continue providing unbundled local switching for at least a year, not a “few months” as Verizon states.

5. Verizon offers no legitimate basis for the Commission to reconsider Order No. 3, and Joint Respondents respectfully request the Commission to proceed immediately with briefing on remedies for Verizon’s breach of its ICA obligation to provide unbundled local switching.

⁷ Commission Staff’s Response to Verizon’s Motion for Judgment on the Pleadings, Oct. 27, 2005, Attachment A (Williamson Declaration), at ¶19.

II. ORDER NO. 3 CORRECTLY HELD THAT VERIZON HAS A CONTINUING OBLIGATION TO PROVIDE UNBUNDLED SWITCHING

6. In its Petition, Verizon claims that it has no obligation under its ICA to provide unbundled local switching since it deployed the Nortel “packet” switch,⁸ and claims that the ruling to the contrary in Order No. 3 is in error.⁹ Verizon’s claim is wrong. Order No. 3 correctly held that Joint Respondents’ ICAs require Verizon to provide unbundled local switching, and that Verizon failed to identify any order or law that would excuse Verizon’s performance of its ICA obligations. Thus, Verizon breached its ICAs when it unilaterally decided to discontinue unbundled local switching.

A. Joint Respondents’ ICAs Require Verizon to Provide Unbundled Local Switching

7. Order No. 3 correctly concluded that AT&T and MCI’s ICAs with Verizon require the continued provision of local switching functionality to the CLECs, and that Verizon has breached its ICAs by discontinuing such switching.¹⁰ Contrary to Verizon’s claim that Order No. 3 did not do sufficient analysis of its ICA requirements,¹¹ the Order expressly cites to, and evaluated the language of the ICAs defining Verizon’s obligation to provide unbundled local

⁸ Verizon previously made this same argument. *See* Verizon JOP Motion, at p.9-14, 17-19.

⁹ *See* Verizon Petition at ¶¶ 27, 39-41, 53, 56-57.

¹⁰ Order No. 3, at ¶76.

¹¹ Verizon Petition, at ¶53.

switching.¹² The plain language of the ICAs requires Verizon to offer unbundled “local switching,” and combinations of UNEs that include “local switching” throughout Verizon’s incumbent local exchange territory in Washington. The ICAs define “local switching” broadly, as the functionality to originate, route, and terminate traffic, including “all features and functions and capabilities” of the switch, such as signaling.¹³ Under MCI’s and AT&T’s ICAs, Verizon is required to offer local switching regardless of the technology employed.¹⁴ Thus, Order No. 3 correctly concluded that, based on the record in this proceeding, Verizon had a continuing obligation to provide unbundled local switching to Joint Respondents, and that Verizon breached its ICAs when it unilaterally discontinued providing unbundled local switching.

B. Nothing in Verizon’s ICAs With MCI and AT&T Allows Verizon to Abrogate its ICAs by “Upgrading” Its Network

8. Verizon claims that it may unilaterally abrogate its ICA obligations to provide unbundled local switching due to a provision that allows Verizon to

¹² Order No. 3, at ¶68.

¹³ See, MCImetro Access Transmission Services, LLC Interconnection Agreement with Verizon, page 11, Section 47.1; AT&T Interconnection Agreement with Verizon, § 47.1.

¹⁴ Joint CLEC Response to Verizon’s Motion for Judgment on the Pleadings, Oct. 27, 2004, at ¶12 (*citing* Verizon Response to MCI Data Request No. 21, Attachment 2 to the Affidavit of Jeff Haltom, Exhibit A to Joint CLEC Response) [cited hereinafter as “Joint CLEC JOP Response”].

upgrade its network.¹⁵ Verizon also claims that Order No. 3 erred by not taking this provision into account. Verizon is incorrect on both points.

9. In its Petition, Verizon attempts to rely on a provision in the MCI and AT&T ICAs that states that Verizon may “discontinue any unbundled Network Element . . . to the extent *required* by network changes or upgrades.”¹⁶ But this provision is inapplicable. Verizon’s decision to discontinue unbundled local switching is not *required* by the upgrade to the Nortel switch; rather Verizon is discontinuing local switching solely based on its policy of prematurely eliminating UNE-P. Verizon has admitted that it is technically feasible to provide unbundled local switching on the packet fabric of the Nortel switches, thus it is not “required” to discontinue providing UNE-P due to a technology upgrade.¹⁷ Further, Verizon has admitted in sworn testimony in California¹⁸ that

¹⁵ Verizon Petition, at ¶¶ 27, 39-41, 53, 56-57.

¹⁶ Petition at ¶56, citing ATT/MCI ICA at §3.3 (emphasis added).

¹⁷ Joint CLEC JOP Response, at ¶14.

¹⁸ The California Public Utilities Commission (“CPUC”) held a hearing on Verizon’s efforts to deploy Nortel switches and remove its circuit switches in California. Michael Lipchock, Verizon’s national director of network planning testified that Verizon intends to deploy circuit switching fabric as part of every Nortel switch it deploys, including specifically the switch at Mt. Vernon. CPUC Docket No. 04-08-026, Hearing Transcript at 245, 247-248 (Jan. 21, 2005). Excerpts from this transcript are provided as Attachment 2 to this Response. Joint Respondents request that the Commission take administrative notice, and admit this sworn party admission into the record of this proceeding pursuant to RCW 34.05.452 and WAC 480-07-490. Joint Respondents will make available the entire transcript if needed. Joint Respondents had planned to submit Mr. Lipchock’s sworn testimony as evidence in their brief on remedies, but because the schedule for those briefs has been delayed, and because the testimony is directly relevant to claims made by Verizon in its Petition, Joint Respondents move at this time for

the Nortel switch it deployed at Mt. Vernon has circuit switching capability that could be used to support unbundled local switching/UNE-P for CLECs.¹⁹ Verizon, however, refuses to give CLECs access to this already-deployed circuit switching capability for UNE-P customers.

10. Verizon criticizes Order No. 3 claiming that it did not consider the provision in MCI and AT&T's ICAs regarding network upgrades. However, Verizon makes this argument regarding MCI and AT&T's ICAs for the first time in its Petition. Previously, in its Motion for Judgment on the Pleadings, Verizon relies on FCC orders, not the network upgrade provision in the MCI and AT&T ICAs, as justification for its unilateral decision to deploy "packet" switches and thereby discontinue providing unbundled local switching for MCI and AT&T.²⁰ Thus, even if Order No. 3 did not assess this provision, it cannot be legal error since Verizon didn't raise this argument against MCI and AT&T. As discussed above, no purpose would be served in reviewing Verizon's argument because the provision is inapplicable to the circumstances in this proceeding.

admission of Attachment 2 into the record, so that they are not disadvantaged by Verizon's request to delay the schedule for briefs on remedies.

¹⁹ Supplemental Declaration of Mr. Jeff Haltom, provided as Attachment 3 to this Response.

²⁰ See Verizon JOP Motion, ¶¶ 18-28, 52-56.

**C. No FCC Order Eliminates Verizon's Existing
Obligation to
Provide Unbundled Local Switching**

11. The FCC first ordered that local switching be provided as a UNE in the *Local Competition Order*,²¹ and it has reaffirmed this requirement (including the requirement to provide UNE-P – the availability of UNE switching as part of a platform with UNE loops and ports) in a series of orders issued over the last nine years. In the *Triennial Review Order*, the FCC held that CLECs are impaired without access to unbundled switching and reaffirmed that switching is a UNE.²² The FCC's subsequent interim UNE rules, required ILECs "to continue providing unbundled access to switching."²³

**1. Verizon must continue providing unbundled local
switching for at least another year**

12. Verizon criticizes Order No. 3 claiming that it requires Verizon to maintain a separate legacy circuit switching network so that CLECs can "cling" to UNE switching for "a few more months" at "below-cost" rates.²⁴ Verizon's claims are not only hyperbolic, but demonstrably untrue. As discussed in detail below, Verizon is not required to maintain a separate circuit switching network

²¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 et al.*, CC Docket Nos. 96-98 *et al.*, First Report and Order, 11 FCC Rcd. 15,499, FCC 96-325, at ¶ 410 (1996) ("*Local Competition Order*").

²² *Triennial Review Order*, at ¶419.

²³ Interim UNE Rules, at p.1.

²⁴ Verizon Petition, at ¶¶6-7. This argument is really a hypothetical argument about the possible remedies the Commission might order after additional briefing in this proceeding, and is thus premature as well as being incorrect factually.

because the Nortel switch it deployed is a dual function switch that supports both circuit switching and packet switching.²⁵ Further CLECs are clearly entitled under federal law to unbundled local switching for at least another year, and at rates that are higher than TELRIC – the pricing methodology upheld by the U.S. Supreme Court as one that gives ILECs the opportunity to achieve a fair return on investment.

13. Order No. 3 correctly held that in the TRRO, which just took effect on March 11, 2005, the FCC reaffirms that ILECs must continue to provide unbundled local switching, including UNE-P, for existing customers through March 11, 2006 at rates that are one dollar above the previous TELRIC-compliant rates.²⁶ The TRRO requires CLECs to begin transitioning existing customers off of UNE-P and onto other serving arrangements during this one-year period. Thus, far from “clinging” to unbundled switching, Joint Respondents are merely attempting to enforce Verizon’s obligations set forth in its ICAs and the TRRO, to continue providing the UNEs to which they are entitled for at least another year.

14. Despite Verizon’s single-minded resolve to eliminate UNE-P as quickly as possible, the FCC made clear that ILECs may not precipitously force CLECs to discontinue using UNE-P. The FCC ordered that upon the TRRO taking effect, ILECs must begin negotiations with CLECs to implement change of law provisions in their ICAs, and to negotiate other service arrangements or hot

²⁵ See Section II.D.1 below; Attachment 3.

²⁶ Order No. 3, at ¶¶23, 61.

cuts to CLEC facilities over a twelve month period.²⁷ The TRRO makes clear that the TRRO does not automatically invalidate existing ICA provisions under which Verizon provides UNE-P, thus, Verizon may not unilaterally withdraw access to UNE-P. Rather, in order to discontinue unbundled local switching, the ILECs must take affirmative steps to alter existing ICAs with CLECs.

15. The FCC stated that a transition period is necessary because “eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors.”²⁸ Yet, unilaterally flash cutting CLECs off of UNE-P is precisely what Verizon has done in the Mt. Vernon central office (“CO”). As soon as Verizon deployed the Nortel switch, Verizon immediately discontinued providing UNE-P.²⁹

2. Neither the TRO nor TRRO authorizes Verizon to replace circuit switches with packet switching in order to evade unbundling obligations

16. In its Petition, Verizon claims that Order No. 3 erred because it found no authority that allows Verizon to evade its unbundling obligations in its ICA by deploying packet switches.³⁰ However, Verizon was never able to identify an express order of the FCC that provides such authorization; rather,

²⁷ TRRO, at ¶227.

²⁸ TRRO, at ¶226 (citing *Interim Order and NPRM*, 19 FCC Rcd at 16794, 16795-96, ¶¶ 20, 24 discussing the need for a transition period to avoid harmful disruption in the telecommunications markets).

²⁹ See e.g., Verizon Petition, at ¶8.

³⁰ See Verizon Petition, at ¶¶3, 23, 26-27, 30-34, 38.

Verizon attempted to create an implied authorization by cobbling together dicta and implied conclusions from random passages in the TRO. Order No. 3 correctly, and prudently, declines to accept Verizon's virtual authority.

(a) Order No. 3 correctly held that the *dicta* on which Verizon relied does not authorize Verizon to abrogate its ICAs

17. Verizon's argument that it is authorized to deploy packet switches in order to evade its unbundling obligations is based solely on its interpretation of a single footnote in the TRO, which totals almost 500 pages, and isolated sentences elsewhere in the TRO.³¹ None of these obscure statements in the TRO comes close to being a formal holding by the FCC radically altering CLECs' rights to access UNEs.

18. As Joint Respondents demonstrated in this proceeding,³² the footnote is actually a discussion by the majority about concerns raised by the minority, and thus is clearly *dicta*. Further, it is clear when one examines the entire discussion in the footnote, and not just Verizon's misapplied excerpt, that the FCC is stating that ILECs can avoid unbundling obligations for *advanced services*, not for voice service, by deploying packet switches. The FCC stated:

Moreover, the dissents fail to consider the incentives created by our decisions on packet switching and advanced services. Specifically, we no longer unbundle packet switching and the advanced

³¹ Verizon Petition, at ¶¶23, 26-27, 30-34.

³² Joint CLEC Petition for Review of Order No. 02, Docket No. UT-041127, Dec. 13, 2004, at ¶54.

networks used with such switching. This means that to the extent there are significant disincentives caused by unbundling of circuit switching, incumbents can avoid them by deploying more advanced packet switching. This would suggest that incumbents have every incentive to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage.³³

19. The FCC is declining to unbundle packet switches solely because it wishes to encourage deployment of such switches for the provision of advanced services. Nothing in this footnote suggests that the FCC intends to give ILECs a means to abrogate their ICA obligations to provide unbundled switching for voice services. The FCC states “[f]inally, because packet switching is used in the provision of broadband services, our decision not to unbundle stand-alone packet switching is also guided by the goals of, and our obligations under section 706 of the 1996 Act.”³⁴ Of course, section 706 deals solely with advanced services, not analog voice services.

20. Further, some of the very passages elsewhere in the TRO on which Verizon relies actually undermine Verizon’s argument. For example, Verizon points to paragraph 447 (the text of which is reiterated in the TRRO at paragraph 220) as support for the notion that it can evade its unbundling obligations by deploying packet switches.³⁵ The TRO states:

³³ *Triennial Review Order*, ¶ 446, n.1365.

³⁴ *Triennial Review Order*, ¶ 541.

³⁵ Verizon Petition, at ¶¶25, 34.

Here—where the incumbents already operate ubiquitous legacy circuit switching networks—our inquiry into unbundling’s impact on investment incentives focuses primarily on the competitive LECs’ incentives to deploy alternative switching facilities. In fact, given that we do not require packet switches to be unbundled, there is little if any, basis for an argument that our treatment of circuit switches gives LECs a disincentive to upgrade their switches.³⁶

21. Thus, the FCC clearly presupposes as part of its decision not to unbundle packet switches that that ILECs will continue to make available local switching UNEs for voice service on their legacy networks. Verizon also seizes on the word “upgrade” in this passage in a futile attempt to justify its discontinuance of unbundled local switching.³⁷ Verizon somehow interprets the term “upgrade” to mean “replace” and concludes that this passage in the TRO means it can replace its circuit switches and packet switches without any need “to preserve legacy equipment to maintain ubiquitous CLEC access to unbundled local circuit switching.”³⁸ Thus, the plain language of the TRO undermines Verizon’s argument -- the term “upgrade” necessarily means that the former equipment will be left in place and that new capability is added to it. Nonetheless, Verizon chose to replace its existing circuit switch with a Nortel switch that has both circuit and packet switching capability, so Verizon’s

³⁶ *Triennial Review Order*, ¶ 448.

³⁷ Verizon Petition, at ¶34.

³⁸ Verizon Petition, at ¶34.

claim that it need not maintain a separate legacy network to support UNEs is irrelevant.

22. Similarly, Verizon claims that it has no obligation to “preserve legacy technology for the benefit of CLECs” after deploying packet switches because there is no express requirement set forth in the TRO.³⁹ Verizon notes that the TRO does include an express requirement for ILECs to maintain all-copper loops for access by CLECs in areas where fiber loops (which are not subject to unbundling requirements) have been deployed.⁴⁰ However, this passage in the TRO makes clear that the FCC’s intent is to preserve CLEC access to UNEs for narrowband services even in the face of advanced service equipment deployment. Thus, if the FCC had issued an express ruling, it would likely have required ILECs to maintain the functionality necessary to provide unbundled local switching for voice. In the TRO, the FCC retained a requirement for access to hybrid fiber/copper loops for TDM voice transmission, even though such loops otherwise need not be unbundled.

we prohibit incumbent LECs from engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop UNEs (either hybrid loops or stand-alone copper loops) provided to competitive LECs. . . . we determine that any incumbent LEC practice, policy, or procedure that has the effect of disrupting or degrading access to the TDM-based features, functions, and capabilities of hybrid loops for serving the customer is prohibited

³⁹ Verizon Petition, at ¶38.

⁴⁰ *Id.*

under the section 251(c)(3) duty to provide unbundled access to loops on just, reasonable, and nondiscriminatory terms and conditions.⁴¹

23. Similarly, the FCC held that even if ILECs choose to deploy technology such as Integrated Digital Loop Carrier (“IDLC”), that impedes CLECs’ ability to obtain access to UNEs, ILECs still have an obligation to provide the UNE. The FCC stated:

297. Even still, we require incumbent LECs to provide requesting carriers access to a transmission path over hybrid loops served by Integrated DLC systems. We recognize that in most cases this will be either through a spare copper facility or through the availability of Universal DLC systems. Nonetheless even if neither of these options is available, incumbent LECs must present requesting carriers a technically feasible method of unbundled access.⁴²

24. Thus, far from endorsing Verizon’s claim that the FCC has held ILECs may cut off access to UNEs through new technology deployment, the FCC’s holdings in the TRO actually undercut Verizon’s claim.

(b) Verizon admitted in California that the FCC has not expressly authorized it to evade unbundling obligations by replacing circuit switches with packet switches

25. In its Petition, Verizon claims that it has been authorized by a footnote in the TRO to discontinue unbundled local switching since it deployed Nortel “packet” switches in Mt. Vernon.⁴³ However, Verizon admitted in a brief

⁴¹ *Triennial Review Order*, ¶ 297.

⁴² *Triennial Review Order*, ¶ 297 (internal citations omitted).

⁴³ Verizon Petition, at ¶25, 27, 30-32.

filed on February 28, 2005 that there is no FCC ruling that expressly authorizes it to evade unbundling obligations by removing circuit switches and replacing them with packet switches.⁴⁴ Rather, Verizon stated:

Given the FCC's oft-repeated statements about creating incentives for ILEC packet switch deployment, the TRRO makes clear that there is no need for the FCC to issue an express ruling repeating what it has already made clear through incentives. Rather, incentives are assumed to be self-executing . . .⁴⁵

26. Nonetheless, Verizon claimed that the lack of an express ruling is “meaningless” because the FCC has provided incentives for ILECs to deploy packet switches, and such “*incentives are assumed to be self-executing.*”⁴⁶ However, an assumption that the FCC wanted ILECs to deploy advanced service equipment provides no legal basis whatsoever for concluding that Verizon is authorized to abrogate the unbundling obligations in its ICAs with MCI and

⁴⁴ Verizon Opening Brief, at p. 7.

⁴⁵ Additional Opening Brief of Verizon California, Inc. (U 1002 C) on the Triennial Review Remand Order, California Public Utilities Commission Docket No. 04-08-026 et al., at p. 7 (Feb. 28, 2005). For the convenience of the Commission, a copy of Verizon's Additional Opening Brief is provided as Attachment 1 to this Response. Joint Respondents request the Commission to take administrative notice of this party admission to a sister Commission pursuant to RCW 34.05.452.

⁴⁶ Verizon Opening Brief, at p. 7 (emphasis added). Verizon hints at this admission in its Petition in this proceeding when it states claims that Order No. 3 at ¶65 is inconsistent with “the *incentive structure* that the FCC has erected” for deploying packet switches. Verizon Petition, at ¶35. Thus, Verizon is quietly relying on an “incentive structure” rather than a non-existent holding in the TRO for the proposition that it may evade its unbundling obligations by deploying packet switches.

AT&T by deploying packet switches. Verizon's flimsy argument is even more ridiculous in this situation, where the "packet" switches Verizon has deployed are actually hybrid switches that provide both packet and circuit switching functionality.⁴⁷

3. Neither the TRO nor TRRO authorizes Verizon to withhold access to already-deployed TDM circuit switching capability

27. Verizon misquotes a portion of the TRO (which is summarized in the TRRO) in an effort to justify its decision to discontinue unbundled local switching even though it has deployed circuit switching capability in its Nortel switch.⁴⁸ Verizon claims that the TRO states that ILECs do not have to "configure" packet switches to include a circuit switching capability. However, the TRO actually states that ILECs "are not required to *build* TDM capability into new packet-based networks or into existing packet-based networks that never had TDM capability."⁴⁹

28. Verizon's argument ignores the facts in this proceeding. Verizon has deployed hybrid switches that *already have* TDM circuit switching functionality.⁵⁰ Verizon simply refuses to give CLECs access to this functionality for UNE-P customers. Thus, any rule that allows Verizon to decline to *add* circuit

⁴⁷ Attachment 3 .

⁴⁸ Verizon Petition, at ¶38.

⁴⁹ TRRO, at ¶ 18, n. 49 (emphasis added).

⁵⁰ See Section II.D.1 below.

switching capability to packet switches to support CLEC's traffic is irrelevant because Verizon has already done so.

29. Federal law makes clear that Verizon is required to give CLECs such as Joint Respondents access to the functionality already in its network needed to support UNEs. Under Section 251(c)(3) of the Telecommunications Act, ILECs have a duty to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point. The evidence in this proceeding demonstrates that it is technically feasible for Verizon to use the circuit switching capability of the ENET deployed with the Nortel switch to support all CLECs' UNE-P customers.⁵¹

30. Under federal law, Verizon has a legal obligation to make necessary network modifications to give CLECs access to this technically feasible interconnection point for access to UNEs. In *Iowa Utilities Board*, the Supreme Court held "the obligations imposed by sections 251(c)(2) and section 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements."⁵² Based on this holding, the FCC has determined that ILECs such as Verizon must make network modifications to allow CLECs to access UNEs where the requested

⁵¹ CLEC JOP Response, at ¶14; Attachment 2, at 317:5-12; Attachment 3, at ¶12.

⁵² *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 n.33 (1997).

facility has already been constructed.⁵³ In so holding, the FCC expressly rejected an argument from Verizon that ILECs could not be required to make modifications to enable access to UNEs. The FCC stated, “we reject Verizon’s argument that the Commission lacks authority to compel incumbent LECs to deploy new equipment to meet the demands of a competitive carrier.”⁵⁴ Thus, if Verizon insists on limiting the provision of unbundled local switching only to circuit switching, then it is required by federal law to make modifications for Joint Respondents to access the ENET deployed at Mt. Vernon to support unbundled local switching for UNE-P customers.

D. FCC Orders Regarding Unbundling of Packet Switching Are Inapplicable

31. In its Petition, Verizon criticizes Order No. 3 for rejecting its contention that the FCC’s rules declining to unbundle packet switching are dispositive in this case.⁵⁵ However, Verizon’s argument is nothing more than a replay of the same arguments that it raised in detail previously,⁵⁶ and which the Commission considered and rejected.

32. The Joint Respondents have previously demonstrated that the FCC’s rules on unbundling packet switching do not address the necessary legal

⁵³ *Triennial Review Order*, at p. 14, ¶¶632-641.

⁵⁴ *Triennial Review Order*, at ¶639.

⁵⁵ Verizon Petition, at ¶¶17-25, 30, 40-41

⁵⁶ See Verizon JOP Motion, at p. 4-8.

and factual issues for determining Verizon's unbundling obligations,⁵⁷ and Order No. 3 correctly rejects Verizon's efforts to unduly narrow the scope of inquiry.

33. At the outset, Joint Respondents note that they disagree with Order No. 3 that the FCC has clearly held that packet switches need not be unbundled for voice service in the circumstances of this case.⁵⁸ It is absolutely clear that the FCC has not considered, or issued a ruling, that gives Verizon the right to remove its legacy circuit switch and replace it with a next generation switch capable of supporting both packet and circuit switching, yet refuse to provide unbundled local switching to MCI and other CLECs using either switching capability.

34. However, this holding in Order No. 3 is not dispositive to the resolution of this case, and therefore the Joint Respondents are not contesting it. As demonstrated below, Verizon has deployed circuit switching capability in its Nortel switch, and any FCC rule regarding unbundling of packet switching functionality is therefore irrelevant.

⁵⁷ See, e.g., Joint CLEC JOP Response, at Section II.A. (discussing legal issues regarding Verizon's ICA obligations) and Section II.C. of Joint CLEC Petition for Review (discussing the technical capability of the Nortel switch to support circuit switching for UNE-P customers).

⁵⁸ See Joint CLEC Petition for Review at Section II.H. demonstrating that the FCC's rules declining to unbundle packet switching are limited to advanced services, not voice.

1. Verizon has deployed a dual function switch that has both packet switching and circuit switching capabilities

35. Although Verizon provided very little information regarding the technical capabilities of its Nortel switch, Joint Respondents presented evidence in the form of a sworn declaration from Mr. Jeff Haltom that the Nortel Succession switch can support both traditional circuit switching functionality and packet switching functionality.⁵⁹ Since that time, Verizon has admitted in sworn testimony that Verizon has in fact deployed the ENET circuit switching fabric as part of the Nortel switch at Mt. Vernon. On cross examination, Mr. Michael Lipchock, Verizon's national director of network planning testified that Verizon intends to deploy circuit switching fabric as part of every Nortel switch it deploys, including specifically the switch at Mt. Vernon.⁶⁰

36. Mr. Haltom has provided evidence that the ENET provides circuit switching capability that could be used to support UNE-P customers at Mt. Vernon, but Verizon refuses to give CLECs access to that capability. Mr. Lipchock admitted that in California, Verizon intends to support some of its retail ISDN customers on the ENET.⁶¹ Further, Nortel engineer, Mr. Danny Peeler, who submitted a declaration in this proceeding, admitted in California

⁵⁹ Joint Respondents' JOP Response , at Exhibit A at ¶¶ 9-11, 34-42.

⁶⁰ Attachment 2, at 245, 247-248.

⁶¹ Attachment 2, at 311-312.

that the Nortel Succession switch could have been configured to support TDM traffic such as UNE-P on the ENET circuit switching fabric.⁶²

37. Thus, Verizon clearly has in place circuit switching capability in the Nortel switch at Mt. Vernon that that could be used to support unbundled local switching for Joint Respondents. All parties agree that Verizon has a clear legal obligation to provide unbundled local switching, at least on circuit switches, and at least for the next year. Therefore, Order No. 3 correctly held that Verizon is in breach of its ICAs with MCI and AT&T because it has an obligation to provide unbundled local switching.

III. VERIZON'S PETITION MISSTATES THE HOLDINGS IN ORDER NO. 3 AND THE FACTS IN THIS CASE

A. Order No. 3 Does Not Require Verizon to Maintain a Separate Circuit Switching Network

38. Verizon criticizes Order No. 3 because Verizon says the Order sets forth an “implied” requirement to maintain a separate legacy network to provide circuit switching for the provision of unbundled local switching.⁶³ Verizon states “The logical implication of Order No. 3, however, is that ILECs are required to retain their circuit switches in their network and deploy their advanced packet switches in parallel to the outmoded legacy circuit switches. Thus Order No. 3 forces ILEC (sic) to maintain two networks – one based on

⁶² Attachment 2, at 316-317.

⁶³ This section responds to arguments in Verizon’s Petition in ¶¶3,6, 29, 30-32, 35-36, 37, 42.

advanced packet switch deployments, and a second based on legacy circuit switches.”⁶⁴

39. However, as Mr. Haltom made clear in his declaration submitted previously in this proceeding that circuit switching can be, and is being maintained, as part of Verizon’s integrated network. Mr. Haltom presented evidence that Verizon had the option of leaving its existing circuit switch in place, and adding the Nortel packet switching capability as an adjunct, or Verizon could proceed as it actually did, to remove the existing circuit switch and to re-deploy the circuit switching fabric from the legacy DMS-100 as part of the Nortel deployment.⁶⁵ Thus, there is no need for Verizon to maintain a separate network solely with legacy equipment to support circuit switching in order to fulfill the holding in Order No. 3 that it must continue to provide unbundled local switching. Verizon’s claim of legal error in Order No. 3 is incorrect and should be dismissed.

B. Verizon Withheld Discovery That Would Have Enabled The Joint Respondents and the Commission to Verify Earlier That the Nortel Switch Is a Dual Function Switch

40. In its Petition, Verizon criticizes Order No. 3 for finding that a material issue of fact exists with regard to the capabilities of the Nortel switch deployed at Mt. Vernon.⁶⁶ However, as discussed above, Verizon has created the misleading impression in this proceeding that its Nortel switch was solely

⁶⁴ Verizon Petition, at ¶36.

⁶⁵ Joint CLEC JOP Response , at Exhibit A at ¶¶ 9, 34, 36-42.

⁶⁶ Verizon Petition, at ¶59.

capable of providing packet switching,⁶⁷ and that it was not required to provide unbundled local switching on a packet switch. During the proceeding, Verizon provided little technical information regarding its Nortel switch. Indeed, until counsel for Joint Respondents threatened to file a motion to compel, Verizon refused even to identify the actual name or series number of the new Mount Vernon switch. Verizon asserted that the identification of the specific switch is not relevant to the issues before this Commission in this proceeding.⁶⁸

41. Information has since become available demonstrating beyond doubt that the Nortel switch at Mt. Vernon is a dual function switch that supports both circuit and packet switching capabilities.⁶⁹ Thus, Order No. 3 correctly solicits supplemental information for the record in this proceeding regarding the ability of Verizon to continue providing unbundled local switching using the circuit switching capabilities of the Nortel switch.

c. Order No. 3 Does Not Stop Verizon's Deployment of Nortel Switches

42. Verizon complains that Order No. 3 “has stopped the very first steps” of Verizon’s deployment of advanced service equipment in Washington.⁷⁰ Further, Verizon complains that Order No. 3 requires Verizon to seek permission

⁶⁷ See *e.g.*, Verizon Petition, at ¶8

⁶⁸ See Joint CLEC JOP Response, at ¶19 (*citing* Exhibit A Attachment 3, Verizon’s Supplemental Responses to MCI’s Data Request No. 10.

⁶⁹ See Attachments 2 and 3.

⁷⁰ Verizon Petition, at ¶4, 7.

from CLECs before upgrading its network.⁷¹ Both of Verizon's complaints are demonstrably untrue. Verizon unilaterally decided to deploy its Nortel switch at Mt. Vernon, was able to do so, and has operated it since September 2005. There is no evidence of any other location at which Verizon desires to deploy Nortel switches at this time. Thus, Order No. 3 in no way impedes or slows Verizon's deployment of Nortel switches. Any decision not to deploy such switches is entirely Verizon's. Thus, Verizon's complaint is nothing more than hyperbolic rhetoric designed to badger the Commission into reversing the outcome in Order No. 3, and it should be dismissed.

**D. Order No. 3 Does Not Require Unbundling in
Excess of the
Unbundling Required Under Federal Law**

43. Verizon repeatedly complains in its Petition that the Commission is improperly imposing requirements in excess of Verizon's federal unbundling obligations by requiring the continued provision of unbundled local switching.⁷² For example, Verizon states in its Petition that federal law makes clear that ILECs do not have to make available the maximum unbundling possible.⁷³ However, Verizon's argument is a red herring. The Commission has merely held that Verizon has an obligation under its ICAs to continue providing unbundled local switching - a UNE designated long ago by the FCC. Under the

⁷¹ Verizon Petition, at ¶6,26.

⁷² Verizon Petition, at ¶5, 29, 43-47, 49-52. Verizon previously made this same argument. See Verizon JOP Motion, at p. 19-22.

⁷³ Verizon Petition, at ¶39-41.

Telecommunications Act, states are expressly designated to oversee ICAs and to resolve disputes regarding ILECs' unbundling obligations.⁷⁴ Thus, Order No. 3 merely exercises the Commissions express authority to resolve ICA disputes, and requires that Verizon continue to provide a UNE already designated by the FCC.

E. Requiring Verizon to Continue Providing Unbundled Local Switching Is Not a Taking

44. Verizon makes the unsupported and illogical argument that the requirement in Order No. 3 for Verizon to continue providing access to unbundled local switching amounts to a taking.⁷⁵ Verizon's complaint appears to be based on its erroneous belief that Order No. 3 requires Verizon to maintain a separate legacy network to support circuit switching for unbundled local switching. As discussed above, Order No. 3 does not require the maintenance of a separate network for circuit switching. Thus, Verizon's complaint is misplaced.

45. Further, Verizon's claim that Order No. 3 would result in a taking is completely at odds with the actual requirements for a taking under well settled federal law. An unconstitutional taking arises only if a party's property is taken without reasonable compensation. However, under the rules set forth in the TRRO, Verizon will be paid for the use of its switches at rates that are above TELRIC.⁷⁶ The U.S. Supreme Court has already held that the TELRIC pricing

⁷⁴ 47 C.F.R. §252.

⁷⁵ Verizon Petition, at ¶58.

⁷⁶ The TRRO mandates that CLECs pay one dollar above the existing TELRIC-compliant rates established by state commissions for unbundled local switching.

methodology does not result in a taking.⁷⁷ Thus, Verizon has no grounds to complain that receiving compensation at rates higher than those that TELRIC could cause an unconstitutional taking.

46. Furthermore, neither the Commission nor the FCC have forever locked Verizon into making unbundled local switching available and thereby instituted a “taking.” Rather, the TRRO provides specific steps Verizon must follow to eliminate its switching obligations from its interconnection agreements.

47. That is, the FCC has established the process Verizon is to follow if it wishes to cease providing unbundled local switching. Both the TRO and TRRO specifically require the parties to follow a Section 252 process to implement changes in Verizon’s unbundling obligations.⁷⁸ In fact, the FCC insisted that the Section 252 process be followed despite the express request by several ILECs that argued that the process should be overridden to “permit unilateral change to all interconnection agreements”⁷⁹ Thus, when Verizon wants to alter its interconnection obligations to avoid unbundling its local switching, it must invoke the change-in-law provision under the contracts and Section 252. It may

⁷⁷ Verizon Comm. Inc. v. FCC, 535 U.S. 467 (May 2, 2002) (“There is no evidence that the decision to adopt TELRIC was arbitrary, opportunistic, or undertaken with a confiscatory purpose. Indeed, the indications in the record are very much to the contrary. Pp. 52.58.”)

⁷⁸ TRO at ¶ 701; TRRO at ¶¶ 143, 196 & 227.

⁷⁹ TRO at ¶ 701.

not—as it suggests—unilaterally employ different switches to perform the local switching function so as to instantly “eliminate its unbundling obligations.”⁸⁰

IV. CONCLUSION

48. In conclusion, for all the reasons set forth in this Response, the Joint Respondents respectfully request that this Commission deny Verizon’s Petition for Reconsideration, and immediately reinstate the schedule for briefing on remedies in this proceeding.

⁸⁰ Verizon Petition, at ¶13, 25.

Respectfully submitted this 14th day of March, 2005.

MCI

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**AT&T COMMUNICATIONS OF THE
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BEHALF OF TCG SEATTLE AND
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