[Service Date June 15, 2004]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of	)	DOCKET NO. UT-043013
	)	ORDER NO. 05
VERIZON NORTHWEST INC.	)	
	)	ORDER DENYING MOTIONS TO
with	)	DISMISS; GRANTING JOINT
	)	CLECS' MOTION; REQUIRING
COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN WASHINGTON	)	VERIZON TO MAINTAIN STATUS QUO
Pursuant to 47 U.S.C. Section 252(b), and the *Triennial Review Order*.	)	
. . . . .	)	

1 ***SYNOPSIS.*** *In this Order, the Commission denies the motions to dismiss Verizon's petition. To address procedural inadequacies, the schedule for the arbitration may be modified to require Verizon to identify the issues as well as parties positions and to address issues arising from the Triennial Review Order and USTA II in separate phases. These issues will be addressed in the June 16 prehearing conference. The Commission also grants the Joint CLECs' motion for a status quo order, and requires Verizon to continue to provide products and services under interconnection agreements with CLECs at the prices set forth in the agreements until the Commission approves amendments to the agreements in this arbitration or the FCC otherwise resolves the legal uncertainties presented by the effect of the mandate in USTA II.*

2 **NATURE OF PROCEEDING.** This proceeding involves a petition Verizon Northwest Inc. (Verizon) filed with the Washington Utilities and Transportation Commission (Commission) requesting arbitration pursuant to 47 U.S.C. § 252(b)(1) of the Telecommunications Act of 1996, Public Law No. 104-104, 101

Stat. 56 (1996) (Act), and the Federal Communications Commission's (FCC) Triennial Review Order.[1] The petition was served on all competitive local exchange carriers (CLECs) and Commercial Mobile Radio Service (CMRS) providers in Washington that have entered into interconnection agreements with Verizon.

3 **PROCEDURAL HISTORY.** Verizon filed its arbitration petition with the Commission on February 26, 2004. On March 2, 2004, the D.C. Circuit entered its decision in *United States Telecom Association v. Federal Communications Commission,* 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*). In its decision, the D.C. Circuit vacated and remanded significant portions of the FCC's Triennial Review Order, but stayed the effect of its decisions for 60 days.

4 On March 17, 2004, Sprint Communications Company, L.P (Sprint) filed with the Commission a motion to dismiss Verizon's petition.

5 On March 19, 2004, Verizon amended its petition to conform to the court's decision and requested that the Commission consider the arbitration proceeding filed as of March 19, rather than February 26. On March 22, 2004, the arbitrator granted Verizon's request in Order No. 02, and established a procedural schedule for responses to Sprint's motion.

6 The Commission convened a prehearing conference in this docket on March 29, 2004. On March 31, 2004, the arbitrator entered Order No. 03, a prehearing conference order establishing a procedural schedule for filing responses to the amended petition, additional motions to dismiss, and responsive pleadings and

---

[1] *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. August 21, 2003) [Hereinafter "Triennial Review Order"].

scheduling a prehearing conference for May 14, 2004. The prehearing conference was later rescheduled to May 25, 2004, and then again to June 16, 2004.

7 On March 31, 2004, the FCC urged carriers to begin negotiations to "arrive at commercially acceptable arrangements for the availability of unbundled network elements." *Press Release of FCC Chairman Michael K. Powell, March 31, 2004*. Based on the agreement of carriers to enter such negotiations, the FCC sought an extension of the stay of the mandate.

8 On April 6, 2004, XO Washington, Inc. (XO) and Verizon filed responses to Sprint's motion.

9 On April 13, 2004, the D.C. Circuit granted the FCC's motion to extend the stay of the mandate in *USTA II* through June 15, 2004. Also on April 13, 2004, Focal Communications Corp. of Washington, Allegiance Telecom of Washington, Inc., DSLnet Communications, LLC, Integra Telecom of Washington, Inc. (Integra), Adelphia Business Solutions Operations, Inc., Pac-West Telecomm, Inc. (Pac-West), ICG Telecom Group, Inc. and McLeodUSA Telecommunications Services, Inc. (collectively the Competitive Carrier Coalition), AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle (collectively AT&T), and Eschelon Telecom of Washington, Inc. (Eschelon) filed motions to dismiss Verizon's amended petition.

10 On April 27, 2004, Verizon filed a response to the motions of the Competitive Carrier Coalition, AT&T and Eschelon, opposing the motions.

11 On May 4, 2004, the Competitive Carrier Coalition and Advanced Telecom Group Inc. (ATG), BullsEye Telecom Inc., Comcast Phone of Washington LLC (Comcast), DIECA Communications Inc. d/b/a Covad Communications Company (Covad), Global Crossing Local Services Inc., KMC Telecom V Inc.,

and Winstar Communications LLC (collectively the Competitive Carriers Group) filed with the Commission replies to Verizon's response to motions to dismiss.

12 On May 7, 2004, Verizon filed with the Commission a Motion to Hold Proceedings in Abeyance Until June 15, 2004, asserting that suspending the proceedings would allow the parties to focus on commercial negotiations without the distraction of simultaneous litigation. The Competitive Carrier Coalition, the Competitive Carrier Group, Sprint, MCI, XO, and AT&T filed responses opposing Verizon's motion.

13 On May 19, 2004, the Solicitor General requested, and Supreme Court Justice Rehnquist granted, an extension of the deadline for the FCC to file petitions for writ of certiorari with the United States Supreme Court until June 30.[2] The D.C. Circuit, however, refused the FCC's and other parties' requests for a further extension of the stay of the mandate.

14 On May 21, 2004, in Order No. 04, the arbitrator granted Verizon's request to hold proceedings in abeyance, subject to the condition that Verizon maintain the status quo under existing interconnection agreements in Washington State by continuing to offer UNEs consistent with the agreements at existing rates pending completion of the arbitration.

15 Also on May 21, 2004, Eschelon, Integra, Pac-West, Time Warner Telecom of Washington, LLC (Time Warner), and XO (collectively the Joint CLECs) filed with the Commission a Motion for an Order Requiring Verizon to Maintain Status Quo Pending Resolution of Legal Issues. In a notice to the parties, the Commission requested comments on the differences between the status quo order granted in Order No. 04 and the Joint CLECs' motion.

---

[2] Other parties, including NARUC and AT&T, requested and were granted similar extensions of the time to file petitions for writ of certiorari.

16 On June 2, 2004, Sprint, ATG, Comcast, Covad, and Verizon filed responses to the Joint CLECs' motion. On July 9, 2004, Verizon and the Joint CLECs filed replies. On June 11, 2004, the Joint CLECs filed with the Commission supplemental authority in support of their motion, and Verizon filed supplemental authority to its opposition to the Joint CLECs' motion.

17 On June 9, 2004, the Solicitor General and the FCC announced that they would not file a petition for writ of certiorari with the Supreme Court. Although other parties filed petitions for stay with the Supreme Court on June 10, 2004, Justice Rehnquist denied the stay petitions on June 14, allowing the mandate in *USTA II* to become effective on June 15, 2004.

18 **PARTY REPRESENTATIVES.** Timothy J. O'Connell, Stoel Rives, LLP, Seattle, Washington, represents Verizon. Edward W. Kirsch and Philip J. Macres, Swidler Berlin Shereff Friedman, LLP, Washington, D.C., represent the Competitive Carrier Coalition. Letty S.D. Friesen, AT&T Law Department, Denver, Colorado, represents AT&T. Andrew M. Klein, Kelley, Drye & Warren, LLP, Washington, D.C., represents the Competitive Carrier Group. Brooks E. Harlow, Miller Nash LLP, Seattle, Washington, and Hong Huynh, Miller Nash LLP, Portland, Oregon, represent Centel Communications. Karen S. Frame, Senior Counsel, Denver, Colorado, represents Covad. Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents Electric Lightwave, Inc., New Edge Networks, Inc., Pac-West, Time Warner and XO. Dennis D. Ahlers, Senior Attorney, Minneapolis, Minnesota, represents Eschelon. Richard A. Pitt, attorney, Burlington, Washington, represents Northwest Telephone, Inc. Richard A. Finnigan, attorney, Olympia, Washington, represents SBC Telecom, Inc. William E. Hendricks, III, Hood River, Oregon, represents Sprint. Michael E. Daughtry, Vice President of Operations, Bend, Oregon, represents United Communications, Inc., d/b/a/ UNICOM. Michel Singer Nelson, Regulatory Attorney, Denver, Colorado, represents WorldCom, Inc. and its subsidiaries in Washington (n/k/a MCI, Inc.).

MOTIONS TO DISMISS.

19 **A. Sprint.** Sprint moves to dismiss Verizon's petition asserting that Verizon has failed to negotiate in good faith, failed to follow the requirements of the Act and the Commission's rules for negotiation and arbitration of interconnection agreements, and failed to follow the effective change in law provisions in Sprint's interconnection agreement. Sprint also argues that the changes proposed in Verizon's petition are not ripe for consideration, as the *USTA II* decision has not yet become effective. Sprint requests that the Commission dismiss the petition as a whole, and as to Sprint individually, and require Verizon to follow the proper procedures for arbitration.[3]

20 **B. Competitive Carrier Coalition Motion and Reply.** The Competitive Carrier Coalition, or Coalition, argues that Verizon's petition is premature as there has not been an effective change in law requiring amendment of interconnection agreements. The Coalition asserts that the Bell Atlantic/GTE merger conditions require Verizon to offer UNEs under its interconnection agreements until there is a final and non-appealable order requiring otherwise. They assert that the Triennial Review Order is not yet final and non-appealable, as the *USTA II* decision may yet be appealed to the Supreme Court. Like Sprint, the Coalition argues that Verizon's petition is procedurally defective, as Verizon did not comply with the procedural requirements for arbitration under Section 252(b)(2), or the Commission's procedural rules. They assert that Verizon has not met its upfront burden as the petitioning party. Finally, the Coalition asserts that Verizon's request in the petition for new rates and charges for routine network modification should be dismissed, as the Triennial Review Order clarified

[3] On May 11, Sprint filed a letter with the Commission withdrawing its request that the Commission dismiss Sprint from the arbitration, but continuing its assertion that the Commission should dismiss the petition in its entirety.

Verizon's obligations to perform such modifications and did not establish a new obligation.

21 **C. AT&T Motion.** Like Sprint and the Coalition, AT&T moves to dismiss asserting that Verizon improperly seeks arbitration on alleged changes of law in the *USTA II* decision. AT&T argues first that the *USTA II* decision does not result in a change in law, and second, that even if there was a change in law that Verizon has failed to comply with change of law provisions under its interconnection agreement with AT&T. AT&T requests that the Commission dismiss the petition as premature, allow the parties to negotiate once the *USTA II* mandate is effective and the issues are ripe for discussion, and then arbitrate if the parties have not reached agreement.

22 **D. Eschelon Motion.** Like the Coalition, Eschelon argues that Verizon is subject to the terms of the Bell Atlantic/GTE merger conditions and must make UNEs available under its interconnection agreements until the Triennial Review Order is final and non-appealable. Eschelon also argues that Verizon's petition does not meet the requirements under Section 252 for arbitration as only a CLEC can initiate negotiations that lead to arbitration.

23 **E. XO Response.** XO opposes dismissal of the petition, asserting that the arbitration proceeding provides an opportunity for the Commission to address requirements in the Triennial Review Order that are not at issue in judicial appeals, and requests that the Commission prevent Verizon from taking unilateral action while the judicial appeals are pending.

24 **F. Verizon's Response and Reply.** Verizon asserts that it has negotiated in good faith, but that the parties simply have not reached agreement. Verizon argues that the CLECs, not Verizon, should be seen as negotiating in bad faith, as Verizon properly notified all affected carriers on October 2, 2003, of its intent to begin negotiations pursuant to the Triennial Review Order, and that virtually all

of the CLECS failed to respond until four to five months after the October notice. Verizon provides affidavits of five Verizon employees and lawyers identifying Verizon's efforts to notify and negotiate with affected CLECs. Verizon further argues that dismissal is not the appropriate remedy for failure to negotiate in good faith, but that the arbitration should continue to resolve the dispute.

25 Verizon argues that the FCC established a different standard for arbitrations of amendments implementing the changes required by the Triennial Review Order. Verizon argues that that there is no need to follow Section 252 requirements for arbitration of such amendments, as the FCC intended carriers only to be bound by the Section 252 timetable, *i.e.*, nine months. Verizon argues that it has substantially complied with Section 252 requirements and the Commission's rules governing arbitration, and asserts that it has not been possible to describe the positions of each party as very few CLECs responded, and the responses it received were very late in the process.

26 Verizon denies that it has failed to follow change in law provisions of interconnection agreements. Verizon interprets both the Triennial Review Order and USTA II as effecting a change in law. Verizon argues that it does not matter whether an interconnection agreement contains a change in law provision, asserting that the FCC established in the Triennial Review Order a mandatory requirement that the Section 252 timetable for arbitration applies even where agreements contain change in law provisions.

27 Verizon states that the conditions placed on the Bell Atlantic/GTE merger do not place a restriction on its ability to seek changes to UNEs offered in its interconnection agreements, asserting that the merger conditions were effective for only three years unless "other termination dates are specifically established."[4]

---

[4] Verizon Response to Joint CLEC Motion at 8-10, citing Memorandum Opinion and Order, *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control*, 15 FCC Rcd 14032 (2000)[Hereinafter Bell Atlantic/GTE Merger Order].

Verizon argues that the FCC's order approving the merger conditions required Verizon to continue to provide UNEs under its interconnection agreements in accordance with the UNE Remand Order and Line Sharing Order, until set aside by a final non-appealable order or the conclusion of any "subsequent proceeding," but that the Bell Atlantic/GTE Merger Order did not establish a specific date for such an occurrence.

28 Verizon argues that the *USTA II* decision provides no basis for dismissing or delaying the proceeding. Verizon argues that the D.C. Circuit vacated some, but not all, of the Triennial Review Order's provisions, and that there is no need to wait for the outcome of judicial review of the D.C. Circuit's decision to proceed with the arbitration of Verizon's petition. Verizon argues that certain Triennial Review Order issues are ripe for arbitration and that the Commission should resolve these in the arbitration proceeding. Verizon asserts that the FCC has provided that any delay in implementing the new rules will have an adverse impact on the industry.

29 Finally, Verizon asserts that the Triennial Review Order imposes new obligations for routine network modification to which Verizon was not previously obligated to provide. Verizon asserts that the portion of its petition addressing this issue is appropriate and should not be dismissed.

30 **G. Sprint Reply.** In reply, Sprint argues that Verizon's actions, *i.e.*, not responding to Sprint's proposals for four months and then responding just before Verizon filed its petition for arbitration, is not good faith negotiation. Sprint argues that such actions allow Verizon to use its superior bargaining position to force CLECs into arbitration. Sprint objects to Verizon's characterization of negotiations, arguing that the principles of contract formation are counter to Verizon's assertion. Sprint requests, on the basis of an Ohio arbitration decision, that the Commission dismiss the petition and order Verizon to negotiate in good faith with Sprint.

31 **H. Competitive Carriers Group Reply.** The Competitive Carriers Group argues that Verizon's October 2, 2003, letter was ambiguous, suggesting that if carriers sought to negotiate, they should contact Verizon. The Competitive Carriers Group asserts that Verizon did nothing to eliminate this ambiguity. In addition, the Competitive Carriers Group suggests that the lack of response to the notice was an indication that CLECs did not perceive the notice as an invitation to negotiate under the Act. Further, the Competitive Carriers Group asserts that the reference in the notice to a proposed amendment located on the Internet, and the fact that the proposed amendment was not annotated or editable, made it difficult for carriers to respond to the proposal.

32 The Competitive Carriers Group argues that Verizon remains obligated under Section 251, Washington law, the conditions of the Bell Atlantic/GTE Merger Order, and its interconnection agreements to provide access to UNEs. The Competitive Carriers Group requests that the Commission enter an order maintaining the status quo while arbitrating any change to interconnection agreements. The Competitive Carriers Group also requests that the Commission establish a two-phase process for the arbitration. Specifically, the Competitive Carriers Group requests that the Commission assert its jurisdiction over all issues naturally related to the parties' interconnection agreements, hold *USTA II*-related issues in abeyance until issues under judicial review are resolved, and address issues, such as the routine network modifications and UNE commingling issues, immediately.

33 **Discussion And Decision.** For the reasons ser forth below, the motions of Sprint, the Coalition, Eschelon, and AT&T to dismiss Verizon's petition are denied.

34 The issues raised by the Triennial Review Order and the *USTA II* decision are ripe for consideration in this arbitration proceeding as a result of the Justice

Rehnquist's decision to deny further stay of the effect of *USTA II*. The parties' arguments that Verizon's petition is premature, even if valid at one time, are now moot. The Commission must determine whether to bifurcate or phase its consideration of these issues, as requested by the Competitive Carriers Group.

35 Sprint, the Coalition, and the Competitive Carriers Group request that the Commission dismiss Verizon's petition, asserting that Verizon has negotiated in bad faith. Verizon counters that the CLECs, not Verizon, have negotiated in bad faith. The multiple allegations, supported by affidavits and documents, support only the fact that there is extreme polarization on the issues, and that parties are reluctant to agree to the other parties' proposals. It is not possible to determine whether parties negotiated in bad faith without conducting evidentiary hearings on the allegations. Given the recent resolution of some of the legal uncertainties, an evidentiary hearing on bad faith negotiations at this point in the proceeding would be a waste of all parties' and the Commission's resources. In addition, while dismissing a petition for failure to negotiate in good faith may be an appropriate remedy where negotiations may prove fruitful, it is clear that arbitration is necessary in this case and that dismissal is not the best solution.

36 Verizon is correct that the FCC identified October 2, 2003, as the date upon which negotiations to implement changes required by the Triennial Review Order should be deemed to start. *Triennial Review Order*, ¶ *703*. Verizon interprets other implementation provisions of the Triennial Review Order incorrectly, however. Verizon argues that the Section 252 timetable applies to negotiating and arbitrating amendments to all agreements, regardless of whether the agreement contains a change in law provision. The FCC rejected the BOCs' arguments about unilateral change of interconnection agreements, providing that "contract arrangements shall govern." *Id.*, ¶ *701*. Further, the FCC stated that the nine-month timetable of Section 252 "provides good guidance even in instances where a change of law provision exists." *Id.*, ¶ *704*. Such statements are counter to Verizon's statements that the FCC "preempted" change of law provisions and

required a mandatory nine-month period for arbitrations. The issue of whether change of law provisions apply and how such provisions should be interpreted is an issue for the Commission, not Verizon, to decide in this arbitration proceeding.

37 Further, Verizon insists that state commissions must complete all arbitrations within a nine-month period beginning on October 2, 2003. In contrast, the FCC merely stated that "to the extent a contractual change of law provision envisions a state role, we believe a state commission should be able to resolve a dispute over contract language at least within the nine-month timeframe envisioned for new contract arbitrations under section 252." *Id., ¶ 704.* The Commission does not interpret the FCC as requiring all arbitrations to conclude in a nine-month period.

38 Sprint, the Coalition and the Competitive Carriers Group request that the Commission dismiss Verizon's petition for failing to comply with Section 252 requirements and this Commission's rules governing arbitrations.[5] Verizon argues that only the timetable of Section 252 applies to arbitration of amendments to implement the Triennial Review Order: Verizon asserts that other procedural requirements for arbitration do not apply. The FCC specifically rejected Verizon's arguments, stating "we decline to depart from the section 252 process." *Id., ¶ 702; see also Id., ¶ 701.*

39 The Commission also rejects Verizon's arguments and finds that Section 252 requirements and the Commission's procedural requirements for arbitrations set forth in WAC 480-07-650 apply to this proceeding. Verizon has not complied with Section 252 requirements or this Commission's rules governing arbitrations.

---

[5] Eschelon requests that the Commission dismiss Verizon's petition arguing that only CLECs may request arbitration under Sections 252(a)(1) and Section 252(b)(1). Eschelon's request is denied. Both the FCC and this Commission have interpreted Section 252 to allow both ILECs and CLECs to seek arbitration in the interconnection amendment context. *See Triennial Review Order,* n.2087*; see also* WAC 480-07-650(4)(a).

Verizon has not provided the Commission with all relevant documentation to arbitrate open issues, including "a brief statement of each unresolved issue and a summary of each party's position with respect to each issue," "a current draft of the interconnection agreement, if available, with all agreed provisions in standard typeface and all unresolved issues in bold typeface," or "a legal brief that addresses the disputed issues." *See Section 252(b)(2); see also WAC 480-07-650(b), (f)(i), (f)(ii).*

40 Although this Order finds that Verizon has failed to meet federal and state arbitration requirements, dismissal of Verizon's petition is too drastic a remedy taking into consideration the difficulties Verizon faced in summarizing late-provided CLEC responses while trying to stay within what it interpreted as a strict nine-month timeframe. Instead, the appropriate remedy is to require Verizon to properly identify the disputed issues and the parties' positions on the issues in order to allow the Commission to efficiently arbitrate the open issues. This requirement may require some extension of the arbitration schedule. The Commission may also require Verizon to address the issues arising from the Triennial Review Order and the *USTA II* decision in two phases. These issues will be addressed during the prehearing conference scheduled for June 16, 2004.

41 Sprint, the Coalition, Eschelon, and the Competitive Carriers Group assert that the Bell Atlantic/GTE Merger Order precludes Verizon from amending its interconnection agreements to remove access to UNEs, and request the Commission dismiss Verizon's petition. The Bell Atlantic/GTE Merger Order requires that

> In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, from now until the date on which the Commission's orders in those proceedings, and any subsequent proceedings, become final and non-appealable, Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE

> and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell/Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory.

Bell Atlantic/GTE Merger Order, ¶ *316.* The order also requires that the merger conditions cease to apply after 36 months, or three years, "except where other termination dates are specifically established herein." *Id., Appendix D,* ¶ *64.*

42 If the merger conditions are interpreted as Sprint, the Coalition, and Eschelon assert, the conditions would never end. The "subsequent proceedings" language could be interpreted to apply to the FCC's efforts on remand from the *USTA II* decision, and if appealed, to the next possible proceeding. Such an interpretation leads to the absurd result that other ILECs, such as Qwest and BellSouth, may amend their agreements, while Verizon may not. We reject the CLECs' arguments as to the effect of the Bell Atlantic/GTE Merger Order on this proceeding. Even if exception to the sunset provision of the Bell Atlantic/GTE Merger Order applies, the Commission finds that the UNE Remand and Line Sharing proceedings, and any subsequent proceedings, have become final and non-appealable with the effect of the USTA II decision. The FCC's interpretation of the effect of its Triennial Review Order supports this interpretation. *Triennial Review Order,* ¶ *705.* The CLECs' motions on this issue are denied.

43 Finally, the issue of Verizon's amendment provision relating to routine network modifications should not be dismissed. The issue is raised in the Triennial Review Order and any change in interconnection agreements resulting from the FCC's treatment of the issue is properly addressed in arbitration.

44 For the reasons discussed above, the motions to dismiss are denied and the parties must proceed with the arbitration.

45 **JOINT CLECS' MOTION.** Based upon the parties' responses to Verizon's motion to hold the proceeding in abeyance, the arbitrator granted Verizon's motion in Order No. 04, subject to the condition that Verizon maintain the status quo under existing interconnection agreements in Washington State by continuing to offer UNEs consistent with the agreements at existing rates pending completion of the arbitration. On the same day as Order No. 04 was entered, the Joint CLECs filed a motion requesting that the Commission require Verizon to

> [C]ontinue 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")and any resulting FCC action or additional Commission action.

Motion at 1. The Joint CLECs assert that Verizon is likely to unilaterally limit or deny CLEC access to UNE-P and dedicated transport, dark fiber and high-capacity transport and loops, and increase prices upon the *USTA II* mandate becoming effective, despite the existence of interconnection agreements that preclude such action. *Id. at 3.*

46 The Joint CLECs assert that Verizon will seek to revise all of its interconnection agreements to eliminate these UNEs as soon as the *USTA II* mandate becomes effective, and that CLECs will file multiple petitions to challenge Verizon's actions. *Id. at 3.* The Joint CLECs request that the Commission address this threat of immediate elimination of certain UNEs by ordering Verizon to maintain the status quo and honor its interconnection agreements. *Id. at 4.* The Joint CLECs assert that the Commission has authority under state and federal law to require Verizon to comply with the terms of its interconnection agreements. *Id. at 6.* The Joint CLECs request that the Commission require Verizon to comply with such an order until "final unbundling rules are in place or until the

Commission can undertake a generic proceeding to determine the impact of the D.C. Circuit's decision on Verizon's existing obligations to provide these UNEs." *Id. at 4.*

47 Sprint, ATG, Comcast, and Covad filed responses in support of the Joint CLECs' motion, urging the Commission to maintain the status quo to ensure market stability in Washington State. Verizon opposes the motion.

48 Verizon requests the Commission deny the motion asserting that a status quo order, as requested by the CLECs, would "unlawfully abrogate existing interconnection agreements." *Verizon Response at 1.* Verizon contests the Joint CLECs' argument that they and their customers will suffer a "devastating impact" unless such an order is issued, asserting that none of the Joint CLECs currently obtains from Verizon UNE-P arrangements, high-capacity UNE loops and transport or UNE dark fiber. *Id. at 1-2.* Verizon argues in its reply that none of the carriers responding to the motion alleged irreparable harm or injury absent relief, and that any effect on customers will be *de minimis. Verizon Reply at 5.* Further, Verizon states that it will provide CLECs with 90-days notice after the court's mandate issues to transition the existing base of UNE-P customers and will accept new orders for the 90-day period. Verizon maintains that this will avoid disruption to CLEC customers.

49 Verizon asserts that the motion seeks to change the status quo, not maintain it, by asking the Commission to relieve CLECs of terms of interconnection agreements. *Id. at 2.* Verizon asserts that the Commission has no authority to prevent Verizon from complying with the terms of its agreements or to impose unbundling requirements in the absence of a valid finding of impairment. *Id.* Verizon argues that unbundling obligations under Section 251 are not self-effectuating, but require the FCC to determine which network elements must be made available. *Verizon Reply at 5.* Verizon argues that without a lawful finding of impairment, there is no unbundling obligation. *Id.*

50 Verizon argues that the Commission cannot engage in a "generic" proceeding to interpret the meaning of individual interconnection agreements, asserting that this is contrary to the holdings of the Ninth Circuit Court of Appeals, citing *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003). *Verizon Response at 8.* Verizon argues that the Commission cannot rely on a condition in the Bell Atlantic/GTE Merger Order to find that Verizon must continue to provide access to UNEs under FCC regulations vacated more than 14 months ago (rules adopted in UNE Remand Order). *Id. at 8-9.* Finally, Verizon argues that the Commission has no authority to re-impose the vacated unbundling obligations for mass-market switching, high-capacity loops and transport and dark fiber after issuance of the D.C. Circuit's mandate. *Id. at 10.*

51 **Discussion And Decision.** The parties' comments in dispositive motions and responsive pleadings, as well as responses to the Joint CLECs' motion, on the effect of *USTA II* on ILEC unbundling obligations, whether a change in law occurs when the *USTA II* mandate becomes effective, and state authority to interpret and impose unbundling obligations underscore the urgency behind the Joint CLECs' motion. The momentous confusion in the state of the law under Section 251 of the Telecommunications Act since the D.C. Circuit entered its decision in *USTA II* likewise creates equally momentous confusion in the competitive markets in Washington State and across the country until the FCC, or the states, in the absence of FCC action, act to resolve the issues, despite the assertions by various BOCs that they will not immediately raise prices or change contract terms.

52 The Commission has authority under Section 252 to approve negotiated or arbitrated interconnection agreements. The Act does not preclude state commission enforcement of any regulation, order or policy establishing access and interconnection obligations of local exchange carriers, as long as the state commission action is consistent with Section 251 and does not prevent

implementation of the requirements of the section. *49 U.S.C. § 251*(d)(3). The FCC has recognized the authority of state commissions to address fact-intensive determinations relating to interconnection agreements, including enforcement of those agreements.[6]

53 The Commission also has authority under RCW 80.36.610(1) to "take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission" under the Act. The Commission has authority under state law to resolve complaints between two or more public service companies and to determine whether any practice of a telecommunications company is unreasonable. *See RCW 80.04.110 and RCW 80.36.170.* As Commission Staff notes, the Commission has adopted rules governing the enforcement of interconnection agreements. *See WAC 480-07-650.* Finally, The Commission's governing statutes require the Commission to regulate in the public interest the rates, services, facilities and practices of telecommunications companies in this State. *RCW 80.01.040(3).* Considered together, the Commission has authority to address the Joint CLECs' motion as well as the issues raised by the motion.

54 The Joint CLECs request an order to maintain the status quo "pending judicial review of the FCC's TRO and any resulting FCC action or additional Commission action." The overriding public interest in maintaining stability in the local telecommunications marketplace in Washington State until these matters are resolved requires that the Commission grant the Joint CLECs' motion.

---

[6] *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Agreements under Section 252(a)(1),* WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd. 19.337, ¶ 7 (October 4, 2002) [Hereinafter "*FCC Declaratory Ruling*"].

55 As required in Order No. 04, Verizon must continue to provide all of the products and services under existing interconnection agreements with CLECs, at the prices set forth in the agreements, until the Commission approves amendments to these agreements in this arbitration proceeding or the FCC otherwise resolves the legal uncertainties presented by the effect of the mandate in *USTA II*. Maintaining the status quo among parties to interconnection agreements will allow negotiation or arbitration of amendments to such agreements to proceed without the threat of sudden or unplanned discontinuation of services and products offered under the agreements.

56 This Order is consistent with Section 251. It does not establish unbundling requirements, it merely requires Verizon to comply with the terms of its existing interconnection agreements, including change in law provisions, until the FCC establishes interim rules governing Section 251 obligations that permit change, or until this Commission approves appropriate amendments to those agreements.

57 Verizon argues that such an order unlawfully modifies change in law provisions of interconnection agreements, asserting that a change in law has or will soon occur, and that it will honor its agreements with CLECs, including the change in law provisions. In granting this motion, the Commission does not modify the change in law provisions, but exerts it authority over the arbitration of interconnection agreements, including the interpretation of change in law provisions, and requires that Verizon make no changes until the Commission approves such a change in this arbitration proceeding.

58 While Verizon may interpret change in law provisions in a certain way, it may not act to limit or eliminate UNEs offered under interconnection agreements without the approval of this Commission. The Commission, not Verizon, has jurisdiction to decide the issues the parties raise, *i.e.*, whether there is a change in law, the extent of ILEC unbundling requirements under Section 251, and the extent of state authority to establish separate unbundling requirements. Verizon

further argues that the Commission may not engage in a "generic" proceeding to interpret the meaning of individual interconnection agreements. The Commission need not initiate a generic proceeding as to Verizon, as Verizon has filed a petition in this docket to arbitration amendments to all of its interconnection agreements in Washington. The Commission will resolve any issues relating to the interconnection agreements in this consolidated docket.

59 The Commission may modify or revoke this Order at any time if the circumstances that gave rise to this Order change. For example, should the FCC enter interim rules that address the legal uncertainties raised by the parties, this status quo order may no longer be necessary.

60 **NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to *WAC 480-07-810(3)*.**

Dated at Olympia, Washington, and effective this 15th day of June, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge