PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

May 5, 2005

TO: PARTIES OF RECORD IN THE CONSOLIDATED PROCEEDINGS OF CASE (C.) 04-08-026, C.04-09-001 and C.04-09-010

These consolidated proceedings were filed on August 19, 2004, September 1, 2004, and September 7, 2004, respectively, and are assigned to Commissioner Brown and Administrative Law Judge (ALJ) Econome. This is the decision of the Presiding Officer, ALJ Econome.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 8.2 of the Commission's Rules of Practice and Procedure.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:jva

Attachment

PRESIDING OFFICER'S DECISION OF ALJ ECONOME (Mailed 5/05/2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AT&T Communications of California, Inc. (U 5002 C), TCG Los Angeles, Inc. (U 5462 C), TCG San Diego (U 5389 C) and TCG San Francisco (U 5454C), Complainants, vs. Verizon California Inc. (U 1002 C), Defendant.	Case 04-08-026 (Filed August 19, 2004)
Telescape Communications, Inc. (U 6589 C), Wholesale Airtime, Inc. (U 5751 C), and Blue Casa Communications, LLC (U 6764 C), Complainants, vs. Verizon California, Inc. (U 1002 C), Defendant.	Case 04-09-001 (Filed September 1, 2004)
ACN Communication Services, Inc. (U 6342 C), Covad Communications Co. (U 5752 C), and Vycera Communications, Inc. (U 5477), Complainants, vs. Verizon California Inc. (U 1002 C), Defendant.	Case 04-09-010 (Filed September 7, 2004)

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OPINION ON CONSOLIDATED COMPLAINTS

I. Summary

Complainants in three consolidated complaints, (1) AT&T Communications of California, Inc., TCG Los Angeles, Inc., TCG San Diego, Inc. and TCG San Francisco, Inc. (AT&T); (2) Telescape Communications, Inc. (Telescape) and Wholesale Airtime, Inc. (Wholesale Airtime);[1] and (3) ACN Communications Services, Inc. (ACN),[2] allege in essence that their interconnection agreements with Verizon California, Inc. (Verizon) require Verizon to provide complainants unbundled access to the Local Switching and Common Transport network elements. These complainants, together with intervenor nii Communications, Inc (nii), as well as Intervenors Anew Telecommunications Corporation d/b/a Call America and Navigator Telecommunications, LLC (Call America and Navigator), filed summary judgment motions, and Verizon filed a cross motion for summary judgment. Intervenor MCI, Inc. (MCI) did not seek summary judgment, but opposed Verizon's motion and participated in the evidentiary hearings.

We hold that Verizon must allow AT&T, Telescape, Wholesale Airtime, nii, MCI, Call America, and Navigator to purchase unbundled Local Switching

[1] Complainant Blue Casa Communications, LLC did not join in the motion for summary judgment and has moved that it be permitted to withdraw from the proceeding. We grant this motion.

[2] On September 22, 2004, Covad Communications Company filed a notice to withdraw from the complaints. On December 6, 2004, Vycera Communications, Inc. moved to withdraw from the complaint. We grant both Covad and Vycera's motions to withdraw from the complaint.

and Common Transport network elements under the terms of their interconnection agreements, and may not decline to sell the unbundled network elements on the grounds that Verizon has changed certain hardware (i.e., replaced the circuit switch with a packet switch) used to provide the network elements. We so hold because the interconnection agreements address the functionality, and not the specific hardware, of the switch providing the Local Switching and Common Transport network elements. Verizon's obligation to continue to provide these network elements is also circumscribed by implementation of other decisions, such as the *Triennial Review Remand Order*,[3] and related proceedings, as explained below.

Complainants filed these complaints before the Federal Communications Commission (FCC) issued the *Triennial Review Remand Order*. That order determined, among other things, that the incumbent local exchange carriers (ILECs) are not obligated to provide unbundled local switching pursuant to Section 251(c)(3) of the Federal Telecommunications Act.[4] The FCC made the *Triennial Review Remand Order* effective as of March 11, 2005, with a 12 month transition period for certain customers. The relief granted in these cases is limited to the competitive local exchange carrier (CLEC) customer base for which Verizon is still required to provide unbundled Local Switching and Common Transport for a limited period, as this requirement is phased out under the *Triennial Review Remand Order* and related proceedings.

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[3] Order on Remand in *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338 released February 4, 2005 (*Triennial Review Remand Order)*.

[4] The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq*.

Furthermore, this order does not prohibit Verizon from deploying its new packet switches, nor does the order require Verizon to unbundle and provide the advanced service capabilities of its packet switches to complainants and intervenors. This order does require Verizon to comply with its interconnection agreements with complainants and intervenors and to provide the Local Switching and Common Transport network elements pursuant to those agreements.

We deny relief to complainant ACN, because ACN's interconnection agreement has expired. We also deny relief to Intervenor Fones4All for failing to prosecute or in anyway meet its burden of proof. After being granted intervention, Fones4All did not request specific relief or participate in any aspect of these cases, including the motions for summary judgment, the hearings, or post-hearing briefing.

II. Procedural Background

A. Verizon's June 15, 2004 Letter

All complainants except ACN, and all intervenors except Fones4All, have valid interconnection agreements with Verizon. Pursuant to those agreements, Verizon currently provides complainants with unbundled Local Switching and Common Transport network elements. These two network elements are part of the unbundled network elements platform (UNE-P) by which complainants and intervenors provide local service to many California consumers in Verizon's service territory.

These consolidated complaints arise from a June 15, 2004 Verizon letter to complainants and intervenors which stated that, beginning September 17, 2004, Verizon would convert its Class 5 circuit switches to packet switches in two of its five central offices. In so doing, Verizon would eliminate complainants' and

intervenors' access to the Local Switching and Common Transport UNEs. Verizon has stated it can serve complainants and intervenors' customers through a resale platform, as opposed to the UNE-P.

B. The Consolidated Complaints

The three complaints filed in August and September 2004 were consolidated by a September 21, 2004 Administrative Law Judge (ALJ) Ruling because of common issues of law and fact. All three complaints allege that Verizon intends to eliminate the ability of other CLECs to purchase unbundled Local Switching and Common Transport network elements, alone and in combination with other network elements. The complaints also contend that Verizon's anticipated actions violate Verizon's interconnection agreements with complainants, as well as federal and state law.

C. The Order Maintaining the Status Quo

On August 19, 2004, AT&T filed, together with its complaint, an Emergency Motion for Order Maintaining the Status Quo Pending Resolution of the Complaint. On September 15, 2004, the Assigned Commissioner and ALJ granted AT&T's motion. (September 15 Ruling Maintaining the Status Quo.) The September 15 Ruling Maintaining the Status Quo, still in effect, made clear that it does not prohibit Verizon from deploying its new packet switches, nor does the ruling require Verizon to unbundle and provide the advance service capabilities of its packet switches to AT&T. The ruling only requires Verizon to continue to provide AT&T access to unbundled Local Switching and Common Transport network elements under the terms of AT&T's interconnection agreement, which addresses functionality, and not specific hardware of the switch providing the Local Switching and Common Transport network elements.

The September 15 Ruling also maintains the status quo by extending the restraint to Verizon's performance under its California interconnection agreements with substantially similar access provision. It does so in order to maintain a level playing field and treat Verizon's interconnection agreements with all similarly situated California CLECs in the same way.

D. September 17, 2004 Hearing and Decision Confirming September 15 Ruling

On September 16, 2004, Verizon filed a notice regarding compliance with the September 15 Ruling. In that notice, Verizon clearly informed the Commission for the first time that it was unable at that time to deploy the packet switches and continue to provide AT&T the access required by the ruling due to the lack of operational support system capabilities currently in place. Therefore, even though the September 15 Ruling did not prohibit Verizon from deploying its packet switch, Verizon stated it would not deploy packet switches in California while the ruling remained in place.

In light of the new information, the Assigned Commissioner and ALJ convened an emergency hearing on September 17, 2004 so that AT&T and Verizon could offer witnesses on the issue of the parties' respective harms, with a particular focus on end-user customers. The testimony at the hearing demonstrated that if the status quo were maintained, the current service to both AT&T and Verizon customers should not be disrupted.

On September 23, 2004, the Commission issued an interim order, Decision (D.) 04-09-056, which clarified and confirmed the September 15 Ruling. On that same day, the Commission issued D.04-09-057 which denied Verizon's appeal as to the categorization of this case and affirmed the categorization as "adjudicatory," as previously determined in the Instructions to Answer mailed to Verizon on August 24, 2004.

E. Subsequent Events

On October 21, 2004, the Assigned Commissioner and ALJ issued a Scoping Memo setting dates for the parties to file cross motions for summary judgment and reserving a hearing date if necessary. The following complainants or intervenors filed cross motions for summary judgment: AT&T; Telescape, Wholesale Airtime and nii; ACN; Call America and Navigator; and Verizon. MCI did not file a motion for summary judgment but opposed Verizon's summary judgment motion.

On December 20, 2004, the parties completed briefing on the cross motions for summary judgment. MCI alleged that hearings were necessary on four issues. The ALJ made no determination on the outcome of the cross motions but set hearings on the two issues set forth below in order to have a complete record so that the Commission could resolve the matter as soon as possible. The issues addressed in hearings were:

- What is the capability of the Nortel switch as deployed by Verizon with respect to performing the circuit switching function? Is the Nortel switch able to be modified to perform the circuit switching function and if so, what is the extent of the necessary modifications?

- From a technical perspective, is it feasible for Verizon to leave in place its existing circuit switch and also deploy the new Nortel switch?

Hearings were held on Friday, January 21 and Monday, January 24, 2005. Following the hearing and subsequent briefing, the FCC released the *Triennial Review Remand Order*. The parties in the instant case had the opportunity to address the effect, if any, this recent FCC order has on this case. The briefing was complete on March 7, 2005, on which date the cases were submitted.

We make our determination on the entire record, which includes the motions for summary judgment as well as the hearing transcript and post-hearing briefs. Complainants have the burden of proof in these complaint cases. The standard of proof is by a preponderance of the evidence. (See *Office of Ratepayer Advocates v. Pacific Bell Telephone Company*, D.01-08-067, 2001 Cal PUC LEXIS 517*8.)[5]

III. Circuit Switches vs. Packet Switches

Verizon currently provides complainants with unbundled Local Switching and Common Transport network elements through its circuit switches. Verizon claims that it is no longer required to do so when it deploys its packet switches.

Preliminarily, it is useful to describe the difference between circuit and packet switches. With a circuit switch, when person "A" calls person "B," a dedicated circuit is created between these two points. This path is not shared by anyone else while the call takes place. A packet switch, in contrast, is more like a freeway, on which multiple vehicles with differing originations and destinations share the same path. A packet switch is more efficient than a circuit switch because calls and other data are packaged (i.e., digitized and packetized), sent through a shared network, and reassembled at their respective destinations.

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[5] On March 7, 2005, Verizon filed a conditional request that the Commission take administrative notice of Verizon's March 4, 2005 brief filed in Washington State. Verizon states that MCI's opening brief exceeded the ALJ's ruling that the parties only discuss the effect of the *Triennial Review Remand Order* on this case, and also made reference to a recent decision from the Washington State Public Utilities Commission. We deny Verizon's motion to strike MCI's brief, but take notice (under Rule 73 of our Rules of Practice and Procedure) of Verizon's March 4, 2005 motion for reconsideration of the Washington State Public Utilities Commission decision. In granting this motion, we recognize that Verizon filed this document, but make no findings or conclusions about the veracity of its representations.

Packet technology is not new. It was first deployed over 15 years ago, replacing high-capacity telecommunications circuits, and is currently used by carriers to route long-distance traffic. The technology has evolved such that it can now be deployed into additional branches of the telecommunications network. The benefits from such deployment include many advanced service features, including broadband capabilities, as well as certain efficiencies.

IV. Parties' Positions

A. AT&T

AT&T states that its interconnection agreements with Verizon require Verizon to provide AT&T with access to Local Switching and Common Transport regardless of the switching technology deployed by Verizon. According to AT&T, the record established that it is technically feasible for Verizon to provide AT&T with access to Local Switching and Common Transport through the five central offices at issue regardless of how Verizon deploys its Nortel Succession switches (Nortel switches). AT&T views its complaint as a breach of contract case, and believes that Verizon's failure to provide these network elements by unilaterally discontinuing them after installing packet switches would breach AT&T's interconnection agreements, absent a valid amendment to them. According to AT&T, the hardware or technology used is irrelevant to Verizon's obligation to provide these elements, and Verizon must provide these elements whether through its existing switches or a replacement switch.

B. Telescape, Wholesale Airtime, nii; ACN; Call America and Navigator

These CLECs, like AT&T, believe that their interconnection agreements with Verizon require Verizon to provide unbundled local switching, regardless of the technology Verizon uses to do so. Telescape , Call America, and Navigator

also argue that the Commission may require Verizon to continue to provide unbundled local switching under its independent state authority to compel compliance with California's unbundling policy. ACN also requests that the Commission find that Verizon's conduct in refusing to provide unbundled switching to ACN is anticompetitive.

C. MCI

As stated above, MCI did not file a motion for summary judgment, but opposed Verizon's motion for summary judgment. Additionally, MCI requested and participated in hearings on the issues set forth above.

MCI believes that Verizon's motion should be denied because the law is not sufficiently settled for the Commission to grant judgment. MCI states that the FCC has declined to unbundle packet switches only for broadband, or advanced services, and has consistently required CLEC access to UNEs needed to provide narrowband services. MCI also states that, under its interconnection agreement with Verizon, Verizon is required to provide unbundled local switching regardless of the technology used.

With respect to the factual issues which were the subject of evidentiary hearings, MCI states that the Nortel switch as deployed by Verizon has circuit switching capabilities that could support UNE-P customers, because Verizon is deploying the switch with a re-deployed enhanced network module (ENET) circuit switching fabric which can support UNE-P. MCI states that Verizon's decision to remove the UNE-P customers from the ENET is a policy choice, and not a technical decision. MCI also argues that Verizon tried but failed to create "pure" packet switching in order to eliminate competition. MCI believes that Verizon would need to make only straightforward modifications to the re-deployed ENET to support this traffic with circuit switching rather than packet

switching. According to MCI, it is also technically feasible for Verizon to operate its circuit switch and the Nortel switch at the same time.

In sum, MCI maintains that Verizon has three technical alternatives to providing unbundled local switching: (1) use the ENET being re-deployed with the Nortel switch to support UNE-P customers; (2) use the packet switching fabric being deployed with the Nortel switch to support UNE-P customers; or (3) leave in place the existing DMS-100 circuit switch to support UNE-P customers, and operate the Nortel switch in parallel.

D. Verizon

Verizon states that federal law and the FCC have never required unbundled packet switching. Verizon similarly states that its interconnection agreements with the CLECs, adopted under and incorporating federal law, have never required unbundled packet switching and do not require it now. Verizon states that the interconnection agreements can only be interpreted against this backdrop of federal law, both because they are the means of effectuating federal law and because the agreements themselves specifically state that the duties they impose are congruent with the requirements of federal law.

Verizon also states that federal law prohibits this Commission from making a determination under its independent state authority that packet switches are a network element subject to unbundling. According to Verizon, the FCC's determination not to require the unbundling of packet switches preempts inconsistent state regulation, and means that no such regulation is appropriate. Verizon also argues that the interconnection agreements at issue here explicitly restrict Verizon's unbundling obligations to those required by federal law, and federal law precludes the unbundling of packet switches. Therefore, according to Verizon, in the absence of any explicit agreement to unbundle packet switches, the Commission cannot interpret the interconnection

agreements to impose such an unbundling requirement. Verizon further believes that its interconnection agreements do not contain unbundling obligations that exceed those set forth by the FCC.

Verizon states that although its Nortel switches have both packet and circuit switching capability, as currently configured, the switches are packet switches and cannot support UNE-P traffic in a TDM mode without being modified. Verizon elaborates that its Nortel switch is a packet switch, and the fact that it has continued to serve a few data lines which could not be supported by the packet switching fabric over the ENET does not alter this conclusion.

Verizon believes that modifications, or "operational workarounds" to perpetuate UNE-P, would be costly, time consuming, and present serious operational challenges. Therefore, Verizon believes making these modifications is not feasible.

Verizon first believes that such modifications would not be technically feasible because any switching overlay would be fraught with problems.[6] Verizon further states that operational "workarounds" to perpetuate UNE-P would be costly. Verizon's witness, Danny Peeler, is Nortel's solution architect for the Nortel succession switches. Peeler states that he spoke to a Nortel director who does commercial costing and the director told Peeler the cost would be in the millions. Peeler also stated that making such modifications would take at least six months.

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[6] According to Verizon, these problems include but are not limited to: (1) Nortel redesign of the complexes; (2) additional interface packets; (3) echo cancellers; (4) additional provisioning and engineering work to support the echo cancellers; (4) possible additional interworking SPMs; (5) modification of node and line provisioning data; (6) TDM remotes; (7) a transport solution to backhaul GR-303 DLC traffic, and (8) additional provisioning and translations for the GR-303 DLC lines.

Verizon also states that duplicative deployment of both switches is not feasible from a business perspective, again because such deployment is costly and time consuming.

V. Applicable Law

Most of the interconnection agreements have provisions addressing how applicable law affects the parties' rights and obligations under the agreements. Therefore, before addressing the specific interconnection agreements at issue, it is useful to set forth the applicable federal law regarding requirements to unbundle the local switching and packet switching network elements.

A. Network Elements

The Telecommunications Act of 1996 requires ILECs to provide "access to network elements on an unbundled basis." (47 U.S.C. § 251(c)(3).) The term "network element" means "a facility or equipment used in the provision of a telecommunications service. This term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." (47 U.S.C. § 153(29).)

The FCC has consistently maintained a broad definition of network elements subject to the 1996 Telecommunication Acts's unbundling requirement which is not limited to a particular piece of hardware:

> "We reaffirm our previous interpretation of the definition of 'network element', set forth in Section 153(29) of the Act, as requiring incumbent LECs to make available to requesting carriers network elements that are capable of being used in the provision of a telecommunications service. Section 153(29) defines 'network element' as 'a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions and capabilities that are provided

> by means of such facility or equipment…' As an initial matter, we disagree with those commenters that continue to argue that 'network elements' can only be physical facilities or pieces of equipment and therefore cannot include mere features, functions, and capabilities of a physical facility or equipment, such as a portion of the available bandwidth of a loop. Several courts, including the Supreme Court, have previously considered and rejected this argument. Indeed, the Supreme Court stated that '[g]iven the breadth of [Congress's network element] definition, it is impossible to credit the incumbents' argument that a 'network element' must be part of the physical facilities and equipment used to provide local telephone service.'"(Citations omitted.)[7]

Verizon argues that determining what is a network element is essentially a two-part process. According to Verizon, once the FCC determines whether a particular facility or equipment should be unbundled, only then do the features and functions of the particular piece of equipment become available for unbundling purposes. Thus, according to Verizon, the features and functions of the circuit switch are subject to unbundling, but the features and functions of a packet switch are not, even though both pieces of hardware may be utilized to provide overlapping features or functions, in this case, local switching.

We disagree with Verizon's narrow reading of the definition of a network element tied to a particular piece of equipment. The authorities cited above define a network element as the facility or equipment used to provide telecommunications service, as well as the features, functions, and capabilities

[7] *In the Matter for Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.,* CC Docket Nos. 01-338 et al., Further Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16,978, FCC 03-36 (*Triennial Review Order*) released August 21, 2003 at ¶ 58.

provided by means of such facility or equipment. Once a feature or function provided by a facility or piece of equipment is identified as a network element, that feature or function remains a network element regardless of the piece of equipment used to provide it.

This broader definition makes sense in the commercial setting, where parties to an interconnection agreement care about the nature of the unbundled services they are to receive. For example, a CLEC receiving the local switching does not care what piece of equipment is used to perform the local switching function, as long as the CLEC receives the agreed-upon function in a serviceable manner.

B. Local Switching

The FCC's *Local Competition Order*[8] held that ILECs "must provide local switching as an unbundled network element" and, until the T*riennial Review Remand Order* issued earlier this year, no subsequent FCC order has reversed that holding. (See ¶ 410.) The FCC's definition of local switching is consistent with its definition of a network element, and is not limited to the technology used to provide that switching. ("[W]e identify a local switching element that includes the basic function of connecting lines and trunks…." *Id*.) The *Local Competition Order* gave rise to 47 C.F.R. § 51.319, which also defines local switching without regard to underlying technologies.[9]

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[8] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98 released August 8, 1996. (*Local Competition Order.*) (As stated above, the *Triennial Review Remand Order* addresses phasing out the above requirement.)

[9] Section 51.319 states in pertinent part: "(c) Switching Capability. (1) Local Switching Capability. (i) The local switching capability network element is defined as: (A) line-side facilities, which include, but are not limited to, the connection between a loop

Footnote continued on next page

C. Packet Switching

The FCC has declined to require unbundling of packet switching for advance services, but has not squarely addressed the issue of whether the ILECs can replace circuit switches with packet switches to avoid unbundling obligations.

Because of an insufficient record, in the *Local Competition Order*, the FCC did not finally decide the issue of whether to unbundled packet switches. The FCC stated it would continue to review and revise the rules.

Paragraph 427 of the *Local Competition Order* provides:

> "At this time, we decline to find, as requested by AT&T and MCI, that incumbent LECs' packet switches should be identified as network elements. Because so few parties commented on the packet switches in connection with Section 251(c)(3), *the record is insufficient for us to decide whether packet switches should be defined as a separate network element*. We will continue to review and revise our rules, but at present, we do not adopt a national rule for the unbundling of packet switches. "(Emphasis added.)

In that order, the FCC addressed a limited request by several CLECs to unbundle *data switching* by packet switches. (See ¶ 407.) To the extent that the

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termination at the main distribution frame and a switch line card; (B) trunk-side facilities, which include, but are not limited to, the connection between trunk termination at a trunk-side cross-connect panel and a switch trunk card; and (C) all features, functions, and capabilities of the switch, which include but are not limited to: (1) the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks, as well as the same basic capabilities made available to the incumbent LEC's customers, such as a telephone number, white page listing, and dial tone; and (2) all other features that the switch is capable of providing…"

FCC focused on packet switches in the *Local Competition Order*, it focused on packet switches solely as a vehicle for providing advanced and data services.

In the *UNE Remand Order*,[10] ¶ 304, the FCC addressed whether to unbundle packet switching. As a threshold matter, the FCC defined the functionality of the packet switching network element. The FCC first described packet-switched networks, where "messages between network users are divided into units, commonly referred to as packets, frames, or cells. These individual units are then routed between network users. The switches that provide this routing function are 'packet switches,' and the function of routing individual data units based on address or other routing information contained in the units is 'packet switching.'" (¶ 302.)

The FCC's packet switching definition focuses on the packet switching functionality used for providing data and advanced services, and not voice. The FCC describes a component of the packet switching functionality, the Digital Subscriber Line Access Multiplexer (DSLAM), and how the DSLAM, or a separate splitter, can split voice (low band) and data (high band) signals carried over a copper twisted pair. At that point, "the voice signal is transmitted toward a circuit switch, and the data from multiple lines is combined in packet or cell format and is transmitted to a packet switch…" (¶ 303.) Thus, the FCC's definition distinguishes low-band voice from the packet switching definition.[11]

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[10] *In the Matter of Implementation of the Local Competition provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd. 3696, FCC 99-238 released November 5, 1999 (*UNE Remand Order*).

[11] The FCC includes the DSLAM as part of the packet switching network element. However, the FCC also recognizes that a splitter separate from the DSLAM can separate low-band voice and high-band data signals, and that separate splitter is not included in

Footnote continued on next page

Paragraph 304 of the *UNE Remand Order* then defines packet switching as follows:

> "We define packet switching as the function of routing individual data units, or 'packets,' based on address or other routing information contained in the packets. The packet switching network element includes the necessary electronics (e.g. routers and DSLAMs [Digital Subscriber Line Access Multiplexer].) We find that packet switching qualifies as a network element because it includes 'all features, functions and capabilities…sufficient…for transmission, routing or other provision of a telecommunications service."

In the *UNE Remand* Order, the FCC declined to unbundle the packet switching functionality (with a limited exception not applicable in this case). Similar to the definition discussed above, the rationale for this decision focused on using the packet switching function for providing advanced services. Paragraph 306 of the *UNE Remand Order* states in pertinent part:

> "…The record demonstrates that competitors are actively deploying facilities used to provide advanced services to serve certain segments of the market – namely, medium and large businesses – and hence they cannot be said to be impaired in their ability to offer service, at least to these segments without access to the incumbent's facilities. …We conclude, however, that given the nascent nature of the advanced services marketplace, we will not order unbundling of the packet switching functionality as a general matter." (Emphasis added.) (See generally ¶¶ 300-317.)

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the packet switching definition. Thus, we view the FCC's packet switching definition as focused on data and advanced services.

The *Triennial Review Order* also addresses the packet switching function. Because the FCC continues to apply the same definition of packet switching used in the *UNE Remand Order* (see ¶ 535), the FCC's refusal to unbundle "packet switching as a stand-alone network element" again focuses on data and advanced services. (See ¶ 537; See also ¶ 539: "Thus, we decline to require unbundling on a national basis for stand-alone packet switching because it is the type of equipment used in the delivery of broadband.")

Verizon believes the orders above are broader in scope, and apply to both voice and advanced services. Verizon states the FCC clarified this point when it denied MCI's (WorldCom's) petitions for reconsideration and clarification on unbundling packet switching equipment. However, ¶ 288, note 833 of the *Triennial Review Order*, which Verizon cites, limits its discussion to advance services (i.e., DSL services). ("Because we decline to require unbundling of packet-switching equipment, we deny WorldCom's petitions for reconsideration and clarification requesting that we unbundle packet-switching equipment, SDLAMs, and other equipment used to deliver DSL service.")

Furthermore, neither the *Triennial Review Order*, nor other FCC precedent, addresses the question here: whether the ILECs can replace their circuit switches with packet switches and thereby avoid their obligations under interconnection agreements to provide the local switching functionality. Verizon, however, believes the FCC addressed this issue in footnote 1365 and ¶ 448 of the *Triennial Review Order*.

Footnote 1365 in the *Triennial Review Order* states in pertinent part:

> "Moreover, the dissents fail to consider the incentives created by our decisions on packet switching and advanced services. Specifically, we no longer unbundled packet switching and the advanced 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 network, which is precisely the kind of facilities deployment we wish to encourage."

In ¶ 448, the *Triennial Review Order* further states:

> "…In fact, given that we do not require packet switches to be unbundled, there is little, if any basis for argument that our treatment of circuit switches gives LECs a disincentive to upgrade their switches."

The above references refer to the deployment of new technology for the purpose of promoting the development of advanced services (i.e., broadband networks), rather than the replacement of existing switches. We do not read this language, primarily in a footnote, as constituting a major holding that the ILECs can replace their circuit switches with packet switches and thereby avoid their obligations under the interconnection agreements to provide the local switching functionality. Presumably, had the FCC so intended, it would have rendered its decision explicitly and in more prominent, directive language. Moreover, the FCC has never prohibited Verizon from satisfying its obligations under interconnection agreements by means of a packet switch.

VI. The Interconnection Agreements

We now turn to the language of the interconnection agreements to determine whether these agreements release Verizon from its obligation to provide unbundled Local Switching and Common Transport network elements when it changes its hardware from a circuit to a packet switch. For this analysis, we turn to the specific language in the various interconnection agreements. We first analyze the AT&T interconnection agreements and then address the remaining agreements.

A. AT&T

1. Verizon's Obligation to Provide Local Switching and Common Transport Network Elements Under the Interconnection Agreements

Complainants in the AT&T case currently have two valid interconnection agreements with Verizon: (1) the AT&T Communications ICA; and (2) the TCG ICA.[12] The AT&T Communications ICA requires Verizon to provide AT&T Communications with access to UNEs identified in Attachment 2 to the agreement.[13] Attachment 2 to the AT&T Communications ICA lists and defines Local Switching and Common Transport network elements as two of the network elements to which Verizon must provide AT&T access. (See Sections 60 and 63 of Attachment 2 respectively.)

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[12] On January 23, 1997, AT&T Communications entered into the *Interconnection, Resale and Unbundling Agreement between GTE California Incorporated, Contel of California, Inc. and AT&T Communications of California, Inc.* (AT&T Communications ICA). The Commission approved the arbitrated AT&T Communications ICA in D.97-01-022, 70 CPUC2d 609. In 1998, the TCG Companies adopted the terms of the arbitrated *Interconnection Agreement between MCImetro and GTE (TCG ICA)*. The Commission approved the TCG ICA in Resolution T-16185. Verizon is the successor in interest to GTE and, as such, assumed GTE's obligations under these agreements. Both agreements continue in effect on a month-to-month basis by mutual agreement until AT&T and Verizon enter into a new agreement under 47 U.S.C. § 252. Because the interconnection agreements are quite lengthy, we discuss only the most relevant provisions in this order.

[13] See General Terms and Conditions Section 29 and 30. Specifically, Section 29, Introduction, provides that "This Part II sets forth the unbundled Network Elements that [Verizon] agrees to offer AT&T in accordance with its obligations under Section 251(c)(3) of the Act and 47 CFR 51.307 to 51.321 of the FCC Rules. The specific terms and conditions that apply to the unbundled Network Elements are described below and in Attachment 2. Prices for Network Elements are set forth in Part V and Attachment 14 of this Agreement."

Attachment 2, § 60 to the AT&T Communications ICA defines Local Switching as "the Network Element that provides the functionality required to connect the appropriate originating lines or trunks wired to the Main Distributing Frame (MDF) or Digital Signal Cross Connect (DSX) panel to a desired terminating line or trunk. Such functionality shall include *all of the features, functions, and capabilities* of the [Verizon] switch including but not limited to … ." (Italics added.)

The AT&T Communications ICA definition of Local Switching speaks in terms of "functionality", e.g., the functional means to accomplish the task of Local Switching. Local Switching is not defined in terms of the underlying technology used to "connect the appropriate originating lines or trunks…to a desired terminating line or trunk." Nowhere does the ICA state that Verizon's obligations to provide Local Switching are limited by the type of technology used to provide it. Additionally, Verizon does not dispute that the packet switch it anticipates deploying can "connect the appropriate originating lines … wired to the Main Distribution Frame (MDF) or Digital Signal Cross Connect (DSX) panel to a desired terminating line or trunk."[14]

Attachment 2, § 63 to the AT&T Communications ICA defines Common Transport as "an interoffice transmission path between … Network Elements that carries the traffic of more than one carrier and is not dedicated to a single carrier." Nothing in the ICA defines Common Transport based on the technology used to provide it, nor does the ICA permit Verizon not to provide Common Transport based on the type of switching technology deployed.

[14] AT&T's Separate Statement of Fact 9.

Similarly, the TCG ICA requires Verizon to provide TCG Companies with access to unbundled Local Switching and Common Transport network elements.[15] This agreement also speaks in terms of functionality, and provides that Verizon shall have the full burden of proving that access requested by TCG is not technically feasible. Article VI, §§ 7 and 8 of the TCG ICA define Local Switching and Common Transport respectively, in language similar to the AT&T Communications ICA.

Thus, we conclude that the interconnection agreement language above requires Verizon to provide AT&T with unbundled Local Switching and Common Transport network elements, regardless of the technology used. We next examine the sections of the interconnection agreements which Verizon believes relieve it of this obligation.

2. Verizon's Arguments

Verizon believes that several sections of the AT&T Communications ICA and the TCG ICA permit Verizon to unilaterally discontinue AT&T's access to the Local Switching and Common Transport network elements of the UNE-P. First, Verizon states that the interconnection agreements must be interpreted under the law existing at the time the interconnection agreements were entered into. Verizon argues that, as early as 1996, the FCC determined in the *Local Competition Order* that packet switches were not subject to unbundling. Verizon believes that the definition of "local switching" in the parties' interconnection

[15] See Sections 23.2 and 23.5. Because the TCG Companies adopted the MCImetro ICA, the language of the agreement that refers to MCIm should be read to refer to the TCG Companies.

agreements tracks the definition of "Local Switching" in the FCC's *Local Competition Order*, and does not include packet switching within its ambit.

As stated above, we disagree with Verizon. In 1996, because of an insufficient record, the FCC did not finally decide the issue of whether to unbundle packet switches in the *Local Competition Order*. The law at the time these interconnection agreements were entered into was unsettled as to whether packet switches were to be unbundled.

Verizon also argues that each of the interconnection agreements at issue in this case define "local switching" in a manner substantively identical to the FCC's definition of "local circuit switching" in the *Triennial Review Order*, and that this definition therefore conclusively demonstrates that the agreements contemplate only the unbundling of circuit, and not packet switches. However, all of the agreements at issue in this proceed*ing* were executed prior to the date the FCC released the *Triennial Review Order* (August 21, 2003). Verizon's argument applying a definition from an order that was not released when the underlying interconnection agreements were executed is not persuasive.

Next, Verizon states that its actions comply with the interconnection agreements because both the AT&T Communications and TCG ICAs expressly limit the network elements that must be unbundled to those offered "in accordance" with Verizon's statutory obligations under § 251(c)(3) of the Act, and relevant FCC rules.[16] Verizon believes that applicable federal law does not require unbundling of packet switches under any circumstances.

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[16] Verizon cites, among other similar provisions, the AT&T ICA at 36, Part II: Unbundled Network Elements § 29 (Introduction) ("This Part [II] sets forth the unbundled Network Elements that [Verizon] agrees to offer to AT&T in accordance with its obligations under Section 251(c)(3) of the Act and 47 CFR 51.307 to 51.321 of the FCC rules"; *id*. At 36, Part II: Unbundled Network Elements § 30.1 ("[V]erizon will offer

Footnote continued on next page

As stated above, we disagree with Verizon's interpretation. At the time the agreements were entered into (i.e., 1997 and 1998), federal law was unsettled as to whether Verizon was required to unbundle packet switches under any circumstances, and federal law does not prohibit Verizon from so doing. Moreover, the sections cited by Verizon are general provisions requiring Verizon to perform its obligations under federal law, and in some cases in accordance both with federal law and the ICA. We read these general references to federal law at the time the interconnection agreements were entered into, and not to changes of law that may occur over the life of the ICA. More specific ICA provisions set forth the parties' conduct under changed circumstances of fact or law.

Section 3.3 of the General Terms and Conditions in the AT&T Communications ICA addresses how a network change contemplated by Verizon should be handled.[17] According to § 3.3, Verizon may unilaterally discontinue an unbundled network element, such as the Local Switching and

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Network Elements to AT&T on an unbundled basis on rates, terms and conditions that are just, reasonable, and non-discriminatory in accordance with this Agreement, the Telecommunications Act of 1996, and applicable (and in force) State, and FCC Rules and Regulations."

[17] "3.3 [Verizon] will not discontinue any unbundled Network Element, Ancillary Function or Combination thereof during the term of this Agreement without AT&T's written consent which consent shall not be unreasonably withheld, except (1) to the extent required by network changes or upgrades, in which event [Verizon] will comply with network disclosure requirements stated in the Act and the FCC or the Commission as a result of remand or appeal of the FCC's [*Local Competition Order*]. In the event such a final order allows but does not require discontinuance, [Verizon] shall make a proposal for AT&T's approval, and if the parties are unable to agree, either Party may submit the matter to the Alternative Dispute Resolution procedures described in Attachment 1…" Section 2.1 of the TCG ICA contains a similar provision.

Common Transport network elements, only after proper notice, "to the extent required by network changes or upgrades." (Emphasis added.)

Verizon admits that it is technically feasible to provide AT&T (and other CLECs) with UNE-P through a packet switch, but will not do so because Verizon believes it is not legally obligated to do so. Verizon also argues that it is not technically feasible to reconfigure its network to provide for circuit switching because it would be too costly, time consuming, and challenging to go back now and reconfigure its network.

Verizon tried to install its Nortel switches as pure packet switches for the main purpose of "immunizing against UNE-P business erosion." (See Exhibit C501.) Verizon did not install a pure packet switch because its switch still contains the ENET, which is the TDM fabric used in circuit switching. According to Verizon, the ENET is not there for switching voice traffic, but has been retained as an interface with other legacy devices to provide alarm and monitoring functions and is slated for elimination in an upcoming Nortel release to provide greater efficiencies. Verizon also argues that any modifications this will be costly and take at least six months to accomplish.

Verizon was aware of its obligations under the interconnection agreements to provide Local Switching and Common Transport when it installed its packet switches. It chose to ignore these obligations and specifically designed its network with the intent to eliminate UNE-P. Verizon is not relieved of its obligation under the AT&T interconnection agreements to provide access to

these network elements because modifications may be time consuming and costly, especially under these circumstances.[18]

Section 3.3 also provides that, (a) in the event a final order by the court or the FCC allows but does not require discontinuance of an unbundled network element, the parties must try to reach agreement, and if unsuccessful, (b) either party may submit the matter to alternative dispute resolution. Thus, assuming for the sake of argument that, subsequent to the *Local Competition Order*, the FCC determined that Verizon was not required to unbundle packet switches under any circumstances, Verizon would still have to follow these change of law provisions and could not unilaterally discontinue providing the Local Switching and Common Transport network elements to AT&T. These change of law provisions are as follows: If a change of law materially affects any material term, the parties, after proper notice, may renegotiate in good faith mutually acceptable new terms. If such terms are not renegotiated within 90 days after such notice, the dispute then proceeds to alternative dispute resolution.[19]

B. Other CLEC Interconnection Agreements

Other CLECs' interconnection agreements also require Verizon to provide unbundled local switching. Telescape Communicaitons and Wholesale Airtime, Inc. have each adopted the existing ICA between Verizon and Pac-West

[18] Verizon's cost estimates are general observations at best. Peeler states he obtained his cost estimate by speaking with a Nortel director with costing experience, but did not give specifics of the cost estimates (other than they were in the millions) in order for other parties or the Commission to determine the basis for the costs.

[19] See Section 8.3 of the General Terms and Conditions of the AT&T Communications ICA and Section 12.1 of the TCG ICA.

Telecomm, Inc. (Telescape/Wholesale Airtime ICA).[20] nii Communications, Inc. adopted the existing agreement between Verizon and Rural West-Western Rural Broadband, Inc.[21] The pertinent language in these two agreements is identical.

Section 10 of the Network Elements Attachment of the Telescape/Wholesale Airtime ICA describes Verizon's obligations to provide unbundled local switching as follows:

> "…Verizon shall provide [Telescape/Wholesale Airtime] with access to the local switching element and the tandem switching element in accordance with, but only to the extent required by, Applicable Law.
> ….
>
> "The unbundled Local Switching Element includes line side and trunk side facilities (e.g. line and trunk side Ports such as analog and ISDN line side Ports and DS1 trunk side Ports), plus the features, functions, and capabilities of the switch. It consists of the line-side Port (including connection between a Loop termination and a switch line card, telephone number assignment, basic intercept, one primary directory listing, presubscription, and access to 911, operator services, and directory assistance), line and line group features (including all vertical features and line blocking options that the switch and its associated deployed switch software is capable of providing and are currently offered to Verizon's local exchange Customers), usage (including the connection of lines to lines,

[20] The Commission approved this agreement on May 22, 2003, in D.03-05-075 (2002 Cal. PUC LEXIS 945.) This agreement expires on May 29, 2006.

[21] Resolution T-16761 approved the interconnection agreement between Verizon California Inc. and RuralWest-Western Rural Broadband, Inc. nii adopted this interconnection agreement by advice letter which became effective on October 19, 2003. The underlying Verizon/ RuralWest interconnection agreement became effective on April 25, 2003, and remained in effect until April 22, 2005. nii states it has the option under 47 U.S.C. § 252(i) of adopting the interconnection agreement between Verizon California Inc. and Pac-West Telecomm.

> lines to trunks, trunks to lines, and trunks to trunks), and trunk features (including the connection between the trunk termination and the trunk card)."

As in the interconnection agreements discussed above, nothing in this interconnection agreement limits Verizon's obligation to provide local switching a specific type of hardware. Changing hardware from a circuit to a packet switch does not affect that obligation.

Verizon argues that other portions of the interconnection agreements relieve it from the requirement of providing local switching to these CLECs. As an example, Verizon cites § 1.1 of the Network Elements Attachment of the Telescape/Wholesale Airtime ICA, which Verizon states limits its obligation to provide unbundled UNE to those required by applicable law.

> "…notwithstanding any other provision of this Agreement, Verizon shall be obligated to provide unbundled Network Elements (UNEs) and Combinations to [Telescape/Wholesale Airtime] only to the extent required by Applicable Law and may decline to provide UNEs or Combinations to [Telescape/Wholesale Airtime] to the extent that provision of such UNEs or Combinations is not required by Applicable Law." (Emphasis added.)[22]

Other sections of the interconnection agreement contain similar language. Based on our discussion of federal law above, Verizon has not been relieved of its obligation to provide the Local Switching and Common Transport network elements because it changes its switch from a circuit to a packet switch.

[22] Other sections of this interconnection agreement contain similar language. (See e.g. Network Elements Attachment § 2, § 10.1.)

The interconnection agreements of MCI,[23] Call America[24] and Navigator[25] contain identical language with the Telescape/Wholesale Airtime, and nii interconnection agreements. Our conclusion regarding these interconnection agreements is the same.

ACN adopted the interconnection agreement between Verizon and Sprint Communications, L.P. pursuant to an advice letter dated July 31, 2003. The Commission approved the underlying interconnection agreement in D.01-03-044, 2001 Cal PUC LEXIS 191. This agreement expired on April 15, 2004. (See § 5 of the Verizon/Sprint Interconnection Agreement.) Although ACN states that it is involved in the Commission's interconnection arbitration proceeding, Application 04-03-014, this proceeding is not the vehicle by which ACN can extend the Sprint interconnection agreement beyond its termination date.

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[23] On February 28, 2003, MCI opted into the interconnection agreement between ICG Telecom Group, Inc. and Verizon California Inc. f/k/a GTC California Incorporated for the State of California. The underlying interconnection agreement was approved by the Commission on February 7, 2002 in Resolution T-16631. According to § 2.1, the initial term of the agreement is until June 20, 2004, and thereafter the agreement continues in effect until terminated as provided by the agreement. Neither MCI nor Verizon states that the underlying agreement has terminated.

[24] On February 18, 2003, Call America filed an advice letter with the Commission adopting the interconnection agreement between Z-Tel and Verizon, which underlying agreement was approved by the Commission on September 20, 2001 in Resolution T-16574. Pursuant to § 2.1 of this agreement, the initial term of the agreement ended June 8, 2003 and thereafter continues in full force and effect until cancelled or terminated by the parties. Neither party has indicated that it has cancelled or terminated the agreement.

[25] On July 17, 2002, the Commission approved the interconnection agreement between Navigator and Verizon in Resolution T-16672. Pursuant to §2.1 of this agreement, the initial term of the agreement ended February 19, 2004 and thereafter continues in full force and effect until cancelled or terminated by the parties. Neither party has indicated that it has cancelled or terminated the agreement

Because the underlying interconnection agreement is not currently in force, we deny ACN its requested relief.

Although Fones4All intervened in these cases, it has not otherwise requested relief or participated in this proceeding. Fones4All failed to file a motion for summary judgment or respond to the other pleadings, failed to participate in the hearings and post-hearing briefing, and failed to provide a copy of its interconnection agreement, as the ALJ required.[26] We therefore hold that Fones4All has not met its burden of proof, and therefore deny it relief.

C. State Law Issues

Several CLECs argue that the Commission may require Verizon to continue to provide unbundled local switching under its independent state authority to compel compliance with California's unbundling policy. Because of our resolution in this case, we need not reach this issue.

VII. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janet A. Econome is the Presiding Officer in this case.

Findings of Fact

1. Complainants AT&T, Telescape, Wholesale Airtime, and Intervenors nii, MCI, Call America, and Navigator have valid interconnection agreements with Verizon.

2. Complainant ACN's interconnection agreement with Verizon has expired.

3. Pursuant to the valid interconnection agreements, Verizon currently provides complainants and intervenors with unbundled Local Switching and

[26] See October 8, 2004 Transcript at p. 25; see also March 30, 2005 ALJ Ruling.

Common Transport network elements. These two network elements are part of the unbundled network elements platform (UNE-P) by which complainants and intervenors provide local service to many California consumers in Verizon's service territory.

4. In a June 15, 2004 letter to complainants and intervenors, Verizon stated that, beginning September 17, 2004, it would convert its Class 5 circuit switches to packet switches in two of its five central offices, and that in so doing, it would eliminate complainants' and intervenors' access to the Local Switching and Common Transport unbundled network elements.

5. Verizon has stated that it can serve complainants and intervenors' customers through the resale platform, as opposed to the UNE-P.

6. On September 15, 2004, the Assigned Commissioner and ALJ issued a September 15 Ruling Maintaining the Status Quo requiring Verizon to continue to provide AT&T and similarly situated CLECs access to unbundled Local Switching and Common Transport network elements under the terms of the interconnection agreements.

7. On September 23, 2004, the Commission issued an interim order, D.04-09-056, which clarified and confirmed the September 15 Ruling. On that same day, the Commission issued D.04-09-057 which denied Verizon's appeal as to the categorization of this case and affirmed the categorization as "adjudicatory."

8. The AT&T Communications ICA defines Local Switching as "the Network Element that provides the functionality required to connect the appropriate originating lines or trunks wired to the Main Distributing Frame (MDF) or Digital Signal Cross Connect (DSX) panel to a desired terminating line or trunk. Such functionality shall include *all of the features, functions, and capabilities* of the [Verizon] switch including but not limited to … ."

9. The AT&T Communications ICA definition of Local Switching speaks in terms of "functionality," e.g., the functional means to accomplish the task of Local Switching. Local Switching is not defined in terms of the underlying technology used to "connect the appropriate originating lines or trunks…to a desired terminating line or trunk." Nowhere does the ICA state that Verizon's obligations to provide Local Switching are limited by the type of technology used to provide it.

10. Attachment 2, § 63 to the AT&T Communications ICA defines Common Transport as "an interoffice transmission path between … Network Elements that carries the traffic of more than one carrier and is not dedicated to a single carrier." Nothing in the ICA defines Common Transport based on the technology used to provide it, nor does the ICA permit Verizon not to provide Common Transport based on the type of switching technology deployed.

11. The interconnection agreements of the other complainants and intervenors for whom we grant relief contain similar provisions with respect to unbundled local switching. Nothing in these interconnection agreements limits Verizon's obligation to provide local switching to the type of hardware used.

12. All of the interconnection agreements at issue in this proceeding were executed prior to the date the FCC released the *Triennial Review Order* (August 21, 2003).

13. Verizon admits that it is technically feasible to provide AT&T (and other CLECs) with UNE-P through a packet switch, but will not do so because Verizon believes it is not legally obligated to do so.

14. Verizon tried to install its Nortel switches as pure packet switches for the main purpose of "immunizing against UNE-P business erosion." Verizon did not install a pure packet switch because its switch still contains the ENET, which is the TDM fabric used in circuit switching. According to Verizon, the ENET is

not there for switching voice traffic, but has been retained as an interface with other legacy devices to provide alarm and monitoring functions and is slated for elimination in an upcoming Nortel release to provide greater efficiencies.

15. Verizon was aware of its obligations under the interconnection agreements to provide Local Switching and Common Transport when it installed its packet switches. It chose to ignore these obligations and specifically designed its network with the intent to eliminate UNE-P.

16. The interconnection agreements of Telescape, Wholesale Airtime, and nii; MCI; Call America and Navigator require Verizon to provide the network elements only to the extent required by applicable law.

17. ACN's interconnection agreement expired on April 15, 2004.

18. Other than requesting intervention, Fones4All has not otherwise requested relief or participated in this proceeding.

Conclusions of Law

1. Complainants Blue Casa Communications, LLC, Covad Communications Company, and Vycera Communications, Inc.'s motions to withdraw from this proceeding should be granted.

2. Federal law defines a network element as the facility or equipment used to provide telecommunications service, as well as the features, functions, and capabilities provided by means of such facility or equipment. Once a feature or function provided by a facility or piece of equipment is identified as a network element, that feature or function remains a network element regardless of the piece of equipment used to provide it.

3. The FCC has declined to require unbundling of packet switches for advanced services, but has not squarely addressed the issue of whether the ILECs can replace circuit switches with packet switches to avoid unbundling obligations.

4. In 1997 and 1998, at the time the AT&T interconnection agreements were executed, the law was unsettled as to whether packet switches were to be unbundled.

5. Verizon's argument applying a definition to the interconnection agreements from an order that was not released when the underlying interconnection agreements were executed is not persuasive.

6. The AT&T Communications ICA, Part II: Unbunbled Network Elements § 29 and § 30.1, among other sections, and similar sections in the TCG ICA, contain general references to federal law. We read these references to refer to the law at the time the interconnection agreements were entered into, and not to changes of law that may occur over the life of the ICA.

7. According to § 3.3 of the General Terms and conditions in the AT&T Communications ICA, and § 2.1 of the TCG ICA, Verizon may unilaterally discontinue an unbundled network element only after proper notice "to the extent required by network changes or upgrades."

8. Sections 3.3 and 2.1, discussed above, respectively provide that, (a) in the event a final order by the court or the FCC allows but does not require discontinuance of an unbundled network element, the parties must try to reach agreement, and if unsuccessful, (b) either party may submit the matter to alternative dispute resolution. Thus, assuming for the sake of argument that, subsequent to the *Local Competition Order*, the FCC determined that Verizon was not required to unbundle packet switches under any circumstances, Verizon would still have to follow these change of law provisions and could not unilaterally discontinue providing the Local Switching and Common Transport network elements to AT&T.

9. Verizon is not relieved of its obligation under the AT&T interconnection agreements to provide access to the Local Switching and Common Transport

network elements because modifications to its new switch may be time consuming and costly, especially under the circumstances of this case.

10. Based on applicable law, Verizon is not relieved of its obligation to provide the unbundled local switching and common transport network elements to AT&T; Telescape, Wholesale Airtime, and nii; MCI; Call America and Navigator on the grounds that Verizon changed certain hardware (i.e., replaced the circuit switch with a packet switch) used to provide the network elements.

11. ACN's requested relief should be denied because its underlying interconnection agreement is not currently in force.

12. Fones4All should be denied relief for failure to prosecute.

13. Verizon's motion to strike MCI's February 28, 2005 brief should be denied.

14. Verizon's March 7, 2005 conditional request that the Commission take administrative notice should be granted. Pursuant to Rule 73 of the Commission's Rules of Practice and Procedure, the Commission should take notice of Verizon's March 4, 2005 motion for reconsideration of the Washington State Public Utilities Commission, which was attached to Verizon's March 7, 2005 conditional request filed with the Commission. In granting this motion, we recognize that Verizon filed this document, but make no findings or conclusions about the veracity of its representations.

15. This order should be effective immediately to ensure Verizon continues to comply with its interconnection agreements.

O R D E R

IT IS ORDERED that:

1. Verizon California Inc. (Verizon) must allow Complainants AT&T Communications of California, Inc., TCG Los Angeles, Inc, TCG San Diego and TCG San Francisco; Complainants Telescape Communications, Inc and

Wholesale Airtime, Inc.; Intervenor nii Communications, Inc.; Intervenor MCI, Inc.; and Intervenors Anew Telecommunications Corporation d/b/a Call America and Navigator Telecommunications, LLC to purchase unbundled Local Switching and Common Transport network elements under the terms of their interconnection agreements, and may not decline to sell the unbundled network elements on the grounds that Verizon has changed certain hardware (i.e., replaced the circuit switch with a packet switch) used to provide the network elements.

2. The relief granted in Ordering Paragraph 1 is limited to the competitive local exchange carrier base for which Verizon is still required to provide unbundled Local Switching and Common Transport network elements for a limited period, as this requirement is phased out under *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338 released February 4, 2005 (*Triennial Review Remand Order*), and related proceedings.

3. Complainant ACN Communications Services, Inc. is denied relief because its interconnection agreement with Verizon has expired.

4. Intervenor Fones4All is denied relief for failure to prosecute.

5. Complainants Blue Casa Communications, LLC, Covad Communications Company, and Vycera Communications, Inc.'s motions to withdraw from this proceeding are granted.

6. Verizon's motion to strike MCI's February 28, 2005 brief is denied.

7. Verizon's March 7, 2005 conditional request that the Commission take administrative notice is granted. Pursuant to Rule 73 of the Commission's Rules of Practice and Procedure, the Commission takes notice of Verizon's March 4, 2005 motion for reconsideration of the Washington State Public Utilities

Commission, which was attached to Verizon's March 7, 2005 conditional request filed with the Commission. In granting this motion, we recognize that Verizon filed this document with the Commission, but make no findings or conclusions about the veracity of its representations.

8. Case (C.) 04-08-026, C.04-09-001, and C.04-09-010 are closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A
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(END OF APPENDIX A)