BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of VERIZON NORTHWEST INC. with COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN WASHINGTON Pursuant to 47 U.S.C. Section 252(b), and the *Triennial Review Order*.	)	Docket No. UT-043013 JOINT CLEC RESPONSE TO VERIZON PETITION FOR REVIEW OF ORDER TO MAINTAIN STATUS QUO

Eschelon Telecom of Washington, Inc., Integra Telecom of Washington, Inc., Pac-West Telecomm, Inc., Time Warner Telecom of Washington, LLC, and XO Washington, Inc. (collectively "Joint CLECs"), provide the following response to the Petition of Verizon Northwest Inc. ("Verizon") for review of Order No. 5 ("Verizon Petition"), requiring Verizon to continue to maintain the status quo of its obligations under existing Commission-approved interconnection agreements ("ICAs"). Verizon fails to provide any basis on which the Commission should review or reverse Order No. 5, and the Commission should deny the Verizon Petition.

DISCUSSION

1. Verizon mischaracterizes Order No. 5 and misinterprets applicable law in a futile attempt to support its position that the Order is unlawful and contrary to public policy. The Order in no way overrides the terms of Verizon's ICAs, but merely requires that Verizon continue to maintain the status quo until the Commission determines whether and to what extent a change of law requiring modification of those agreements has occurred. The Order thus does not even arguably attempt to block the legal effect of the D.C. Circuit Court of Appeals' decision in *USTA II*. In addition, the Commission's authority to establish unbundling requirements in the absence of effective FCC rules is irrelevant to the Commission's ability to provide interim relief and is an issue that the Commission will address when it considers the substantive issues in this arbitration. Finally, Verizon's "commitments" to take no action for 90 days are meaningless in light of Verizon's extreme interpretations of its ICAs and applicable law. Nor can Verizon claim any harm from the Order when its effect is temporary and Verizon continues to enjoy an overwhelming share of the local exchange market in its service territory.

A. Order No. 5 Does Not Override the Terms of ICAs Between Verizon and CLECs

2. The Order requires Verizon to "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*." Order No. 5, ¶ 55. Verizon mischaracterizes this requirement as "overrid[ing] the terms of valid interconnection agreements" and thus "violat[ing] federal law." Verizon Petition, ¶ 4. The Order does no such thing. Rather, the Order is no different than a preliminary injunction issued by a state superior

or federal district court requiring the parties to maintain the status quo until their disputes have been resolved. Such injunctive relief does not even arguably "override" a party's contractual rights. Indeed, Verizon has repeatedly sought a stay of the Commission's order in Docket No. UT-020406 reducing Verizon's unlawful intrastate access charges without ever once conceding that such relief would "override" the Commission's order or the statutes on which that order is based.

3. The Ninth Circuit's decision in *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003), on which Verizon relies is not to the contrary. The Court in that case invalidated a California Commission rule establishing terms and conditions for the exchange of Internet Service Provider bound traffic, without reference to specific ICAs. The Order does nothing of the kind. The Order merely requires Verizon to maintain the status quo while the Commission determines what amendments, if any, need to be made to the specific ICAs at issue in this arbitration. The Order thus is entirely consistent with the Ninth Circuit's concerns that changes to existing ICAs be made in the context of the affected ICAs.

4. Verizon nevertheless contends that it has the unfettered, unilateral right to discontinue providing certain UNEs in the wake of *USTA II*. Verizon confuses its arguments on the merits with the preliminary relief granted in the Order. The Order does not resolve the parties' disputes but simply prohibits Verizon from unilaterally implementing its interpretation of the ICAs and applicable law until the disputes over those issues have been resolved. As the Order correctly observes, "The Commission, not Verizon, has jurisdiction to decide the issues the parties raise." Order No. 5, ¶ 58.

5. Verizon's arguments also are contrary to the position that Verizon took by initiating this proceeding. Verizon sought to amend all of its ICAs in Washington to implement the FCC's *Triennial*

Review Order. If, as Verizon now asserts, Verizon believed that it had the authority under its ICAs unilaterally to implement changes in law, there would have been no reason to initiate this arbitration. Verizon simply would have implemented its interpretation of the changes of law. Verizon cannot credibly claim that it need not amend its ICAs to reflect Verizon's interpretation of changes in applicable law while simultaneously requesting that the Commission arbitrate amendments to Verizon's ICAs to implement those same changes of law.

6. Finally, Verizon claims that the Order "gives CLECs a powerful financial incentive to obstruct the implementation of D.C. Circuit's mandate, and to delay any negotiation or arbitration process that might apply under a particular agreement." Verizon Petition, ¶ 11. Again, this argument ignores the context of this arbitration. Every CLEC that has an ICA with Verizon is a named party. Verizon has raised issues arising out of *USTA II*, and the Commission has stated that it will consider those issues. Order No. 5, ¶ 34. The Commission, not the CLECs, will determine the schedule for deciding those issues. CLECs' financial incentives are irrelevant. In the absence of a requirement that Verizon maintain the status quo, on the other hand, Verizon has a powerful financial incentive to impose its own interpretation of *USTA II* on CLECs prior to any Commission decision on the disputed issues, including imposing rates for services comparable to existing UNEs that in many cases are twice as high as the UNE rates that this Commission has established. Far from being "bad public policy," Verizon Petition, ¶ 11, the Order fosters the longstanding public policy established by the legislature and this Commission to preserve and encourage further development of local exchange competition in Washington.

B. Order No. 5 Does Not Stay the *USTA II* Court's Mandate.

7. Verizon once again confuses the temporary relief granted in the Order with Verizon's position on substantive issues when claiming, "The Order is also contrary to federal law because it purports to block the D.C. Circuit's mandate." Verizon Petition, ¶ 12. The Order does not purport to block the D.C. Circuit's mandate. The Order simply requires Verizon to maintain the status quo until the Commission and/or the FCC determines the impact of the D.C. Circuit's mandate.

8. Indeed, Verizon's position on the impact of *USTA II* on Verizon's unbundling obligations only further illustrates the need for the Order. To rephrase Verizon's assertion, the issuance of the mandate in *USTA II* unquestionably *does not* eliminate Verizon's unbundling obligations. *See* Verizon Petition, ¶ 14. The D.C. Circuit merely vacated FCC rules governing certain UNEs. Those rules, however, are not even arguably the only source of Verizon's unbundling obligations. Section 251(c)(3) of the Act requires Verizon to provide unbundled access to its local exchange network, and nothing in the Act or USTA II conditions that obligation on the existence of FCC rules. Similarly, *USTA II* does not even address, much less override, the Act's preservation of Commission authority to adopt and enforce unbundling obligations. Verizon's undeniable intent to impose its extreme and unsupported interpretation of applicable law demonstrates the necessity of the Order's requirement that Verizon maintain the status quo until the *Commission and/or FCC* interprets the applicable law.

C. The Commission Has Ample Authority to Issue an Order Requiring Verizon to Maintain the Status Quo Pending Resolution of Disputed Issues.

9. Verizon's assertion that the Commission lacks authority to issue the Order is consistent with Verizon's misinterpretation of the Order. The Commission's ability to require the parties to maintain the status quo pending resolution of their disputes in this arbitration derives from the Commission's authority to review and approve all ICAs between carriers in Washington, including

amendments to those agreements. Indeed, Verizon invoked that very authority by filing its Petition for arbitration initiating this proceeding. The Order does not address, much less reach any conclusion, on the merits of Verizon's claim to be free of virtually all unbundling obligations.

10. Verizon's arguments on federal preemption and state law authority thus are entirely irrelevant to the Order. Verizon will have ample opportunity to brief the Commission on its legal position with respect to those issues, and the Joint CLECs will not compound Verizon's error by responding to Verizon's arguments on the merits at this state of the proceedings. Pending Commission review of the merits, however, the Order properly exercises Commission authority to preserve each party's position pending resolution of these and other disputed issues.

D. The Public Interest More Than Justifies the Order.

11. Verizon ignores reality by contending that permitting Verizon unilaterally to impose its interpretation of applicable law, including its ICAs, "would cause no significant disruption to the market." Verizon Petition ¶ 21. Verizon's representations are neither binding nor meaningful. Verizon states that CLECs have 90 days to convert UNEs to other services or have Verizon make that selection for them. The "price CLECs will pay" for such conversion remains unknown and completely within Verizon's discretion. A 200% rate increase, moreover, will undoubtedly make providing service to certain customers uneconomic, resulting either in a sharp escalation of CLECs' rates to end-users or discontinuation of certain services to those customers. While Verizon apparently does not consider these customers being forced to switch their service back to Verizon to be a "significant disruption to the market," Order No. 5 properly concluded that it would be.

12. Verizon's claim to be harmed by Order No. 5 is not even facially plausible. In opposing the Joint CLECs' motion that Order No. 5 granted, Verizon contended that CLECs would not suffer any harm because of the *de minimus* level at which CLECs obtain UNEs from Verizon. Verizon continues to retain a 97% share of the local exchange market in Verizon's Washington service territory.[1] Verizon has no basis to claim any significant harm from being required to continue to provide UNEs under the rates, terms, and conditions in existing ICAs for a few months while the Commission resolves the disputed issues in this proceeding.

CONCLUSION

13. For the foregoing reasons, the Commission should deny the Verizon Petition.

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[1] Docket No. UT-023003, Response Testimony of Thomas Spinks.

DATED this 28th day of June, 2004.

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