

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

|                         |   |                          |
|-------------------------|---|--------------------------|
| In the Matter of        | ) |                          |
|                         | ) | DOCKET NO. UT-041127     |
| THE JOINT PETITION FOR  | ) |                          |
| ENFORCEMENT OF          | ) | ORDER NO. 05             |
| INTERCONNECTION         | ) |                          |
| AGREEMENTS WITH VERIZON | ) | ORDER DENYING VERIZON'S  |
| NORTHWEST INC.          | ) | MOTION TO DEFER RULING;  |
|                         | ) | GRANTING AT&T'S MOTION   |
|                         | ) | TO WITHDRAW; GRANTING,   |
|                         | ) | IN PART, AND DENYING, IN |
|                         | ) | PART, VERIZON'S PETITION |
| .....                   | ) | FOR RECONSIDERATION      |

1     **SYNOPSIS.** *In this Order, we deny Verizon's motion to defer ruling on its petition for reconsideration, and grant AT&T's motion to withdraw from the proceeding. We also grant Verizon's petition for reconsideration on all issues except whether our prior order resulted in an unconstitutional taking. We find that the FCC intended in the Triennial Review Order to allow incumbent companies, such as Verizon, to replace circuit switches with packet switches to avoid unbundling obligations. In addition, we find that Verizon's action to replace its circuit switch in Mount Vernon, Washington, with a packet switch did not violate the terms of its interconnection agreements with AT&T, MCI, ATI, UNICOM, or Tel West.*

**PROCEDURAL BACKGROUND**

2     **Nature of Proceeding.** This proceeding involves a petition filed by Advanced TelCom, Inc. (ATI), AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle (collectively AT&T), MCImetro Access Transmission Service, LLC (MCI), and United Communications, Inc.,

d/b/a UNICOM (UNICOM), collectively the Joint Petitioners, seeking enforcement of their interconnection agreements with Verizon Northwest Inc. (Verizon).

- 3 **Procedural History.** On June 8, 2004, Verizon issued a Notice of Network Change informing competitive local exchange carriers (CLECs) in Washington State that Verizon intended to replace the existing Nortel DMS 100 switch, a circuit switch, in Mount Vernon, Washington, with a Nortel Succession switch, which Verizon describes as a packet switch.<sup>1</sup> Verizon notified all affected CLECs that unbundled switching would not be available at the Mount Vernon switch after September 10, 2004, but that Verizon would convert existing unbundled network element platform, or UNE-P, service to resale service.<sup>2</sup>
- 4 The Commission held a hearing in Docket No. UT-043013 on September 9, 2004, to determine whether Verizon's planned switch conversion would affect customers served by the switch. The Commission held the hearing after ATI, AT&T, Covad Communications Company (Covad), MCI, and UNICOM, collectively the Competitor Group, filed with the Commission a motion in that docket seeking enforcement of an order requiring Verizon to maintain the status quo under its interconnection agreements. The Competitor Group asserted that Verizon's planned switch conversion violated the Commission's orders and the parties' interconnection agreements.
- 5 On September 10, 2004, Verizon replaced the Mount Vernon DMS 100 circuit switch with a Nortel Succession switch. Verizon's action in Washington is unique, as Verizon has not replaced a circuit switch with a packet switch in any other location in the United States.<sup>3</sup>

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<sup>1</sup> See Exhibit A to Joint CLECs Petition for Enforcement, at 1.

<sup>2</sup> *Id.*, at 2.

<sup>3</sup> The California Public Utilities Commission has enjoined Verizon from converting Class 5 circuit switches to packet switches in two central offices while the Commission determines the propriety

- 6 On September 13, 2004, Administrative Law Judge (ALJ) Ann E. Rendahl entered Order No. 10 in Docket No. UT-043013 allowing the switch conversion to proceed but requiring Verizon to charge affected CLECs the UNE-P rate for resale service provided out of the Mount Vernon switch. Order No. 10 also directed the Competitor Group to file a petition for enforcement with the Commission to allow the Commission to address the issue of whether the provisions of the FCC's Triennial Review Order,<sup>4</sup> other FCC Orders, and interconnection agreements allow the replacement of existing circuit switches used for voice service with packet switches, rather than the mere deployment of packet switching.
- 7 On September 20, 2004, ATI, AT&T, MCI, and UNICOM, collectively the Joint Petitioners, filed with the Commission a Joint Petition for Enforcement of their interconnection agreements with Verizon.
- 8 On September 24, 2004, Tel West Communications, L.L.C. (Tel West), filed with the Commission a petition to intervene in the proceeding. The Commission granted Tel West intervention in Order No. 01, a prehearing conference order.

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of Verizon's planned switch conversion. See Exhibit H to Joint Petition, *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 5454 C) v. Verizon California Inc. (U 1002 C)*, Assigned Commissioner and Administrative Law Judge's Ruling on AT&T's Emergency Motion For Order Maintaining the Status Quo Pending Resolution of the Complaint, California Public Utilities Commission Case No. 04-08-026 (Sept. 15, 2004).

<sup>4</sup> *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, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16,978 (rel. Aug. 21, 2003) [Hereinafter "Triennial Review Order"].

- 9 On December 3, 2004, ALJ Rendahl entered Order No. 02, Recommended Decision Granting Verizon's Motion for Judgment on the Pleadings and Denying, in Part, Verizon's Motion to Strike.
- 10 In December 2004, AT&T, MCI, and Tel West filed petitions for review of Order No. 02, Commission Staff filed Comments on the Recommended Decision, and Verizon filed a response to the petitions for review and Staff comments.
- 11 On February 4, 2005, the FCC entered its Triennial Review Remand Order following the D.C. Circuit Court of Appeal's decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), which vacated in part and remanded in part the FCC's Triennial Review Order.<sup>5</sup> In its Triennial Review Remand Order, the FCC determined that, effective March 11, 2005, incumbent local exchange companies (ILECs) are no longer obligated to provide unbundled local circuit switching to requesting CLECs.<sup>6</sup> The FCC established a twelve-month period for CLECs to transition to alternative facilities and arrangements, allowing ILECs to charge CLECs for existing service during this period the UNE-P rate plus one dollar.<sup>7</sup>
- 12 On February 22, 2005, the Commission entered Order No. 03 in this proceeding, granting, in part, AT&T, MCI, and Tel West's petitions for review.
- 13 On March 4, 2005, Verizon filed with the Commission a Petition for Reconsideration of Order No. 03. Staff filed an Answer to Verizon's petition on March 14, 2005, and AT&T and MCI filed a Joint Response to Verizon's petition on March 15, 2005.

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<sup>5</sup> *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) [Hereinafter "*Triennial Review Remand Order*"].

<sup>6</sup> *Id.*, ¶ 199.

<sup>7</sup> *Id.*, ¶¶ 227-28.

- 14 In part at the request of the parties, and in part due to the press of Commission business, the Commission has extended the date for action on Verizon's petition for reconsideration several times, up to September 9, 2005.
- 15 On September 8, 2005, Verizon filed a Motion to Defer Ruling on Petition for Reconsideration, requesting the Commission further extend the time for action on the petition past September 9, 2005.
- 16 In a notice issued on Friday, September 9, 2005, the Commission requested answers to Verizon's motion by Wednesday, September 14, 2005, and extended the date for action on Verizon's petition until Thursday, September 15, 2005.
- 17 On September 13, 2005, AT&T filed with the Commission a Motion to Withdraw from the Proceeding with Prejudice.
- 18 On September 14, 2005, Tel West and Commission Staff filed responses to Verizon's motion with the Commission.
- 19 Also on September 14, 2005, Verizon filed with the Commission a Response to Tel West's Objection to Motion to Defer.
- 20 **Appearances.** Letty S. D. Friesen, AT&T Law Department, Denver, Colorado, represents AT&T. Michel Singer Nelson, Senior Regulatory Attorney, Denver, Colorado, represents MCI. Brooks Harlow, Miller Nash LLP, Seattle, Washington, represents ATI and UNICOM. David E. Mittle, Santa Fe, New Mexico, represents Tel West. Timothy J. O'Connell and John H. Ridge, Stoel Rives LLP, Seattle, Washington, and Charles H. Carrathers, III, Vice President and General Counsel for Verizon Northwest Inc. and Verizon Southwest Inc.,

Irving, Texas, represent Verizon. Jonathan C. Thompson, Assistant Attorney General, Olympia, Washington, represents Commission Staff.

**MEMORANDUM**

**A. Verizon Motion to Defer Ruling / AT&T Motion to Withdraw.**

- 21 Verizon requests the Commission further extend the date for entering an order on its petition for reconsideration until March 26, 2006. Verizon asserts that it is separately negotiating with other parties to resolve the issues raised in the proceeding in the context of broader negotiations for commercial agreements. Verizon asserts a Commission decision may complicate those discussions. Verizon expects AT&T to file a motion to withdraw from the proceeding. Verizon also asserts that no party will be prejudiced by further delay, as Verizon continues to provide access to the Mount Vernon switch under the Commission's prior orders.
- 22 In response to Verizon's motion, AT&T filed a motion to withdraw from the proceedings with prejudice. AT&T asserts that AT&T and Verizon recently entered into a commercial agreement to replace the UNE-P product AT&T had previously purchased under its interconnection agreement with Verizon. AT&T requests AT&T be allowed to withdraw from this proceeding asserting that its commercial agreement renders moot the existing dispute between Verizon and AT&T.
- 23 Tel West opposes Verizon's motion, asserting that Verizon's request is not based on a change of law or facts, but because Verizon seeks to settle with some of the parties. Tel West asserts that the uncertainty of the Commission's deferral of a decision on the issues creates substantial prejudice to Tel West and to CLECs in general. Tel West asserts that not knowing whether Tel West and other CLECs

have access to packet switches that replace circuit switches will complicate its network design.

24 Commission Staff supports Verizon's motion, asserting that deferral of the ruling would conserve Commission and party resources and maintain the status quo through March 26, 2006, at which point the issues before the Commission would become moot. Staff asserts that maintaining the status quo would benefit CLECs by continuing access to the switch at UNE-P transition rates until March 26, 2006, when CLECs no longer have access to unbundled local switching.

25 In a response to Tel West's objection, Verizon asserts that Tel West's interest in the matter is not substantial and requests the Commission limit Tel West's further participation in the matter. Verizon further asserts that Tel West has refused to negotiate with Verizon in this matter, making it difficult to resolve the issues in the proceeding. Verizon requests the Commission reject Tel West's objection.

26 *Discussion and Decision.* We grant AT&T's motion to withdraw from the proceeding with prejudice. As AT&T is one of four CLECs that filed the original petition for enforcement, allowing AT&T to withdraw from the proceeding does not affect the status of the petition, or the Commission's ability to enter a decision on Verizon's petition for reconsideration, or prejudice any other party to the proceeding. Three petitioning CLECs—MCI, UNICOM, and ATI, an intervening CLEC, Tel West, and Commission Staff remain parties to the proceeding.

27 We also deny Verizon's motion to defer ruling on its petition for reconsideration. We would be more inclined to rule in Verizon's favor if all parties agreed that deferral was appropriate. One party, however, objects to the Commission deferring its ruling. Tel West, a CLEC operating in Verizon's service area in

Washington State and out of the Mount Vernon switch, asserts it and other CLECs may be negatively affected by the uncertainty created by the Commission deferring its ruling in this matter. Contrary to Verizon's and Staff's assertions, entering an order in this matter will not prejudice any party, insofar as the entry of an order resolving this dispute is the expected result of litigation. We hope that our Order will create more certainty and assist the remaining parties in their negotiations of commercial agreements and amendments to interconnection agreements. In any event, we are not inclined to delay our decision over the objection of a party who credibly claims prejudice from delay even if the other parties can credibly claim some benefit from delay.

28 Although the Commission did not seek replies to answers to Verizon's motion to defer ruling, Verizon has filed such a reply, without requesting leave to file a reply. Parties may not file a reply to an answer without authorization or invitation. *See WAC 480-07-370(1)(d)*. We reject Verizon's reply as improper, and reject Verizon's request to limit Tel West's participation in the proceeding. As discussed above, Tel West is a CLEC operating in Verizon's service area and out of the Mount Vernon switch. Regardless of the number of circuits Tel West serves out of the switch, Tel West has a substantial interest in the outcome of this proceeding because Verizon's actions affect Tel West's service to customers and the Commission's decision in this matter may affect Tel West's decisions concerning network design.

#### **B. Petition for Reconsideration.**

29 In its petition, Verizon asserts that the Commission erred in:

- Interpreting the Triennial Review Order to preclude the replacement of circuit switches with packet switches to avoid existing unbundling obligations;<sup>8</sup>

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<sup>8</sup> Verizon Petition for Reconsideration, ¶¶ 3, 26-47.



- Finding Verizon in breach of its interconnection agreements with AT&T, MCI, ATI, UNICOM, and Tel West by replacing the Mount Vernon circuit switch and eliminating the availability of unbundled local circuit switching;<sup>9</sup> and
- Concluding that the nature and functions of the Mount Vernon switch are material issues of fact in interpreting the definition of “local circuit switching” in the CLECs’ interconnection agreements.<sup>10</sup>

Verizon also asserts that the Commission’s decision results in an unconstitutional taking of Verizon’s property.<sup>11</sup> Verizon’s claims are addressed in greater detail below.

### 1. Does Order No. 03 Err in Interpreting the Triennial Review Order?

30 The primary issue in this proceeding is the meaning of two statements in the FCC’s Triennial Review Order. In discussing whether to require ILECs to provide unbundled access to local circuit switching, the FCC stated: “[G]iven that we do not require packet switches to be unbundled, there is little, if any, basis for an argument that our treatment of circuit switches gives LECs a disincentive to upgrade their switches.”<sup>12</sup> The FCC further stated:

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

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<sup>9</sup> *Id.*, ¶¶ 48-57.

<sup>10</sup> *Id.*, ¶¶ 59-65.

<sup>11</sup> *Id.*, ¶ 58.

<sup>12</sup> *Triennial Review Order*, ¶ 448.

*advanced packet switching*. This would suggest that incumbents have every incentive to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage.<sup>13</sup>

31 The Commission interpreted the effect of the FCC's statements in Order No. 03, concluding in Conclusion of Law No. 16 that:

Paragraph 448 and footnote 1365 of the Triennial Review Order provide an insufficient basis for finding that ILECs may replace circuit switches with new technology to avoid unbundling obligations. The FCC's references more reasonably refer to the deployment of new packet switches rather than the replacement of existing circuit switches with packet switches.<sup>14</sup>

32 Verizon seeks reconsideration of the Commission's conclusion of law. Verizon also objects to the Commission's decision that where an ILEC's interconnection agreement obligates the ILEC to provide unbundled local switching, the ILEC must amend its agreement before replacing unbundled elements with network elements not subject to unbundling.<sup>15</sup>

33 Verizon asserts that the two statements in the Triennial Review Order result in an "inescapable conclusion" and "unqualified right" of ILECs to replace a circuit switch with a packet switch, eliminating the ILECs' obligation to provide unbundled access to local circuit switching.<sup>16</sup> Verizon also argues that allowing ILECs to avoid unbundling obligations when replacing equipment is a "common

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<sup>13</sup> *Id.*, ¶ 447, n.1365 (emphasis added).

<sup>14</sup> Order No. 03, ¶ 126; *see also* ¶ 65.

<sup>15</sup> Verizon Petition, ¶¶ 39-41; *see* Order No. 03, ¶ 127 (Conclusion of Law No. 17).

<sup>16</sup> Verizon Petition, ¶¶ 26, 33.

sense conclusion” and consistent “with the incentive structure that the FCC has erected” for deploying new technology.<sup>17</sup>

34 Verizon argues that when a circuit switch is upgraded to a packet switch, there is no longer an unbundling requirement, because there is no longer a circuit switch.<sup>18</sup> Verizon argues that the Commission’s decision would require Verizon to maintain its legacy circuit switch equipment in place parallel to the packet switch.<sup>19</sup> Verizon asserts that the Commission has no authority to require Verizon to maintain both a circuit switch and a packet switch.<sup>20</sup> Verizon asserts that the FCC would have explicitly required ILECs to maintain their old circuit switches if they meant ILECs to do so.<sup>21</sup>

35 AT&T and MCI dispute Verizon’s interpretation of the Triennial Review Order, asserting that Verizon creates “an implied authorization by cobbling together dicta and implied conclusions from random passages in the TRO.”<sup>22</sup> AT&T and MCI assert that the more appropriate interpretation is that ILECs may avoid unbundling obligations when deploying equipment providing advanced services.<sup>23</sup> AT&T and MCI also assert that the term “upgrade” used in the Triennial Review Order does not mean “replace.”<sup>24</sup> AT&T and MCI refer to various sections of the Triennial Review Order concerning replacement of copper facilities with fiber as support for their argument that the FCC does not intend that upgrading switches should result in replacement without access to the legacy facilities.<sup>25</sup> AT&T and MCI also contest Verizon’s assertion that Order

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<sup>17</sup> *Id.*, ¶¶ 30, 35.

<sup>18</sup> *Id.*, ¶ 31.

<sup>19</sup> *Id.*, ¶¶ 31-32, 36.

<sup>20</sup> *Id.*, ¶¶ 42-47.

<sup>21</sup> *Id.*, ¶ 37.

<sup>22</sup> Joint CLECs Response, ¶ 16.

<sup>23</sup> *Id.*, ¶ 18.

<sup>24</sup> *Id.*, ¶¶ 20-21.

<sup>25</sup> *Id.*, ¶¶ 22-24.

No. 03 requires Verizon to maintain a separate network.<sup>26</sup> AT&T and MCI assert that the Nortel switch can be used to provide circuit switching without requiring a parallel network.<sup>27</sup>

36 Staff supports the Commission's interpretation of the Triennial Review Order in Order No. 03, and requests denial of Verizon's petition. Staff asserts that the FCC intended to relieve ILECs of unbundling obligations when the ILEC deploys a switch that provides *broadband services*, not just narrowband switching.<sup>28</sup> Staff asserts that the Nortel Switch that Verizon has deployed does not provide broadband service.<sup>29</sup> Staff asserts that the record in the proceeding does not support Verizon's claim that it must maintain legacy equipment parallel with new switching equipment, as the new switch can provide circuit switching functions.<sup>30</sup>

37 ***Discussion and Decision.*** In its Triennial Review Remand Order released in February, the FCC determined that, as of March 11, 2005, ILECs are not obligated to provide access to new UNE-P arrangements, and after the 12-month transition period ending March 11, 2006, ILECs are no longer obligated at all to provide unbundled access to local switching or UNE-P. Thus, the issue posed in this proceeding, whether ILECs may replace circuit switches with packet switches to avoid their unbundling obligations, is essentially moot and soon will become irrelevant. Six months after this Order is entered CLECs may no longer obtain unbundled access to an ILEC's circuit switches.

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<sup>26</sup> *Id.*, ¶ 38.

<sup>27</sup> *Id.*, ¶ 39.

<sup>28</sup> Staff Answer, ¶¶ 1-3.

<sup>29</sup> *Id.*, ¶ 4.

<sup>30</sup> *Id.*, ¶¶ 5-6.

38 After considering the parties' arguments and the FCC's decisions in the Triennial Review Order and Triennial Review Remand Order, we find Verizon's interpretation of the FCC's policies persuasive. The FCC clearly stated that ILECs may "upgrade" their circuit switches to deploy packet switches, and by doing so, "avoid" unbundling obligations. We read the term "upgrade" to include replacement of existing switches, not just deployment of additional switches. Because an ILEC is not obligated to provide access to narrowband or voice-grade service through a packet switch, Verizon has no obligation to continue unbundled access to circuit switching when deploying a packet switch.<sup>31</sup> Thus, we reject the arguments of AT&T, MCI, and Staff on this issue. We vacate Conclusions of Law No. 16 and 17 in Order No. 03 concerning the interpretation of the FCC's Triennial Review Order's requirement that ILECs may not replace unbundled elements to avoid unbundling obligations without amending their interconnection agreements.

39 Prior to the FCC's decision in the Triennial Review Remand Order, the FCC's intent in the disputed provisions of the Triennial Review Order was not entirely clear. The FCC's statements could be interpreted either to allow ILECs to replace circuit switches or to merely to allow ILECs to deploy more packet switches without incurring additional obligations for unbundled switching. Whatever our policy preferences regarding the availability of unbundled local switching, we are bound by the FCC's policy choices and interpretation of federal law in this regard.

40 The aim of the Commission's prior decision was to ensure MCI, UNICOM, and ATI's existing customers were not harmed by Verizon's switch conversion. Specifically, the Commission was concerned with the effect of the switch conversion in eliminating access to competitive services and increasing the price to consumers. Under the regulatory scheme of the 1996 Act, state commissions

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<sup>31</sup> Order No. 03, ¶ 63.

are charged with enforcing and interpreting interconnection agreements to ensure consistency with federal law. As discussed above, given the FCC's decision to eliminate unbundled access to local circuit switching, our concerns are eclipsed by the FCC's decision.<sup>32</sup> Pursuant to the Triennial Review Remand Order, we find Verizon may replace existing circuit switches with packet switches and avoid its existing obligations under interconnection agreements to provide local circuit switching through affected switches.

## **2. Did Order No. 03 Err in Finding Verizon in Breach of its Interconnection Agreements?**

41 Order No. 03 finds that Verizon breached the terms of its interconnection agreements with the Joint CLECs to provide unbundled local switching.<sup>33</sup> The Commission found that Verizon breached its obligation under the agreements by replacing circuit switching without making unbundled local circuit switching available.<sup>34</sup> The Commission also found that Order No. 02 determined that Verizon complied with the terms for upgrading equipment, without any analysis of the provisions in the interconnection agreements.<sup>35</sup>

42 Verizon asserts that the Commission erred in interpreting the interconnection agreements to require ILECs to maintain circuit switches when deploying packet switches.<sup>36</sup> Verizon contends that the obligation in the CLECs' interconnection agreements to provide unbundled switching is not applicable where an ILEC has deployed and replaced a circuit switch with a packet switch.<sup>37</sup> Verizon asserts

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<sup>32</sup>We recognize the change in the legal environment, but expect the parties will ensure that no customer is harmed by the effect of this Order.

<sup>33</sup> *Id.*, ¶ 76.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Verizon Petition, ¶ 52.

<sup>37</sup> *Id.*, ¶ 48.

that the Commission cannot impose unbundling requirements contrary to federal law, *i.e.*, by requiring unbundling of a packet switch.<sup>38</sup>

43 Verizon also insists that the interconnection agreements allow Verizon to upgrade its network.<sup>39</sup> Verizon asserts that the ATI, UNICOM and Tel West agreements expressly allow Verizon to upgrade its network, provide that Verizon may discontinue services with 30 days notice, and provide that Verizon is obligated to provide access to UNEs to the extent that “the equipment and facilities necessary to provide the UNE are available in Verizon’s network.”<sup>40</sup> Verizon further asserts that AT&T’s and MCI’s agreements allow Verizon to discontinue access to UNEs when required to upgrade its network, provided Verizon follows the FCC’s regulations for network upgrades.<sup>41</sup>

44 AT&T and MCI assert that Verizon is required to offer local switching under its interconnection agreements, regardless of the technology used to provide switching.<sup>42</sup> AT&T and MCI assert that Verizon misinterprets the upgrade provision in their interconnection agreements.<sup>43</sup> The provision allows Verizon to “discontinue any unbundled Network Element . . . to the extent required by network changes or upgrades.”<sup>44</sup> AT&T and MCI assert that Verizon’s decision to discontinue unbundled local switching is not *required* by the upgrade of the Nortel switch, and that Verizon has only done so to prematurely discontinue access to UNE-P.<sup>45</sup> In an affidavit filed with its answer, AT&T and MCI assert

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<sup>38</sup> *Id.*, ¶ 49.

<sup>39</sup> *Id.*, ¶¶ 48, 53-57.

<sup>40</sup> *Id.*, ¶¶ 54-55.

<sup>41</sup> *Id.*, ¶ 56.

<sup>42</sup> Joint Answer, ¶ 7. Contrary to AT&T’s and MCI’s argument that the agreements are technology neutral, Order No. 03 interprets the term “local switching” in the interconnection agreements to refer to local circuit switching. Order No. 03, ¶ 75.

<sup>43</sup> *Id.*, ¶ 9.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

that the Nortel switch is capable of providing unbundled local switching and UNE-P service.<sup>46</sup>

45 ***Discussion and Decision.*** After reviewing the upgrade provisions in the CLECs' interconnection agreements, we reverse the decision in Order No. 03 that Verizon is in breach of its agreements with the CLECs. We grant Verizon's petition for reconsideration on this issue.

46 Provisions in the interconnection agreements of ATI, UNICOM and Tel West quoted by Verizon allow Verizon to upgrade its network.<sup>47</sup> Verizon is only obligated to provide access to UNEs under the agreements if the "the equipment and facilities necessary to provide the UNE are available in Verizon's network" and "only to the extent required by Applicable Law."<sup>48</sup>

47 AT&T's and MCI's interconnection agreements contain identical terms regarding upgrades, as MCI has adopted the terms of AT&T's agreement with Verizon.<sup>49</sup> AT&T's and MCI's interconnection agreements with Verizon provide, in relevant part, that Verizon may "discontinue any unbundled Network Element to the extent required by network changes or upgrade, in which event [Verizon] will comply with the network disclosure requirements stated in the Act and the FCC's implementing regulations."<sup>50</sup> AT&T and MCI dispute that discontinuing unbundled circuit switching was *required* under the network upgrade provisions of their agreements.

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<sup>46</sup> *Id.*; see Att. 3 to Joint Response, Affidavit of Jeff Haltom.

<sup>47</sup> Verizon Petition, ¶ 54, n.23, *quoting* Tel West Interconnection Agreement at 24, § 42; UNICOM Interconnection Agreement at 23, § 42; ATI Interconnection Agreement, § 4.4.

<sup>48</sup> *Id.*, ¶ 55, n.24, *quoting* Tel West Interconnection Agreement at 80, Network Elements Attachment, §§ 1.1, 1.2; UNICOM Interconnection Agreement at 78, Unbundled Network Elements Attachment, §§ 1.1, 1.2; Supplemental Agreement No. 3 Regarding Unbundled Network Elements by and between Verizon Northwest Inc. and Advanced TelCom, Inc., at 1-2, §§ 1.1, 1.2.

<sup>49</sup> *Id.*, n.25.



48 We read these provisions to allow Verizon to upgrade its circuit switches. As Verizon asserts, interconnection agreements are not simply contracts, but are creatures of federal law. We cannot blindly apply rules of contract interpretation when reviewing interconnection agreements without regard to the underlying law. Under the FCC's Triennial Review Order and prior orders, *i.e.*, "applicable law," Verizon is not obligated to provide unbundled access to packet switches. If a switch upgrade results in replacement of a circuit switch with a packet switch, Verizon is not legally obligated to provide unbundled access to the packet switch, even if it were configured to allow circuit switching.<sup>51</sup>

49 The term "required" in AT&T's and MCI's interconnection agreement can reasonably be interpreted to mean both required by law or technology. While the affidavits and declarations of Mr. Haltom, Williamson and Peeler make clear that discontinuation of the circuit switching function was not "required" technologically in order to replace the switch, the FCC's decisions governing unbundled access to packet switches control any consideration of technological requirements.

50 Thus, we find that Verizon did not breach the terms of its interconnection agreements with AT&T, MCI, ATI, UNICOM, or Tel West by ceasing to provide unbundled local circuit switching after converting the Mount Vernon switch to a packet switch. The provisions of the CLECs' agreements governing upgrades of equipment and network elements, combined with the requirements and reasoning of the FCC's orders, are decisive of whether Verizon is in breach of its interconnection agreements. There is no need to reach the issues of whether the definition of local circuit switching in the CLECs' agreements includes circuit switching providing by a packet switch or whether Verizon is in breach of the

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<sup>50</sup> *Id.*, ¶ 56, quoting AT&T and MCI Interconnection Agreements at 4, § 3.3.

<sup>51</sup> See Order No. 03, ¶ 63; see also *Triennial Review Order*, n.1649 (¶ 538).

provisions of its agreements with CLECs governing local circuit switching. Thus, we vacate Conclusions of Law No. 20, 21, and 23 in Order No. 03.

51 Having resolved the issues of interpreting the Triennial Review Order, Triennial Review Remand Order, and Verizon's compliance with its interconnection agreements, we turn to the issue of remedies. We find it appropriate that the parties negotiate appropriate remedies due Verizon in this matter. Only MCI, UNICOM, and ATI were providing UNE-P service through Verizon's Mount Vernon switch at the time of the switch conversion. There is no evidence in the record as to whether the CLECs are still serving customers out of the switch. In addition, given that Verizon is in the process of acquiring MCI, and that MCI, UNICOM and ATI must make alternate arrangements for their UNE-P traffic by March 11, 2006, we believe that it is likely that the parties are in the midst of negotiations. If the parties cannot agree on appropriate remedies through negotiations, the parties should notify the Commission of the impasse. If necessary, the Commission will establish a briefing schedule to address remedies.

### **3. Did Order No. 03 Err in Finding Material Issues of Fact?**

52 Order No. 03 determines that the nature and functions of the Nortel Succession switch installed in Mount Vernon are material issues of fact in connection with interpreting the definition of "local switching" in the Joint CLECs' interconnection agreements.<sup>52</sup> This issue arises from the Commission's decision on Verizon's motion for judgment on the pleadings, and the CLECs' assertion that the nature and function of the new switch are material issues of fact.

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<sup>52</sup> Order No. 03, ¶ 47.

- 53 Verizon asserts that the Commission erred in finding that a material issue of fact exists as to whether the Nortel switch is a packet switch or a hybrid switch.<sup>53</sup> Verizon asserts that the declaration of Mr. Williamson and affidavits of Mr. Haltom and Mr. Peeler clearly identify the Nortel switch as a packet switch.<sup>54</sup> Verizon notes that Mr. Haltom argues that Verizon is not using the switch as a packet switch.<sup>55</sup>
- 54 Verizon also asserts that the Commission erred in finding that a material issue of fact exists concerning the characteristics of remote switches served by the Mount Vernon switch.<sup>56</sup>
- 55 AT&T and MCI do not directly respond to whether there is a material issue of fact, but address the question of the nature of the switch. AT&T and MCI disagree with the decision in Order No. 03 that packet switches need not be unbundled for voice service in this case. AT&T and MCI assert that the switch Verizon deployed in Mount Vernon is a hybrid switch capable of providing circuit-switching.<sup>57</sup>
- 56 AT&T and MCI assert that Mr. Haltom's affidavit identifies that the switch can support both traditional circuit switching as well as packet switching. AT&T and MCI submit an additional affidavit relying on information submitted in the California proceeding, asserting that the Mount Vernon switch, as installed, includes the capability to support local circuit switching.<sup>58</sup>

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<sup>53</sup> Verizon Petition, ¶ 60.

<sup>54</sup> *Id.*, ¶ 62.

<sup>55</sup> *Id.*, ¶ 63.

<sup>56</sup> *Id.*, ¶ 64.

<sup>57</sup> Joint Response, ¶¶ 26-30.

<sup>58</sup> *Id.*, ¶¶ 35-36.

57 Staff asserts that the new switch does not provide broadband service, but only narrowband voice grade functions.<sup>59</sup> Staff asserts that the switch provides the same circuit switching functionality as the switch it replaced.<sup>60</sup>

58 ***Discussion and Decision.*** Order No. 03 held that there was no material issue of fact as to whether the Nortel Succession switch is a packet switch for purposes of interpreting the Triennial Review Order.<sup>61</sup> The Commission found, however, that a material issue of fact exists as to the nature and function of the Nortel switch installed in Mount Vernon in connection with the interpretation of the CLECs' interconnection agreement and whether Verizon is in breach of those agreements.<sup>62</sup>

59 "A material fact is one upon which the outcome of the litigation depends in whole or in part."<sup>63</sup> Whether there are material issues of fact in dispute is central to a determination of a motion for summary judgment. Consistent with the prior decision in Order No. 03, we do not find a material issue of fact exists as to whether the switch is a packet switch. The affidavits of Jeff Haltom and Danny Peeler and the declaration of Robert Williamson all describe the new Nortel switch as a type of packet switch.<sup>64</sup> We need not reach the issue of the nature and functions of the packet switch in interpreting the meaning of "local circuit switching" in the parties' interconnection agreements, as we find Verizon not in breach after considering other provisions in the agreements.

60 While there may be an issue of fact as to whether Verizon installed the Nortel switch in Mount Vernon as a hybrid packet switch including circuit switching

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<sup>59</sup> Staff Answer, ¶ 4.

<sup>60</sup> *Id.*, ¶ 5.

<sup>61</sup> Order No. 03, ¶ 46.

<sup>62</sup> *Id.*, ¶¶ 46, 77.

<sup>63</sup> *Samis v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477 (2001).

<sup>64</sup> Williamson Declaration, ¶¶ 11, 18-19; Haltom Affidavit, ¶¶ 9-11; Peeler Affidavit, ¶¶ 5-11.

functions, this issue is not material to the decision, given the findings and conclusions in this Order. Because we find Verizon is not in breach of its interconnection agreements with the CLECs by discontinuing unbundled access to local circuit switching, the question of whether the Nortel switch is a hybrid switch is no longer a material issue of fact in the proceeding. In addition, as we find the switch is a packet switch, the Commission cannot require Verizon to install circuit switching capabilities into the switch, or require Verizon to unbundle the switch without acting contrary to the FCC's recent orders. We grant Verizon's petition for reconsideration on this issue and vacate Conclusion of Law No. 15.

#### **4. Did Order No. 03 Result in an Unconstitutional Taking?**

61 Verizon asserts that Order No.03 results in an unconstitutional taking by requiring Verizon to maintain circuit switches in its network parallel to newly deployed packet switches.<sup>65</sup> Verizon asserts that the circuit switch is Verizon's property, and that requiring Verizon to offer redundant unbundled switching results in an unconstitutional taking without just compensation.<sup>66</sup>

62 AT&T and MCI assert that Order No. 03 does not require Verizon to maintain a separate legacy network to support local circuit switching, and that Verizon's assertion of a taking is "misplaced."<sup>67</sup> AT&T and MCI also assert that a taking occurs only if a party's property is taken without reasonable compensation.<sup>68</sup> AT&T and MCI assert that Verizon will be compensated for the use of its switch through TELRIC rates, and that the Supreme Court has held that TELRIC rates do not result in a taking.<sup>69</sup> AT&T and MCI further assert that the FCC has

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<sup>65</sup> Verizon Petition, ¶ 58.

<sup>66</sup> *Id.*

<sup>67</sup> Joint Answer, ¶ 44.

<sup>68</sup> *Id.*, ¶ 45.

<sup>69</sup> *Id.*

provided a process Verizon must follow in discontinuing access to unbundled switching: the twelve-month transition period includes time to allow carriers to modify their interconnection agreements.<sup>70</sup>

63 ***Discussion and Decision.*** Verizon does not meet the requirements for establishing an unconstitutional taking. Under the Fifth and Fourteenth Amendments to the United States Constitution, states may not deprive a person of property or take private property for public use without just compensation. As AT&T and MCI make clear, an unconstitutional taking occurs when a person's property is taken without reasonable compensation. Under the decision in Order No. 03, Verizon would receive reasonable compensation from the CLECs through TELRIC rates, rates the Supreme Court has found to be sufficient,<sup>71</sup> plus the transition amount identified by the FCC in the Triennial Review Remand Order. In this decision, however, we reverse the portions of Order No. 03 for which Verizon seeks reconsideration. There is no longer a basis for Verizon's takings claim. We deny Verizon's petition on the takings issue.

### **FINDINGS OF FACT**

64 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

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<sup>70</sup> *Id.*, ¶ 47, citing *Triennial Review Remand Order*, ¶¶ 143, 196, 227.

<sup>71</sup> *Verizon Comm. Inc. v. FCC*, 535 U.S. 467 (2002).

- 65 (1) Verizon Northwest Inc. is an ILEC providing local exchange telecommunications service to the public for compensation within the state of Washington.
- 66 (2) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.
- 67 (3) Advanced TelCom, Inc., AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle, Covad Communications Company, MCImetro Access Transmission Service, LLC, and United Communications, Inc., d/b/a UNICOM are local exchange carriers within the definition of 47 U.S.C. § 153(26), providing local exchange telecommunications service to the public for compensation within the state of Washington, or are classified as competitive telecommunications companies under RCW 80.36.310 - .330.
- 68 (4) On June 8, 2004, Verizon issued a Notice of Network Change informing CLECs in Washington that Verizon intended to replace the existing Nortel DMS 100 switch in Mount Vernon, Washington, with a Nortel Succession switch. The notice also informed CLECs that it would cease providing unbundled circuit switching at the Mount Vernon switch as of September 10, 2004.
- 69 (5) On August 31, 2004, the Competitor Group filed with the Commission in Docket No. UT-043013 a motion for enforcement of Order No. 05 in that proceeding, the CLECs' interconnection agreements and the FCC's

Triennial Review Order, asserting that Verizon's planned switch conversion violated these orders and agreements.

- 70 (6) On September 10, 2004, Verizon replaced the Mount Vernon DMS 100 circuit switch with a Nortel Succession switch.
- 71 (7) Administrative Law Judge Rendahl entered Order No. 10 in Docket No. UT-043013 on September 13, 2004, allowing the switch conversion to proceed, requiring Verizon to charge affected CLECs the UNE-P rate for resale service provided out of the Mount Vernon switch, and directing the Competitor Group CLECs to file a petition for enforcement with the Commission to allow the Commission to address the merits of the issues raised in the motion.
- 72 (8) On September 20, 2004, ATI, AT&T, MCI, and UNICOM, collectively the Joint Petitioners, filed with the Commission a Joint Petition for Enforcement of their interconnection agreements with Verizon.
- 73 (9) On September 24, 2004, Tel West filed with the Commission a petition to intervene in the proceeding. Tel West's petition to intervene was granted at a prehearing conference held on October 11, 2004.
- 74 (10) Tel West is a CLEC providing service in Verizon's service area, and providing service out of the Mount Vernon switch.
- 75 (11) ALJ Rendahl entered Order No. 02 on December 3, 2004, a recommended decision granting Verizon's Motion for Judgment on the Pleadings.
- 76 (12) After AT&T, MCI and Tel West sought review of Order No. 02, the Commission entered Order No. 03, finding that the FCC did not intend for



ILECs to replace circuit switches with packet switches to avoid unbundling obligations and finding Verizon in breach of its interconnection agreements with the CLECs.

- 77 (13) Verizon seeks reconsideration of certain conclusions of law in Order No. 03.
- 78 (14) Under the FCC's Triennial Review Remand Order ILECs are not obligated to provide access to new UNE-P arrangements as of March 11, 2005, and after a 12-month transition period ending March 11, 2006, ILECs are no longer obligated to provide access to unbundled local switching or UNE-P.
- 79 (15) The interconnection agreements between Verizon and ATI, UNICOM and Tel West allow Verizon to upgrade its network and obligate Verizon to provide access to UNEs under the agreements if the "the equipment and facilities necessary to provide the UNE are available in Verizon's network" and "only to the extent required by Applicable Law."<sup>72</sup>
- 80 (16) The interconnection agreements between Verizon and AT&T and MCI provide, in relevant part, that Verizon may "discontinue any unbundled Network Element ... to the extent required by network changes or upgrade, in which event [Verizon] will comply with the network disclosure requirements stated in the Act and the FCC's implementing regulations."<sup>73</sup>

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<sup>72</sup> Tel West Interconnection Agreement at 24, § 42; 80, and at Network Elements Attachment, §§ 1.1, 1.2; UNICOM Interconnection Agreement at 23, § 42, and at 78, Unbundled Network Elements Attachment, §§ 1.1, 1.2; Supplemental Agreement No. 3 Regarding Unbundled Network Elements by and between Verizon Northwest Inc. and Advanced TelCom, Inc., at 1-2, §§ 1.1, 1.2, 4.4.

<sup>73</sup> AT&T and MCI Interconnection Agreements at 4, § 3.3.

CONCLUSIONS OF LAW

81 Having discussed above in detail all matters material to this decision, and having  
stated general findings and conclusions, the Commission now makes the  
following summary conclusions of law. Those portions of the preceding detailed  
discussion that state conclusions pertaining to the ultimate decisions of the  
Commission are incorporated by this reference.

82 (1) The Commission has jurisdiction over the subject matter of this  
proceeding and the parties to the proceeding.

83 (2) Allowing AT&T to withdraw from the proceeding does not affect the  
status of the petition, the Commission's ability to enter a decision on  
Verizon's petition for reconsideration, or prejudice any other party to the  
proceeding, as three petitioning CLECs—MCI, UNICOM, and ATI, an  
intervening CLEC, Tel West, and Commission Staff remain parties to the  
proceeding.

84 (3) Tel West has a substantial interest in the outcome of the proceeding, as  
Verizon's actions affect Tel West's service to customers and the  
Commission's decision in this matter may affect Tel West's decisions  
concerning network design.

85 (4) The alleged benefits to some parties from deferring a ruling do not  
outweigh the legitimate expectations of a party that a dispute will be  
resolved without undue delay, especially where that party advances  
credible claims of prejudice.

- 86 (5) Further deferring a ruling on Verizon’s petition for reconsideration may prejudice Tel West and other CLECs by compromising and complicating their efforts to design their networks, and may impede efforts to negotiate commercial agreements and amendments to interconnection agreements.
- 87 (6) Replies to answers to motions filed with the Commission are not appropriate unless requested or authorized by the Commission. *WAC 480-07-370(1)(d)*.
- 88 (7) Verizon’s reply to Tel West’s answer is improper, as the Commission did not invite parties to file replies and Verizon failed to move for permission to file a reply.
- 89 (8) The term “upgrade” in paragraph 488 and footnote 1365 of the Triennial Review Order includes replacement of switches, not just additional deployment. In those portions of the Triennial Review Order, the FCC intended that ILECs be able to “upgrade” their circuit switches by replacing them with packet switches, and thereby, avoid unbundling obligations.
- 90 (9) An ILEC is not obligated to provide access to narrowband or voice-grade service through a packet switch, or obligated to continue access to circuit switching when deploying a packet switch. *See Triennial Review Order*, n.1649 (¶ 538).
- 91 (10) Verizon is not in breach of the upgrade provisions of its interconnection agreements with MCI, AT&T, ATI, UNICOM and Tel West, as the provisions allow Verizon to upgrade its circuit switches. Federal law governing unbundled access to packet switches controls in determining Verizon’s obligations to provide unbundled access to local switching and

whether discontinuing unbundled access to local switching was “required” when Verizon upgraded the circuit switch to a packet switch.

- 92 (11) As the provisions of the CLECs’ agreements governing upgrades of equipment and network elements combined with the requirements and reasoning of the FCC’s orders are decisive of whether Verizon is in breach of its interconnection agreements, there is no need to reach the issue of whether Verizon is in breach of the provisions of its agreements governing local circuit switching.
- 93 (12) “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Samis v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477 (2001). Whether there are material issues of fact in dispute is central to a determination of a motion for summary judgment.
- 94 (13) No material issue of fact exists as to whether the Nortel Succession switch installed in Mount Vernon is a packet switch. The affidavits of Jeff Haltom and Danny Peeler and the declaration of Robert Williamson all describe the new Nortel switch as a type of packet switch.<sup>74</sup>
- 95 (14) It is not necessary to reach the issue of the nature and function of the packet switch in interpreting the meaning of “local circuit switching” in the parties’ interconnection agreements, as we find Verizon not in breach of those agreements after considering other provisions in the agreements and pertinent orders of the FCC.
- 96 (15) The question of whether Verizon installed the Nortel switch in Mount Vernon as a hybrid packet switch, including circuit switching functions, is not material to the decision in this Order, as we find Verizon not in breach

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<sup>74</sup> Williamson Declaration, ¶¶ 11, 18-19; Haltom Affidavit, ¶¶ 9-11; Peeler Affidavit, ¶¶ 5-11.

of its interconnection agreements with AT&T, ATI, MCI, UNICOM and Tel West.

- 97 (16) Verizon does not meet the requirements for establishing an unconstitutional taking under the Fifth and Fourteenth Amendments as we reverse the portions of Order No. 03 which pertain to this issue. In addition, Verizon would receive reasonable compensation under Order No. 03 from the CLECs through TELRIC rates, which the Supreme Court has found to be sufficient, plus the transition amount identified by the FCC in the Triennial Review Remand Order. *See Verizon Comm. Inc. v. FCC*, 535 U.S. 467 (2002).

### ORDER

#### THE COMMISSION ORDERS:

- 98 (1) The Motion to Withdraw From the Proceeding with Prejudice filed by AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle is granted.
- 99 (2) Verizon Northwest Inc.'s Motion to Defer Ruling on Petition for Reconsideration is denied.
- 100 (3) Verizon Northwest Inc.'s Response to Objection to Motion to Defer is rejected.
- 101 (4) Verizon Northwest Inc.'s Petition for Reconsideration of Order No. 03 is granted, in part, and denied, in part, consistent with the findings and conclusions in this Order.

- 102 (5) Conclusions of Law No. 15, 16, 17, 20, 21, and 23 in Order No. 03 in this docket are vacated.

Dated at Olympia, Washington, and effective this 15<sup>th</sup> day of September, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner