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July 2, 2004

VIA HAND DELIVERY

Ms. Carole Washburn, Executive Secretary
Washington Utilities & Transportation Committee
1300 Evergreen Park Drive, SW
Olympia, WA 98504

Re: ***Docket No. UT-043013 –***

Dear Ms. Washburn:

Enclosed please find an original and six copies for filing Verizon's Reply in Support of Its Petition for Review of Order Requiring Verizon to Maintain Status Quo and a Certificate of Service.

If you have any questions or concerns, please do not hesitate to call.

Sincerely,

Timothy J. O'Connell

Enclosures

cc: Parties of Record

Oregon
Washington
California
Utah
Idaho

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment for 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 VERIZON'S REPLY IN SUPPORT OF ITS PETITION FOR REVIEW OF ORDER REQUIRING VERIZON TO MAINTAIN STATUS QUO

1 Verizon Northwest Inc. ("Verizon") hereby files this reply in support of its petition for review of Order No. 05 (rel. June 15, 2004) ("Order") in the above-captioned docket, to reply to the new arguments raised in the three CLEC responses to Verizon's petition filed on June 28, 2004.[1]

2 *First*, contrary to Sprint's claim, interlocutory review of the Order is proper under WAC 480-07-810. *Second*, the Order is unlawful because it was issued without consideration of the provisions of *any* interconnection agreement and, as Verizon demonstrated, overrides the unambiguous terms of many, if not all, of Verizon's agreements. Only Sprint disputes Verizon's interpretation of its interconnection agreement and its interpretation is contrary to the plain language of its agreement. *Third*, the Order perpetuates unlawful unbundling at TELRIC rates, without basis in federal or state law.

[1] Responses were filed by Sprint Communications Co. L.P. ("Sprint"); 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"); and Advanced Telecom Group, Inc., Covad Communications Company, and Centel Communications, Inc. (collectively, "ATG CLECs").

Fourth, the Commission must reject the new request for relief that the ATG CLECs seek in their response. Not only is their request for additional relief procedurally improper, but that relief — an order requiring Verizon to unbundle packet switching — is directly contrary to the FCC's long-standing determination that incumbents are not obligated to unbundle packet switches.

Verizon's Petition Satisfies the Requirements of WAC 480-07-810

3 Relying on the 1996 Arbitration Policy Statement,[2] Sprint contends that interlocutory review of the Order is not available under WAC 480-07-810. *See* Sprint Resp. at 2-4. However, the Commission subsequently adopted a Rule explicitly addressing arbitrations under the Telecommunications Act, effective January 1, 2004. *See* WAC 480-07-630. That Rule gives administrative law judges ("ALJs") sitting as arbitrators broad authority to "exercise all authority reasonable and necessary to conduct arbitration under the provisions of this rule, the commission's orders on arbitrational procedure, and other provisions of law." WAC 480-07-630(11)(b).

4 Exercising that authority, the ALJ, sitting as an arbitrator in this case, specifically designated the Order as an "Interlocutory Order of the Commission" and indicated that "[a]dministrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810(3)." Order ¶ 60. Sprint did not appeal this portion of the Order, which expressly permits Verizon's Petition, consistent with the authority the Commission conferred on ALJs. For these reasons, Sprint's argument must be rejected, and the Commission should reach the merits of Verizon's Petition.

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[2] Interpretative Policy Statement: Negotiation, Mediation, Arbitration, and Approval Agreements under the Telecommunications Act of 1996, *Implementation of Certain Provisions of the Telecommunications Act of 1996,* Docket No. 96-0269 (June 1996).

The Purpose and Effect of the Order Is To Override the Terms of Binding Interconnection Agreements

5 The CLECs opposing Verizon's Petition do not dispute that a state commission violates the 1996 Act when it issues a generic order that purports to interpret existing interconnection agreements without regard to the terms of those agreements. *See Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003). Indeed, for this very reason, a California Commission Administrative Law Judge recently denied a petition for relief virtually identical to that granted in the Order, on the ground that the "generic ruling sought by movants cannot encompass the case-by-case analysis be required to resolve disputes about the effect of *USTA II* on each [interconnection agreement]."[3] And the Oregon Commission rejected CLEC requests that it "interfere in the contract process" by issuing a generic order applicable to all agreements.[4] Along with these two commissions, state commissions in Florida, Louisiana, Massachusetts, New Hampshire, New York, North Carolina, South Carolina, Tennessee, Texas, Utah, and Vermont have all rejected CLEC requests for relief indistinguishable from that granted in the Order.

6 Instead, the Joint CLECs and the ATG CLECs (but not Sprint) deny that the Commission has interpreted the agreements, instead characterizing the Order as "no different than a preliminary injunction" and noting that the Order states that the "'Commission, not Verizon, has jurisdiction to decide the issues the parties raise.'" Joint CLEC Resp. at 3-4 (quoting Order ¶ 58); *see* ATG CLEC Resp. at 3. But as this Commission has recognized, relief equivalent to a preliminary injunction cannot be granted absent a

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[3] Administrate Law Judge's Ruling Denying Motion, *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, Rulemaking 95-04-043, Investigation 95-04-044, at 6 (Cal. PUC June 25, 2004).

[4] Order, *Verizon Northwest Inc. Petition for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Oregon Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, ARB 531, at 6 (Ore. PUC June 30, 2004) ("Oregon Order").

determination that the party seeking relief has a "likelihood of prevailing on the merits."[5] And that determination — no different from a final determination on the merits — cannot be made without considering the specific terms of parties' interconnection agreements.

7 As Verizon has explained, it has no quarrel with this Commission's authority to "interpret[] change in law provisions." Order ¶ 57. But that is not what the Order does. Instead, even on the CLECs' own understanding of the Order, it is "a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements" and, therefore, it violates the 1996 Act. *Pacific Bell*, 325 F.3d at 1125-26.

8 In any event, the Joint CLECs and the ATG CLECs do not dispute that, under their specific agreements, they have *no likelihood* of success on the merits, because those agreements expressly and unambiguously permit Verizon, at a minimum, to cease providing UNEs once no federal regulations requiring such unbundling, whether as a result of the D.C. Circuit's mandate or the *Triennial Review Order*. *See* Verizon Pet. at 3-5.[6]

9 Only Sprint takes issue with Verizon's interpretation of its interconnection agreement, and even Sprint does not contend that the Order was based on an interpretation of the terms of that agreement. *See* Sprint Resp. at 4-5. But Sprint's interpretation cannot be squared with the plain language of the agreement. As Verizon has shown, that agreement states that it "shall be subject to any and all . . . judicial decisions[] and administrative

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[5] Sixth Supplemental Order, *Air Liquide America Corp. v. Puget Sound Energy, Inc.*, Docket Nos. UE-001952, UE-001959, at 16 & n.7 (Wash. UTC Jan. 22, 2001).

[6] Contrary to the Joint CLECs' claim (at 4), Verizon noted from the outset of this proceeding that "[m]any, if not all, of Verizon's interconnection agreements with CLECs permit Verizon to cease providing services, including access to UNEs, once applicable law no longer requires Verizon to provide such services" and that it was proposing to amend those agreements "not to establish, in the first instance, its right to cease providing access to such UNEs, but to carry that right forward in an amendment that also implements changes with respect to other UNEs to which Verizon must continue to provide access." Verizon Petition for Arbitration at 3 n.4 (Wash. UTC filed Feb. 26, 2004).

rulings," which "will be deemed to *automatically supersede* any conflicting terms and conditions of this Agreement."[7] Sprint, however, contends that, despite these plain terms, such changes of law *never* "automatically supersede" provisions of the agreement, but instead the parties must *always* amend the agreement to reflect changes of law and Verizon must continue to provide UNEs until such an amendment is signed. *See* Sprint Resp. at 4-5. Sprint's interpretation of the agreement must be rejected because it renders the phrase "automatically supersedes" a nullity, in violation of standard principles of contract interpretation. *Diamond B Constructors, Inc. v. Granite Falls School Dist.*, 70 P.3d 966, 970 (Wash. Ct. App. 2003) ("We must construe a contract to give meaning to every term.").

10 For these reasons, where Verizon has a contractual right to stop providing UNEs at TELRIC prices when no longer required to do so by federal law, the Commission cannot void that contractual right by forcing Verizon to continue to provide those services to all CLECs, without regard to the terms of their individual agreements.[8]

The Commission Cannot Perpetuate the Unlawful Unbundling Requirements that the D.C. Circuit Vacated

11 As Verizon has explained, the Order is unlawful for two additional reasons: it purports to block the effect of the D.C. Circuit's mandate in *USTA II* and to require unbundling in the absence of a valid FCC finding of impairment.

[7] Sprint Agreement, Art. II, § 1.2 (emphasis added).

[8] Moreover, because the FCC's attempts to expand unbundling beyond the reach of the statute have now been struck down by the federal courts three times, there have never been lawful section 251 unbundling rules binding the ILECs and obligating them to provide local mass market switching, high-capacity loops and transport, and dark fiber as UNEs. Accordingly, the issuance of the D.C. Circuit's mandate was not a "change of law" to eliminate previously lawful rules requiring provision of UNEs, but merely an affirmation that there have never been lawful UNEs rules to change. Verizon does not waive this argument when it seeks to follow the administrative processes set forth in its interconnection agreements that apply to actual changes in law.

12 The Joint CLECs assert that the Order does not have the effect of staying the D.C. Circuit's mandate because Verizon's unbundling obligations under § 251(c)(3) purportedly exist even absent any FCC regulations requiring unbundling of particular network elements. *See* Joint CLEC Resp. at 5-6. The ATG CLECs, in contrast, assert that various provisions of state law permit the Commission to require unbundling notwithstanding *USTA II*. *See* ATG CLEC Resp. at 3-4. But as Staff has recognized — and neither group of CLECs even acknowledges — "an order under state law requiring, at least temporarily, exactly what the *USTA II* court held the FCC could not require under the Section 251 impair standard . . . is very likely preempted as inconsistent with Section 251 of the Act." Commission Staff's Response to Joint CLECs' Motion To Maintain Status Quo, Docket No. UT-033044, ¶ 7 (filed May 25, 2004) ("Staff Comments"); *see also* Verizon Pet. at 7-10.

13 In a recent order, the Oregon Commission similarly held that it "is not empowered under state law to require Verizon to continue providing UNEs where the statutory prerequisites of the Act have not been met." Oregon Order at 7. As that Commission explained, rejecting claims identical to those the CLECs have raised here:

> We do not, however, agree with the assertion that Verizon must continue providing the UNEs at issue until there is a finding that CLECs are *not impaired* without access to those elements. Section 252(d) requires an affirmative finding of impairment before an incumbent telecommunications carrier can be required to provide a UNE. Absent a legally sufficient finding of impairment by the FCC or this Commission, there is no obligation to unbundle.

Id. at 8.

14 Nor have the CLECs provided any support for their claims that the public interest is served by the Order. *See* Joint CLEC Resp. at 7; ATG CLEC Resp. at 2-3. For example, contrary to the ATG CLECs' claim (at 3), Congress did not intend in the 1996 Act "to provide the widest possible unbundling, or to guarantee competitors access to ILEC

network elements at the lowest price that government may lawfully mandate." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) ("*USTA II*"). Instead, Congress's purpose was "to stimulate competition — preferably genuine, facilities-based competition." *Id.* Continuing to require statewide unbundling of these elements notwithstanding the D.C. Circuit's vacatur and the provisions of binding interconnection agreements — which is the effect of the Order — is plainly inconsistent with Congress's intent that unbundling be limited to those few bottleneck elements that cannot be sensibly duplicated. Staff Comments ¶ 7.

15 The Joint CLECs' claim that it is "unknown" what price will apply to their UNEs after the 90-day notice period — or five months in the case of UNE-P — is plainly false. Joint CLEC Resp. at 7. Indeed, it is entirely inconsistent with their unsubstantiated assertion that Verizon is seeking a "200% rate increase." *Id.* In fact, Verizon has been offering its Wholesale Advantage service, a commercial replacement for DS-0 based UNE-P arrangements, since the fall of 2003. To the extent a CLEC decides, instead, to switch to lawful resale arrangements, Verizon's retail rates and the applicable, Commission-established wholesale discount are also well known. And Verizon's special access rates, including widely obtained volume and term discounts, are tariffed. Finally, Verizon notes that one of the Joint CLECs, Time Warner, recently announced that it "does not rely upon UNEs" at all, and instead provides service using its "own network facilities" and facilities purchased from "special access tariffs or under agreements with the ILECs."[9]

[9] Time Warner Telecom Press Release, *Time Warner Telecom Not Impacted by UNE Ruling* (June 10, 2004).

The ATG CLECs' Request that the Commission Require Verizon to Unbundle Packet Switching Is Barred Procedurally and Contrary to Federal Law

16 For the first time, the ATG CLECs assert that the Commission should require Verizon to continue providing UNE-P after Verizon replaces a circuit switch in its Mount Vernon central office with a packet switch. *See* ATG CLEC Resp. at 4-5. Although the ATG CLECs present this as a request for clarification, the Order was limited to requiring 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." Order ¶ 55. Those agreements do *not* require Verizon to provide UNE access to packet switching because the FCC, with one narrow exception that it recently eliminated, has *never* required unbundling of packet switches.

17 As an initial matter, because the ATG CLECs did not file their own petition for review and did not present these claims earlier in this proceeding, the Commission cannot consider them now. Indeed, the Commission routinely refuses to consider new evidence when reconsidering earlier orders. *See, e.g.*, Second Supplemental Order, *In re GTE Northwest Inc.*, Docket No. U-89-3031-P (Wash. UTC July 1990); 15th Supplemental Order, *In Re UTC v. Puget Sound Power & Light Co.*, Docket Nos. UE-92-1262 *et al.* (Wash. UTC Dec. 15, 1993) (on petition for reconsideration). The same concerns of procedural fairness should guide the Commission here, and bar the consideration of these claims.

18 In any event, the relief the ATG CLECs request is squarely precluded by federal law. In the *Local Competition Order*, the FCC expressly "decline[d] to find, as requested by AT&T and MCI, that incumbent LECs' packet switches should be identified as network elements" that must be unbundled.[10] In the *UNE Remand Order*, the Commission again

[10] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 427 (1996) ("*Local Competition Order*") (subsequent history omitted).

determined that it would "not order unbundling of the packet switching functionality as a general matter," creating only "one limited exception" that is not relevant here.[11] For this reason, Verizon's current interconnection agreements, virtually all of which were approved before release of the *Triennial Review Order*, do not obligate Verizon to unbundle packet switching. Therefore, an order requiring Verizon to continue to provide UNE-P by providing UNE access to its packet switch would impose a requirement found nowhere in either Verizon's agreements or in pre-*Triennial Review Order* regulations.

19 The *Triennial Review Order,* moreover, confirms that any such order would violate federal law. The FCC again "decline[d] to unbundle packet switching as a stand-alone network element," finding, "on a national basis, that competitors are not impaired without access to packet switching." *Triennial Review Order* ¶ 537; *see id.* ¶ 539 ("there do not appear to be any barriers to deployment of packet switches that would cause us to conclude that requesting carriers are impaired with respect to packet switching"). The FCC also found that its "limited exception to its packet-switching unbundling exemption is no longer necessary." *Id.* ¶ 537. Where the FCC has expressly found that competitors are *not* impaired without UNE access to a network element, state commissions have no authority to require unbundling of that element; any state law purporting to require unbundling would be preempted. *See id.* ¶¶ 191-195.

20 Finally, in the *Triennial Review Order*, the FCC expressly *encouraged* the specific action that Verizon is taking — replacing circuit switches with packet switches — even though it recognized that the result of such replacement would be the elimination of the incumbent's unbundling obligations. As the FCC explained, "to the extent there are significant disincentives caused by unbundling of circuit switching, incumbents *can*

[11] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999), ¶¶ 306, 313 ("*UNE Remand Order*"), *petitions for review granted*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

avoid them by deploying more advanced packet switching." *Id.* ¶ 447 n.1365 (emphasis added). This Commission plainly has no authority to contradict the FCC's binding judgment in this regard.

Conclusion

21 For the foregoing reasons, the Commission should grant the petition for review and eliminate the requirement that Verizon continue to provide access to unbundled network elements where no such obligation exists under the terms of its interconnection agreements.

Respectfully submitted,

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