BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

INTEGRA TELECOM OF WASHINGTON, INC., a Washington corporation, Complainant, vs. VERIZON NORTHWEST, INC., Respondent.	Docket No. 053038 REPLY TO RESPONSE TO VERIZON'S MOTION TO DISMISS

I. INTRODUCTION

1 Complainant, Integra Telecom of Washington, Inc. ("Integra"), mischaracterizes the basis for the Motion to Dismiss of Verizon Northwest Inc. ("Verizon"). In its response to Verizon's Motion to Dismiss ("Response"), Integra claims incorrectly that Verizon seeks dismissal of the Complaint because of the "mere fact" that Verizon and Integra are parties to an interconnection agreement ("ICA") in Washington. Integra misses the point. The ICA covers the specific conduct complained of by Integra and, as a result, federal law preempts any alleged state law violation for the same conduct. Both Congress and this Commission have emphasized that disputes arising under 47 U.S.C. § 252, including interconnection agreement disputes, such as Integra's instant claim, must be handled under Section 252 processes, including the dispute resolution processes applicable to ICAs. Nothing in the Response refutes this point.

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II. ARGUMENT

A. INTEGRA'S STATE LAW CLAIMS ARE PREEMPTED BY FEDERAL LAW.

2 Integra asserts that the state law claims it alleges in the Complaint are not preempted by federal law governing interconnection agreements even though it also claims that it "has alleged facts sufficient to state a cause of action for violation of the [ICA]." See Response at 2, 10. Because the same facts it alleges to make a procedurally deficient ICA breach claim (see Section III.B. of Motion to Dismiss) are also the basis for its state law claims, the state law claims are preempted by federal law. The preemption is clear from Integra's pleadings, and the Commission must dismiss the Complaint as a matter of law. *See Modern Sewer v. Nelson Distribution*, 125 Wn. App. 564, 568 (2005) (A "ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law.")

3 Integra makes no effort to hide its attempt to utilize the same facts as the basis for both its state law claims and its claims that Verizon violated the ICA. *See, e.g.* Response at 6-7 (describing the basis for the state law claim as "anticompetitive conduct of providing facilities that are insufficient to provide the most basic of telephone functions ..."); Response at 10 (claiming that it "has alleged facts sufficient to state a cause of action for violation of the [ICA] by describing, in great detail, the problems it experienced with providing service using Verizon's elements ..."). As explained in the Motion to Dismiss, however, by entering into a comprehensive agreement governing Verizon's provisioning of unbundled network elements and agreeing expressly that the ICA constitutes the entire agreement between the parties on matters covered therein, Integra agreed that any disputes arising with regard to Verizon's provisioning of UNEs were to be resolved within the four corners of the ICA.

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4 Integra should be held to the terms of its agreement with Verizon and required to follow the processes for addressing ICA disputes, which Integra has purposefully avoided.[1]

5 This Commission requires parties to resolve disputes pursuant to the negotiated terms and conditions of ICAs, rather than invoking state statutory powers. For instance, in *MCI Metro Access Transmission Services, Inc. v. US West Communications, Inc.*, 1998 Wash. UTC Lexis 44, Docket No. UT-971158, 1998, the Commission rejected MCI's request that the Commission use its powers under RCW 80.36.140, .170 and .260 to address conduct covered by negotiated agreements. As the Commission noted:

> [t]hese important powers are not diminished by the Commission's policy that the respective rights and obligations of parties seeking interconnection of their networks should be controlled by a contract and that disagreements over the details of interconnection agreements be resolved through arbitration consistent with Section 252 of the Telecom Act.

6 State commissions that stray from this rationale are preempted. For example, an order of the Michigan Public Service Commission ("Michigan PSC") that required independent local exchange carriers to publish tariffs offering to sell elements of its telecommunications network at rates predetermined by the Michigan PSC and to allow competitors to purchase pre-assembled platforms of network elements was preempted by the Sixth Circuit. *See Verizon North v. Strand,* 309 F.3d 935 (6th Cir. 2002). The court found that this order interfered with the comprehensive and exclusive interconnection agreement scheme imposed by the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act" or "1996 Act")), which had as its "centerpiece" the goal of encouraging private negotiation of binding inter-carrier contracts.

7 As the Sixth Circuit pointed out:

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[1] The Commission went to great lengths to adopt a rule, WAC 480-09-530, relating to petitions for enforcement of interconnection agreements. Integra ignored this clear procedural vehicle to address its concerns. The Commission should encourage use of this procedural mechanism rather than entertaining independent complaints.

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> State law provisions can be inconsistent with, and therefore preempted by, federal law even if the federal and state laws share a common goal. ...even in the case of a shared goal, the state law is preempted "if it interferes with the methods by which the federal statute was designed to reach [its goal]. *Id.* at 940.

8 This Commission would make the same error as the Michigan PSC if it ignores the terms of an ICA that resulted from the private negotiation required by the Act and that provides a means for resolving disputes over conduct covered by the ICA. If the Commission allowed an independent state law claim covering the same conduct, it would eviscerate the effectiveness of ICAs and thus clearly interfere with the methods by which the federal statute was designed to reach its goal. In sum, the state law claims raised by Integra in the Complaint are preempted by the interconnection agreement process set forth in the Act and must be dismissed.

B. INTEGRA HAS NO BASIS TO ASSERT INDEPENDENT CLAIMS OF ANTICOMPETITIVE CONDUCT.

9 Integra claims that the "Complaint primarily seeks to remedy Verizon's anticompetitive conduct of providing [insufficient] facilities" to Integra for use in serving Integra's customers. Response at 6. The United States Supreme Court rejected a similar attempt to bootstrap alleged violations of the Act into claims of anticompetitive conduct. *See Verizon Communications Inc. v. Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) *("Trinko")*. In *Trinko*, the Supreme Court found no grounds under federal antitrust laws to allow a claim regarding Verizon's Operations System Support ("OSS") obligations to proceed, relying in part on the extensive regulatory framework of the Act that was "much more ambitious than the antitrust laws" and "designed to deter and remedy anticompetitive harm." 540 U.S. at 412, 415. In reaching this conclusion, the Supreme Court noted that "unbundled elements offered pursuant to Section 251(c)(3) ... are brought out on compulsion of the 1996 Act," and that the governing interconnection agreement entered into by Verizon as required under the Act's scheme "specified the mechanics by which its OSS obligation would be met." *Id.* at 403, 410. A similar situation is presented by the Complaint: Integra attempts to use purported violations of the unbundled elements provisions of an interconnection agreement that would not exist but for the Act as grounds to allege

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"anticompetitive" conduct under state law. The Commission should follow the lead of the Supreme Court and reject Integra's claim.

C. THE CASES CITED IN THE RESPONSE DO NOT REFUTE THIS ANALYSIS.

10 None of the authority cited by Integra in its response refutes the conclusion of preemption. Integra's reliance on *WorldCom and GTE Northwest, Inc.*, 1999 Wash. UTC Lexis 295 (1999) is misplaced, because that decision was reversed in pertinent part by the Ninth Circuit in *Verizon Northwest Inc. v. WorldCom, Inc.*, 61 Fed. Appx. 388, 2003 U.S. App. Lexis 6724 (2003). The Ninth Circuit reversed the Commission's decision to assess penalties against Verizon for allegedly violating RCW 80.36.170 under its interpretation of the reciprocal compensations provisions of the Verizon/WorldCom ICA. The Ninth Circuit held that "Verizon's actions in support of its interpretation of federal law as it related to the agreement do not merit sanctions under the WUTC's own standards." Similarly, Verizon's interpretation of its obligations under the Integra ICA, even if rejected, does not convert Verizon's actions into discriminatory conduct under RCW 80.36.170.

11 Integra's citation to *AT&T Communication of the Pacific Northwest, Inc. v. Qwest Corp.*, 2001 Wash. UTC Lexis 218 (2001) is ironic in light of the Commission's reliance in that decision on the ICA at issue, rather than independent state law claims. In fact, the following statement by the Commission in that case applies here:

> "We note that the Act and prior Commission orders contemplate that interconnection and unbundled access will be accomplished through agreements, not piecemeal litigation."[2]

12 Finally, *North County Communications Corporation v. Verizon New York Inc.*, 233 F.Supp.2d 381 (N.D. N.Y. 2002), a decision relied on heavily by Integra in the Response, is inapposite for at least three reasons. First, there was no underlying interconnection agreement at

[2] The only reference in this decision to state law outside of the Section 252 context was to a failure to negotiate in good faith that the Commission characterized as conduct that could be a violation of state law.

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issue in that case, as there is here. Second, the case dealt with the issue of whether a state case could be removed properly to Federal District Court; it did not address the question of how an ICA is to be enforced. Third, the dispute between the parties did not relate to conduct covered by the terms of an interconnection agreement, but rather "Verizon's conduct outside of the Agreement." Integra's claim that Verizon's actions at issue in the Complaint arose outside the scope of the Agreement (Response at 6) are simply incorrect. The actions at issue arose directly from, and would not have occurred but for, the unbundling obligations set forth in the ICA. In sum, the finding in *North County* that independent disputes under state law, unrelated to an ICA – and that do not implicate federal law – may be resolved in state court does not apply to Integra's Complaint.

III. CONCLUSION

13 Integra alleges conduct by Verizon that is clearly within the purview of, and can only be addressed through enforcement of an interconnection agreement entered into and governed by federal law. Therefore, the state law claims Integra raises are preempted by federal law and must be dismissed. Integra's claims that Verizon violated the ICA also should be dismissed because, as Verizon explained in its Motion to Dismiss and as Integra concedes, Integra failed to follow the Commission rules governing petitions for enforcement of interconnection agreements.

DATED this 9th day of August, 2005.

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