

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

)	
In the Matter of the Petition for	)	DOCKET NO. UT-043013
Arbitration of an Amendment to)	
Interconnection Agreements of	)	ORDER NO. 08
)	
VERIZON NORTHWEST INC.	)	ORDER GRANTING
	)	INTERLOCUTORY REVIEW OF
with	)	ORDER NO. 05; DENYING IN
	)	PART VERIZON'S PETITION
COMPETITIVE LOCAL EXCHANGE	)	FOR REVIEW; REQUIRING
CARRIERS AND COMMERCIAL	)	VERIZON TO FILE COPIES OF
MOBILE RADIO SERVICE	)	INDIVIDUAL
PROVIDERS IN WASHINGTON	)	INTERCONNECTION
	)	AGREEMENTS
Pursuant to 47 U.S.C. Section 252(b),)	
and the <i>Triennial Review Order</i> .)	
.....)	

1 **SYNOPSIS.** *In this Order, the Commission upholds an order requiring Verizon to maintain the status quo under existing interconnection agreements in Washington State until the conclusion of the arbitration proceeding or the FCC acts to eliminate uncertainties arising from the USTA II decision. To ensure that the status quo order appropriately applies to each interconnection order approved in the state, the Commission orders Verizon to file within 30 days copies of each interconnection agreement to which Verizon asserts that the status quo order does not apply. After reviewing the agreements, the Commission may amend the status quo order. The Commission also denies the request of ATG, Covad, and Centel to find in violation of Order No. 05 Verizon's decision to replace the Mount Vernon circuit switch with a packet switch.*

2 **NATURE OF PROCEEDING.** This proceeding involves a petition Verizon Northwest Inc. (Verizon) filed with the Washington Utilities and Transportation Commission (Commission) requesting arbitration pursuant to 47 U.S.C.

§ 252(b)(1) of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56 (1996) (Act), and the Federal Communications Commission's (FCC) Triennial Review Order.¹ The petition was served on all competitive local exchange carriers (CLECs) and Commercial Mobile Radio Service (CMRS) providers in Washington that have entered into interconnection agreements with Verizon.

3 **PROCEDURAL HISTORY.** Verizon filed its arbitration petition with the Commission on February 26, 2004. On March 2, 2004, the D.C. Circuit entered its decision in *United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*). In its decision, the D.C. Circuit vacated and remanded significant portions of the FCC's Triennial Review Order, but stayed the effect of its decisions for 60 days.

4 On June 15, 2004, the arbitrator, administrative law judge Ann E. Rendahl, entered Order No. 05 in this proceeding. That Order denied several motions to dismiss Verizon's arbitration petition, and granted a motion to maintain status quo, 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, 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. 05, ¶ 55. Order No. 05 describes the earlier procedural history of this proceeding, which will not be repeated in this Order.

5 On June 18, 2004, Verizon filed a Petition for Review of Order Requiring Verizon to Maintain Status Quo. Advanced Telecom Group, Inc. (ATG), Covad

¹ *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*, CC Docket Nos. 01-338, 96098, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (Rel. August 21, 2003) [Hereinafter "Triennial Review Order"].

Communications Company (Covad), and Centel Communications, Inc. (Centel), Sprint, and the Joint CLECs (Eschelon Telecom of Washington, Inc. (Eschelon), Integra Telecom of Washington, Inc., Pac-West Telecomm, Inc. (Pac-West), Time Warner Telecom of Washington, LLC (Time Warner), and XO Washington, Inc. (XO)) filed answers to Verizon's petition on June 28, 2004. Verizon filed a reply on July 2, 2004. Verizon filed statements of supplemental authorities on June 29 and July 22, 2004.

- 6 **PARTY REPRESENTATIVES.** Timothy J. O'Connell, Stoel Rives, LLP, Seattle, Washington, represents Verizon. Edward W. Kirsch and Philip J. Macres, Swidler Berlin Shereff Friedman, LLP, Washington, D.C., represent the Competitive Carrier Coalition. Letty S.D. Friesen, AT&T Law Department, Denver, Colorado, represents AT&T. Andrew M. Klein, Kelley, Drye & Warren, LLP, Washington, D.C., represents the Competitive Carrier Group. Brooks E. Harlow, Miller Nash LLP, Seattle, Washington, and Hong Huynh, Miller Nash LLP, Portland, Oregon, represent Centel. Karen S. Frame, Senior Counsel, Denver, Colorado, represents Covad. Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents Electric Lightwave, Inc., New Edge Networks, Inc., Pac-West, Time Warner and XO. Dennis D. Ahlers, Senior Attorney, Minneapolis, Minnesota, represents Eschelon. Richard A. Pitt, attorney, Burlington, Washington, represents Northwest Telephone, Inc. Richard A. Finnigan, attorney, Olympia, Washington, represents SBC Telecom, Inc. William E. Hendricks, III, Hood River, Oregon, represents Sprint. Michael E. Daughtry, Vice President of Operations, Bend, Oregon, represents United Communications, Inc., d/b/a/ UNICOM. Michel Singer Nelson, Regulatory Attorney, Denver, Colorado, represents WorldCom, Inc., and its subsidiaries in Washington n/k/a MCI, Inc. (MCI).
- 7 **VERIZON'S PETITION FOR REVIEW.** Verizon requests review of the requirement in Order No. 05 to continue to provide UNEs eliminated by the Triennial Review Order and the *USTA II* decision until amendments are

approved in this proceeding, in particular as to interconnection agreements that Verizon asserts, by their terms, do not require amendments. Verizon requests review under the Commission's rules governing interlocutory review, asserting substantial prejudice not remediable by post-hearing review.

8 Verizon asserts that the Order violates federal law and exceeds the Commission's authority because the Order overrides the terms of interconnection agreements and unlawfully attempts to block the legal effect of the mandate in *USTA II*, that the Commission has no authority to establish unbundling obligations in the absence of a valid finding by the FCC of impairment under Section 251(d)(2), and that CLECs will suffer no immediate harm absent the Order.

9 Verizon argues that many of its interconnection agreements contain provisions authorizing Verizon to cease providing UNEs upon a change in law or judicial decision without requiring amendments and a dispute resolution process. Verizon relies on *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003), to argue that the Commission cannot enter a generic decision about interconnection agreements, but must enter decisions that address the actual terms of the interconnection agreements at issue.

10 Verizon provides excerpts from eight interconnection agreements arguing that Verizon may terminate access to certain UNEs under these agreements upon a judicial decision, without waiting for a dispute resolution period.

11 Verizon argues that the Order represents bad public policy as it eliminates the CLECs' incentive to negotiate commercial agreements with Verizon, and that CLECs will stand to gain financially by dragging out the arbitration and negotiation process.

12 Verizon argues that the effect of the *USTA II* mandate is to eliminate Verizon's unbundling obligations for certain UNEs. Verizon argues that the effect of Order

No. 05 is to unlawfully stay the effectiveness of the *USTA II* decision, ordering unbundling outside of the Section 252 process.

- 13 Finally, Verizon argues that the issue is really the price CLECs must pay for access to those UNEs, as Verizon has stated its intent to provide at least 90 days notice before discontinuing UNEs at TELRIC prices. Verizon asserts that the Order provides CLECs a windfall.
- 14 **ATG, COVAD & CENTEL JOINT ANSWER.** In their joint answer, ATG, Covad, and Centel rely on provisions of Order No. 05 to assert that the Order “serves the public interest by limiting confusion and upheaval in the telecommunications markets during this interim period.” *Joint Answer at 1*. The Companies argue that the Commission should protect the general public rather than one carrier and assert that the Commission has authority to maintain the status quo. *Id. at 2-3*. The Companies assert that the Commission is not adopting unbundling rules, but preserving existing arrangements for a temporary period. *Id. at 3*. The Companies also request that the Commission order, under Order No. 05, that Verizon may not eliminate UNE-P by replacing circuit switches with packet switches, noting that Verizon plans to replace its Mount Vernon circuit switch with a packet switch. *Id. at 4*.
- 15 **SPRINT ANSWER.** Sprint asserts that Verizon’s petition is inappropriate as Commission rules limit interlocutory review to adjudicative proceedings. *Sprint Answer at 1*. Sprint argues that the Commission determined in a policy statement that arbitration proceedings are not adjudications and allowing such review “would be a substantial departure from the Commission’s long standing practice.” *Id. at 2*. Sprint also asserts that Verizon’s petition does not meet the standards for interlocutory review under WAC 480-07-810(2), as Verizon provides no support for its argument that it will suffer substantial prejudice not remediable by post-hearing review. *Id. at 3*. Assuming that the presumed harm

is provision of UNEs at TELRIC prices, Sprint argues that such possible harm could be remedied by a post-hearing order. *Id. at 3.*

16 Sprint argues that Verizon has included as issues in the arbitration proceeding the effect of the *USTA II* decision and the Triennial Review Order and that it is inappropriate, premature, and unlawful for Verizon to ask for resolution of the issues in its petition. *Id. at 4.* Noting that Verizon objects to the Commission not considering the terms of each individual interconnection agreement, Sprint asserts that Verizon misquotes and misinterprets the change of law provision of its interconnection agreement with Sprint. *Id.* Contrary to Verizon's claim, Sprint argues that the agreement provides for a dispute resolution process when parties cannot agree on a change in law. *Id. at 5.* Sprint requests that the Commission deny Verizon's petition, or in the alternative, order Verizon to continue to provide UNEs to Sprint as required under the parties' interconnection agreement. *Id. at 6.*

17 **JOINT CLEC ANSWER.** The Joint CLECs argue that Order No. 05 does not override the terms of Verizon's agreements, but requires that Verizon maintain the status quo until the Commission determines whether and to what extent a change in law has occurred allowing modification of the agreements. *Joint CLEC Answer at 2.* The Joint CLECs argue that Order No. 05 is consistent with the *Pacific Bell* decision on which Verizon relies, as the Order requires that Verizon maintain the status quo until the Commission determines what amendments are required to specific interconnection agreements. *Id. at 3.*

18 The Joint CLECs object to Verizon's contentions that it has an "unfettered, unilateral right to discontinue providing certain UNEs" and argue that the Order simply prohibits Verizon from implementing its interpretation of the agreements and the law until the Commission resolves the disputes. *Id. at 3.* The Joint CLECs note that Verizon itself sought to amend all of its interconnection agreements in one arbitration proceeding, and question why Verizon would file

the petition to arbitrate amendments to the agreements if the Company believes it has the right to make the unilateral changes to these agreements. *Id. at 4.*

19 The Joint CLECs argue that Verizon “confuses the temporary relief granted in the Order with Verizon’s position on the substantive issues.” *Id. at 5.* The Joint CLECs assert that the Order does not stay or block the *USTA II* mandate, but maintains the status quo until the Commission or the FCC determine the effect of the mandate. *Id.* The Joint CLECs vigorously contest Verizon’s position that the mandate eliminates Verizon’s unbundling obligations. *Id.* Finally, the Joint CLECs argue that the Commission has ample authority under federal and state law to enter a status quo order, and that the public interest justifies the Order. *Id. at 6.*

20 **VERIZON REPLY.** In its reply, Verizon argues that interlocutory review of Order No. 05 is proper under WAC 480-07-810, asserting that administrative law judges sitting as arbitrators may conduct arbitrations by relying on Commission orders on arbitration procedures and other provisions of law. *Verizon Reply at 2, citing WAC 480-07-630(11)(b).* Verizon notes that Order No. 05 allows interlocutory review, as the Order included a notice allowing for administrative review under WAC 480-07-810, the Commission’s rule addressing interlocutory review. *Id. at 2.*

21 Verizon provides as a supplemental statement of authority an administrative law judge’s decision denying a status quo motion before the California Public Utilities Commission (CPUC) in that commission’s Triennial Review proceeding.² In the decision, the administrative law judge asserts that the Triennial Review proceeding, as a generic proceeding, is not the proper forum for resolving disputes over the change in law terms of specific interconnection agreements. In its reply, Verizon reiterates the argument that Order No. 05 is

² Verizon also provides as a supplemental statement of authority a decision of the Virginia State Corporations Commission dismissing petitions for status quo orders.

unlawful as it does not address specific terms of specific interconnection agreements, referring to the *Pacific Bell* decision and the California PUC administrative law judge's ruling. *Reply at 3.*

- 22 Verizon notes that the CLECs do not dispute the general rule of *Pacific Bell* regarding generic decisions. *Id.* Verizon does not contest the Commission's authority to interpret change in law provisions: Verizon argues that the Commission has not done so, but has entered an unlawful generic order. *Id. at 4.*
- 23 Verizon notes that only Sprint takes issue with Verizon's interpretation of its interconnection agreement, but asserts that Sprint's interpretation is incorrect. *Id. at 4-5.* Verizon asserts that it has a contractual right to stop providing UNEs at TELRIC prices when no longer required to do so by federal law, and that the Commission cannot void that right without interpreting the terms of individual interconnection agreements. *Id. at 5.*
- 24 Verizon reiterates its argument that the Commission has no authority to order Verizon to continue to provide unbundling obligations under state law, asserting that the Commission is likely preempted from requiring what the *USTA II* court determined the FCC could not require under the Section 251 impair standard. *Id. at 6, quoting May 25, 2004, Staff Comments.*
- 25 Verizon argues that the harm asserted by CLECs is not well founded, as Verizon has notified CLECs that it will not unilaterally discontinue UNEs: Verizon will provide 90-days notice and has already notified CLECs of alternatives to such service. *Id. at 7.*
- 26 Finally, Verizon requests that the Commission reject as not properly presented ATG, Covad, and Centel's joint request regarding Verizon's plans to replace a Mount Vernon circuit switch with a packet switch. *Id. at 8.* Verizon asserts that

the CLECs did not file a petition for review or enforcement of their interconnection agreements. *Id.* Verizon also argues that the CLECs' request is precluded under federal law, *i.e.*, the FCC's Local Competition Order, UNE Remand Order, and Triennial Review Order, all of which declined to establish packet switching as a UNE. *Id. at 8-9.*

27 **DISCUSSION AND DECISION.** The first issue the Commission must address is the whether Verizon may seek interlocutory review in an arbitration proceeding. The Commission will entertain Verizon's petition, despite Sprint's arguments concerning interlocutory review and arbitration proceedings. The Commission intended interlocutory review of Order No. 05, which is why the notice allowing petitions for review appears at the end of the Order. The Commission generally does not entertain interlocutory review in arbitration proceedings: Arbitrations are intended to proceed without reference to the rules governing adjudicative proceedings. *See WAC 480-07-630(2).* As Verizon notes, however, the Commission's rules allow arbitrators to conduct arbitrations "under the provisions of this rule, the commission's orders on arbitration procedure, and other provisions of law." *WAC 480-07-630(11)(b).*

28 Verizon alleges that substantial prejudice not remediable by post-hearing review requires the Commission to accept review of Order No. 05. The substantial prejudice Verizon alleges appears due to the Order's requirement that prices for services provided under interconnection agreements not change. A more appropriate basis for accepting interlocutory review is the standard in WAC 480-07-810(2)(c) allowing review if "some other factor is present that outweighs the cost in time and delay of exercising review." Although it is a departure from the Commission's usual process, the Commission will entertain interlocutory review of Order No. 05 given the unusual circumstances presented by Verizon's petition for arbitration of multiple agreements and the significant issues presented by the Triennial Review Order and *USTA II* decision. As the procedural schedule has

been suspended to allow Verizon additional time to revise its proposed amendment, there is no significant concern over delay in the proceeding.

29 In this proceeding, Verizon petitioned the Commission for arbitration of an amendment to not just one interconnection agreement, but agreements with 77 companies. Within the context of this proceeding, the CLECs requested a status quo order effective until the Commission arbitrates and approves amendments to agreements or the FCC adopts final rules. Order No. 05 requires that Verizon not modify the terms or services of interconnection agreements until the conclusion of the arbitration proceeding or the FCC acts to resolve the legal uncertainties arising from *USTA II*. It is inappropriate, and borders on the absurd, for Verizon to initiate a mass arbitration proceeding and then insist that it may effect on its own the very changes it requests the Commission to arbitrate.

30 The Commission rejects Verizon's arguments that Order No. 05 unlawfully stays the effect of *USTA II* and the Triennial Review Order, and imposes unlawful unbundling requirements. Verizon has initiated a proceeding to arbitrate an amendment requiring the Commission to interpret *USTA II* and the Triennial Review Order. Order No. 05 requires Verizon to allow these issues to be resolved in the arbitration proceeding. State commissions have jurisdiction to arbitrate agreements under Section 252 of the Act. Requiring parties to refrain from actions contrary to a request for arbitration does not constitute a stay of the *USTA II* decision, nor establishment of unbundling requirements. Although Verizon agrees that the Commission is authorized to interpret interconnection agreements, Verizon continues to assert that it has the right to impose its interpretation of the issues on other parties during the proceeding. Such assertions are contrary to the arbitration process.

31 Verizon asserts that CLECs will suffer no immediate harm should the Commission grant its petition for review of Order No. 05. Verizon asserts that the only effect on CLECs is the price of elements, and that allowing the Order to

continue in place grants CLECs and CMRS providers a windfall. Verizon further asserts that it will provide 90 days notice of any change in the terms or prices of elements currently provided in interconnection agreements. As with Verizon's other arguments, the argument relating to harm is based upon Verizon's assumption that it may interpret the change in law provisions of interconnection agreements at issue in this arbitration proceeding, without allowing this Commission to consider the change in law terms of the agreements. Until Verizon demonstrates otherwise, Order No. 05 should remain in place.

32 Verizon relies on the *Pacific Bell* decision, an administrative law judge's decision from the California Commission, and a decision of the Virginia State Corporations Commission to bolster its arguments that the Commission cannot enter a "generic" order in this proceeding without reference to specific interconnection agreements. The *Pacific Bell* decision relates to a generic proceeding to address reciprocal compensation provisions of interconnection agreements, not an arbitration proceeding. The California decision relates to a "generic" proceeding concerning the Triennial Review Order, not an arbitration proceeding. The Virginia decision relates to petitions requesting a status quo order filed without reference to another proceeding. This proceeding is an arbitration proceeding, not a "generic" proceeding, such as a cost proceeding or a Triennial Review proceeding. The proceeding will affect 77 separate agreements. The fact that Verizon has chosen to arbitrate an amendment to all agreements filed in Washington state in one proceeding does not render decisions made in the proceeding "generic" orders.

33 Verizon asserts, on the basis of the *Pacific Bell* decision, that Order No. 05 is a "generic" order made without reference to the provisions of specific interconnection agreements. Verizon provides excerpts of several agreements to support its position that it may unilaterally modify the terms of certain agreements. Quoting portions of agreements is not sufficient to demonstrate Verizon's position that it may act unilaterally. For example, as Sprint argues,

Verizon may have quoted only a part of the relevant change in law provision in its petition.

34 To address Verizon's argument that Order No. 05 may have the effect of a "generic" order under *Pacific Bell*, the Commission would need to review the change in law provisions of all agreements filed in Washington state. Verizon, not this Commission, should bear the burden to show that its interconnection agreements allow unilateral action. In order that the Commission may conduct this agreement-by-agreement review, Verizon must file copies of each interconnection agreement in which it argues there is no dispute resolution process that would prevent the Company from taking action unilaterally. As the party initiating the proceeding, Verizon must bear the burden of demonstrating that its position before the Commission will not alter the status quo provisions of Order No. 05. Once Verizon makes this showing, the Commission will interpret the agreements and determine which agreements are subject to the status quo order.

35 Finally, the Commission rejects ATG, Covad, and Centel's request that the Commission find the replacement of Verizon's Mount Vernon circuit switch improper under Order No. 05. The companies do not bring the complaint in a petition for enforcement or a formal motion, but as a new issue in an answer to Verizon's petition. If the companies believe that Verizon's action is contrary to their interconnection agreements, they may file a formal complaint or petition for enforcement.

ORDER

The Commission Orders:

36 (1) Verizon Northwest Inc.'s Petition for Review is accepted, pursuant to WAC 480-07-810(2)(c), as a petition for interlocutory review.

- 37 (2) Verizon Northwest Inc.'s Petition for Review is denied, in part, as to all bases except the assertion that the Order No. 05 in this proceeding is a "generic" order deemed improper under *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003).
- 38 (3) Within 30 days of the service date of this Order, Verizon Northwest Inc. must file with the Commission copies of each interconnection agreement in which it argues there is no dispute resolution process and that would allow the Company to take action unilaterally.
- 39 (4) The request of Advanced Telecom Group, Inc., Covad Communications Company, and Centel Communications, Inc., that the Commission find the replacement of Verizon's Mount Vernon circuit switch improper under Order No. 05 is denied as improperly raised in a responsive pleading.

Dated at Olympia, Washington, and effective this 13th day of August, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK OSHIE, Commissioner