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VIA ELECTRONIC MAIL & DHL

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504

Re: Docket No. UT-053025

Dear Ms. Washburn:

On August 9, 2006, Covad Communications Company, Eschelon Telecom of Washington, Inc., Integra Telecom of Washington, Inc., Time Warner Telecom of Washington, LLC, and XO Communications Services, Inc. ("Joint CLECs") filed unauthorized "comments and recommendations" in this docket ("Joint CLEC Comments"). That procedurally improper filing asks the Commission to "initiate an adjudicated phase of this docket" to reduce to cost the Commission-approved rates for Qwest's high-capacity loop and transport facilities that are no longer available as UNEs. Joint CLEC Comments at 6-7. The Joint CLECs tell the Commission that it may do so by designating the de-listed elements as "Section 271 UNEs" or by using its authority to set rates for intrastate private line services. *See id*. at 6.

The Joint CLECs do not seek any relief with respect to Verizon Northwest Inc. ("Verizon"). They have not asked the Commission to re-examine Verizon's special access or other rates, nor have they claimed that Verizon has any Section 271 obligations. As the Commission stated in Verizon's *TRO*/*TRRO* amendment proceeding, "Verizon has no obligation to provide unbundled access to Section 271 elements in this state."[1] The Commission added that "[e]ven if Verizon were the BOC in this state," only the FCC, not this Commission, "has the exclusive authority to act under Section 271....An order requiring inclusion of unbundling of Section 271 elements would conflict with the federal regulatory scheme." Arb. Rep. at 25. Therefore, even though the

[1] *Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc. with Competitive Local Exchange Carriers in Washington*, Docket No. UT-043013, Order No. 17, Arbitrator's Report and Decision ("Arb. Rep."), at 25 (July 8, 2005), affirmed in part and modified in part in the Commission's Order No. 18 (Sept. 22, 2005).

Joint CLECs' section 271 arguments do not relate to Verizon, the Commission has already recognized that it cannot create "Section 271 UNEs."

Although the Joint CLECs' proposal relates only to Qwest, Verizon is, nevertheless, compelled to address the fundamental error underlying that proposal—that implementation of the FCC's unbundling rules is optional. The Joint CLECs argue that "[i]mplementation of the TRRO will severely limit CLECs' access to high capacity facilities in wire centers that have been classified as non-impaired" (Joint CLEC Comments at 2), so this Commission must take action to preserve that access. The Joint CLECs claim that the FCC's conclusions underlying its non-impairment criteria do not apply in Washington (Joint CLEC Comments at 3), and thus the Commission may and should overrule the FCC and effectively re-instate de-listed UNEs by taking the rates for their tariffed replacements down to (or near) UNE levels.

This Commission, like others around the country,[2] has decisively rejected the Joint CLECs' theory that a state commission may countermand the FCC's non-impairment determinations. In Verizon's *TRO/TRRO* Amendment case, for example, the Commission emphasized the FCC's repeated admonitions that a commission may not adopt requirements inconsistent with the FCC's

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[2] *See, e.g., Petition of Verizon Southwest Inc. for Arbitration of an Amendment to Interconnection Agreements*, Docket No. 29451, Arbitration Award, at 7 (Tex. PUC July 5, 2006) (because the FCC has occupied the field with respect to unbundling obligations, state law is "no longer operative" with respect to unbundling at TELRIC rates); *Petition of BellSouth Telecomm. Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements*, Order Addressing Changes of Law, Order No. 2006-136, at 12 (S.C. PSC March 10, 2006) ("It would be exceedingly odd for all of the FCC's decisions, deliberations, and conclusions about the adverse impact of the de-listed UNEs on competition under Section 251 of the Act to be rendered moot by allowing CLECs to obtain the exact same arrangements pursuant to Section 271 of the very same act."); *Petition of Verizon Calif. Inc. for Arbitration of an Amendment to Interconnection Agreements*, Application 04-03-014, Decision Adopting Amendment to Existing Interconnection Agreements, at 8-9 (Calif. PUC Feb. 16, 2006), *quoting TRO*, ¶ 192 ("'states would be precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in this Order'"); *Petition of Verizon New England, Inc. for Arbitration of Interconnection Agreements*, D.T.E. 04-33, Arbitration Order, at 44 (Mass. DTE July 14, 2005) ("Where the FCC has made affirmative non-impairment findings and has ruled that network elements are not required to be unbundled, state mandated unbundling of those elements would be contrary to federal regulation"); *Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements*, Docket No. 3588, Arbitration Decision, at 3 ("the FCC has made it rather clear that it would be 'unlikely' that a state utility commission decision which contradicts the FCC's Rules 'would fail to conflict' with federal law and thus, be preempted") (R.I. PUC Nov. 10, 2005); *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law, etc.*, Order No. PSC 05-0492-FOF-TP, at 6-7 (Fla. PSC May 5, 2005) ("further prolonging the availability of...delisted UNEs could cause competitive carriers to further defer investment in their own facilities, a result that would be clearly contrary to the FCC's intent, as well as the Court's decision in USTA II"); *Indiana Util. Reg. Comm'n's Investigation of Matters Related to the FCC's Report and Order*, Cause Nos. 42500, etc., Order, at 14 (Ind. URC Jan. 12, 2005) (impairment determinations are "reserved for the FCC, not the states"); *Petitions of the Competitive Carrier Coalition and AT&T Comm. of Va., LLC*, Order Dismissing Petitions, Case Nos. PUC-2004-00073 & PUC 2004-00074, at 6 (Va. SCC July 19, 2004) ("*USTA II* establishes that no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under 4 U.S.C. § 251(d)(2)").

unbundling rules or that "'substantially prevent' implementation of the federal regime."[3] Reducing existing rates for tariffed private line or other services to TELRIC levels, as the Joint CLECs urge, would not just substantially prevent implementation of the federal regime; it would completely override that regime. Indeed, application of the FCC's non-impairment criteria would be a meaningless exercise if CLECs could still obtain de-listed facilities out of non-impaired wire centers at UNE-like rates. The repricing sought by the Joint CLECs would reverse the FCC-mandated transition away from de-listed high-capacity services to non-UNE-priced replacements that ended on March 10, 2006.

The FCC's unbundling approach is intended to satisfy "the guidance of courts to weigh the costs of unbundling, and ensures that our rules provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition."[4] Indeed, just 8 weeks ago, the DC Circuit affirmed the FCC's *TRRO* decision in the face of a challenge quite like the one the Joint CLECs attempt here.[5] Contrary to the Joint CLECs' arguments, this Commission cannot decide that the FCC struck the wrong balance for Washington, and require incumbents to provide UNE-priced access to elements that the FCC has decided are unnecessary as UNEs for CLECs to efficiently compete. The Commission cannot launch a proceeding to reduce rates *by any degree* (to TELRIC or any level short of TELRIC) based on the Joint CLECs' unlawful premise that the Commission may second-guess the FCC's conclusion that CLECs can economically deploy their own high-capacity facilities where the FCC's non-impairment criteria are met.

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[3] Arb. Rep., at 21-22, *citing Petition for Arbitration of Covad Comm. Co. with Qwest Corp. Pursuant to 47 U.S.C. Section 252(b) and the Triennial Review Order*, Order No. 06, Docket UT-043045, at 51-52, 130 (Feb. 8, 2005); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 195 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004); and *BellSouth Telecommunications, Inc. Request for Declaratory Ruling*, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830, ¶ 22 (2005) (preempting four states' requirements for BellSouth to provide DSL service to customers of CLECs using BellSouth's unbundled loops, because they "impose on BellSouth a requirement to...do exactly what the [FCC] expressly determined was not required by the Act and thus exceed the reservation of authority under section 251(d)(3)(B). *Id*. ¶ 27. .

[4] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 2 (2005) ("*Triennial Review Remand Order*" or "*TRRO*").

[5] *Covad Comm. Co. and DIECA Comm., Inc. v. F.C.C.*, Civ. No. 05-1095 (D.C.Cir. June 16, 2006), slip op. at 28 ("The Commission's standard uses market data to predict when and where the CLECs will be economically able to deploy their own high-speed facilities, thus obviating the need for UNEs. We think this balancing act is reasonable.").

The Commission should make clear, once again, that it cannot override the FCC's rules, and reject the Joint CLECs' proposal for a cost phase explicitly designed to circumvent the FCC's limits on unbundling.

Sincerely,

Gregory M. Romano

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