Original

**BEFORE THE**
**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition for Arbitration of an Amendment to 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 TO MOTION FOR ENFORCEMENT OF ORDER NO. 5

RECEIVED RECORDS MANAGEMENT
04 SEP -9 PM 1:15
STATE OF WASH. UTIL. AND TRANSP. COMMISSION

**VERIZON NORTHWEST INC.'S REPLY TO MOTION FOR ENFORCEMENT OF ORDER NO. 5, FOR ENFORCEMENT OF INTERCONNECTION AGREEMENTS AND ENFORCEMENT OF *TRO***

## INTRODUCTION

A group of five CLECs – Advanced TelCom, Inc., AT&T Communications of the Pacific Northwest, Inc., MCI, Inc., United Communications, Inc. d/b/a UNICOM, and Covad Communications Company (collectively the "Competitor Group") have filed a motion that would effectively derail a network upgrade that was publicly announced months ago and is now in the final stages of implementation across the industry by asserting that Verizon has to continue offering local switching, UNE-P and line splitting out of packet switch – all of which is contrary to FCC and court precedent. The FCC has never required the unbundling of packet switches as sought by the Competitor Group

here, and the FCC's binding determination, which was again reiterated in the FCC's *Triennial Review Order,* has also been affirmed by the Court of Appeals for the District of Columbia Circuit. Clear FCC and federal judicial precedent thus require this Commission to reject the Joint Competitors' request and federal law preempts any state law "solution." Nor do the interconnection agreements of the Joint Competitors – agreements that were adopted under and therefore incorporate federal law – require that packet switching be unbundled. Just the opposite is true.

In support of their extraordinary request, the Competitor Group offers nothing more than an unverified motion of less than 40 paragraphs styled as a request to enforce a prior Commission order.[1] In addition to lacking any sworn facts, the *Motion* is silent as to why these carriers have waited months before seeking this relief, silent as to why they suddenly do so now, with the actual deployment only days away, and silent as to what operational harm these carriers would suffer if this long-planned deployment moves forward.

Any request for what is effectively emergency adjudicative relief can only be granted by this Commission if it "involves an immediate danger to the public health, safety or welfare."[2] Significantly, late yesterday afternoon, the Joint Competitors "clarif[ied]" that their motion "does NOT seek to stop or postpone Verizon's conversion of its Mt. Vernon switch."[3] In doing so, they have effectively conceded that there is no harm that warrants the extraordinary relief that they seek. In fact, had these carriers made

---

[1] Joint Competitors' *Motion for Enforcement of Order No. 5 for Enforcement of Interconnection Agreements and Enforcement of TRO* (August 31, 2004) ("*Motion*").
[2] WAC 480-07-680.
[3] September 8, 2004 email message to ALJ Ann E. Rendahl from Brooks E. Harlow, counsel for Joint Competitors.

this point clearly in their pleading, there would have been no need for the expedited, emergency evidentiary hearing that is being held today.

With the Joint Competitors' assertion that they are not seeking to delay deployment, the motive for their request has been crystallized: They want to continue to enjoy the heavily subsidized wholesale rate that accompanies bottleneck facilities that must be unbundled pursuant to section 251 of the Telecommunications Act. But as explained in greater detail below, there is absolutely no legitimate dispute that the FCC has conclusively determined that packet switching is not such a bottleneck facility and therefore cannot be unbundled pursuant to section 251, and that this conclusion is binding on this Commission.

It is not clear whether the Joint Competitors are now also conceding that they are able to order resale service. If they actually are conceding this point, there is no dispute that needs to be adjudicated – particularly in such an expedited fashion. In their original *Motion*, the Joint Competitors would have this Commission believe that ordering resale is an operational Manhattan project; however, the facts show that some of these carriers are already ordering and maintaining resale service in Washington, and others are already using the systems needed to order and maintain resale service. The resale process is straightforward and very similar to the UNE-P processes to which these carriers are using.[4]

Nor do the legal justifications that these carriers offer in support of their position have any merit. As stated above and set out in more detail below, the FCC has determined that packet switching cannot be unbundled pursuant to section 251. In

[4] Verizon is always willing to discuss its resale processes with carriers. The CLEC's motion states that Verizon virtually ignored their response to the notice. This is incorrect. Verizon responded in detail on August 4, 2004, a copy of which is attached hereto.

response to this controlling law, the Joint Competitors serve up a mélange of legal justifications for their position. But all of these arguments are without merit and most border on the frivolous. There is no truth to their claim that Verizon's actions violate the Commission's Order No. 5, and Verizon's deployment is fully consistent with federal law, its interconnection agreements with these carriers, and its voluntary commitments to the FCC.

Finally, there is no reason, as these carriers so breezily claim, that Verizon should be expected to provide unbundled platform service for their ordering convenience. It has been clear for years that Verizon and other ILECs have no obligation to unbundle packet switching. In view of that clear legal direction, Verizon did not undertake any of the extensive work that would have been required in order to attempt to provide unbundled switching on a packet switch. Thus, from both a legal and operational standpoint, the relief that these carriers seek cannot be provided, and their *Motion* should be denied.

## ARGUMENT

### I. Verizon's Lawful Deployment of a Packet Switch does not "Violate" Commission Order No. 5.

The procedural basis for the Joint Competitors extraordinary request is their claim that Order No. 5 requires Verizon to continue to provide unbundled switching in Mt. Vernon. However, this argument ignores Order No. 8, in which the Commission expressly denied a CLEC motion to "clarify" that Order No. 5 stands for the proposition that the Joint Competitors attempt to assign to it.

When the ALJ issued Order No. 5, Verizon filed a petition for review. In response to that petition, three CLECs – ATG, Covad and Centel – filed a Joint Answer asking the Commission to "clarify" Order No. 5 to prevent Verizon from eliminating

UNE-P by replacing its circuit switch with a packet switch in Mt. Vernon. In Order No. 8, the Commission denied the CLECs' request. It said the request was improper because it brought "a *new* issue in an answer to Verizon's petition," and that if the CLECs believed Verizon's action is contrary to law, these carriers should file a formal complaint. (Order No. 8, para. 35 (emphasis added)). In short, the Commission explicitly determined that the packet switch issue was not covered by Order No. 5. The Commission's holding in Order No. 8 reflects the fact that Order No. 5 addressed only those UNEs eliminated by the *Triennial Review Order* or *USTA II*.

As Verizon explained in opposing the CLECs' request for clarification of Order No. 5, the FCC has never required the unbundling of packet switching, and therefore neither the *Triennial Review Order* nor *USTA II* "eliminated" it. (*See* Verizon's Reply in Support of its Petition for Review, ¶¶ 16-18) Accordingly, the Commission rightfully held that this new issue – the unbundling of packet switching – was outside the scope of Order No. 5.

Thus, the Competitor Group's claim that they merely seek to "enforce" Order No. 5 is false, since the Commission itself has already held that the issue the Joint Competitors raise was not adjudicated in Order No. 5. Instead, the Joint Competitors' request to "enforce" Order No. 5 is nothing more than a thinly disguised attempt to rewrite Order No. 8, and a spurious procedural hook to raise an issue that these carriers have failed to raise in a timely and appropriate manner.[5]

## II. Under Federal Law, Packet Switching Is Not, and Has Never Been, Subject to the Unbundling That the Joint Competitors Demand.

[5] Remarkably, the only mention of Order No. 8 in the Competitor Group's motion is a single citation in footnote 13, but this reference does not mention the Commission's rejection of the reading of Order No. 5 that the Joint Competitors now press on the Commission.

Packet switching has never been subject to general unbundling obligations under federal law. The Joint Competitors' suggestion that this is merely a "theor[y]" is frivolous. Verizon's obligation to provide unbundled local switching under section 251(c)(3) and the FCC's rules has never included an obligation to provide the unbundled *packet* switching that these carriers are requesting. To the contrary, when the FCC first established a national list of UNEs in the *Local Competition Order* over eight years ago,[6] it explicitly "declin[ed] to find, as requested by AT&T and MCI, that incumbent LECs' packet switches should be identified as network elements" subject to unbundling under the Act.[7]

The FCC has never deviated from that clear ruling. The FCC reiterated its rejection of packet switching unbundling five years ago in the *UNE Remand Order* [8] because CLECs and cable companies – even in 1999 – seriously outpaced the ILECs in the deployment of advanced services using packet switching technology. The FCC explained,

> "[o]ur decision to decline to unbundle packet switching therefore reflects our concern that we not stifle burgeoning competition in the advanced service market. We are mindful that, in such a dynamic and evolving market, *regulatory restraint* on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation."[9]

---

[6] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, released August 8, 1996, at ¶ 407 ("*Local Competition Order*").
[7] *Id.* at ¶ 427.
[8] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, released November 5, 1999, at ¶ 306, 313 ("*UNE Remand Order*"). The sole exception to the no-unbundling rule related only to the unbundling of Digital Subscriber Line Access Multiplexers ("DSLAMs") at remote terminals, which is not at issue here. And the *Triennial Review Order* eliminated even this limited exception.
[9] *Id.* at ¶ 316 (emphasis added).

The FCC reinforced this finding a third time in its *Triennial Review Order*. The FCC's decision not to order unbundling of packet switching – both standing alone as a switch replacement and in the context of packet-switched networks – was guided not only by the lack of impairment clearly demonstrated by the extensive deployment of packet switching by CLECs across the country, but also by the FCC's desire to encourage further deployment of advanced telecommunications technology, consistent with section 706 of the Act: "by prohibiting access to the packet-based networks of incumbent LECs, we expect that our rules will stimulate competitive LEC deployment of next-generation networks."[10] In fact, the FCC has expressly noted that even if one result of the replacement of circuit switches with packet switches is the elimination of mass market unbundling, such an outcome is both appropriate and desirable:

> [T]o the extent that there are significant disincentives caused by the unbundling of circuit switching, incumbents can avoid them by deploying more 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.*[11]

The FCC's conclusions rejecting the unbundling of packet switching have been recently upheld in court. On appeal, the United States District Court for the District of Columbia Circuit rejected all of the CLECs' challenges to the FCC's decision not to require unbundling of ILEC broadband facilities "in light of evidence that unbundling would skew investment incentives in undesirable ways."[12]

[10] Report and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 290, released August 21, 2003 ("*Triennial Review Order*"); see also id. ¶ 541 ("In order to ensure that both incumbent LECs and competitive LECs retain sufficient incentives to invest in and deploy broadband infrastructure, such as packet switches, we find that requiring no unbundling best serves our statutorily-required goal.").
[11] *Triennial Review Order* ¶ 446, n. 1365 (emphasis added).
[12] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 585 (D.C. Cir. 2004) ("*USTA II*").

Faced with this series of unambiguous rulings, the Joint Competitors are reduced to claiming that if a packet switch is going to be used to provide voice service, it must be unbundled. But this argument was also considered and rejected by the FCC – a critical fact that the Joint Competitors fail to bring to this Commission's attention. Indeed, it was one of the Joint Competitors – MCI (then WorldCom) – that petitioned the FCC for "clarification" on this very point – that, in then-WorldCom's words, "even if it [the FCC] does not require ILECs to make packet switching available as an unbundled network element for the provision of advanced services, ILECs are required to make packet switching available as a UNE when the ILEC is using it to provide voice service."[13] But the FCC refused to carve out the "voice only" exception that MCI and other CLECs sought.[14]

The paragraph that the Joint Competitors cite from the *Triennial Review Order* does not hold to the contrary. Rather, in this paragraph the FCC merely observed that packet switches are used in the provision of broadband services – a point not at all in dispute or at issue. But at no point in that paragraph – or anywhere else in the *Triennial Review Order* for that matter – did the FCC ever suggest that a packet switch must be unbundled if it is used to provide voice services. To the contrary, in addition to rejecting MCI's request for clarification on this very point, the FCC also expressly stated that its decision not to order the unbundling of packet switching recognizes "that to the extent that there are significant disincentives caused by the unbundling of circuit switching, incumbents can avoid them by deploying more advanced packet switching. This would

---

[13] *See Petition of MCI for Clarification in CC Dkt 96-98* (filed February 17, 2000).

[14] *See TRO* ¶ 288, n. 833 ("Because we decline to require unbundling of packet-switching equipment, we deny WorldCom's petitions for reconsideration and clarification requesting that we unbundled packet-switching equipment, DSLAMs, and other equipment used to deliver DSL service."). MCI's petition sought other clarification that was granted. *See TRO* ¶ 837.

suggest that incumbents have every incentive to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage."[15] In other words, the FCC concluded that even if one result of the replacement of circuit switches with packet switches was the elimination of mass market unbundling, such an outcome was appropriate and desirable.

Verizon is not, and has never been, obligated – under Section 251 or FCC rules or precedent – to unbundle the packet switching the Joint Competitors now seek. To the contrary, federal law not only sanctions but is designed to promote and protect the precise type of network upgrade that Verizon is engaging in here.

Moreover, any effort by the Commission to require that Verizon unbundle packet switches (including any attempt to perpetuate UNE-P rates despite the deployment of a packet switch) or any attempt to staunch Verizon's network upgrades would violate and be preempted by federal law. It is abundantly clear in the wake of the *Triennial Review Order* and the *USTA II* decision that Congress expressly assigned *to the FCC* the task of making unbundling determinations, not the states.[16] And as the FCC found, "[b]ased on the plain language" of the 1996 Act, state authority "is limited to state unbundling actions that are consistent with the requirements of section 251 *and* do not 'substantially prevent' the implementation of the federal regulatory regime."[17]

---

[15] *TRO* ¶ 466, n. 1365.

[16] In fact, the D.C. Circuit vacated those portions of the *Triennial Review Order* in which the FCC purported to delegate to state commissions the authority to make unbundling determinations – an outcome that vividly confirms that unbundling determinations are entrusted by Congress to the FCC, and the FCC alone. *See, e.g., Iowa Utils. Bd. V. FCC,* 366, 378, n. 6 [fix] ("With regard to matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications away from the States.").

[17] *Triennial Review Order* ¶ 193 (interpreting 47 U.S.C. § 251(d)(3)).

Once the FCC has determined that a network element should not be unbundled, as it has in the case of packet switching, a state commission may not lawfully override that decision. And as the FCC noted, any argument that "states may impose any unbundling they deem proper under state law, without regard to the federal regime," overlooks the 1996 Act's "specific" and "general" restraints on state actions, "and simply ignore[s] long-standing federal preemption principles that establish a federal agency's authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy."[18]

There can be no doubt that the FCC or a federal court would consider any state requirement that ILECs unbundle packet switching to be an illegal attempt to "thwart or frustrate the federal regime" adopted by the FCC. *Id.* In fact, in its briefs in the *USTA II* case, the FCC argued that, because it had "declined to unbundle the packetized functionality of ILEC loops," a "state requirement to reverse that decision would substantially prevent implementation of the Act," "thereby warranting preemption." Brief for Respondents United States Department of Justice and Federal Communications Commission at 93 & n. 41, *USTA II*. Likewise, in rejecting AT&T's argument that states maintain independent authority to order the unbundling of packet switching, the United States Court of Appeals for the Seventh Circuit pointed out that

> "only in very limited circumstances, *which we cannot now imagine*, will a state be able to craft a packet switching unbundling requirement that will comply with the Act."[19]

---

[18] *Triennial Review Order* ¶ 192.

[19] *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 394 (7th Cir. 2004).

## III. Verizon's Deployment does not violate the Joint Competitors' Interconnection Agreements.

The Joint Competitors claim that Verizon's packet switching deployment violates "interconnection agreements with CLECs." They do not. Verizon's actions are completely consistent with these agreements, which were negotiated and adopted with the knowledge that packet switches do not have to be unbundled. In fact, in the FCC's *Local Competition Order* – the unbundling rules in place at the time the parties entered into their interconnection agreements – the FCC expressly excluded packet switching from the definition of the local switching network element.

The FCC defined the "local circuit switching" network element in the *Local Competition Order* to include "the basic function of connecting lines and trunks."[20] The FCC further explained that "[t]he line-side facilities include the connection between a loop termination at, for example, a main distribution frame (MDF), and a switch line card. Trunk-side facilities include the connection between, for example, trunk termination at a trunk-side cross-connect panel and a trunk card."[21] All of the interconnection agreements referenced by the Joint Competitors are consistent with the FCC's definition of circuit switching – an outcome that is hardly surprising, since at the time these agreements were entered into, packet switching and circuit switching were separate network elements, and only circuit switching needed to be unbundled.

---

[20] *Local Competition Order* ¶ 410; *UNE Remand Order* ¶ 244 ("In the Local Competition First Report and Order, the [FCC] defined local circuit switching as including the basic function of connecting lines and trunks. In addition to line-side and trunk-side facilities, the definition of the local switching element encompasses all the features, functions and capabilities of the switch. . . . . We . . . find no reason to alter our current definition of local circuit switching.")

[21] *Local Competition Order* ¶ 412 (footnotes omitted).

Both the ATI and UNICOM interconnection agreements contain an identical definition of local switching, a definition that is virtually identical the FCC's definition of circuit switching:

> "Local Switching is the Network Element that provides the functionality required to connect the appropriate originating lines or trunks wired to the Main Distributing Frame (MDF) or Digital Signal Cross Connect (DSX) panel to a desired terminating line or trunk."[22]

In the case of Covad, this distinction is clearer still. Indeed, the portion of Covad's interconnection agreement that the Joint Competitors quote expressly states that "local switching provides the basic *circuit* switching functions to originate, route, and terminate traffic and any signaling employed in the switch."[23] And the definitions of local switching in the AT&T and MCI agreements are also limited to circuit switching, since these definitions all speak about the ability of a switch to receive data traffic from customer premises equipment in a digital format at an ISDN interface, where it is then switched using ISDN protocols. But ISDN is – and always has been – a "feature, function, and capacity" of *circuit* switching technology, and has nothing to do with the packet switching at issue in this dispute. Any doubt on this point is removed by the FCC's definition of packet switching: "the function of routing individual data units, or 'packets,' based on address or other routing information contained in the packets," *not* over particular lines or trunks, as occurs in a circuit switching environment.[24] In fact, the FCC expressly distinguished circuit switching from packet switching in this regard.[25]

[22] AT&T Interconnection Agreement Section 4.7. This definition is contained in MCI's interconnection agreement. MCI Interconnection Agreement 47.1.
[23] Covad Interconnection Agreement § 5.4 (emphasis added) (quoted in *Motion* at ¶ 16).
[24] *UNE Remand Order* ¶ 304.
[25] *See UNE Remand Order* ¶ 302, n. 592 ("With packet switching, the packet switches place data units on inter-switch trunks only when there are active communications between network users. When users are not sending each other messages or packets, no bandwidth is used on the trunks between packet switches. By contrast, with voice connections between circuit switches, when both users are silent, the digital trunks

Nor is the Joint Competitors' argument resuscitated by their citation to the portion of AT&T's interconnection agreement that addresses the procedures for discontinuing an unbundled network element. To the contrary, the portion of the agreement quoted by the Joint Competitors expressly states that Verizon may discontinue the provision of a UNE identified in the contracts without AT&T's written consent "to the extent required by network changes or upgrades" as long as Verizon complies with the network disclosure requirements stated in the Act and FCC regulations. Once Verizon disconnects its circuit switches identified in the Notice of Network Change, there is no longer any circuit switching available for unbundling. Since, as a matter of longstanding federal law, packet switching is not subject to unbundling, the discontinuation of unbundling for a circuit switch is "required" by a network change or upgrade that replaces circuit switching with packet switching. And Verizon complied with the disclosure requirements applicable to such an upgrade in its industry Notice of Network Change – a fact that AT&T does not dispute. The only way that discontinuing unbundled circuit switching would not be "required" by the network upgrade is if the network upgrade did not take place at all and the circuit switches remained connected – an outcome that is at odds with binding federal law, the express terms of the contracts, and the public interest.[26]

Therefore, Verizon does not need AT&T's consent to upgrade its network and change out its circuit switches with more advanced packet switching technology, even if one result of the discontinuance of the local circuit switch is the elimination of UNE-P.

---

carry digitally encoded silence. Inter-switch bandwidth is required even when no information is being exchanged.").

[26] Moreover, Verizon is not "discontinuing" unbundled packet switching; it has never provided unbundled packet switching to AT&T, nor has it ever been obligated to provide unbundled packet switching to AT&T. So the ICA provisions that call for AT&T's consent if a UNE is "discontinued" are not triggered by the unavailability of unbundled packet switching that was never a UNE to begin with.

As the FCC itself has emphasized, "to the extent that there are significant disincentives caused by the unbundling of circuit switching, incumbents can avoid them by deploying more 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.*[27]

Moreover, while the contracts at issue manifestly do not require Verizon to provide unbundled packet switching, it bears noting that these interconnection agreements are not garden variety "contracts" that simply may be interpreted under Washington law without regard to the federal telecommunications regulatory regime. Interconnection agreements are federal-mandates, entered and enforced by state commissions under federal law, with terms that would never be arrived at by arms-length bargaining in private transactions. *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003) (en banc) ("Interconnection agreements are tools through which the [1996 Act is] enforced."). They are simply the mechanism by which the FCC rules, which authorize access to private property by a competitor (and a taking of that property), are implemented to override the normal default rules of economic transactions that apply in our economy. *Trinko*, 124 S. Ct. at 880-883 (traditional antitrust principles do not require network-sharing duties found in Act; "[t]he sharing obligation imposed by the 1996 Act created 'something brand new'—'the wholesale market for leasing network elements.'"); *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 489 (2002) (noting that the Act is the "first time" Congress has sought to jump start and "reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers"); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d

[27] *Triennial Review Order* ¶ 446, n. 1365 (emphasis added).

1441, 1445-47 (D.C. Cir. 1994) (pre-1996 Act does not authorize FCC to order physical collocation in LEC's central office, and therefore such an order would constitute a taking; FCC may not impose physical collocation without such authorization). Because interconnection "agreements" are nothing but an embodiment of the compelled-access regime created by the FCC rules, and that regime *does not and cannot include packet switching technology*, no interconnection agreement whatever its general terms regarding local switching can authorize unbundling of packet switching.

The Joint Competitors' "contract" argument likewise runs headlong into a substantial body of federal law that makes clear that a state cannot accomplish by contract (or enforcement of a contract by its adjudicatory bodies) what it is preempted by federal law from doing by affirmative regulation. Federal courts have consistently looked askance at a state's use of a "contract" to achieve regulatory goals in conflict with federal law. For example, in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), the Supreme Court held that a state contract regarding the sale of timber violated the dormant Commerce Clause. "The State may not impose conditions, whether by statute, regulation, *or contract*, that have a substantial regulatory effect outside of that particular market." *Id.* at 97 (emphasis added). In a similar vein, in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 (1981), the Supreme Court found that the enforcement of contracts by state courts was preempted to the extent such enforcement conflicted with Federal Power Commission jurisdiction to enforce filed rates. *See id.* at 580 ("It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do."). In *Norman v. Baltimore & Ohio Railroad*, 294 U.S. 240 (1935), the Supreme Court

upheld a joint resolution of Congress which prohibited contract clauses requiring payment in gold. The Court stated: "Contracts, however express, cannot fetter the constitutional authority of the Congress. . . . Parties cannot remove their transactions from the reach of the dominant constitutional power by making contracts about them." *Id.* at 307-08. The *Norman* Court further noted that the rule was the same, "even if the contract be a charter granted by a state and limiting rates, or a contract between municipalities and carriers." *Id.* at 308 (citations omitted). *Accord Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) ("If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions.").

Even if plain contract law were relevant here, that would not help the Joint Competitors, because black letter contract law itself recognizes that any contract that is contrary to federal law cannot be enforced *as a matter of Washington law because it is contrary to public policy.* As the California court of appeals explained just this May:

> California law includes federal law. (*People ex rel. Happell v. Sischo* (1943) 23 Cal.2d 478, 491, 144 P.2d 785 [Federal law is "the supreme law of the land (U.S. Const., art. VI, sec.2) to the same extent as though expressly written into every state law"]; 6A Corbin on Contracts, *supra,* § 1374, p. 7 ["Under our Constitution, national law is also the law of every separate State"].) Thus, a violation of federal law is a violation of law for purposes of determining whether or not a contract is unenforceable as contrary to the public policy of California.

*Kashani v. Tsann Kuen China Enterprise Co., Ltd.*, 188 Cal. App. 4th 531, 543, 13 Cal. Rptr. 3d 174, 181 (Cal. App. 2d Div. 2004). The same is true in the State of Washington.

In the end, the Joint Competitors are attempting to twist their interconnection agreements to provide a basis to force Verizon to provide a completely new UNE that it has never before provided – unbundled *packet* switching. But as explained above, this network element was not available on an unbundled basis at the time the agreements were negotiated and signed, and in fact Verizon has never had an obligation to unbundle the features, functions, and capabilities of its *packet* switches under applicable law or the parties' Interconnection Agreements, which have *only* required Verizon to unbundled local *circuit* switching.[28]

**IV. Verizon's Deployment does not violate the FCC's Interim Rules.**

The FCC's Interim Rules sets forth the details of the FCC's "twelve-month plan" for providing "certainty and steadiness in the market" while the FCC adopts its final rules.[29] But this "comprehensive twelve-month plan" expressly applies only to network elements that were subject to unbundling as of June 15, 2004, the day before the *USTA II* mandate issued.[30] Packet switching was not available on an unbundled basis on this date – indeed it has never been available on an unbundled basis – and accordingly, the FCC's "twelve-month plan" discussed in paragraph 29 does not apply to packet switches.

Moreover, the FCC's six-month "standstill" clearly does not apply to packet switching. The FCC's Interim Order expressly states that all references to unbundled

[28] The FCC has held that shared transport, although defined as a separate network element, is "inextricably linked" to the use of unbundled local switching. Where unbundled switching is not provided, there is no need – and no obligation – to provide shared transport. *Triennial Review Order* ¶ 534; *see also UNE Remand Order* ¶ 369 n. 731 ("the only carrier that would need shared transport facilities would be one that was using an unbundled local switch") & ¶ 371 ("shared transport is technically inseparable from unbundled switching"). Therefore, since Verizon is not required to unbundle its packet switching, AT&T also has no need – or right – to obtain unbundled shared transport.

[29] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313; CC Docket No. 01-338, ¶ 29 (released August 20, 2004) ("*Interim Rules*").

[30] *Interim Rules* ¶¶ 1 & 29.

"switching" in the Order – including its "standstill" on "switching" as of June 15 – "encompass mass market *local circuit switching*" – not packet switching.[31] Not coincidently, the FCC made this express clarification in a footnote in the very first paragraph of its Interim Rules, at the end of the very first sentence of those rules in which the FCC discussed its "twelve-month plan" and the network elements to which this plan applied. *Id.* ¶ 1 & n. 3. The FCC no doubt did so in order to ensure that there was no dispute about whether its "twelve-month plan" applied to packet switching. Remarkably, the Joint Competitors quote this portion of the Interim Rules in a footnote but do not comment on it. Their silence in the face of the FCC's clear exclusion of packet switching from its interim rules is an admission that their contention is without merit.

## V. Verizon's Deployment does not violate its Voluntary Commitment to the FCC.

The Joint Competitors suggest that Verizon's deployment of packet switching is somehow inconsistent with Verizon's voluntary commitment to the FCC that Verizon would not unilaterally raise the wholesale price charged for UNE-P arrangements that are used to serve mass market customers for five months.[32] But in the letter to FCC Chairman Powell in which Verizon made this commitment, Verizon expressly stated that it would "continue to invest in new broadband technologies such as fiber optics and packet switching" and noted that the FCC's "decision that these technologies are not subject to unbundling helped paved the way for these investments . . . ." *Seidenberg Letter* at 2. Thus, Verizon's deployment of packet switching is not only consistent with its commitment to the FCC, it was an express part of that commitment.

---

[31] *Interim Rules* ¶ 1, n. 3 (emphasis added).
[32] *See* June 11, 2004 Letter from Ivan Seidenberg, Chairman & CEO of Verizon to the Honorable Michael K. Powell, Chairman, FCC (attached hereto as Exhibit "[]") ("*Seidenberg Letter*").

The Joint Competitors contend that Verizon is violating its resale obligations "by allowing UNE-P providers, but not pure resellers, to obtain voice services with line splitting."[33] However, none of this is relevant to the central office affected by Verizon's deployment of a packet switch. The Joint Competitors do not allege that there is so much as a single line served out of this central office that is in any way affected by their concerns about line splitting. And in fact, of the few hundred UNE-P lines provided out of this central office, not one is being used to provide DSL. The Joint Competitors are merely trying turn their already spurious request for extraordinary relief into a request that this Commission create yet another new unbundling requirement. But such an outcome would be inconsistent with binding FCC federal law, and any attempt to circumvent this binding federal law would be itself unlawful, for the reasons Verizon has set out above.

Moreover, it is beyond dispute that the entire concept of line splitting is premised on the notion that a competitive carrier "opt[s] to take an unbundled stand-alone loop."[34] Thus, line splitting cannot be done on a resold line, since the process requires "one competitive LEC [to] provide[] narrowband service over the low frequency of a loop and a second competitive LEC [to] provide[] xDSL service over the high frequency portion of that same loop."[35]

In addition, as the Joint Competitors acknowledge, Verizon's resale obligations run to "any *retail* telecommunications service."[36] Of course, neither unbundled switching nor the high frequency portion of an unbundled loop are retail products, and so there

---

[33] *Motion* at ¶ 27.
[34] *Triennial Review Order* ¶ 251.
[35] *Triennial Review Order* ¶ 251.
[36] *Motion* ¶ 26 (emphasis added).

cannot be a violation of section 251(c)(4) of the 1996 Act if these two wholesale products are not available for resale.

## VII. The Relief Sought would harm Verizon and Washington Consumers.

The Joint Competitors claim that they are only seeking to maintain the "status quo," and that no other party will be harmed if Verizon is forced to provide unbundled switching at the affected wire centers. They are wrong.

The balance of harms in this case is not even close. On the one hand, these carriers seek subsidized access to technology and transmission systems that are fully available to them on the open market and that at least some of these carriers have deployed elsewhere in their networks. Packet switching technology and the voice, video, and data delivery services it will eventually support is the antithesis of an "essential" or "bottleneck" facility to which unbundling obligations might be applied. The FCC's express finding that competitors are not "impaired" in their ability to compete by lack of access to this new technology precludes any finding that these carriers will be irreparably harmed. Nor are these facilities that were constructed or paid for under any state or federal regulatory regime. Verizon stands in the same shoes as a cable operator upgrading its system at its own risk to provide data and voice services in competition with telephone companies. Indeed, when AT&T owned cable systems and was engaged in such upgrades, it repeatedly told the FCC (and state and local regulators) that unbundling requirements for new technologies were unfair and counterproductive. *See, e.g.*, C. Michael Armstrong, Chairman and CEO, AT&T, "Telecom and Cable TV: Shared Prospects for the Communications Future," Remarks before the Washington

Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998) ("No company will invest billions of dollars to become a facilities-based ... provider" if other companies "that have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investment and risks of others.").[37]

On the other hand, the harms to Verizon are substantial and irreparable. While the Joint Competitors no longer challenge the deployment itself, it may be that they are still demanding unbundled switching at the Mt. Vernon switch. However, because the FCC first decided eight years ago that packet switching does not have to be unbundled, Verizon has understandably not undertaken any systems or operations development work necessary to provide unbundled platform service at the packet switch in Mt. Vernon.

Moreover, Verizon will suffer a substantial retroactive loss of value of capital investments already made. Every dollar spent on packet switching technology in Washington will be rendered *valueless* if Verizon is prevented from deploying it or, at the very least, an uneconomic investment if the Commission attaches new, costly, and unworkable conditions to the deployment of such technology.[38]

Perhaps more significantly, this switch replacement is not optional, but is dictated in large part by the fact that there is no longer adequate capacity on the circuit switch

[37] AT&T itself has explained all of these points before: "To premaurely subject innovative new IP services to the regulations applicable to established circuit switched services, and all their attendants costs, could stifle innovation and competition, for all the reasons Chairman Powell identified in his concurrence to the *Universal Service Report*. In this regard, even if it were clear that these new IP-based services will eventually become no more than substitutes for circuit switched long distance services - as it patently is not, see *infra* - the Commission should allow the services to establish themselves and to mature before subjecting them to the above-cost and inefficient access charges that are applicable to established circuit switched services." *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* WC Docket No. 02-361, at 27 (Oct. 18, 2002)

[38] If the Commission were to grant a TRO under the circumstances here, it would raise serious problems under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. This is because such an order would deprive Verizon of property and liberty in the absence of critical procedural protections that are constitutionally required, including, *inter alia*, the right to a hearing in such circumstances. *See, e.g., Ohio Bell Telephone Co. v. Public Utils. Comm'n of Ohio*, 301 U.S. 292 (1937).

currently in operation. The timely deployment of this switch is therefore essential. In order to make an orderly and accurate transition to the packet switch it is necessary to "mirror" the contents of both switches (e.g., customer services and associated customer information including 911). In order create the "mirror", Verizon must freeze new service additions or changes to existing service. This is known as the "quiet period" where customers cannot get new or different services and it is currently in effect. Any delay in conversion is to the detriment of Washington customers and it is completely inappropriate to delay conversion of a 25,000 line central office when the 300 lines at issue can be served by resale.

## VIII ANY ORDER REQUIRING VERIZON TO UNBUNDLE ITS PACKET SWITCH VIOLATES ITS CONSTITUTIONAL RIGHTS

From a legal perspective, any order requiring Verizon to unbundle packet switching or provide "mirror" circuit facilities would violate Verizon's constitutional rights. There can be no doubt that Verizon's switching equipment—circuit switches and packet switches alike—is Verizon's "property" and that any Commission action requiring Verizon to offer access to that property by others is a "taking" as understood under the Takings Clause. *See, e.g., Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). A Commission order permitting others to access that property in the absence of express authority to do so clearly violates the Takings Clause. *Cf. Bell Atlantic*, 24 F.3d at 1445-47. Even where just compensation is proffered, a taking is unconstitutional where it does not "substantially advance legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *see, e.g., Yee v. City of Escondido*, 503 U.S. 519, 534

(1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987); *Brown v. Legal Found. of Washington*, 123 S. Ct. 1406, 1419 (2003). Because the Commission lacks any express authority to engage in this taking, and, to the contrary, is prohibited from doing so in this instance as a matter of federal statutory and regulatory law, a grant of the Joint Competitors' *Motion* would neither be authorized nor advance a legitimate state interest. Thus, any Commission decision to take Verizon's circuit or packet switching property raises serious constitutional issues on these grounds alone. As the Ninth Circuit has repeatedly recognized, potential invasion of a constitutionally protected right constitutes irreparable injury as a matter of law. *See, e.g., Foti v. City of Menlo Park*, 146 F.3d 629, 643 (9th Cir. 1998); *Jacobsen v. U.S. Postal Serv.*, 812 F.3d 1151, 1154 (9th Cir. 1987).

**CONCLUSION**

For all of the reasons set forth above, the Joint Competitors' *Motion* must be denied. Verizon has not violated Commission Order No. 5, its interconnection agreements with the Joint Competitors, or controlling federal law. Rather, Verizon has acting in accordance with long-standing federal law in lawfully upgrading its network. Nor does the relief requested maintain the status quo. To the contrary, given the late date for the requested relief and the exhaust situation that exists with the current circuit switch, any attempt to delay this deployment could ultimately affect end users. It is the Joint Competitors who are responsible for the "emergency" they invoke, having waited for months before seeking expedited relief. Granting the relief requested by AT&T would irreparably harm Verizon, and end user customers. The relief sought would not

only be unjustified, but would send a strong signal to the market that such innovation is no longer encouraged in this state.

Dated: September 9, 2004

/S/ J. Endgai

Charles H. Carrathers, II
Vice President and General Counsel
Verizon Southwest Inc.
Verizon Northwest Inc.

600 Hidden Ridge
HQE03H45
Irving, TX 75038
972-718-2415

John S. Cullina
Associate General Counsel

1515 North Court House Road
Suite 500
Arlington, VA 22201-2909
Phone 703 351-3035
Fax 703 351-3659
john.s.cullina@verizon.com

August 4, 2004

*VIA EMAIL*

Eileen M. Halloran
Director
AT&T
Suite 706
111 Washington Avenue
Albany, NY 12210

Re: Packet Switching Replacement in Mt. Vernon, Washington

Dear Ms. Halloran:

I am responding to your July 30, 2004 letter on behalf of AT&T Communications of the Pacific Northwest ("AT&T") and TCG Oregon, which is itself a response to Verizon's letter of June 7, 2004 regarding Verizon's planned deployment of packet switching in Mt. Vernon Washington and the resulting discontinuance of UNE-P.[1]

As an initial matter, our records indicate that AT&T has no UNE-P arrangements in Mt. Vernon. Given this and AT&T's June 23rd announcement of its planned exit from the Washington market, the arguments you advance and the remedies you seek in your letter appear to be divorced from legitimate business concerns.

You contend that Verizon's proposed actions do not comport with its obligations under the interconnection agreement ("Agreement") between Verizon and AT&T. But the portions of the Agreement to which you point demonstrate just the opposite.

[1] While in your letter you reference an interconnection agreement between Verizon and an entity that you identify as "TCG Oregon," you do not discuss this agreement. For this reason, I will limit my comments to the interconnection agreement that you do discuss – the one between Verizon and AT&T Communications of the Pacific Northwest, Inc.

As you are forced to acknowledge, the Agreement allows Verizon to discontinue any unbundled network element, and to do so without AT&T's consent, if "required by network changes or upgrades."[2] Verizon's replacement of the circuit switch in Mt. Vernon, Washington with a packet switch is precisely the kind of "network change[] or upgrade[]" for which Verizon does not need AT&T's consent. Instead, for a change such as this one, the Agreement requires Verizon to "comply with the network disclosure requirements stated in the Act and the FCC's implementing regulations." Verizon has complied with these obligations.[3]

You also contend, again without support, that Verizon's unbundling position is premised on what you characterize as a change of law – "that the Triennial Review Order relieves Verizon of its obligation to provide packet switching as a UNE."[4] But in the *Triennial Review Order*, the FCC did not "change" the law regarding the general unbundling of packet switches, nor did it "relieve[]" ILECs of a prior, unmitigated obligation to provide packet switching as an unbundled network element, as you incorrectly suggest. No such obligation existed at the time the *Triennial Review Order* was released – nor has it ever existed. To the contrary, approximately eight years ago, the FCC rejected the proposal of AT&T and other CLECs "that the local switching element be defined to include data switching by packet switches,"[5] and the FCC refused to order the unbundling of packet switching.[6] In 1999, the FCC reaffirmed this conclusion,[7] and did so again in its *Triennial Review Order*.[8] Thus, the *Triennial Review Order* merely reaffirmed what is at this point a conclusion beyond any reasonable dispute – packet switches do not have to be unbundled.[9] The fact that during the FCC's Triennial Review CLECs attempted to resurrect an

---

[2] AT&T's July 30 Letter at 1.

[3] While you believe that Verizon has not complied with federal notice requirements, you fail to set forth any basis for this belief. In any event, your position is unfounded. Verizon posted the short term network disclosure for Mt. Vernon on April 28, 2004 and certified the posting with the FCC on May 6, 2004. It went into effect ten business days later without objection. You also contend that the Agreement requires Verizon to provide at least six months advance notice to AT&T. But the portion of section 23.18 of the Agreement to which you point does not apply to a "network change[] or upgrade[]" such as the one at issue here, which is governed specifically by Section 3.3 of the Agreement..

[4] AT&T's July 30 Letter at 1.

[5] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, CC Docket No. 95-185, ¶ 407 ("*Local Competition Order*").

[6] *Local Competition Order* ¶ 427 ("At this time, we decline to find, as requested by AT&T and MCI, that incumbent LECs' packet switches should be identified as network elements . . . . We will continue to review and revise our rules, but at present, we do not adopt a national rule for the unbundling of packet switches.").

[7] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, ¶ 306 ("*UNE Remand Order*") ("We decline at this time to unbundled the packet switching functionality, except in limited circumstances." The FCC's "limited exception" – that an ILEC must offer unbundled packet switching only where the ILEC has deployed digital fiber carrier systems or otherwise deployed fiber optic facilities in the distribution part of the loop, and has no spare copper loops capable of providing the xDSL service the requesting carrier seeks to offer, and has not permitted the requesting carrier to collocate its own DSLAM at an appropriate subloop point, and has deployed packet switching for its own use – does not apply to the Mt. Vernon deployment.

[8] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"). In the *Triennial Review Order*, the FCC concluded that even the "limited exception" that it had set out in its *UNE Remand Order* was "no longer necessary." *Triennial Review Order* ¶ 537.

[9] Verizon made this point expressly in the letter you reference: "Under the rules adopted in the Triennial Review Order, as under prior FCC rules, Verizon is not required to provide unbundled packet switching."

argument that had already been rejected by the FCC for years numerous occasions does not somehow convert the FCC's reiteration of its prior decision into a "change of law."

You also attempt to invoke the dispute resolution procedures in the Agreement. But there is no legitimate dispute as to whether Verizon has to unbundle packet switches – it does not. The issue was resolved eight years ago. The dispute resolution procedures you reference therefore do not apply. Verizon has an unambiguous right under the express terms of Section 3.3 to discontinue network elements as a result of a network change or upgrade – which is the triggering event here. The dispute resolution procedures are not only inapplicable, but they are inconsistent with the Agreement's unambiguous notification time frame for discontinuing an unbundled network element resulting from a network change or upgrade.

Finally, you close your letter by stating that there are "additional, extra-Agreement reasons" why you believe that Verizon's proposed actions are unlawful, but you have failed to provide them in your letter. Obviously, I cannot respond to an empty assertion that lacks any specificity. But I do wish to reiterate that there is no legitimate basis to preclude Verizon from moving forward with the steps set forth in its June 7, 2004 letter, and I trust that AT&T will take the necessary operational steps to comply with the network obligations referenced in that letter.

I would also like to emphasize that in the event AT&T does acquire UNE-P customers in Mt. Vernon prior to the September 10 cutover but refuses to cooperate and takes no actions before that date, service to AT&T's end user customers will not be affected. Instead, Verizon will convert AT&T's unbundled switch arrangements to resold voice service. The only way that AT&T's end users will be affected by Verizon's deployment of the packet switch at Mt. Vernon will be if AT&T decides to disconnect these customers, or takes other actions that disrupt their service.

Please feel free to call me if you would like to discuss this further.

Sincerely yours,

John S. Cullina