

**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. 10
)	
VERIZON NORTHWEST INC.)	
)	ORDER GRANTING IN PART
with)	MOTION FOR ENFORCEMENT;
)	REQUIRING VERIZON TO
COMPETITIVE LOCAL EXCHANGE)	MAINTAIN STATUS QUO
CARRIERS AND COMMERCIAL)	
MOBILE RADIO SERVICE)	
PROVIDERS IN WASHINGTON)	
)	
Pursuant to 47 U.S.C. Section 252(b),)	
and the <i>Triennial Review Order</i> .)	
.....)	

1 **SYNOPSIS.** *The Commission grants, in part, the Competitor Group’s Motion for Enforcement, requiring Verizon to maintain the status quo under its interconnection agreements with the affected carriers by charging affected carriers the UNE-P rate for resale services provided out of the Mt. Vernon packet switch until such time as the Commission resolves the merits of the motion in a separate enforcement proceeding, and commences a proceeding for that purpose.*

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

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.*

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. The D.C. Circuit later extended the effect of the vacatur until June 16, 2004, at which time the court's mandate became effective.

4 On May 7, 2004, Verizon filed with the Commission a Motion to Hold Proceedings in Abeyance Until June 15, 2004. A number of carriers filed responses opposing Verizon's motion. On May 21, 2004, in Order No. 04, the arbitrator granted Verizon's request to hold proceedings in abeyance, subject to the condition that Verizon maintain the status quo under existing interconnection agreements in Washington State by continuing to offer UNEs consistent with the agreements at existing rates pending completion of the arbitration.

5 On June 15, 2004, the arbitrator 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.

6 A prehearing conference was held before arbitrator and administrative law judge Ann E. Rendahl in Olympia, Washington, on June 16, 2004, to establish a procedural schedule for the arbitration.

7 On June 18, 2004, Verizon filed a Petition for Review of Order Requiring Verizon to Maintain Status Quo. A number of parties filed answers to Verizon’s petition. Verizon filed a reply, as well as statements of supplemental authorities. On August 13, 2004, the Commission entered Order No. 08, Order Denying in Part Verizon’s Petition for Review of Order No. 05; Requiring Verizon to File Copies of Individual Interconnection Agreements.

8 Following a July 6, 2004, motion by Verizon for an extension of the procedural schedule in order to file a new revised amendment to the petition, the Commission issued a notice on July 7, 2004, canceling the procedural schedule and requiring Verizon to file its revised amendment with the Commission by August 20, 2004, and a proposed procedural schedule by August 27, 2004.

9 On August 20, 2004, and August 27, 2004, respectively, Verizon filed with the Commission revised TRO Amendment Nos. 1 and 2 to the Arbitration Petition, and a proposed procedural schedule for the remainder of the proceeding. A number of carriers filed comments objecting to Verizon’s proposed schedule.

10 On August 31, 2004, a number of CLECs, *i.e.*, Advanced TelCom, Inc. (ATI), AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle (collectively AT&T), Covad Communications Company (Covad), MCI, Inc. (MCI), and United Communications, Inc., d/b/a UNICOM (UNICOM), collectively the Competitor Group, filed with the Commission a

motion for enforcement of Order No. 05 in this proceeding, the CLECs' interconnection agreements and the Triennial Review Order. The Competitor Group asserted that Verizon's planned conversion from a circuit switch to a packet switch in Mt. Vernon, Washington, on September 10, 2004, violates these orders and agreements.

11 At a prehearing conference held on September 7, 2004, the parties agreed to a procedural schedule for the arbitration. The schedule is set forth in Order No. 09 in this proceeding. The arbitrator heard argument on the motion for enforcement. Based upon concerns raised by the CLECs that Verizon's planned switch conversion may cause disruption to customers, the Commission scheduled a hearing on short notice for September 9, 2004, to determine whether the switch conversion would affect customers served by the switch or was purely a matter of pricing.

12 The arbitrator advised all parties of the hearing in an electronic message on the morning of September 8, 2004, notifying all parties that a more formal notice would be issued later that same day. In an electronic -mail message sent on September 8, 2004, Verizon objected to the proceeding, and requested reconsideration, arguing that the matter was purely a pricing issue. Through an electronic message that same day, the arbitrator denied the request for reconsideration, noting that the Commission must determine whether the switch conversion was a pricing issue or one that may affect customers.

13 **PARTY REPRESENTATIVES.** Timothy J. O'Connell, Stoel Rives, LLP, Seattle, Washington, Judith Endejan, Graham & Dunn, PC, Seattle, Washington, Charles H. Carrathers, II, Vice President and General Counsel for Verizon Northwest Inc. and Verizon Southwest Inc., Irving, Texas, Andrew G. McBride, Wiley Rein & Fielding, Washington, D.C., Randal S. Milch, Senior Vice President and Deputy General Counsel for Verizon Communications, New York, New York, and Michael D. Lowe, Vice President and Associate General Counsel for Verizon

Communications, Arlington, Virginia, represent Verizon. Edward W. Kirsch, Philip J. Macres, and Harry Malone, Swidler Berlin Shereff Friedman, LLP, Washington, D.C., represent Focal Communications Corporation of Washington, ICG Telecom Group, Inc., Integra Telecom of Washington, Inc. (Integra), McLeodUSA Telecommunications Services, Inc., and Pac-West Telecomm, Inc (collectively the Competitive Carrier Coalition). Letty S. D. Friesen, AT&T Law Department, Denver, Colorado, represents AT&T. Andrew M. Klein and Heather T. Hendrickson, Kelley, Drye & Warren, LLP, Washington, D.C. and Brooks E. Harlow and David Rice, Miller Nash LLP, Seattle, Washington, represent ATI, BullsEye Telecom Inc., Comcast Phone of Washington LLC, Covad, Global Crossing Local Services, Inc., and Winstar Communications LLC (the Competitive Carrier Group) and UNICOM. 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., Time Warner Telecom of Washington, Inc. and XO Washington, Inc.. Dennis D. Ahlers, Senior Attorney, Minneapolis, Minnesota, represents Eschelon. Karen Johnson, Corporate Regulatory Attorney, Beaverton, Oregon, represents Integra. 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. Michel Singer Nelson, Regulatory Attorney, Denver, Colorado, represents MCI.

MEMORANDUM

14 **MOTION FOR ENFORCEMENT.** The Competitor Group requests that the Commission issue an order enforcing Order No. 05 in this docket to maintain the status quo, enforcing the interconnection agreements of the Competitor Group and requiring Verizon to comply with the Triennial Review Order. The Competitor Group states that Verizon informed CLECs through an industry-wide notice on June 8, 2004, that it planned to replace its existing Mount Vernon

circuit switch with a packet switch and, further, that Vernon was not required to provide unbundled packet switching. *Motion at 2; see also Ex. 1.*

15 The Competitor Group alleges that Verizon seeks to eliminate UNE-P and line-splitting products at the Mt. Vernon switch and that doing so violates the Commission's status quo order. *Motion at 2-3.* The Competitor Group states that Verizon's notice is "purely a Verizon pricing decision," which can wait until the Commission determines whether Verizon may take the actions it proposes. *Id. at 5.* The Competitor Group also asserts "potential harm to those CLECs whose operational support systems cannot accommodate the resale platform offered."² *Id. at 6.*

16 The Competitor Group argues violations of its interconnection agreements, the Triennial Review Order, and the FCC's recent Order and Notice of Proposed Rulemaking in WC Docket No. 04-313 and CC Docket No. 01-338 (Interim Order). *Id. at 6-13.* Finally, the Competitor Group asserts that Verizon has committed to the FCC that it will continue to provide unbundled local switching at least through November 2004, and that Verizon's actions in converting the Mt. Vernon switch violate that commitment. *Id. at 13.*

17 **VERIZON'S REPLY.** In reply, Verizon argues that the Competitor Group's motion would derail a network upgrade publicly announced two months ago. Verizon argues that the FCC has never required unbundling of packet switches, which finding has been affirmed by the Court of Appeals for the District of Columbia Circuit. *Reply at 1-2.* Verizon asserts that there is no dispute that the FCC has determined that packet switching is not a bottleneck facility and cannot be unbundled pursuant to section 251 of the Act, and presents its legal arguments in support of that contention. *Id. at 3, 5-10.* In particular, Verizon asserts that the FCC has specifically provided that incumbent local exchange

² AT&T notes that there will be no impact to its customers, as it has no UNE-P customers served out of the Mt. Vernon switch. *Motion at 10, n.21.*

carriers (ILECs) may avoid the disincentives of unbundling circuit switching by deploying packet switching, asserting that the FCC intended that ILECs may replacing existing circuit switches with packet switches. *Id. at 13-14.*

- 18 Verizon asserts that its decision to convert the Mt .Vernon switch to a packet switch does not violate the FCC's Interim Order or its voluntary commitment to not raise wholesale prices for UNE-P arrangements used to serve mass-market customers, noting that Verizon stated that it would continue to invest in new technologies such as fiber optics and packet switching. *Id. at 17-18.*
- 19 Verizon asserts that there is no immediate danger to public health, safety or welfare requiring the emergency relief requested by the CLECS, in view of the communication by CLECs prior to the hearing late on Wednesday, September 8, 2004, advising parties that the CLECs do not seek to stop or postpone the planned switch conversion. *Id. at 2.* Verizon argues that the Commission denied in Order No. 08 the CLECs' earlier motion to clarify the intent of Order No. 05, asserting that the Commission has already determined that packet-switching is not an unbundled element. *Id. at 4-5.*
- 20 Verizon argues that the CLECs are responsible for the alleged emergency, having waited too long to request relief. *Id. at 23.* Finally, Verizon asserts that the remedy sought will cause irreparable harm to Verizon and end user customers, and send a signal that innovation is not encouraged in Washington. *Id. at 24.* Finally, Verizon asserted in oral argument at the hearing that the Commission must follow the standards for granting emergency relief of temporary injunction in acting upon the Competitor Group's motion. Verizon urges the Commission to follow its decision in the *Air Liquide America Corporation, et al.* proceeding, Docket No. UE-001952 (consolidated) and Docket NO. UE-001959 (Consolidated), in declining to act under the statutory provisions allowing emergency adjudicative proceedings.

21 **SEPTEMBER 9, 2004, HEARING.** Based upon statements made in the CLECs motion and during the September 7, 2004, prehearing conference, it was not clear to the Commission whether the planned switch conversion would result in an immediate effect on CLEC customers served out of the Mt. Vernon switch. The CLECs raised both the issue of an effect on customers as well as an effect on CLEC operations and price of services. Given the concern over an immediate effect on the public welfare, and the apparent need to establish the facts surrounding the pending switch conversion, the Commission on September 8, 2004, issued a notice of hearing for the afternoon of September 9, 2004, to determine whether there were customer-affecting issues resulting from the switch conversion or whether the matter was one of pricing.

22 These questions remained unresolved for the Commission even after the CLECs advised the Commission and all parties on Wednesday, September 8, 2004, that they did not seek to stop or prevent the switch conversion from going forward as planned.

23 MCI, UNICOM, and Verizon each offered witness testimony during the hearing: MCI presented as a witness Ms. Sherry Lichtenberg, Senior Manager of Operations for MCI; UNICOM presented Mr. Michael D. Daughtry, Vice President of Operations for UNICOM; and Verizon presented Ms. Kathleen McLean, Senior Vice President of Customer Relations and Wholesale Products for Verizon.

24 Ms. Lichtenberg testified as to the effect the switch conversion would have on MCI and MCI customers taking service from the Mt. Vernon switch. Ms. Lichtenberg testified as to MCI's activity in Verizon's footprint in Washington State, asserting that MCI does not use the total resale product in Washington. Ms. Lichtenberg asserts that the resulting change in available wholesale products and the increase in price will prevent MCI from taking on new customers and will cause existing customers to disconnect their service with MCI.

25 Ms. Lichtenberg testified that the primary effect of the switch conversion on MCI concerns MCI's electronic ordering interface with Verizon and the need to build a new OSS interface to process orders for a resale product for one central office in one state. Ms. Lichtenberg testified that MCI does have the ability to process orders through the internet-based graphical user interface known as the WYSE GUI, but that the interface requires much more manual effort by MCI than its EDI interface and results in MCI processing orders in a less efficient way than Verizon can with its own customers.

26 Mr. Daughtry testified that UNICOM serves at least 200 UNE-P lines homing off the Mt. Vernon switch. UNICOM recently submitted an order for UNE-P to Verizon to be served out of the Mr. Vernon switch and the order was rejected. UNICOM does not plan to serve that customer. Mr. Daughtry testified that the financial difference to UNICOM of offering a resale product rather than UNE-P to its customers is a \$1 per line loss in profit for resale compared to a \$21 per line increase in profit for UNE-P. Mr. Daughtry testified that as a result of the switch conversion, UNICOM will close its customer service and sales office located in the Mt. Vernon area and will cease taking new customers, and will increase its price to existing customers depending upon the terms of the customer's plan.

27 Mr. Daughtry testified that, although it does serve some customers in the area using the resale product, it does not find resale a viable basis for competition in Washington. Mr. Daughtry testified that UNICOM uses Verizon's WYSE GUI system and that the ordering process is not an issue for UNICOM.

28 MCI offered as Exhibit No. 1 the June 8, 2004, notice of network change sent by Verizon to CLECs. Verizon offered the following three exhibits: Exhibit No. 4, a July 20, 2004, follow-up letter to CLECs from Verizon; Exhibit No. 5, a June 11, 2004, letter from Ivan Seidenberg of Verizon to FCC Chairman Powell; and Highly Confidential Exhibit No. 6, a description of the CLECs and lines

operating out of the Mt. Vernon switch, the types of interfaces used by the CLECs, and the amount of activity of CLECs on the WYSE GUI ordering interface. Exhibits 1, 4, and 5 were admitted and Verizon withdrew Highly Confidential Exhibit No. 6.

29 **Discussion And Decision.** The nature of hearing, as stated in the notice and at the hearing, was to determine whether there would be any immediate effect on CLEC customers, such as disruption of service, as a result of the switch conversion or whether the effect was solely one of pricing. The issue arose in the context of an existing proceeding, in which several prehearing conferences have been held, the parties were well identified, and a process for notifying parties of scheduling changes has been established, including e-mail notification and notices and orders served by the U.S. mail.

30 The Competitor Group raised in their motion an issue as to whether CLEC customers might be disconnected as a result of the switch conversion. The Commission convened the September 9, 2004, hearing, pursuant to its procedural rules which allow the Commission to convene continued hearing sessions as necessary, and consistent with its authority to protect the public interest and welfare.³ All affected parties appeared at the hearing, were given the opportunity to present witnesses, and were given an opportunity to cross-examine other parties' witnesses.

31 The testimony and evidence presented at the hearing demonstrate that there is no immediate harm to the public welfare in that the CLECs' existing customers

³ Under the Administrative Procedure Act, RCW 34.05.434, agencies must provide notice of an initial hearing no less than seven days advance notice. Under the Commission's rules, WAC 480-07-440, the Commission provides at least 20 days' notice of an initial hearing or prehearing conference in a proceeding, but there are no specific timing requirements for giving prior notice of continued hearing sessions. The Commission may also hold emergency adjudicative proceedings under RCW 34.05.479 to address "a situation involving an immediate danger to the public health, safety or welfare requiring immediate agency action."

are in no danger of disconnection as a result of the switch conversion. The testimony and evidence do show that CLECs will be affected by the switch as a result of their inability to process orders following the switch conversion using their existing ordering systems, as well as by the price differential between the UNE-P product they currently receive at the Mt. Vernon switch and the resale product offered by Verizon out of the new packet switch.

32 Testimony from Verizon's witness Ms. McLean indicates that there will be no immediate effect on any CLEC customers due to the conversion from the circuit switch to the packet switch in Mt. Vernon. The evidence indicates that Verizon has not programmed the new packet switch in Mt. Vernon to allow for provisioning of UNE-P, but has programmed the switch to allow for resale service. Verizon will reject any new orders for UNE-P out of the Mt. Vernon switch as the switch is not programmed to provide such service. CLECs may order Verizon's total resale product out of the Mt. Vernon switch.

33 MCI's witness, Ms. Lichtenberg, states that MCI uses an electronic interface to order products from Verizon and that the interface is not programmed to order resale products. Ms. Lichtenberg's testimony indicates that it will be more burdensome for MCI to order service for new customers served by the switch. Mr. Daughtry testified that the switch conversion would not create any change in how UNICOM processes orders served from the switch.

34 The Commission has already entered a status quo order in this proceeding, Order No. 08. In that Order, the Commission directed Verizon to continue to provide products and services under the terms of its interconnection agreements, including prices, until such time as the arbitration proceeding concludes or the FCC resolves the legal uncertainties arising from the Triennial Review Order and *USTA II* decision. The Commission has committed to review individual interconnection agreements to determine whether certain CLECs are subject to

the status quo order, but until that time Order No. 08 requires Verizon to maintain the status quo.

The Competitor Group's motion requests a finding that Verizon is in violation of Order No. 08, their interconnection agreements, and the Triennial Review Order. We do not reach in this Order the issue of whether Verizon is, in fact, in violation of these orders and agreements, but find that Verizon must maintain the status quo under the agreements until this determination is made in a separate proceeding, discussed below. The Competitor Group has shown sufficient basis for Commission to direct Verizon to maintain the status quo under the CLECs interconnection agreements by requiring Verizon to charge no more for the resale service provided out of the Mt. Vernon packet switch than it would for UNE-P service Verizon provided prior to the switch conversion. The Commission acts in this order to preserve the status quo consistent with our prior status quo order, not in the nature of temporary injunction, interim relief, or action upon emergency adjudication.

35 Given that the switch conversion is scheduled to go forward on Friday, September 10, 2004, the Commission, like the Competitor Group, does not seek to prevent or modify the scheduled switch conversion, or any planned changes to Verizon's OSS or billing systems. In order to maintain the status quo under Order No. 08, Verizon may convert CLEC UNE-P lines to resale service, as planned under the switch conversion, but must charge CLECs no more than the UNE-P rate for that service. Verizon must either manually modify the bills to affected CLECs after they are electronically generated from Verizon's billing systems, or allow CLECs to use the billing dispute process in their interconnection agreements to dispute the bill for resold service and pay no more than the UNE-P amount for the affected lines until this issue, and the appropriate remedy due to either the CLECs or Verizon, is resolved in a later proceeding.⁴

⁴ Verizon suggested this proposed remedy in its request for reconsideration send via electronic mail on September 8, 2004. After considering the testimony from MCI's, UNICOM's, and

CLECs may continue to order lines from Verizon out of the Mt. Vernon switch equivalent to the UNE-P service they currently order, but must order the lines as a resale product as the Mt. Vernon switch is not programmed to provide UNE-P service.

36 Based upon the parties' pleadings, there remains in dispute the issue of whether the provisions in the Triennial Review Order, other FCC Orders and interconnection agreements allow the replacement of existing circuit switches used for voice service with packet switches, rather than the mere deployment of packet switching. This issue must be determined on the merits in a separate proceeding. Pursuant to WAC 480-07-370(1)(b)(i) and WAC 480-07-395(4), the Commission will treat the Motion for Enforcement as a petition for enforcement filed under WAC 480-07-650, for purposes of commencing a new adjudicative proceeding to address the petition.

37 ATI, AT&T, MCI, Covad, and UNICOM must file an original petition for enforcement, in Docket No. UT-041127, following the requirements set forth in WAC 480-07-650(1)(a) by Friday, September 17, 2004. The Commission waives the requirement in WAC 480-07-650 for ten days written notice of intent to file a petition for enforcement because Verizon has had ample notice that the parties desire to address the issues noted above. Verizon may answer the petition pursuant to the timing and substantive requirements in WAC 480-07-650(2). The Commission will schedule a prehearing conference following the filing of the petition, as required by the rule.

38 **NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.**

Verizon's witnesses, the Commission agrees with Verizon that the matter should be addressed as a billing issue.

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

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Arbitrator and
Administrative Law Judge