[Service Date August 24, 2005]

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

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| In the Matter of | ) | DOCKET NO. UT-053038 |
| | ) | |
| INTEGRA TELECOM OF | ) | |
| WASHINGTON, INC., | ) | ORDER NO. 03 |
| | ) | |
| Complainant, | ) | ORDER DENYING MOTION TO |
| | ) | DISMISS |
| v. | ) | |
| | ) | |
| VERIZON NORTHWEST, INC., | ) | |
| | ) | |
| Respondent. | ) | |
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***Synopsis: This order denies Verizon's motion to dismiss the complaint.***

1 **Proceeding:** Docket No. UT-053038 is a complaint filed by Integra Telecom of Washington, Inc., (Integra) against Verizon Northwest, Inc. (Verizon) alleging that Verizon has violated state statutes and has breached its Interconnection Agreement with Integra.

2 **Appearances.** Jay Nusbaum, attorney, Portland, Oregon, represents Integra. Judith A. Endejan, attorney, Seattle, Washington, represents Verizon.

3 **Background.** Integra is a competitive local exchange carrier (CLEC) providing telecommunications service in Washington, including Verizon exchanges. Integra provides service to its customers under an Interconnection Agreement between GTE Northwest Incorporated and Covad Communications, adopted by

Integra and approved by the Commission on April 26, 2000.[1] Integra alleges that Verizon has violated: 1) Washington state anti-discrimination and anti-preference statutes;[2] 2) Washington state statutes that require the incumbent local exchange carrier (ILEC) to provide, expeditious, sufficient, efficient, suitable and proper service;[3] and, 3) the Interconnection Agreement.

*4* Integra alleges that these violations occurred when Integra attempted to provide service to its customers by purchasing unbundled network element loops[4] at wholesale[5] from Verizon in the form of "channel banks."[6] In the eight cases identified in its complaint, Integra alleges that the channel bank equipment Verizon provided under the Interconnection Agreement would not allow calls to Integra customers to disconnect or "hang up." These eight alleged service problems occurred between 2001 and 2004.

*5* Integra further alleges that in order to provide these customers with the ability to disconnect calls, it had to buy at resale prices from Verizon a higher-priced retail product, which Verizon uses to service its own retail customers, rather than receiving the appropriate product and service at the unbundled rates contained in the Interconnection Agreement.[7] Integra claims that it should be able to obtain the equivalent Verizon retail product or service at an unbundled rate. Integra argues that Verizon's actions demonstrate that Verizon is providing an advantage to itself and that Verizon fails to provide adequate and efficient

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[1] Integra Complaint at ¶ 1. Under Section 252(i) of the federal Telecommunications Act of 1996 (Telecom Act), a CLEC may adopt in its entirety an interconnection agreement between two other carriers.

[2] *RCW 80.36.170; RCW 80.36.186.*

[3] *RCW 80.36.080; RCW 80.36.090.*

[4] Loops are telecommunications circuits that allow origination and delivery of voice signals from one customer to another. Loops are unbundled network elements that ILECs are required to provide to CLECs under Section 251(c) of the Telecom Act.

[5] Under Section 251of the Telecom Act, a CLEC may buy unbundled elements from an ILEC at wholesale prices (prices determined according to the Total Element Long-run Incremental Cost methodology) under the terms of an interconnection agreement. However, the CLEC also has the option of buying at resale from the ILEC – purchasing at a higher price the exact product or service that the ILEC supplies its own retail customers.

[6] Integra Complaint, ¶ 10; channel banks, or multiplexers, are devices that put many slow speed voice or data "conversations" onto one high-speed link and control the flow of those "conversations." Newton's Telecom Dictionary, 15th Expanded Edition.

[7] Integra complaint, ¶17.

equipment to Integra. Integra asserts that Verizon's violations have caused Integra to pay more to serve Integra customers,[8] to lose customers,[9] or to provide customers with an inferior grade of service.[10]

*6* Integra requests the Commission to compel Verizon to: stop providing inferior services and products; to provide a disconnection product that works, charging unbundled prices; to credit Integra for the difference between unbundled prices and the resale prices Verizon has forced Integra to pay, including time spent addressing disconnection service problems; to find Verizon's conduct a breach of the Interconnection Agreement; and to find Verizon's conduct a violation of Washington law, enforceable in a suit for damages.[11]

*7* **Motion.** On July 7, 2005, Verizon filed a motion to dismiss Integra's complaint under WAC 480-07-380. Verizon asserts that the Washington Utilities and Transportation Commission (WUTC or Commission) is federally preempted from acting on Integra's state statutory claims; that state anti-preference and anti-discrimination laws are similar to federal anti-trust laws, and, under the Telecom Act, cannot be used to address anti-competitive behaviors;[12] that the Interconnection Agreement alone governs this dispute; that all the incidents Integra complains of were resolved long ago; and, that Integra failed to follow the provisions of WAC 480-07-650, establishing procedures for enforcement of interconnection agreements.

*8* Integra responds that the mere existence of an interconnection agreement does not require preemption of state law claims; that parallels between state anti-preference laws and federal anti-trust laws are inappropriate; that, in the past, the Commission has allowed complaints that mingle state statutory claims with claims of violation of interconnection agreements; that the Interconnection Agreement does not confine dispute resolution to provisions of the Agreement; and that WAC 480-07-650 is not the only procedural alternative for resolution of interconnection disputes.

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[8] *Id.*, ¶ 17, 19(d)(bi),
[9] *Id.*, ¶ 19(b)(vi), (c)(vi),(e)(vi).
[10] *Id.*, ¶ 19(f)(vi) and (g)(vi).
[11] Integra Complaint at 9-10.
[12] *Verizon Communications Inc. v. Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (Trinko*).

*9* The Commission finds that Integra's complaint presents a claim on which the Commission may grant relief and denies Verizon's motion to dismiss. The Commission addresses Verizon's arguments more fully in the following section of this Order.

## MEMORANDUM

### A. Standard of Review.

*10* The Commission reviews motions to dismiss under WAC 480-07-380(a), providing that a party may request dismissal of a case because the pleadings "fail to state a claim on which the Commission may grant relief." The rule indicates that in deciding motions to dismiss, the Commission will consider whether the pleadings show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[13] The Commission must view the evidence in "a light most favorable to a non-moving party."[14] Motions to dismiss should be granted "sparingly and with care."[15]

### B. Is Commission action on Integra's complaint preempted under the federal Telecommunication Act?

*11* Verizon first claims that the Telecom Act established a comprehensive process for competitive interconnection between ILECs and CLECs and that the Act preempts state law if the state takes any action to interfere with that process.

*12* Verizon argues that under Sections 251(c)(1) and 252[16] of the Act, Congress set up a comprehensive procedure for negotiation, arbitration, state commission

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[13] WAC 480-07-380 refers to standards in Superior Court Civil rules, including CR 12(b)(6), 12(c) and 56. CR 56 provides that a party against whom a claim is made may move for summary judgment in its favor where, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).
[14] *AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corporation , Docket No. UT-003120, Order Denying Motion for Summary Determination, April 5, 2001 (AT&T v. Qwest).*
[15] *Cutler v. Phillips Petroleum Co., 124 Wn 2d 749, 755 (1994).*
[16] Section 251(c) provides that both ILECs and CLECs have the obligation to negotiate in good faith agreements for interconnection, unbundled access, resale and collocation. Section 251(d)(3) preserves the authority of states to prescribe and enforce regulations establishing access and

approval, FCC oversight and federal judicial review of interconnection agreements between ILECs and CLECs.

*13* Verizon asserts that courts have found that state commission actions that circumvent or interfere with the federally established interconnection process are preempted, citing to *Verizon North v. Strand*[17] and *Gade v. National Solid Waste Management Association*.[18] Verizon contends that Integra's allegations of the same facts to support both its state law claims and its claims of interconnection agreement violations "undermine[s] the competitive process dictated by federal law"[19] and, therefore, Commission action to enforce state law is preempted.

*14* **Discussion and decision.** In *Gade*, the Supreme Court set forth a succinct analysis of the law of preemption:

> Preemption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." [citations omitted] Absent explicit pre-emption language, we have recognized at least two types of implied pre-emption: field preemption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," [citations omitted], and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," [citations omitted], or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," [citations omitted].[20]

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interconnection that are consistent with the federal law and do not "substantially prevent implementation of the requirements of this section and the purposes of this part." Section 252 provides for the negotiation, mediation, arbitration, state commission approval and federal court review of interconnection agreements.

[17] *Verizon North v. Strand, 309 F.3d 935 (6th Cir. 2002) (Strand).*

[18] *Gade v. National Solid Waste Management Association, 505 U.S. 88, 103, 120 L.Ed.2d 73, 112 S. Ct 2374 (1992) (Gade).*

[19] Verizon Motion to Dismiss, ¶ 5; Verizon Reply to Response, ¶ 2-3.

[20] *Gade* at 98.

*15* Under this analysis, Verizon has failed to show that Commission action on Integra's state law claims is preempted. The Telecom Act does not explicitly preempt state regulation, but rather is permissive with regard to the states' role in telecommunications regulation.[21] Therefore, one must look to whether the Act implicitly preempts state imposed telecommunications regulation in a field where federal regulation is pervasive, or where state regulation conflicts with or creates an obstacle to the aims of the federal law.

*16* Verizon argues that *Strand* would require a finding of implicit preemption. However, *Strand* is inapposite because it addresses a Michigan commission requirement that ILECs post tariffs covering unbundled network elements as an alternative to entering into negotiated agreements with CLECs. In *Strand*, the court found that the state-imposed tariff requirement was a complete substitute for and prevented the negotiation, arbitration and federal court review contemplated by Congress in passing the Telecom Act. In this case, the state law Integra relies on in its complaint creates no separate system that would completely circumvent the interconnection negotiation process such as was rejected in *Strand*.

*17* Nor does the Supreme Court's finding of preemption in *Gade* support Verizon's argument. In *Gade*, the court found that the federal Occupational and Health Safety Act (OSHA) required states to submit their plans for worker safety regulation to the federal government for approval. Illinois did not submit a plan, claiming that state legislation for the training of employees that worked with hazardous waste served a separate public safety purpose that coincided with OSHA's worker safety regulation. The court found that since the federal act required state submission and federal approval of any state regulatory plan, Congress's clear intention was to preempt state regulation that occurred absent an approved plan. Gade is clearly distinguishable from this case, in that the

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[21] For example, Section 261(b) of the Act states: "Nothing in this part shall be construed to prohibit any state commission from enforcing regulations…if such regulations are not inconsistent with the provisions of this part." Section 261(c) states: "Nothing in this part precludes a State from imposing additional requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirement are not inconsistent with this part or the Commission's regulations to implement this part."

Telecom Act creates no similar requirement that states submit a plan for telecommunications regulation to the FCC or any other federal agency.

*18* In addition, Verizon has failed to show how the Commission's enforcement of state laws against undue preference and discrimination would necessarily encourage CLECs to circumvent or avoid the Telecom Act interconnection agreement negotiation process. The mere allegation that state law enforcement would interfere or circumvent is not enough to support preemption.

### C. Is Commission action on Integra's state law claims prohibited under the reasoning of the *Trinko* case?

*19* Verizon contends that state law claims of anticompetitive conduct are prohibited under the Telecom Act, just as anti-trust lawsuits against ILECs were barred by United States Supreme Court in *Trinko*.[22] In *Trinko*, a law firm customer of AT&T filed an anti-trust class action alleging that Verizon had filled rivals' orders on a discriminatory and anti-competitive basis to discourage potential customers of competitive local exchange carriers (CLECs). The Supreme Court rejected Trinko's anti-trust claim on the grounds that the Telecom Act provided a sufficient "regulatory structure designed to deter and remedy anticompetitive harm." (*at 399)*. The Court further noted that "unbundled elements offered pursuant to Section 251(c)(3)…are brought out on compulsion of the 1996 Act," and that the governing interconnection agreement specified the mechanics by which Verizon would meet its interconnection obligations. (*at 403, 410*).

*20* Verizon asserts that under the *Trinko* rationale, the Telecom Act provides a sufficient regulatory framework, providing for interconnection agreements that encompass dispute resolution provisions. Therefore, separate state law claims based on interconnection agreement disputes are barred as unnecessary.

*21* **Discussion and decision.** Contrary to Verizon's argument, *Trinko* does not compel dismissal of Integra's complaint. *Trinko* is distinguishable from this case because it addresses whether unfair telecommunications competition should be remedied by resort to federal anti-trust law, which operates under a set of specific, specialized standards that are much different from the overarching

[22] Verizon Reply to Integra's Response to Motion, ¶ 9.

public interest standards that govern Commission review under RCW 80.36.170 and RCW 80.36.186.[23] Moreover, in *Trinko*, the court observed that the Telecom Act subjected Verizon to oversight by both the FCC and the state regulatory commission and that this oversight was what provided the protection against anti-competitive behavior by the ILEC.[24] Thus, contrary to Verizon's argument, *Trinko* appears to confirm the role of state regulation in addressing anti-competitive behavior under the Act.

### D. Is the Interconnection Agreement the sole remedy available to Integra?

*22* Verizon further argues that Integra's complaint fails to state a claim upon which relief can be granted because the complaint ignores the dispute resolution provisions contained in the Interconnection Agreement.[25] Verizon asserts that Article III, Section 15.1 of the Interconnection Agreement provides the primary dispute resolution method that the parties must engage in before bringing a dispute to the Commission.

*23* Verizon also argues that part of Integra's complaint is a stale billing dispute governed by Article III, Section 7.1 of the Interconnection Agreement[26] and that Integra's request that the Commission find Verizon liable for damages in a court of law is prohibited under the limitation of liability provision in Article III, Section 25.4 of the Interconnection Agreement.[27]

*24* Finally, Verizon states that Article III, Section 37 of the Interconnection Agreement governs service performance and that Integra's Complaint fails to

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[23] *See, Trinko* at 399.

[24] *Id.*, at 403-404. Both the FCC and the New York Public Service Commission investigated Verizon's failure to provide Operations Support Systems (OSS) pursuant to Verizon's interconnection agreement with AT&T. Both agencies levied significant financial penalties against Verizon.

[25] Verizon Motion ¶ 6.

[26] Section 7.1 requires notification of the "nature and basis of the dispute within six months…or the dispute shall be waived." Verizon asserts that none of the specific problems with customer disconnects that Integra raises in its complaint meet the six-month requirement in Section 7.1, since they relate to events that occurred one to three years prior to the complaint.

[27] Section 25.4 limits Verizon's liability to "direct damages" – essentially the monthly charge for services or UNEs. Verizon also contends that Integra's request ignores the fact that the Commission has no authority to award damages under Washington state law.

address how Verizon violated the performance standards contained in that section. Verizon suggests that the service problems Integra's customers encountered were likely caused by the incompatibility of customer equipment with Verizon's network, and that the Interconnection Agreement demonstrates Verizon has no obligation to "construct any new facilities, install new electronics or software or provide any service, feature, or function that it does not have the capability in place to provide."[28]

*25* **Discussion and decision.** Verizon's arguments are unpersuasive. Verizon ignores the full text of Article III, Section 15.1 of the Interconnection Agreement, which reads:

> Alternative to Litigation. Except as provided under Section 252 of the Act with respect to the approval of this Agreement by the Commission, the Parties desire to resolve disputes arising out of or relating to this Agreement without litigation. Accordingly, *without waiving the right to seek relief from the Commission or the FCC,* and except for action seeking a temporary restraining order or an injunction related to the purposes of this Agreement, or suit to compel compliance with this dispute resolution process, the Parties agree to use the following alternative dispute resolution procedures as the primary remedy with respect to any controversy or claim arising out of or relating to this Agreement or its breach. (emphasis added).

*26* The language of this provision clearly allows a party to seek relief from the Commission, apart from the provisions of the interconnection agreement, and does not specifically prohibit a complaint such as Integra's. In the past, the Commission has favored looking to the four corners of the interconnection agreement for dispute resolution, but has stated that "a contract in effect at the time a complaint is filed is not necessarily the exclusive source of protections and remedies for the parties."[29] While the Commission does not view resolution of

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[28] Sections 1 and 4.4, UNE Amendment; Article VII, Section 2.3; Article II, Section 1.22.

[29] *See, MCI Metro Access Transmission Services, Inc. v. US West Communications, Inc., Docket No.*

contract disputes through litigation as the best approach, the Commission will not foreclose a CLEC from litigating under state laws where circumstances warrant. Moreover, factual questions related to billing issues and service performance are better addressed in an evidentiary hearing.

*27* Verizon's argument that the Integra's request for a finding of Verizon liability for damages is prohibited under the Interconnection Agreement is without merit. Section 25.4 limits liability to direct damages, unless the damages are caused by willful misconduct.[30] Therefore, even under the agreement, there is no absolute limitation to "direct" damages. In any event, the Commission would have the authority to make findings based on the record in this case, and those findings may be used by the parties in further litigation, unless otherwise barred by law.

*28* While it is cause for concern that the specific incidents that Integra complains of are somewhat dated and may have been addressed through the trouble reporting provisions of the interconnection agreement, in deciding a motion to dismiss, the Commission must take Integra's allegations as true, and in a light most favorable to the non-moving party. In that context, it cannot be said that Integra has failed to state a claim upon which relief may be granted.

### E. Is Integra required to follow the procedures in WAC 480-07-650?

*29* WAC 480-07-650 establishes procedures for filing petitions for Commission enforcement of interconnection agreements. These procedures require the petition to: state that the petitioner engaged in good faith negotiations to resolve the agreement; include a copy of the provision of the agreement alleged to be violated; and include a description of facts demonstrating failure to comply with the agreement. The rule also requires service of the petition on the responding

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*UT-971158, Order Granting Clarification, April 8, 1998; see also, AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corporation, Docket No. UT-003120, Order Denying Motion for Summary Determination, April 5, 2001,* where the Commission found that the CLEC (AT&T) was not confined to relief solely through the Section 252 negotiation process. Verizon cites to Verizon N.W. v. WorldCom, 61 Fed Appx. 388, 2003 U.S. App. Lexis 6724 (9th Cir. 2003), a 9th Circuit case where the court found that Verizon's interpretation of its interconnection obligations under federal law did not merit sanctions. *See*,Reply to Response to Verizon's Motion at ¶ 10. It is noteworthy that, contrary to Verizon's arguments, the 9th Circuit opinion permits the Commission to impose sanctions under appropriate circumstances.

[30] Verizon Motion to Dismiss, Attached Interconnection Agreement at III-8, Section 25.4.

party, as well as a prefiling notice to alert the respondent to the anticipated petition.

*30* Verizon asserts that Integra violated this Commission rule because Integra failed to file the required petition or to provide the required service and prefiling notice.

*31* **Discussion and decision.** Verizon's argument fails because it ignores the permissive language of WAC 480-07-650. Section (1) of the rule states: "A telecommunications company that is party to an interconnection agreement with another telecommunications company *may* petition under this rule for enforcement of the agreement." (emphasis added). The rule does not establish its procedures as the only means of achieving enforcement of interconnection agreements. Moreover, nothing in RCW 80.04.110, the statute authorizing the Commission to hear complaints, prevents Integra from filing a complaint that may include allegations requiring enforcement of the interconnection agreement.

**F. Conclusion.**

*32* Verizon does not show that Integra's complaint fails to state a claim upon which relief may be granted. Integra's complaint is not preempted because it alleges state law claims independent of its claims under the Interconnection Agreement. Nor are Integra's state law claims barred on an anti-trust theory of the law. The Interconnection Agreement itself does not confine the parties to relief only under the terms of the Agreement. The Commission, while favoring dispute resolution within the four corners of an agreement, has not prohibited CLECs from seeking relief outside an agreement. Finally, Integra's complaint is not deficient because it fails to follow permissive procedures established in WAC 480-07-650.

## ORDER

*33* IT IS ORDERED That Verizon's motion to dismiss is denied.

DATED at Olympia, Washington, and effective this 24th day of August, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

THEODORA M. MACE
Administrative Law Judge

**NOTICE TO PARTIES**: **Any objection to the provisions of this Order must be filed within ten (10) days after the date of mailing of this statement, pursuant to WAC 480-07-810(3). Absent such objections, this prehearing conference order will control further proceedings in this matter, subject to Commission review.**