BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Petition of Verizon Northwest Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Washington Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order	Docket No. UT-043013 RESPONSE OF THE COMPETITIVE CARRIER GROUP, CENTEL COMMUNICATIONS AND UNITED COMMUNICATIONS INC. TO VERIZON'S WITHDRAWAL FILING

1 Advanced TelCom, Inc. ("ATI"); BullsEye Telecom, Inc. ("BullsEye"); Covad Communications Company ("Covad"); and KMC Telecom V Inc. ("KMC") (collectively the "Competitive Carrier Group" or "CCG")[1] joined by Centel Communications Inc. ("Centel") and United Communications Inc. ("UNICOM") in accordance with the Washington Utilities and Transportation Commission's ("Commission's") Order No. 9 respectfully submit this response to Verizon Northwest Inc.'s ("Verizon's") September 15, 2004 filing in which it seeks to withdraw the above-listed carriers of the CCG, Centel and UNICOM from the protection of the Commission's Status Quo Order No. 5 as well as to withdraw these carriers from this arbitration proceeding completely ("Withdrawal Filing").

[1] Comcast Phone of Washington LLC, Global Crossing Local Services Inc. and Winstar Communications LLC do not join in this filing.

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I. INTRODUCTION AND SUMMARY

2 The CCG, Centel and UNICOM oppose Verizon's Withdrawal Filing and submit that the Commission should preclude Verizon's efforts to unilaterally restrict the scope of this arbitration, to the detriment of a vast number of Washington telecommunications companies. First and foremost, Verizon's Withdrawal Filing incorrectly interprets the contract provisions of the interconnection agreements involving the members of the Competitive Carrier Group, Centel and UNICOM. While Verizon has placed various CCG members, Centel and UNICOM in different groups (BullsEye, Centel and UNICOM in Group 1, KMC in Group 2, ATI in Group 3 and Covad in Group 4), Verizon manages to reach the same incorrect conclusion regarding the need to amend each interconnection agreement before unilaterally affecting access to UNEs. Verizon's improper contract interpretation – asserting that it may unilaterally implement a change in law and discontinue UNEs without an amendment – violates the federal Communications Act of 1934, as amended,[2] as well as Washington contract law.

3 The language of the parties' interconnection agreements aside, any claim by Verizon that the respective interconnection agreements between Verizon and members of the CCG, Centel and UNICOM do not require written amendments to discontinue the UNEs currently provided by Verizon, in accordance with the rates, terms and conditions set forth in those agreements and as required by section 251(c)(3) of the Act, was waived by Verizon's initial Petition for Arbitration.

4 Finally, issues lawfully in the Answer of the CCG must be considered in the arbitration. Under section 252(b)(3) of the Act, the non-petitioning party has the right, in its response to a petition for arbitration, to provide additional issues for the Commission to consider.[3] Since the CCG properly raised the issues identified in its Answer and the

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[2] 47 U.S.C. § 151, et seq. ("Telecom Act").

[3] 47 U.S.C. § 252(b)(3).

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proposed amendment attached thereto, section 252 requires that they be included in the arbitration.[4]

II. VERIZON'S CLAIM OF AN ACTIONABLE CHANGE OF LAW IS INVALID

5 It is Verizon's position that each of the CCG member agreements and the Centel and UNICOM agreements provide that Verizon may unilaterally cease providing UNEs that it claims are no longer required under federal law,[5] citing the following language:

> BullsEye Telecom Inc./Verizon Interconnection Agreement ("BullsEye/Verizon ICA")
>
> > Notwithstanding anything in this Agreement to the contrary, if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in Applicable Law, Verizon is not required by Applicable Law to provide any Service, payment or benefit, otherwise required to be provided to BullsEye hereunder, then Verizon may discontinue the provision of any such Service, payment or benefit, and BullsEye shall reimburse Verizon for any payment previously made by Verizon to BullsEye that was not required by Applicable Law.[6]
>
> KMC Telecom V. Inc./Verizon Interconnection Agreement ("KMC/Verizon ICA")
>
> > Each Party shall comply with all federal, state, and local statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings applicable to its performance under this Agreement. The terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time this Agreement was produced, and shall be subject to any and all applicable statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings that subsequently may be prescribed by any federal, state or local governmental authority having appropriate jurisdiction. Except as otherwise expressly provided herein, such subsequently prescribed statutes, regulations,

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[4] Answer of Advanced Telecom Group Inc.; BullsEye Telecom Inc.; Comcast Phone of Washington LLC; DIECA Communications, Inc. d/b/a Covad Communications Company; Global Crossing Local Services Inc.; KMC Telecom V Inc.; and Winstar Communications LLC, Docket No. UT-043013 (Mar. 19, 2004).

[5] *See* Verizon Withdrawal Filing at ¶¶13, 19, 22, 25.

[6] BullsEye/Verizon ICA, GT&C, Section 4.7. The Centel and UNICOM ICAs also contain this language. See Verizon motion, Exhibit C, Group 1.

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rules, ordinances, judicial decisions, and administrative rulings will be deemed to automatically supersede any conflicting terms and conditions of this Agreement.[7]

Advanced TelCom, Inc./Verizon Interconnection Agreement ("ATI/Verizon ICA")

GTE and ELI further agrees that the terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time the Agreement was produced. Any modifications to those requirements that subsequently may be prescribed by final and effective action of any federal, state, or local governmental authority will be deemed to automatically supersede any terms and conditions of this Agreement. Notwithstanding this section, neither Party waives any rights it otherwise has to dispute any action taken or not taken by the other Party in reliance of this Section 32.[8]

Covad Communications Company/Verizon Interconnection Agreement ("Covad/Verizon ICA")

GTE and Covad agree that the terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time the Agreement was produced. Any modifications to those requirements will be deemed to automatically supersede any terms and conditions of this Agreement. The terms and conditions of this Agreement shall be subject to any and all applicable laws, rules, or regulations that subsequently may be prescribed by any federal, state or local governmental authority of appropriate jurisdiction.[9]

6 Verizon is incorrect in stating that the FCC's *Triennial Review Order*[10] and the D.C. Circuit's decision in *USTA II*[11] meets the standard for "subsequently prescribed statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings."

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[7] KMC/Verizon ICA, General Provisions, Section 1.2.

[8] ATI/Verizon ICA, Section 32.

[9] Covad/Verizon ICA. Section 32.

[10] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (CC Docket No. 96-98); *Deployment of Services Offering Advanced Telecommunications Capability* (CC Docket No. 98-147), Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd 16978 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

[11] In *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

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These are in no way "final and effective" as contemplated by the interconnection agreements. The *USTA II* decision vacated and remanded parts of the *Triennial Review Order* back to the FCC. Since then, the FCC has issued an *Interim Order* and a *Notice of Proposed Rulemaking*[12] and indicated that it will issue final rules in the next several months. Moreover, the status of the *Triennial Review Order* is in flux considering that the National Association of Regulatory Commissioners, among others, has appealed to the Supreme Court for *certiorari* of the *USTA II* decision.[13] And Verizon, who here is claiming that the *Triennial Review Order* and *USTA II* constitute a change of law has both filed a mandamus petition with the D.C. Circuit and has appealed the FCC's *Interim Order* to the D.C. Circuit.[14]

7 Verizon has been, to say the least, inconsistent in its interpretation of the impact of the *Triennial Review Order* on its obligations under interconnection agreements. As noted by the FCC in the *Interim Order*, there was credible evidence that "some incumbents have informed competitive LECs of their intention to initiate proceedings to curtail their UNE offerings, and that least one BOC [Verizon] has announced its intention to withdraw certain UNE offerings immediately."[15] The FCC's was referring to an ALTS letter in which Verizon began informing state commissions that pursuant to the change of law provisions in carriers' interconnection agreements, Verizon could begin withdrawing loops, switching and transport immediately.[16] The FCC pointed out that "***this action is***

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[12] *Unbundled Access to Network Elements, WC Docket No. 04-313, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338*, Order and Notice of Proposed Rulemaking, FCC 04-179 (released Aug. 20, 2004) (*Interim Order*).

[13] *Nat'l Ass'n of Regulatory Comm'rs, et al. v. United States Telecom Ass'n*, Nos. 04-12, 04-15 & 04-18 (June 9, 2004).

[14] *United States Telecom Ass'n v. FCC,* Petition for Writ of Mandamus to Enforce the Mandate of This Court, Nos. 00-1012, *et. al.* (Aug, 23, 2004). *See also United States Telecom Ass'n. et. al. v. Fed. Communications Comm'n.*, No. 04-1320 (filed Sep. 23. 2004).

[15] *Interim Order* at ¶17.

[16] *Id.* at n. 49.

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inconsistent with written representations made by the BOCs before the D.C. Circuit and the Supreme Court when opposing a further stay of the *USTA II* mandate. In that context, the BOCs argued that the change of law provisions in existing contracts contained '***orderly procedures...to transition away from current regime of maximum unbundling***.'"[17]

8 While Verizon conveniently claimed it would follow "orderly procedures" to implement any change of law when it sought to stop a further stay of *USTA II*, it has now changed positions and seeks to unilaterally eliminate certain UNEs by withdrawing parties from this arbitration proceeding. Verizon's conciliatory offering that it "does not intend to disconnect any CLEC's service as a result of these [*Triennial Review Order* and *USTA II*] legal rulings, but instead will offer non-UNE services that provide the same functionality as those UNEs at non-TELRIC rates" is unacceptable given that there has not been an actionable change of law that permits Verizon to take any unilateral action to withdraw, or modify the rates of, any UNEs.[18]

III. VERIZON HAS AFFIRMATIVE OBLIGATIONS TO PROVIDE UNE AND UNE COMBINATIONS PURSUANT TO ALL APPLICABLE LAW

9 As noted in the interconnection agreement language cited above for the CCG, Centel and UNICOM, in order to effectuate any change of law, there must be a change in Applicable Law. All of the CCG's interconnection agreements and the Centel and UNICOM agreements have broad definitions of Applicable Law, which encompasses federal, state and local law.

> BullsEye/Verizon ICA – "Applicable Law" shall mean ***all effective laws, government regulations and governmental orders***,

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[17] *Id.* (*emphasis added*). *See also* Joint Opposition of ILECs to Motions to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 at 15 (June 1, 2004). *See also* Opposition of ILECs to Applications for Stay, *NARUC v. USTA*, Sup. Ct. Nos. 03-A1008 & 03-A1010 at 30-32 (June 14, 2004).

[18] Verizon's Withdrawal Filing at ¶2.

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applicable to each Party's performance of its obligations under this Agreement."[19]

KMC/Verizon ICA – Applicable Law: ***All laws statutes, common law, regulations, ordinances, codes, rules, guidelines, orders, permits, and approvals of any Governmental Authority***, which apply or relate to the subject matter of this Agreement, and are applicable to each Party's performance of its obligations hereunder."[20]

ATI/Verizon ICA – "Applicable Law" " shall mean ***all*** laws, statutes, common law, regulations, ordinances, codes, rules guidelines, orders, permits, and approvals ***of any Governmental Authority***, which apply or relate to the subject matter Agreement.[21]

Covad/Verizon ICA - Applicable Law - ***all*** laws, statutes, common law, regulations, ordinances, codes, rules guidelines, orders, permits, and approvals ***of any Governmental Authority***, which apply or relate to the subject matter Agreement.[22]

10 Verizon's position that it can cease providing UNEs, or increase rates, no longer required by federal law is inconsistent with these interconnection language. As demonstrated above, Applicable Law encompasses ***all laws and regulations*** of a governmental authority. With regard to Verizon's obligations under federal law, Verizon has the "duty" to provide network elements pursuant to section 251(c). Verizon also has a "duty to negotiate in good faith" regarding fulfillment of its duty to provide network elements under section 251(c)(1). These duties did not go away when the D.C. Circuit vacated in part and remanded the FCC's rules, and section 251(c)(3) is still "Applicable Law" that mandates access to UNEs. Moreover, the Applicable Law definitions cited above include Verizon's unbundling obligations pursuant to Washington state law, including this Commission's Status Quo Order No. 5.

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[19] BullsEye/Verizon ICA, Definitions, Section 2.8. The same clause is included in the Centel and UNICOM ICAs.

[20] KMC/Verizon ICA, Appendix A to Articles I & II Glossary.

[21] ATI/Verizon ICA, Article II, Definitions, 1.5.

[22] Covad/Verizon ICA, Article II, Definitions, 1.5.

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11 As the CCG has stated in this proceeding, this Commission has independent state law authority to require Verizon to continue to provide existing UNE and UNE combinations pursuant to existing interconnection agreements.[23] This Commission has made its authority clear even before the passage of the federal Telecom Act[24] and has relied on Washington state statutes for such authority. For example, this Commission decided its *Interconnection Case* under state law the year before the Federal Act was passed. It based its decision in large part on RCW 80.36.140, which provides, in relevant part:

> Whenever the commission shall find, after such hearing that the rules, regulations or practices of any telecommunications company are unjust or unreasonable, or that the equipment, facilities or service of any telecommunications company is inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities and service to be

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[23] *See* Response of Advanced Telecom Group, Inc., Comcast Phone of Washington LLC, Covad Communications Company in Support of the Joint CLEC Motion for an Order Requiring Verizon to Maintain the Status Quo Pending Resolution of Legal Issues, Docket No. UT-043013 at 5 (filed June 2, 2004).

[24] *See, POWER v. Utilities & Transp. Comm'n*, 104 Wn.2d 798, 808, 711 P.2d 319 (1985); *State ex rel. American Telechronometer Co. v. Baker,* 164 Wash. 483, 491-96, 2 P.2d 1099 (1931); *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.*, 85 Wash. 29, 36, 147 P. 885 (1915) (The Commission has carefully and thoroughly considered the incumbent LECs' arguments that we lack authority to order any interconnection terms or conditions other than those they are offering. We believe that the incumbent LECs' interpretation of the Commission's authority, and USWC's interpretation in particular, are unreasonably restrictive. The Commission has broad authority to regulate the rates, services, facilities, and practices of telecommunications companies in the public interest). This Commission has also held that the first paragraph of RCW 80.36.140 (quoted in the Commission Jurisdiction section of this order) gives the Commission broad authority over rates. The second paragraph, quoted above, gives the Commission broad authority over practices and services as well. The way in which services are offered, on a bundled or unbundled basis, certainly falls within the scope of the second paragraph, See, e.g., State ex rel. American Telechronometer Co. v. Baker, 164 Wash. 483, 491-96, 2 P.2d 1099 (1931) (citing earlier version of above quoted provision); State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co., 85 Wash. 29, 36, 147 P. 885 (1915)(describing Commission's power to regulate public utilities as "plenary"). Fourth Supplemental Order Rejecting Tariff Filing and Ordering Refilings; Granting Complaints, In Part ("Interconnection Order"), WUTC v. U S West Communications, Inc., WUTC Docket No. UT-94164, et al. at 15 and 51 ("*Interconnection Case*") (Oct. 30, 1995).

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> thereafter installed, observed and used, and fix the same by order or rule as provided in this title.

12 The withdrawal of UNEs or increase in rates for UNEs would be extremely disruptive to the CCG, Centel and UNICOM as well as their customers. In the context of Washington's policy declarations promoting "efficiency, availability, diversity, universal service and reasonable charges,"[25] there is no way that the unilateral withdrawal of UNEs by Verizon can be found to be "just, reasonable, proper, adequate and efficient" "rules, regulations, practices" under RCW 80.36.140.[26]

13 As discussed above, the CCG, Centel and UNICOM interconnection agreements include a definition of Applicable Law that encompasses more than Verizon's 251 obligations. Verizon claims that the FCC's *Triennial Review Order* and the *USTA II* mandate are applicable to the parties performance under the contract, but Washington state law equally applies to the parties performance. Obviously there is strong disagreement between CLECs and Verizon as to what is considered Applicable Law. Section 252 interconnection arbitrations have long been used to determine what the law requires in interconnection agreements. Therefore, the Commission must decide the extent of Verizon's UNE obligations under Applicable Law as whole and what impact it has on the interconnection agreements. As held by this Commission in its Order No. 5, "[t]he Commission, not Verizon, has jurisdiction to decide the issues the parties raise, *i.e.*, whether there is a change in law, the extent of ILEC unbundling requirements under

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[25] *See* RCW 80.36.300.

[26] *See also* RCW 80.36.200 (Every telecommunications company operating in this state shall receive, transmit and deliver, without discrimination or delay, the messages of any other telecommunications company.); RCW 80.36.260 (Whenever the commission shall find, after a hearing had on its own motion or upon complaint, that repairs or improvements to, or changes in, any telecommunications line ought reasonably be made, or that any additions or extensions should reasonably be made thereto in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for telecommunications communications, the commission shall make and serve an order directing that such repairs, improvements, changes, additions or extensions be made in the manner to be specified therein.).

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Section 251, and the extent of state authority to establish separate unbundling requirements."[27]

IV. THE AGREEMENTS REQUIRE A WRITTEN AMENDMENT TO EFFECTUATE ANY ACTUAL CHANGE IN LAW

14 To the extent that there becomes an actual change of law that triggers the change of law provisions of the interconnection agreements of the CCG, Centel and UNICOM, such change must be negotiated and amended in writing to the interconnection agreements. The CCG member interconnection agreements as well as the Centel and UNICOM agreements contain such a requirement:

BullsEye/Verizon ICA:

> "[i]f any legislative, regulatory, judicial or other governmental decision order, determination or action, or any change in Applicable Law, materially affects any material provision of this Agreement ,the rights or oblations of a Party hereunder... the ***Parties shall promptly renegotiate in good faith and amend in writing this Agreement in order to make such mutually acceptable revisions to the Agreement as may be required in order to conform the Agreement to Applicable Law.***"[28]

KMC/Verizon ICA:

> In addition, subject to the requirements and limitations set forth in Section 1.3, to the extent required or reasonably necessary, the Parties shall modify, in writing, the affected term(s) and condition(s) of this Agreement to bring them into compliance with such statute, regulation, rule, ordinance, judicial decision or administrative ruling. Should the Parties fail to agree on appropriate modification arising out of a change in law, within sixty (60) calendar days of such change in law the dispute shall be governed by Section 3 of Article II in part, that "such subsequently prescribed statutes, regulations, rules, ordinances, judicial decisions and administrative rulings, will be deemed to automatically supersede any conflicting terms and conditions of this Agreement."[29]

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[27] *Id.* at ¶ 58.

[28] BullsEye/Verizon ICA, GT&C, Section 4.6. The same section is included in the Centel and UNICOM ICAs.

[29] KMC/Verizon ICA, General Provisions, Section 1.2.

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ATI/Verizon ICA:

> The terms and conditions of this Agreement shall be subject to any and all applicable laws, rules, or regulations that subsequently may be prescribed by final and effective action of any federal, state or local governmental authority. ***To the extent required by any such subsequently prescribed law, rule, or regulation, the Parties agree to modify, in writing, the affected term(s) and condition(s) of this Agreement to bring them into compliance with such law, rule, or regulation.***[30]

Covad/Verizon ICA:

> The terms and conditions of this Agreement shall be subject to any and all applicable laws, rules, or regulations that subsequently may be prescribed by final and effective action of any federal, state or local governmental authority. ***To the extent required by any such subsequently prescribed law, rule, or regulation, the Parties agree to modify, in writing, the affected term(s) and condition(s) of this Agreement to bring them into compliance with such law, rule, or regulation.***[31]

15 The language of these contracts could not be more clear - to the extent that there is a change in Applicable Law - such change must be effectuated by and through an amendment. That is ostensibly why Verizon initiated this proceeding, and included the members of the CCG, Centel and UNICOM, in the first place.

16 An amendment is required to effectuate the type of change of law proposed by Verizon. Both the FCC and this Commission have stated that Verizon cannot unilaterally cease providing UNEs or modify TELRIC rates in place. The FCC in its *Triennial Review Order* recognized that "many of our decisions in this Order will not be self-executing." "Indeed, under the statutory construct of the Act, the unbundling provisions of section 251 are implemented to a large extent through interconnection agreements between individual carriers."[32] Specifically, the FCC rejected BOC arguments to unilaterally modify interconnection agreements outside of the section 252 process:

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[30] ATI/Verizon ICA, Section 40.

[31] Covad/Verizon ICA, Section 32.

[32] *Triennial Review Order* at ¶ 700.

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> [W]e decline the request of several BOCs that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions. Permitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252.[33]

17 With regard to the interconnection agreements at issue, this Commission has unquestionable jurisdiction to interpret and enforce the terms by virtue of federal and state law, in accordance with the Act, the decision of the United States Supreme Court in *Verizon Md., Inc. v. PSC,*[34] and numerous circuit court decisions.[35] Specifically, the Eleventh Circuit held that:

> [A] common sense reading of [section 252] leads to the conclusion that the authority to approve or reject agreements carries with it the authority to interpret agreements that have already been approved. We find further support for this conclusion in the recent decision of the Supreme Court in *Verizon Md., Inc. v. PSC*, 535 U.S. 635, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002), in the decisions of all other circuit courts to have considered the question, and in the determination of the Federal Communications Commission, ("FCC"), which is entitled to deference in the interpretation of the pertinent statute.[36]

18 As noted by the Eleventh Circuit, "[n]o court has held or suggested that a state commission does not have the authority to interpret and enforce interconnection agreements after they have been approved."[37] Furthermore, the FCC has also specifically held that state commissions have the authority to enforce carrier interconnection

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[33] *Id.* at ¶ 701, n. 2084.

[34] 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002).

[35] *See e.g. Bell Atl. Md., Inc. v. MCI WorldCom*, 240 F.3d 279, 304 (4th Cir.2001) (the court flatly stated that state commissions have authority to interpret and enforce interconnection agreements); *Southwestern Bell Tel. Co. v. PUC*, 208 F.3d 475, 479-80 (5th Cir.2000); *Southwestern Bell Tel. Co. v. Brooks Fiber Communs. of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir.2000); *Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd.*, 189 F.3d 1, 10-13 (1st Cir.1999); *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, 573 (7th Cir.1999); *Iowa Util. Bd. v. F.C.C.*, 120 F.3d 753, 804 (8th Cir. 1997).

[36] *Bellsouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1274 (2003).

[37] 317 F.3d at 1276.

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agreements.[38] Based on this precedent, there can be no question of the Commission's authority to require Verizon to adhere to the terms of its interconnection agreements. With this authority comes responsibility to ensure that Verizon does not take unilateral actions to the detriment of competitors and consumers in Washington. The Commission has taken such action in issuing its Status Quo Order No. 5, leaving no doubt that "[t]he Commission, not Verizon, has jurisdiction to decide the issues the parties raise, *i.e.*, whether there is a change in law, the extent of ILEC unbundling requirements under Section 251, and the extent of state authority to establish separate unbundling requirements."[39] The Commission should exert the same authority in this case and reject Verizon's attempt to withdraw parties from the protection of the Status Quo Order No. 5 and impair their rights by removing them from this proceeding.

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[38] *Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Authorization To Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, FCC 03-243, Memorandum Opinion and Order, 18 FCC Rcd. 21,543 (October 15, 2003) (citing *see* e.g., *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1276-77 (11th Cir. 2003) ("[I]n granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance."); *S.W. Bell Tel Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir. 2000) (finding that state commission's authority "to approve or reject and mediate or arbitrate interconnection agreements necessarily implies the authority to interpret and enforce specific provisions contained in those agreements"); *S.W. Bell Tel. Co., v. Connect Communications Corp.*, 225 R.3d 942, 946 (8th Cir. 2000) (finding that section 252's "grant of power to state commissions necessarily includes the power to enforce the interconnection agreement"); *MCI Telecomms. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000) ("A state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission."); *S.W. Bell Tel. Co. v. Pub. Util. Com'n of Tex.*, 208 F.3d 475, 479-80 (5th Cir. 2000) ("[T]he Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.").

[39] Status Quo Order No. 5, ¶ 59.

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V. VERIZON'S INTERPRETATION OF THE CCG CENTEL AND UNICOM INTERCONNECTION AGREEMENTS VIOLATES THE TELECOM ACT AND WASHINGTON CONTRACT LAW

A. Verizon's interpretation would allow Verizon to violate its obligations under federal law to negotiate UNEs in good faith and not to discriminate.

19 Interpreting the agreement as Verizon does violates the Telecom Act. At the onset, Section 251(c)(1) requires Verizon to negotiate the particular terms and conditions for the provision of UNEs in good faith. Verizon's interpretation of the interconnection agreements that it can act unilaterally to cease providing UNEs, or increase rates and bypass the negotiation provisions the agreements as well as the arbitration proceeding ***it*** commenced is not good faith. Additionally, section 252(i) states that Verizon:

> [S]hall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

20 In its Withdrawal Filing, Verizon is proposing to withdraw 70 Washington CLECs from this proceeding, but proposes to continue arbitrating with the remaining seven CLECs. Effectively, Verizon will undertake unilateral self-help to withdraw UNEs from a portion, albeit the majority, of Washington CLECs. Such action is a violation of section 252(i) which requires that all CLECs be treated in a nondiscriminatory manner. If Verizon is allowed to proceed, the majority of CLECs in Washington will lose access to UNEs at TELRIC rates, while the remaining CLEC will likely have a different, more preferable, outcome. Such a result will put those 70 CLECs at a competitive disadvantage. Accordingly, this Commission should prohibit this potential result by preventing Verizon's attempt to treat Washington CLECs in a discriminatory manner.[40]

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[40] Should the Commission agree with Verizon and withdraw the majority of Washington CLECs from this proceeding, the Commission should at least prohibit Verizon from discontinuing UNEs, including UNE-P, for so long as Verizon is providing such UNEs to any CLEC.

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B. Verizon's interpretation should be rejected under Washington law because it is inconsistent with Verizon's acts and statements.

21 As quoted above Verizon's contracts contain conflicting terms. On the one hand, the contracts set forth extensive dispute resolution terms. On the other hand, Verizon argues that it need not participate in the dispute resolution process because it can exercise self-help; *i.e.* it believes it can impose its interpretation of the Applicable Law unilaterally. Verizon is correct that Washington law requires that a contract should be interpreted to give meaning and effect to every provision of the contract. The problem with Verizon's interpretation of the contracts is that it fails to give effect to the detailed dispute resolution processes. At its heart, the fatal flaw of Verizon's argument is that Verizon **presumes** what "Applicable Law" requires. If parties to a contract always agreed on the law and interpretation of their contract, then dispute resolution clauses would be superfluous. As this case amply illustrates, parties do not always agree on what the law requires.

22 Under Washington law, Verizon may not simply treat the dispute resolution process as superfluous in this case. Because the parties here do not agree on what Applicable Law requires, Verizon must follow the dispute resolution procedures before it can discontinue provision of any disputed network element. Indeed, even if Verizon was correct that the contract language unambiguously supported its interpretation, the tribunal (the Commission in this case) must review the "context" of the contract to determine the true intent of the parties.

> Whether or not ambiguity is apparent from the face of a contract, evidence of the circumstances of the making of the contract is admissible. We reject the plain meaning rule and expressly adopt the context rule as the applicable rule for ascertaining the parties' intent and interpreting written contracts.[41]

[41] *Berg v. Hudesman*, 801 P.2d 222, 115 Wn.2d 657, 678-79 (Wash. 1990).

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23 Here, there is effectively no evidence regarding negotiation of the contracts to aid in interpretation. There are four templates that were simply adopted verbatim by 70 CLECs.

24 Lacking material evidence of prior or contemporaneous negotiations or course of dealing, the Commission must instead look to the parties subsequent conduct. "It is well established that subsequent acts and conduct of the parties to the contract are admissible to assist in ascertaining their intent."[42] Ultimately, the Commission must attempt to determine the contracting parties' intentions.

> The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties.' " Extrinsic evidence of the circumstances under which a contract was made is admissible to determine that intent. We may discern intent from the actual language of the disputed provisions, the contract as a whole, the subject matter and objective of the contract, the circumstances in which the contract was signed, **the later acts and conduct of the parties, and the reasonableness of the parties' interpretations**. The court considers the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made in those negotiations, trade usage, and the course of dealing between the parties.[43]

25 Here, Verizon's interpretation is unreasonable (as well as unconscionable—see below) because it renders nugatory the dispute resolution provisions and processes that the CLECs—as the parties dependent on Verizon's provision of UNEs for their very existence—would expect to protect them from devastating unilateral action by Verizon. Moreover, Verizon acted at least two separate times in a manner consistent with the CLECs' interpretation of the contracts and inconsistent with Verizon's interpretation. First, as discussed above, when Verizon opposed a further state of the *USTA II* mandate it argued to the D.C. Circuit and the Supreme Court that its contracts contained "orderly

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[42] *Id.* at 677-78.

[43] *Diamond B Constructors, Inc. v. Granite Falls School Dist.*, 70 P.3d 966, 117 Wn.App. 157, 161 (Wash.App.2003) (emphasis added) (footnotes and citations omitted).

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procedures" for implementing changes in law. Second, and even more telling, Verizon itself instigated and insisted upon this arbitration proceeding. Verizon's commencement of this docket was an express and unambiguous acknowledgement of its obligation to negotiate and arbitrate its proposed amendments to the interconnection agreements as required by sections 251(c)(1) and 252.

26 Verizon cannot write out of its contracts the processes to which the parties agreed for resolving disputes regarding the application and interpretation of "Applicable Law."

C. Verizon's interpretation should be rejected because it would result in an unconscionable contract that is unenforceable under Washington law.

27 Verizon's interpretation of the agreements goes far beyond unreasonable. Its interpretation would result in a contract that is unconscionable, both procedurally and substantively. Verizon's interpretation would deem the contract procedurally unconscionable because the contract would include confusing and conflicting language. In particular, the interconnection agreements provide that certain changes in law automatically supersede current provisions in the agreement, while at the same time nearly identical language regarding changes in law expressly require a written amendment to effectuate the change.[44] Therefore, from the CLECs' prospective, they are protected from harmful unilateral action by Verizon, while Verizon has proposed the opposite interpretation.

28 The contracts would also be substantively unconscionable because the "contract terms are 'one-sided or overly harsh.'"[45] Verizon's interpretation makes these agreements unduly one-sided because Verizon could ***always*** exercise self-help based on its belief as to what Applicable Law requires, but the CLEC could ***never*** exercise self help. Allowing

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[44] *See, e.g., Kruger Clinic v. Regence Blueshield,* ___ Wn. App. ___ (Div. I, Sept. 20, 2004).

[45] *Kruger, supra.*

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one party to unilaterally impose its interpretation of changes in law while denying that right to the other party is unconscionable enough. That unconscionability is compounded where, as here, the party lacking the right to exercise self-help is totally dependent on the other party for its ability to conduct its business.

29 Under well-recognized contract interpretation guidelines applicable in Washington, the Commission can easily reject Verizon's interpretation. If it should not, however, then it should abrogate the sections upon which Verizon relies as unconscionable.

VI. NOTWITHSTANDING THE PARTIES INTERCONNECTION AGREEMENT LANGUAGE, VERIZON'S WITHDRAWAL IS INAPPROPRIATE

30 In its Withdrawal Filing, Verizon audaciously suggests that may it exclude from this proceeding 70 parties on the basis of certain contract provisions set forth in those parties' interconnection agreements, and accordingly, that Verizon may unilaterally exercise its "contract right" to discontinue its UNE offerings within Washington. Notwithstanding the contract language included in the parties' interconnection agreements, Verizon failed to properly exclude the parties from its initial Petition for Arbitration filed in this proceeding, and thus Verizon's claim to withdraw the parties from this proceeding is waived. Importantly, Verizon named as parties to this proceeding *each* CLEC in the State of Washington.[46] By now seeking to withdraw parties, Verizon is abusing the Commission's arbitration process. The Commission should be reminded that Verizon sought arbitration and successfully resisted the efforts of numerous respondents to dismiss the petition. Then, upon issuance of an unfavorable ruling in the

[46] Petition of Verizon Northwest Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Service Providers in Washington Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order, Petition for Arbitration, Docket No. UT-043013 at 1 (Feb. 26, 2004).

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Commission's Status Quo Order No. 5, Verizon now seeks to back out of its own case in an effort to escape that ruling. As aptly noted by this Commission, "[i]t is inappropriate, and borders on the absurd, for Verizon to initiate a mass arbitration proceeding and then insist that it may effect on its own the very changes it requests the Commission to arbitrate."[47]

31 The Commission should also be reminded that in response to Verizon's Petition for Arbitration, the Commission, the CCG, Centel and UNICOM have devoted considerable time and resources, over a period of eight months, to arbitrating a suitable interconnection agreement amendment that incorporates the *Triennial Review Order* and *USTA II*. Accordingly, Verizon cannot now, at this late date, unilaterally exclude from this proceeding *70 telecommunications companies*, including the CCG, Centel and UNICOM, which Verizon entangled in this proceeding in the first instance.

VII. CONCLUSION

32 Consistent with the foregoing, the CCG, Centel and UNICOM respectfully requests that the Commission take affirmative action to preclude Verizon's efforts to unilaterally withdraw members of the CCG, Centel and UNICOM from the protection of the Commission's Status Quo Order No. 5 and also withdraw these carriers from this arbitration proceeding.

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[47] Order No. 8, Docket No. UT-043013.

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