BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of VERIZON NORTHWEST INC. with COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN WASHINGTON Pursuant to 47 U.S.C. Section 252(b), and the *Triennial Review Order*.	)	Docket No. UT-043013 JOINT CLEC RESPONSE TO VERIZON FILING CLAIMING TO WITHDRAW ARBITRATION PETITION AS TO SELECTED PARTIES

Electric Lightwave, Inc. ("ELI"), Integra Telecom of Washington, Inc. ("Integra"), Pac-West Telecomm, Inc. ("Pac-West"), Time Warner Telecom of Washington, LLC ("TWTC"), and XO Washington, Inc. ("XO"), including affiliate Allegiance Telecom of Washington, Inc. ("Allegiance") (collectively "Joint CLECs"), provide the following response to the filing of Verizon Northwest Inc. ("Verizon") identifying provisions of interconnection agreements that allegedly permit Verizon unilaterally to cease providing UNEs, and purporting to withdraw its Petition for Arbitration ("Petition") with respect to the vast majority of competing local exchange carriers ("CLECs") with which Verizon has an interconnection agreement in Washington ("Verizon Filing"). Verizon has no legal authority to dismiss parties from this proceeding by "withdrawing" its arbitration petition with respect to those parties. Verizon also misinterprets, and misrepresents the effect of, the language in the Joint CLECs' interconnection agreements ("ICAs"), which require a written amendment to reflect any and all changes of law. Order No. 8, moreover, is fully consistent with the language in the Joint CLECs' ICAs. The

Commission, therefore, should not modify Order No. 8 or permit Verizon to withdraw its Petition with respect to the Joint CLECs.

DISCUSSION

A. Verizon May Not Unilaterally Dismiss Parties from a Commission Proceeding.

1. As an initial matter, Verizon's pleading is procedurally improper. Verizon purports to "withdraw[] its Petition for Arbitration" with respect to certain carriers. Verizon Filing ¶ 1. Verizon, however, did not file individual arbitrations against each of these carriers. Rather, Verizon initiated a single arbitration against multiple parties. Verizon, in reality, is attempting to dismiss certain parties from this proceeding. Verizon cites no authority permitting it unilaterally to take such action, which is not surprising in light of the fact that only the Commission has authority to dismiss parties from a litigated docket. The Commission rules permit a party to withdraw *voluntarily*, much less to be removed involuntarily, from a proceeding "only upon permission granted by the commission in response to a written motion."[1] Indeed, the Joint CLECs are unaware of *any* proceeding in which the Commission has permitted one party unilaterally to dismiss another party from a contested proceeding.

2. Even if Verizon's pleading somehow could be construed as an attempt selectively to withdraw its Petition for Arbitration, Verizon has failed to identify any legal authority to take such action. Nothing in Section 252 of the Telecommunications Act of 1996

[1] WAC 480-07-380(3); *accord, e.g., In re Application of U S WEST and Qwest for an Order Disclaiming Jurisdiction, or in the Alternative, Approving the U S WEST-Qwest Merger*, Docket No. UT-991358, Eighth Supp. Order Denying Petitions for Leave to Withdraw (June 19, 2000).

("Act"), applicable Federal Communications Commission ("FCC") orders or rules, or Commission procedures adopted pursuant to the Act authorize a petitioning party unilaterally to withdraw its petition. If such action were permissible, Verizon could effectively prevent competitors from seeking Commission arbitration of unresolved interconnection issues by being the first to file for arbitration and then withdrawing its petition after the statutory time frame for filing an arbitration petition has elapsed. Verizon, therefore, has no legal basis on which it could unilaterally withdraw its Petition with respect to selected parties over those parties' objection.

3. Accordingly, to be considered at all, the Verizon Filing would only be appropriate if it were construed as a motion to dismiss the Joint CLECs. The Commission rules do not address dismissal of a named party from an arbitrated proceeding or other litigated docket. Verizon's "motion," therefore, would need to be considered either as a dispositive motion with respect to the Joint CLECs, or under the standards applicable to dismissing an intervener. The Verizon Filing lacks merit under both alternatives. As discussed below, the Joint CLECs' interconnection agreements ("ICAs") require a written amendment incorporating subsequent legal requirements into the ICAs, and disputed issues abound on how that is to be accomplished. Verizon has stated no basis on which the Joint CLECs, as opposed to other affected parties, do not have a claim on which the Commission can grant relief or on which Verizon is entitled to judgment against the Joint CLECs as a matter of law.[2] Nor can Verizon demonstrate that the Joint CLECs do not have a substantial interest in this proceeding or that the

public interest will not be served by the Joint CLECs' continued participation.[3] The Commission, therefore, should deny any request by Verizon to dismiss the Joint CLECs as parties to this consolidated arbitration.

B. The Joint CLECs' ICAs Require a Written Amendment to Incorporate the *TRO* and Subsequent Federal Legal Developments.

4. Verizon initiated this "consolidated arbitration proceeding to amend the interconnection agreements between Verizon and each of the [CLECs] . . . in Washington," and has proposed several amendments that Verizon believes "implement[] the changes in incumbents' network unbundling obligations promulgated in the [FCC's] *Triennial Review Order*." Verizon Arbitration Petition ¶ 1. Verizon now states that it is withdrawing its Petition with respect to the Joint CLECs allegedly because their ICAs "contain specific terms . . . permitting Verizon to cease providing UNEs that are not subject to an unbundling obligation under section 251(c)(3) of the [Act] and the FCC's implementing regulations." Verizon Filing ¶ 1. The Joint CLECs' ICAs contain no such terms.

5. The ELI, Pac-West, TWTC, and XO ICAs provide in relevant part,

> 32. Changes in Legal Requirements. [The Parties] further 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 that subsequently may be prescribed by final and effective action of any federal, state, or local government authority will be deemed to automatically supercede any terms and conditions of this Agreement. **Notwithstanding this section, neither Party waives any rights it otherwise has to dispute any action**

[2] *See* WAC 480-07-380.
[3] *See* WAC 480-07-355(4).

taken or not taken by the other Party in reliance on this Section 32.

40. Subsequent Law. 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.

Verizon ICAs with ELI, Pac-West, TWTC, and XO, Art. III, Secs. 32 & 40 (emphasis added).

6. The language in these agreements unambiguously requires a ***written*** modification to the ICAs to bring affected terms into compliance with changes in law. That language does not even mention unbundled network elements ("UNEs"), much less provide Verizon with the unilateral right to cease providing them.[4] Indeed, while contending that any new law would automatically supercede terms in the ICA that conflicted with the new law, Verizon concedes that the parties are obligated to "'modify' the Agreement 'in writing' to reflect the new obligations under the changed conditions." Verizon Filing ¶ 23. That is precisely the purpose of this consolidated arbitration, as Verizon states in the first paragraph of its Arbitration Petition.

[4] In addition, nothing in the language of these ICAs supports Verizon's claim that its unbundling obligations are limited to FCC regulations implementing Section 251(c)(3) of the Act. To the contrary, the language specifically provides that the Agreement is subject to "any and all applicable laws, rules, or regulations" that are prescribed by "any federal, state, or local governmental authority." Obviously, the parties contemplated that their obligations arise from state law, as well as federal law, including Verizon's unbundling obligations.

7. The Allegiance and Integra ICAs with Verizon contain somewhat different language but that language is subject to the same interpretation. The relevant portions provide,

> 32. **Changes in Legal Requirements and Subsequent Law**.
>
> 32.1 [The Parties] 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 supercede 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 final and effective action of any federal, state, or local governmental authority of appropriate jurisdiction.
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> To the extent required by any such subsequently prescribed law, rule, or regulation, the Parties shall negotiate 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. **In the event the Parties cannot agree on an amendment within thirty (30) days from the date any such law, rule, regulation or order becomes effective, then the Parties shall resolve their dispute under the applicable Dispute Resolution procedures set forth herein**.
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> 32.2 In the event [Verizon] is permitted or required to discontinue any Unbundled Network Element provided to Allegiance pursuant to this Agreement during the term of this Agreement or any extensions thereto, [Verizon] shall provide Allegiance 30 days advance written notice of such discontinuance, **except as may be otherwise provided herein or required by applicable law**. This provision shall not alter either Party's right to any notification required by applicable law.

Verizon ICAs with Allegiance and Integra, Art. III, Sec. 32 (emphasis added).

8. As in the ELI, Pac-West, TWTC and XO ICAs, the Allegiance and Integra Agreements require a ***written*** modification to incorporate any and all subsequent legal

requirements. Verizon ignores this obligation in its discussion of this ICA, quoting only the "automatically supercede" language. Verizon Filing ¶ 25. Verizon's misconstruction of the contract language through selective quotation is unavailing. The ELI, Pac-West, TWTC and XO agreements have comparable "automatically supercede" language, but as discussed above, even Verizon interprets that language as consistent with the contract requirement that changes in law be incorporated into the ICA through a written amendment.

9. The primary difference between the change of law provisions in the respective Joint CLEC ICAs is that the Allegiance/Integra ICAs include a provision that specifically addresses discontinuance of UNEs. Again, however, Verizon selectively quotes from the Allegiance/Integra ICAs in an attempt to support its position. Section 32.2 discussing discontinuance of UNEs is nothing more than a notice provision. In addition to the 30 day notice language that Verizon quotes, that subsection also references other types of notice that might be applicable. Nothing in this provision gives Verizon the unilateral right to discontinue UNEs "simply by providing '30 days advanced written notice'" as Verizon contends. Verizon Filing ¶ 26. Indeed, were Verizon's interpretation correct, there would be no need for a written amendment, rendering that contractual requirement meaningless.

10. To give effect to all the change of law requirements in the Allegiance/Integra ICAs, the 30 day notice that Verizon must provide to discontinue UNEs obviously corresponds with the 30 day period in which the parties are required to negotiate a written amendment to the ICA. If the parties fail to agree on the written terms and conditions required to implement the new law – including terms and conditions governing any discontinuance of UNEs – "the Parties

shall resolve their dispute under the applicable Dispute Resolution procedures set forth" in the ICA. The change of law provisions in the ICA work in conjunction to ensure that *all* disputes arising under the change in law will be addressed expeditiously and at the same time. The provision requiring Verizon to provide notice of any discontinuance of UNEs thus does not "trump" the other change of law provisions as Verizon contends.

11. Verizon, not the Joint CLECs, is the party that fails to read the contracts as a whole and that seeks to have the ICAs enforced as Verizon now wishes they had been written. *See* Verizon Filing ¶ 11. The ICAs cannot reasonably be interpreted to give effect to their "automatically supercedes" language without also giving effect to the express requirement that changes of law must be reflected in written amendments.

12. As a practical matter, moreover, Verizon never addresses, much less attempts to explain, how a subsequently prescribed legal requirement *could* automatically supercede existing ICA terms when the parties to the ICA do not agree either that there has been a change in law or how that change impacts existing obligations under the ICA. The Joint CLECs, for example, contend that state law provides a legal basis for requiring Verizon to unbundle loop and transport facilities, while Verizon contends that only final and effective FCC rules can create such an obligation. Verizon apparently believes that *Verizon's* interpretation of the ICA and new legal requirements should govern the parties' relationship, but the Commission has already rejected that position.

13. Even if Verizon were entitled to discontinue providing certain UNEs pending a written amendment to the ICAs – which it is not – recent decisions from the FCC and the D.C.

Circuit do not prescribe how Verizon may discontinue UNEs without disrupting end user customers' service. Accordingly, those decisions cannot immediately supercede the terms and conditions in the ICAs without development of appropriate terms and conditions by the parties. Verizon has offered to convert those UNEs to tariffed services, but that offer merely highlights the lack of terms necessary to implement the latest federal decisions. Verizon's offer, moreover, reflects only Verizon's interpretation of its legal requirements and even if appropriate, fails to address any of the specifics of how such a transition would occur, including timing, coordination, and permissible charges, if any. All of these issues directly impact the Joint CLECs and need to be resolved before Verizon may unilaterally discontinue providing UNEs.

14. "The 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."[5] That conclusion is no less applicable when interpreting the language in the Joint CLECs' ICAs. Verizon's ICAs with the Joint CLECs do not authorize Verizon unilaterally to discontinue UNEs without a written amendment establishing appropriate terms and conditions. Verizon thus has provided the Commission with no basis on which either Order No. 8 should be modified or the Joint CLECs should be dismissed from this proceeding.

C. Verizon Cannot Unilaterally Withdraw an Arbitration Petition When Issues in Addition to Discontinuance of UNEs Remain Unresolved.

15. The Verizon Arbitration Petition seeks resolution of a number of issues arising out of the FCC's *Triennial Review Order*, including *but not limited to* which, if any, UNEs that

Verizon currently provides may be discontinued. Not surprisingly, many of the new FCC requirements benefit Verizon's competitors, including the obligations that Verizon permit commingling and combinations of UNEs with tariff services, undertake routine network modifications rather than simply deny CLEC orders for alleged lack of facilities, and establish new certification requirement for the combination of loops and transport known as enhanced extended links ("EELs"). Verizon previously agreed, and claimed in its Petition that the amendment Verizon proposes addresses all of the legal requirements established in the *Triennial Review Order*:

> In those cases where the FCC's new rules work to Verizon's disadvantage, Verizon has included language to ensure that the agreements are consistent with federal law. In sum, Verizon's amendment would ensure that existing agreements are **comprehensively modified** to bring them into accordance with the requirements of federal law – just as the FCC has mandated.

Verizon Arbitration Petition ¶ 11 (emphasis added). Specifically with respect to CLECs whose ICAs Verizon believes authorize it unilaterally to cease providing UNEs, Verizon states that its proposed amendment includes the language necessary to formalize that right and to implement the other aspects of the *TRO*:

> By filing this petition, Verizon does not waive any rights it may have under the terms of existing interconnection agreements to cease providing access to those UNEs. With respect to those agreements, Verizon proposes the draft amendment attached to this petition not to establish, in the first instance, its right to cease providing access to such UNEs, but to carry that right forward in an amendment that **also implements changes with respect to other UNEs to which Verizon must continue to provide access**.

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[5] Order No. 5, ¶ 58.

Id. ¶ 4, n.4 (emphasis added).

16. The Verizon Arbitration Petition amply demonstrates that at the time Verizon initiated this proceeding, Verizon was fully aware that a number of CLECs have ICAs that Verizon interprets as giving it the right to discontinue providing certain UNEs. Verizon nevertheless named those CLECs in its Petition and proposed an amendment to those ICAs that would memorialize Verizon's rights and implement other changes in federal law. Six months later, Verizon has completely reversed its position, claiming that "Verizon does not need to amend [those] interconnection agreements . . . to implement the results of the *Triennial Review Order* or *USTA II* and, therefore, withdraws its petition for arbitration as to those carriers." Verizon Filing ¶ 10. Verizon's latest position is self-serving and completely unsupportable.

17. Having now decided that most of its ICAs already provide Verizon with the benefits of recent federal legal developments, Verizon now proposes to prevent the Joint CLECs from participating in Commission resolution of dispute issues concerning provisions of the *Triennial Review Order* that are not to Verizon's benefit. Verizon adds insult to injury by interpreting the change of law provisions in its ICAs differently depending on whether the change is favorable to Verizon. Verizon's ICAs with the Joint CLECs all provide that "any and all" modifications to existing legal requirements "automatically supercede" conflicting terms of the ICA. Consistently applying Verizon's interpretation of these provisions, the Joint CLECs should already be entitled to commingling and combinations of UNEs, routine network modifications, and new EEL certification requirements. Verizon, however, is not making those modifications available to CLECs without a written amendment to their ICAs. Last month, for

example, Verizon notified CLECs of System Enhancements scheduled to take effect on October 11, 2004, which expressly provide that "Network Modifications will **only** be available to CLECs that have signed a Triennial Review Order Amendment to their existing Interconnection Agreement."[6] Verizon cannot have it both ways. Either the language in the Joint CLECs' ICAs requires the Parties immediately to implement *any and all* changes in law without a written amendment, or that language require that *any and all* changes be implemented through a written amendment.

18. Verizon cannot withdraw its Arbitration Petition as to the Joint CLECs when disputed issues remain unresolved simply because Verizon believes that it can unilaterally resolve the issues that are of the most concern to Verizon. The Joint CLECs reasonably relied on the Verizon Arbitration Petition to address *all* disputed issues arising out of the *Triennial Review Order*. Dismissal of the Joint CLECs from this proceeding would be highly prejudicial, potentially precluding the Joint CLECs from participating in the resolution of disputed issues and development of contract amendment language that will directly affect them and further delaying their ability to implement the legal requirements in the *TRO*.

19. Verizon also ignores the practical impact of its purported withdrawal of its Arbitration Petition with respect to the Joint CLECs. If the Commission were to permit such a withdrawal, the Joint CLECs would be compelled individually to seek resolution of the exact

[6] Verizon West Order LSOG 5&6, October 2004 Release Overview at 8 (emphasis added) (a copy of the relevant pages are attached as Attachment A to this response). This document also establishes procedures and charges for routine network modifications – issues that are presented to the Commission for resolution in this proceeding.

same issues presented in this arbitration through the Dispute Resolution provisions in each of their ICAs. All of those provisions permit a party to seek relief from the Commission. Each of the Joint CLECs, therefore, would be required to file a Petition for Enforcement of their ICA pursuant to WAC 480-07-650 to establish the written amendment each of the ICAs requires to incorporate recent federal legal developments.[7] Because these petitions would raise the same issues that are presented for resolution in this proceeding, the Commission would likely consolidate these petitions with the Verizon Arbitration Petition. The result would be that the Joint CLECs would once again be parties in this docket, except that they and the Commission will have been required to expend limited resources in procedural gamesmanship. The Commission has never encouraged such wasteful activities and should not do so now.

[7] Verizon does not address this issue in its Filing, but its counsel stated at a status conference that CLECs dismissed from the consolidated arbitration could file their own petition for arbitration to resolve the *TRO* issues of interest to them. Such a procedure would delay a Commission decision for almost a year if, as the Commission should expect, Verizon insists on the CLECs restarting the section 252 arbitration clock. By that time, however, the Commission will already have resolved those issues in this proceeding, denying the Joint CLECs any opportunity to participate in the development of a contract amendment that as a practical matter they will be required to accept. If the Joint CLECs were permitted to file arbitration petitions immediately, those petitions undoubtedly would be consolidated with this proceeding as discussed in the text, again resulting in a waste of Commission and party resources.

CONCLUSION

20. Verizon has no legal authority to withdraw its Petition with respect to the Joint CLECs. The Joint CLECs' ICAs do not authorize Verizon unilaterally to discontinue UNEs before new legal requirements are incorporated into the ICAs through a written amendment, and this proceeding was initiated to establish just such an amendment. Nor can Verizon simply abandon disputed issues that Verizon itself raised in its Arbitration Petition simply because Verizon is in no hurry to amend its ICAs to incorporate *TRO* provisions that do not benefit Verizon. The Commission, therefore, should refuse to modify Order No. 8 or to dismiss the Joint CLECs from this consolidated arbitration.

DATED this 30th day of September, 2004.

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