

1
2
3
4
5 BEFORE THE WASHINGTON STATE
 UTILITIES AND TRANSPORTATION COMMISSION

6 In the Matter of the Petition for)
7 Arbitration of an Amendment to)
8 Interconnection Agreements of)
9 VERIZON NORTHWEST, INC.)
10 with)
11 COMPETITIVE LOCAL EXCHANGE)
12 CARRIERS AND COMMERCIAL)
13 MOBILE RADIO SERVICE PROVIDERS)
14 IN WASHINGTON)
15 Pursuant to 47 U.S.C. § 252(b), and the)
16 *Triennial Review Order*)

 DOCKET NO. UT- 043013
 JOINT MOTION FOR STAY OF
 PROCEDURAL ORDER NO. 13
 AND PETITION FOR
 INTERLOCUTORY REVIEW
 EXPEDITED TREATMENT
 REQUESTED

14 **JOINT MOTION FOR STAY OF DECEMBER 20, 2004 PROCEDURAL ORDER**
15 **AND PETITION FOR INTERLOCUTORY REVIEW OF SUCH ORDER**

16 1. Pursuant to WAC 480-07-810 and Order No. 13, ¶ 9¹ AT&T Communications of
17 the Pacific Northwest Inc., TCG Oregon and TCG Seattle (collectively “AT&T”); MCI, Inc.
18 (“MCI”); Advanced TelCom, Inc., BullsEye Telecom, Inc., Covad Communications Company
19 and KMC Telecom V Inc. (collectively “Joint Movants”) hereby submit this Motion for Stay of
20 Procedural Order No. 13 and Petition for Interlocutory Review thereof. Joint Movants are
21 unable to comply with Order 13 because the parties have not yet been able to agree which issues
22 are to be briefed on January 5, 2005, and which issues are to be held in abeyance.
23
24
25

26 _____
¹ Order No. 13, Prehearing Conference Order issued Dec. 20, 2004.

JOINT MOTION FOR STAY OF PROCEDURAL ORDER
NO. 13 - 1

1 the Commission stay the current schedule set forth in Order No. 13 and set a schedule
2 commencing within a reasonable time after the date the FCC releases its decision providing the
3 details for its new permanent rules.

4 6. The FCC's press release provides some information regarding the new rules, but
5 little specificity. Nevertheless, it provides some comfort that the details will be issued within a
6 reasonable timeframe. It makes little sense to proceed under the current schedule for briefing
7 issues when many of the issues presented in this proceeding are subject to specific rules that have
8 not yet been made public. Moreover, with regard to bifurcating the issues in an attempt to
9 proceed now on a subset of those issues, it is not possible for the parties to determine with any
10 certainty which issues will be unaffected by the issuance of the new rules.³

11
12 7. In the alternative, should the Commission desire to proceed with some subset of
13 issues now, the Joint Movants request that the ALJ be given a reasonable opportunity to
14 determine, based upon briefing, which issues are ripe⁴ for consideration now and which issues
15 should be held in abeyance pending the release of the FCC's decision. Without at least some
16 argument regarding the ripeness of various issues for arbitration, the ALJ's decision to go

17
18
19 hearing takes place on paper or in the hearing room, because the law—which creates the very foundation for this
20 arbitration and the parties' contractual rights—is virtually unknown. *Svendgard v. Washington*, 95 P.3d 364, 370
21 (Wash. Ct. App. 2004) (“Due process requires a hearing that is meaningful and appropriate to the nature of the
22 case.”). Neither the Commission nor the ALJ should take the CLEC's rights away based upon speculation about the
23 FCC's new rules and standards. The CLECs have invested far too much money in providing local service in this
24 State for Verizon, through a premature and flawed procedure, to merely wipe it away.

25 ³ The issuance of new rules may also cause the parties to identify additional issues and/or modify the existing issues
26 and disputed contract language, thus requiring a period for additional negotiation between the parties.

27 ⁴ Verizon's disputed issues are not yet ripe for adjudication as the FCC's rules upon which the disputes rest are not
28 yet effective and no final determination on such issues may be rendered by the ALJ at this time. *See e.g., Walker v.*
29 *Munro*, 870 P.2d 920, 926 (Wash. 1994) (A dispute is hypothetical where most of the provisions of the statute are not
30 yet in effect. “When a statute is not in effect, and when it may be amended ... we cannot do otherwise than find that
31 this is only a speculative dispute” not ripe for judicial consideration.); *First Covenant Church v. Seattle*, 787 P2d
32 1352, 1356 (Wash. 1990) (“Deciding whether a case presents a cause of action ripe for judicial determination
33 requires an evaluation of ‘the fitness of the issues for judicial decision and the hardship to the parties of withholding
34 court consideration.’”); *Superior Asphalt & Concrete Co. v. Washington Dept. of Labor & Indus.*, 89 P.3d 316, 318
35 (Wash. Ct. App. 2004) (“a judicial determination of the dispute must be final and conclusive”).

36
JOINT MOTION FOR STAY OF PROCEDURAL ORDER
NO. 13 - 3

1 forward on any given issue would be arbitrary and capricious. More importantly, a decision to
2 move ahead where the alleged “law” upon which the decision is based changes or is clarified
3 within weeks of the decision—or before the decision is even made—is waste of precisions time
4 and resources.

5
6 8. The Joint Movants, therefore, move the Commission for an order staying the
7 current schedule and scheduling a prehearing conference one week after the FCC issues the order
8 and new UNE rules it announced on December 15, 2004. At that prehearing conference, the
9 parties will be better able to address whether further negotiations are necessary or whether the
10 parties can proceed, based on the FCC rules, to brief the issues and contract language currently in
11 dispute. In the alternative, the Joint Movants request that the Commission stay the current
12 schedule and allow the parties to brief which issues are ripe for consideration now and which
13 issues should be held in abeyance pending the release of the FCC’s order and rules. Upon
14 determining which issues should proceed, the ALJ should then schedule a briefing cycle for the
15 bifurcated issues.
16

17 Argument

18 **I. THE FCC HAS ANNOUNCED NEW RULES THAT WILL AFFECT THE** 19 **ISSUES BEING ARBITRATED IN THIS PROCEEDING.**

20 9. On December 15, 2004, the FCC announced its decision to establish permanent
21 federal unbundling rules. *See Exhibit A*, “FCC Adopts New Rules for Network Unbundling
22 Obligations of Incumbent Local Phone Carriers”, FCC News Release, December 15, 2004
23 (“Press Release”). The FCC’s Press Release is not a formal ruling and has no binding effect.
24 The Press Release also is just two pages and states few of the specific details of the FCC’s
25 decisions.
26

JOINT MOTION FOR STAY OF PROCEDURAL ORDER
NO. 13 - 4

1 10. evertheless, the Press Release makes clear, among other things, that Verizon will
2 continue to have federal obligations to provide unbundled access to DS1 and DS3 enterprise
3 loops and transport, based on wire center-specific data concerning the number of business lines
4 and the number of fiber-based collocators in the Verizon wire centers. The Press Release,
5 however, lacks the details of the FCC's decision. In particular, both the criteria necessary to
6 determine the areas where unbundled enterprise loops and transport will be available as UNEs
7 and the data to which those criteria will be applied are not fully known. Moreover, the specifics
8 of the unbundling criteria will not be available until the FCC's Order is released.

10 11. The FCC's Press Release also indicates that the definition of "qualifying
11 services," a concept that was announced in the *Triennial Review Order*⁵ but vacated in *USTA II*,⁶
12 has been "set aside." Other than a statement that the FCC's decision will prohibit the use of
13 UNEs for the provision of telecommunications services in the mobile wireless and long distance
14 markets, however, the Press Release provides no further details on what "set aside" means.
15 Thus, the parties must await the FCC's Order to determine what, if any, use restrictions may
16 apply to enhanced extended links ("EELs") combinations or to various commingled uses of
17 UNEs and tariffed services.

19 12. The FCC's Press Release also identifies a different "transitional structure" than
20 that provided for in the Interim Rules for CLECs using UNEs that Verizon may no longer be
21 obligated to provide under federal law, including unbundled switching. The Press Release states
22

24 ⁵ *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, In the Matter of Review of*
25 *the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338);
Implementation of the Local Competition Provisions of the Telecommunications Capability (CC Docket No. 98-

26 ⁶ *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

JOINT MOTION FOR STAY OF PROCEDURAL ORDER
NO. 13 - 5

1 there will be a transition period of at least twelve months, depending on the UNE, identifies
2 specific price increases that may be applied during that period, and states that the transition plan
3 applies to the CLECs' embedded customer base. Many of the details of this transitional
4 structure, however, remain unclear (*e.g.* what transition period applies to which UNEs; may a
5 CLEC continue to add circuits and UNE-based services for existing customers during the
6 transition).

8 13. Further, the FCC's Press Release did not address a number of subjects on which
9 the FCC sought comments in its August 20, 2004 Notice of Proposed Rulemaking, including
10 requirements for cut-overs (*i.e.*, hot cuts) (*Order and NPRM*, ¶ 10);⁷ the FCC's view of the
11 authority of state commissions to require unbundling under state law and to establish just and
12 reasonable rates for network elements required to be offered pursuant to Section 271 (*Id.* at ¶
13 12); and requirements for the state filing and approval of commercial agreements (*Id.* at ¶ 13).
14 All of these issues, together with issues concerning enterprise loops, dedicated transport,
15 qualifying services, and the transition period are issues in this proceeding and can only be
16 efficiently and effectively addressed after the parties have had an opportunity to review the
17 FCC's Order.
18

19 14. It is this lack of clarity regarding exactly what will be required by the new rules
20 announced by the FCC on December 15th that makes even bifurcating the issues in the current
21 proceeding impractical. For further example and as mentioned above, the Press Release does not
22 address the authority of state commissions to require unbundling under state law and to establish
23
24

25 ⁷ Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements (WC Docket*
26 *No. 04-313)*; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket*
No. 01-338), FCC No. 04-179, (rel. Aug. 20, 2004) (the "*Order and NPRM*").

JOINT MOTION FOR STAY OF PROCEDURAL ORDER
NO. 13 - 6

1 just and reasonable rates for network elements no longer required to be offered pursuant to
2 Section 251, even though that is an issue on which the FCC sought comment in its Notice of
3 Proposed Rulemaking and is likely to address in the written order, when released. However, that
4 is an issue in dispute in this proceeding (see Verizon DPL Amendment 1, Issue 1), and an issue
5 that Verizon has proposed go forward now with briefing required under the current schedule.
6
7 Verizon has also proposed going forward on the issue of how any rate increases and new charges
8 established by the FCC's permanent rules will be implemented, even though it is clear from the
9 Press Release that the FCC will address the issue of a transitional structure in its order and rules
10 when released. These examples demonstrate the difficulty of determining at the present time,
11 much less the parties reaching an agreement, the issues that are ripe for arbitration under the
12 current schedule.

13
14 **II. THE JOINT MOVANTS' PROPOSALS PROVIDE FOR PROMPT AND**
15 **ORDERLY COMPLETION OF THE ARBITRATION PROCESS ONCE THE**
16 **FCC'S NEW RULES ARE KNOWN OR A REASONABLE DECISION IS MADE**
17 **TO MOVE FORWARD WITH ONLY THOSE ISSUES THAT ARE ACTUALLY**
18 **RIPE FOR CONSIDERATION.**

19 15. The Joint Movants' proposal to stay the current schedule and either await the
20 FCC's release of its decision or allow for a reasoned determination of the issues ripe for current
21 consideration provides the flexibility required to manage a proceeding of this nature without
22 imposing undue hardship upon any party. Joint Movants' proposal will move this matter
23 forward as rapidly as reasonably possible because it is based on the date that the FCC's new
24 rules are *issued*, not the date they become effective or even the date they are published in the
25
26

JOINT MOTION FOR STAY OF PROCEDURAL ORDER
NO. 13 - 7

SEADOCs:193763. 1

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

1 Federal Register.⁸ The Joint Movants' proposed method for establishing the schedule also
2 provides appropriate flexibility to amend the schedule as circumstances warrant.


3 **Conclusion**

4 16. For the foregoing reasons, the Joint Movants request that the Commission stay
5 Order No. 13 and schedule a prehearing conference for one week after the FCC releases its order
6 and rules as described in the Press Release attached hereto, or in the alternative, the Joint
7 Movants request that the Commission allow the parties to brief which issues are actually ripe for
8 current consideration and develop a briefing schedule based thereon.

9
10 17. If Order 13 is not set aside, the parties will brief different issues on January 5
11 because the Order does not identify the issues to be briefed and the parties are unlikely to reach
12 agreement before January 5. At best this will result in much wasted time and effort. At worst, it
13 could result in denial of one or more parties' due process rights.

14
15 Respectfully submitted this 30th day of December, 2004.

16 **MILLER NASH LLP**

17 
18 Brooks E. Harlow
19 WSB No. 11843
20 Brooks.harlow@millernash.com
21 Attorneys for Advanced TelCom, Inc.,
22 BullsEye Telecom, Inc., Covad
23 Communications Company, KMC Telecom
24 V Inc.

**AT&T COMMUNICATIONS OF THE
MOUNTAIN STATES, INC.; TCG
SEATTLE AND TCG OREGON**

Letty S.D. Friesen
919 Congress Avenue, Suite 900
Austin, TX 78701-2444
(303) 298-6475
lsfriesen@att.com

21 **MCI, Inc.**

22 Michel Singer Nelson
23 707 17th Street, Suite 4200
24 Denver, Colorado 80202
(303) 390-6106
michel.singer_nelson@mci.com

25
26 ⁸ Generally, the effective date of the FCC's rules is 30 days after they have been published in the Federal Register.

JOINT MOTION FOR STAY OF PROCEDURAL ORDER
NO. 13 - 8

EXHIBIT A



NEWS

Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action.
See MCI v. FCC, 515 F 2d 385 (D.C. Circ 1974).

FOR IMMEDIATE RELEASE:
December 15, 2004

NEWS MEDIA CONTACT:
Mark Wigfield, 202-418-0253
Email: mark.wigfield@fcc.gov

FCC ADOPTS NEW RULES FOR NETWORK UNBUNDLING OBLIGATIONS OF INCUMBENT LOCAL PHONE CARRIERS

New Network Unbundling Rules Preserve Access to Incumbents' Networks by Facilities-Based Competitors Seeking to Enter the Local Telecommunications Market

Washington, D.C. – The Federal Communications Commission today adopted rules concerning incumbent local exchange carriers' (incumbent LECs') obligations to make elements of their network available to other carriers seeking to enter the local telecommunications market. The new framework builds on actions by the Commission to limit unbundling to provide incentives for both incumbent carriers and new entrants to invest in the telecommunications market in a way that best allows for innovation and sustainable competition.

The rules directly respond to the March 2004 decision by the U.S. Court of Appeals for the D.C. Circuit which overturned portions of the Commission's Unbundled Network Element (UNE) rules in its Triennial Review Order. We provide a brief summary of the key issues resolved in today's decision below.

- **Unbundling Framework.** We clarify the impairment standard adopted in the *Triennial Review Order* in one respect and modify its application in three respects. *First*, we clarify that we evaluate impairment with regard to the capabilities of a *reasonably efficient* competitor. *Second*, we set aside the *Triennial Review Order's* "qualifying service" interpretation of section 251(d)(2), but prohibit the use of UNEs for the provision of telecommunications services in the mobile wireless and long-distance markets, which we previously have found to be competitive. *Third*, in applying our impairment test, we draw reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets. *Fourth*, we consider the appropriate role of tariffed incumbent LEC services in our unbundling framework, and determine that in the context of the local exchange markets, a general rule prohibiting access to UNEs whenever a requesting carrier is able to compete using an incumbent LEC's tariffed offering would be inappropriate.
- **Dedicated Interoffice Transport.** Competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines. Competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Finally, competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's

network in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity dedicated transport where they are not impaired, and an 18-month plan to govern transitions away from dark fiber transport. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled dedicated transport at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **High-Capacity Loops.** Competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are not impaired without access to dark fiber loops in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity loops where they are not impaired, and an 18-month plan to govern transitions away from dark fiber loops. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled facilities at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.
- **Mass Market Local Circuit Switching.** Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundled mass market local circuit switching. This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs. During the transition period, competitive carriers will retain access to the UNE platform (*i.e.*, the combination of an unbundled loop, unbundled local circuit switching, and shared transport) at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004, plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for this combination of elements, plus one dollar.

Action by the Commission, December 15, 2004 by Order on Remand (FCC 04-290). Chairman Powell, Commissioners Abernathy and Martin, with Commissioners Copps and Adelstein dissenting. Chairman Powell, Commissioners Abernathy, Copps and Adelstein issuing separate statements.

Wireline Competition Bureau Staff Contact: Jeremy Miller, 418-1507; Email: jeremy.miller@fcc.gov

-FCC-

News about the Federal Communications Commission can also be found
on the Commission's web site www.fcc.gov.