[Service Date February 22, 2005]

BEFORE THE WASHINGTON STATE
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 ORDER NO. 16 ORDER DENYING MCI'S PETITION FOR REVIEW AND VERIZON'S PETITION TO VACATE; MODIFYING ORDER NO. 10 CONSISTENT WITH ORDER NO. 03 IN DOCKET NO. UT-041127

1 ***SYNOPSIS.*** *In this Order, the Commission denies the petitions for review filed by MCI and Verizon. The Commission also modifies Order No. 10, consistent with Order No. 03 in Docket No. UT-041127 entered simultaneously with this Order, to allow Verizon to charge affected CLECs the FCC's transition rate for UNE-P for resale services provided out of the Mount Vernon switch, beginning March 11, 2005.*

2 **NATURE OF PROCEEDING.** This proceeding involves a petition Verizon Northwest Inc. (Verizon) filed with the Washington Utilities and Transportation Commission (Commission) requesting arbitration pursuant to 47 U.S.C. § 252(b)(1) of the Telecommunications Act of 1996,[1] (Act) and the Federal Communications Commission's (FCC) Triennial Review Order.[2] The petition

[1] Public Law No. 104-104, 101 Stat. 56 (1996).

[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,*

was served on all competitive local exchange carriers (CLECs) and Commercial Mobile Radio Service (CMRS) providers in Washington that have entered into interconnection agreements with Verizon.

3 **PROCEDURAL HISTORY.** Verizon filed its arbitration petition with the Commission on February 26, 2004, in order to amend interconnection agreements to include changes in unbundling obligations identified in the Triennial Review Order. On March 2, 2004, the D.C. Circuit entered its decision in *United States Telecom Association v. Federal Communications Commission,* 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*). In that decision, the D.C. Circuit vacated and remanded significant portions of the FCC's Triennial Review Order, but stayed the effect of its decisions for 60 days. The D.C. Circuit later extended the effect of the vacatur until June 16, 2004, at which time the court's mandate became effective.

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

5 On June 15, 2004, the arbitrator entered Order No. 05 in this proceeding. That Order denied several motions to dismiss Verizon's arbitration petition, and granted a motion to maintain status quo, requiring Verizon to "continue to provide all of the products and services under existing interconnection agreements with CLECs at the prices set forth in the agreements, until the

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Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96098, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (Rel. August 21, 2003) [hereinafter "*Triennial Review Order*"].

Commission approves amendments to these agreements in this arbitration proceeding or the FCC otherwise resolves the legal uncertainties presented by the effect of the mandate in *USTA II*."[3] Order No. 05 describes the earlier procedural history of this proceeding, which will not be repeated in this Order.

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

7 On August 20, 2004, the FCC entered its Interim Order in which the FCC required incumbent local exchange carriers (ILECs) "to continue providing unbundled access to switching, enterprise market loops, and dedicated transport, under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004."[4] The FCC preserved these interconnection obligations until it drafted new rules concerning ILECs' unbundling obligations due to "the pressing need for market certainty."[5]

8 On August 31, 2004, a number of CLECs, Advanced TelCom, Inc. (ATI), AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle (collectively AT&T), Covad Communications Company

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[3] *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,* Order No. 05; Order Denying Motions to Dismiss; Granting Joint CLECs' Motion; Requiring Verizon to Maintain Status Quo, WUTC Docket No. UT-043013, ¶ 55 (June 15, 2004) [Hereinafter "Order No. 05"].

[4] *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, ¶ 1 (rel. Aug. 20, 2004) [Hereinafter "*Interim Order*"].

(Covad), MCI, Inc. (MCI), and United Communications, Inc., d/b/a UNICOM (UNICOM), collectively the Competitor Group, filed with the Commission a motion for enforcement of Order No. 05 in this proceeding, the CLECs' interconnection agreements, and the Triennial Review Order. The Competitor Group asserted that Verizon's planned conversion from a circuit switch to a packet switch in Mount Vernon, Washington, on September 10, 2004, would violate these orders and agreements.

9 At a prehearing conference held on September 7, 2004, the arbitrator heard argument on the motion for enforcement. Based upon concerns raised by the CLECs that Verizon's planned switch conversion might cause disruption to customers, the Commission scheduled a hearing for September 9, 2004, to determine whether the switch conversion would affect customers served by the switch or was purely a matter of pricing.

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

11 On September 8, 2004, the arbitrator issued a written notice of the September 9, 2004, hearing.

12 At the September 9, 2004, hearing, the arbitrator heard the testimony of MCI's witness Ms. Sherry Lichtenberg, UNICOM's witness, Mr. Michael Daughtry, and

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[5] *Id.*, ¶ 16.

Verizon's witness, Ms. Kathleen McLean. All parties appearing at the hearing were allowed the opportunity to cross-examine witnesses.

13 On September 13, 2004, the arbitrator entered Order No. 10 in this proceeding, Order Granting in Part Motion for Enforcement; Requiring Verizon to Maintain Status Quo. The Order allowed Verizon to proceed with its planned switch conversion, but required Verizon to charge affected carriers the UNE platform, or UNE-P, rate for resale services provided out of the Mount Vernon switch until the Commission resolved the merits of the CLECs' motion in a separate enforcement proceeding.

14 On September 20, 2004, ATI, AT&T, MCI, and UNICOM, collectively the Joint Petitioners, filed with the Commission in Docket No. UT-041127 a Joint Petition for Enforcement of their interconnection agreements with Verizon.

15 On September 24, 2004, MCImetro Access Transmission Services, Inc. (MCI), filed a Petition for Review of Order No. 10 in Docket No. UT-043013. On October 4, 2004, Verizon filed an Answer to MCI's Petition for Review of Order No. 10, as well as its own Petition to Vacate Order No. 10. On October 15, 2004, MCI filed a Reply to Verizon's Answer to MCI's Petition for Review of Order No. 10, as well as a Response to Verizon's Petition to Vacate Order No. 10.

16 **PARTY REPRESENTATIVES.** Timothy J. O'Connell, Stoel Rives, LLP, Seattle, Washington, Charles H. Carrathers, II, Vice President and General Counsel for Verizon Northwest Inc. and Verizon Southwest Inc., Irving, Texas, Andrew G. McBride, Wiley Rein & Fielding, Washington, D.C., Randal S. Milch, Senior Vice President and Deputy General Counsel for Verizon Communications, New York, New York, and Michael D. Lowe, Vice President and Associate General Counsel for Verizon Communications, Arlington, Virginia, represent Verizon. Edward W. Kirsch, Philip J. Macres, and Harry Malone, Swidler Berlin Shereff Friedman, LLP, Washington, D.C., represent Focal Communications Corporation of

Washington, ICG Telecom Group, Inc., Integra Telecom of Washington, Inc. (Integra), McLeodUSA Telecommunications Services, Inc., and Pac-West Telecomm, Inc (collectively the Competitive Carrier Coalition). Letty S. D. Friesen, AT&T Law Department, Denver, Colorado, represents AT&T. Andrew M. Klein and Heather T. Hendrickson, Kelley Drye & Warren, LLP, Washington, D.C. and Brooks E. Harlow and David Rice, Miller Nash LLP, Seattle, Washington, represent ATI, BullsEye Telecom Inc., Comcast Phone of Washington LLC, Covad, Global Crossing Local Services, Inc., and Winstar Communications LLC (the Competitive Carrier Group) and UNICOM. Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents Electric Lightwave, Inc., New Edge Networks, Inc., Time Warner Telecom of Washington, Inc. and XO Washington, Inc. Dennis D. Ahlers, Senior Attorney, Minneapolis, Minnesota, represents Eschelon. Karen Johnson, Corporate Regulatory Attorney, Beaverton, Oregon, represents Integra. Richard A. Pitt, attorney, Burlington, Washington, represents Northwest Telephone, Inc. Richard A. Finnigan, attorney, Olympia, Washington, represents SBC Telecom, Inc. William E. Hendricks, III, Hood River, Oregon, represents Sprint. Michel Singer Nelson, Regulatory Attorney, Denver, Colorado, represents MCI.

I. MEMORANDUM

A. MCI'S PETITION FOR REVIEW.

17 MCI's Petition for Review of Order No. 10 raises several issues for consideration:

- Whether MCI has established a basis for seeking interlocutory review and whether the Commission should accept review;
- Whether MCI's request for leave to reply to Verizon's answer to MCI's petition should be granted;
- Whether Order No. 10 is inconsistent with Order No. 05, and if so, whether Order No. 10 should be amended to require Verizon to allow

CLECs to process UNE-P orders as UNE-P orders for customers served by the Mount Vernon switch; and

- Whether MCI's interconnection agreement requires Verizon to provide UNE-P at the Mount Vernon Switch.

18 **1. Interlocutory Review.** MCI seeks review of Order No. 10, asserting that MCI will suffer substantial prejudice as it is unable to process new orders for local residential and small business services in the area served by the Mount Vernon switch until the issue is resolved in the enforcement proceeding.[6] Specifically, MCI asserts that it will not be able to add any additional customers for its Neighborhood product in the Mount Vernon area, as MCI does not have an OSS interface available to process resale orders.[7]

19 Verizon does not address whether the Commission should accept review, but requests the Commission deny MCI's petition.[8]

20 In reply, MCI asserts that Verizon mischaracterizes the testimony concerning MCI's ability to use Verizon's internet-based interface system, referred to as the WYSE GUI interface, to place resale orders.[9] MCI asserts that its witness, Ms. Lichtenberg, identified that MCI uses the WISE GUI for maintenance purposes for MCI customers served using Verizon's UNE-P product, and may have placed orders for UNE-P using the WISE GUI, but that MCI is unable to place new service orders for Verizon's resale product using the WISE GUI.[10]

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[6] MCI Petition, ¶ 16.
[7] *Id*., ¶¶ 18-19.
[8] Verizon Answer, ¶¶ 2, 14, 19.
[9] MCI Reply, ¶¶ 3-10.
[10] *Id*., ¶¶ 4, 9-10, *citing* TR. 237, 241-43, 245-49, 253-54, 256-57 (Lichtenberg).

21 ***Decision.*** Arbitration proceedings are conducted pursuant to 47 U.S.C. § 252, and are *not* adjudicative proceedings under the Administrative Procedure Act (APA).[11] Under the Commission's rules on arbitration the arbitrator may "exercise all authority reasonable and necessary to conduct arbitration under the … rule, the commission's orders on arbitration procedure, and other provisions of law."[12] Where appropriate and necessary, the arbitrator and the Commission may apply the Commission's procedural rules, and provisions of the APA, to facilitate arbitration.

22 Order No. 10 included a notice that interlocutory review was a procedure available to the parties. Order No. 10 is an interlocutory order, as it was entered during the course of this arbitration proceeding, rather than at the conclusion of the proceeding.[13] Under Commission rule, review of interlocutory orders is a matter of discretion for the Commission.[14] The Commission may accept review under WAC 480-07-810(2) after finding that:

> (a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;
> (b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or
> (c) A review could save the commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review.[15]

A petition must state why the ruling is in error and why interlocutory review is necessary.[16]

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[11] WAC 480-07-630(2).
[12] WAC 480-07-630(11)(b).
[13] *See* WAC 480-07-810(1).
[14] WAC 480-07-810(2).
[15] *Id.*
[16] WAC 480-07-810(3).

23 MCI alleges substantial prejudice and harm under WAC 480-07-810(2)(b), stating that it is unable to process resale orders for new customers. Testimony by MCI's and Verizon's witnesses during the September 9, 2004, hearing, however, does not establish that MCI is *unable* to process resale orders for new customers, but that using the WISE GUI interface for resale orders would require creation of a new internal software interface and changes to MCI's billing systems.[17] Thus, MCI may experience increased costs and effort to order and bill for resale service from the new switch. We find, given this testimony, that the evidence establishes sufficient prejudice and harm to MCI to accept review of the petition.

24 **2. MCI's Reply.** MCI filed a Reply to Verizon's Response to MCI's Petition for Review, and requested permission to file such a reply. MCI objects to Verizon raising additional issues in its answer to MCI's petition.[18] MCI also asserts that allowing MCI to file a reply would allow the Commission to "fully and fairly resolve the issues presented in MCI's Petition for Review."[19]

25 ***Decision.*** The procedures for interlocutory review identified in WAC 480-07-810 do not include an opportunity for parties to raise additional issues in an answer to a petition for interlocutory review, or the opportunity for parties to file replies. Interlocutory review, however, is a matter of discretion for the Commission.[20] The arbitrator properly applied the Commission's rule consistent with WAC 480-07-630(11)(b) by granting Verizon's request to challenge or raise additional concerns about Order No. 10 in its answer to MCI's petition, finding the process analogous to the procedures for administrative review in WAC 480-07-825(4)(c).[21] We find the arbitrator's decision appropriate. Given that Verizon has raised

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[17] *See* TR. 254:7-255:10 (Lichtenberg).
[18] October 14, 2004, letter from Michel Singer Nelson to Carole Washburn in Docket No. UT-043013.
[19] *Id*.
[20] WAC 480-07-810(2).
[21] *See* September 22, 2004, Notice Granting Request to Seek Review of Order No. 10 in Answer to Petition for Review in Docket No. UT-043013.

matters for interlocutory review, we find it is also appropriate to allow MCI to file a reply to Verizon's answer and petition.

26 **3. Ability of MCI to Initiate Resale Orders in WISE GUI.** MCI asserts that the arbitrator incorrectly concluded in paragraph 25 of the Order that it would be more burdensome for MCI to order service for new customers, asserting that MCI's witness stated that MCI does not have the ability to order service for new customers served by the new switch.[22] The testimony of MCI and Verizon's witnesses make clear that MCI would need to make certain system changes in order to initiate and process resale orders through Verizon's WISE GUI system.[23] In that respect, the arbitrator is correct that MCI is capable of initiating and placing resale orders, and that it will be more burdensome for MCI to order such service for new customers. We deny MCI's petition as to this issue.

27 **4. Consistency With Order No. 05.** MCI also asserts that Order No. 10 is inconsistent with the requirements of Order No. 05, the status quo order, as Order No. 10 allows Verizon to discontinue provisioning UNE-P to CLECs in the Mount Vernon area.[24] MCI asserts that the Order alters the terms and conditions of the ordering and provisioning of local switching at the Mount Vernon switch, contrary to the Commission's status quo order.[25] MCI requests that the Commission amend Order No. 10 to enforce Order No. 05 and require Verizon to allow CLECs to process new UNE-P orders for customers served by the new switch.[26] MCI asserts that the Commission should modify Order No. 10 to prohibit Verizon from discontinuing unbundled local switching at the Mount Vernon central office until the Commission reviews the merits of the issue.[27]

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[22] MCI Petition, ¶ 23; see also MCI Reply, ¶ 1.
[23] *See* TR. 254:7-255:10 (Lichtenberg); *see also* TR. 286:4-9 (McLean), TR. 294:15-16 (McLean); TR. 311:5-18 (McLean).
[24] MCI Petition, ¶¶ 20-23.
[25] *Id*., ¶ 22.
[26] *Id.,* ¶ 26.
[27] MCI Reply, ¶ 12.

28 Verizon asserts that the Commission cannot order Verizon to process UNE-P orders on the new packet switch, as Verizon does not have the process in place to offer UNE-P from the Mount Vernon switch.[28] Verizon asserts that Order No. 05 does not require Verizon to unbundle its packet switch, and asserts that MCI seeks reconsideration of Order No. 08, rather than clarifying Order No. 05.[29]

29 ***Decision.*** We deny MCI's petition for review on this issue. The CLECs that filed the motion for enforcement and appeared at the September 9, 2004, hearing specifically stated that they did not seek to stop or prevent the planned switch conversion from going forward.[30] In addition, it became clear during the hearing that Verizon had not programmed the new switch to accept or process UNE-P orders.[31] Given the facts present at the time of the Order, *i.e.*, that the CLECs did not seek to stop the switch conversion, and that the switch was not programmed to accept UNE-P orders, we find that Order No. 10 is reasonably consistent with Orders No. 05 and 08. The record is not clear as to what would be required for the new switch to process UNE-P orders. Verizon may be required to convert the switch back to a circuit switch, which we find unreasonable and unnecessary, or to make engineering or software changes, the magnitude of which are not present in the record, and for which we have no basis to require.

30 The arbitrator required Verizon to charge CLECs the UNE-P rate for any resale service provided by the switch in order to preserve the status quo in the proceeding under Order Nos. 05 and 08. As it was not possible, under the facts presented at the hearing, to require Verizon to maintain the status quo by continuing to accept and place UNE-P orders at the new switch, it was reasonable to preserve the status quo of the pricing terms in Verizon's

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[28] Verizon Answer, ¶¶ 11-12.
[29] *Id.*, ¶¶ 15-16.
[30] TR. 218:17-23.
[31] TR. 345:9-18 (McLean).

interconnection agreements. Given that the merits of the issue are addressed in Order No. 03 in Docket No. UT-041127, entered simultaneously with this Order, we deny MCI's petition for review on this issue.

31 **5. Enforcement Of Interconnection Agreement**. Lastly, MCI asserts that language in its interconnection agreement with Verizon requires Verizon to continue to provide unbundled local switching at the Mount Vernon switch regardless of switching technology.[32] Verizon asserts that this issue will be addressed in Docket No. UT-041127, and that it is inappropriate for MCI to litigate the issue on the merits on review in this proceeding.[33]

32 ***Decision.*** We deny MCI's petition for review on this issue. MCI's consistency argument is simply another way of arguing the issue on the merits presented in Docket No. UT-041127: Whether Verizon may avoid its obligations under Order No. 5, its interconnection agreements, and the Triennial Review Order to provide unbundled local switching by replacing a circuit switch with a packet switch. This issue is addressed on review in Order No. 03 in Docket No. UT-041127, entered simultaneously with this Order.

B. VERIZON'S PETITION FOR REVIEW.

33 Finding the interlocutory review process analogous to the process for administrative review, the arbitrator allowed Verizon to challenge or raise additional concerns about Order No. 10 in its answer to MCI's petition, as allowed by WAC 480-07-825(4)(c).[34] Verizon's Petition to Vacate Order No. 10 in Docket No. UT-043013 raises the following issues for consideration:

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[32] MCI Petition, ¶ 29.
[33] Verizon Answer, ¶¶ 18-19.
[34] *See* September 22, 2004, Notice Granting Request to Seek Review of Order No. 10 in Answer to Petition for Review in Docket No. UT-043013.

- Whether Verizon has established a basis for seeking interlocutory review and whether the Commission should accept review;
- Whether Order No. 10 unlawfully grants emergency injunctive relief;
- Whether Order No. 10 improperly grants emergency relief without considering the likelihood of success on the merits; and
- Whether the September 9, 2004, hearing was procedurally unlawful and if so, whether Order No. 10 should be vacated.

34 **1. Interlocutory Review.** Verizon seeks review of Order No. 10 in its answer to MCI's petition, after the arbitrator found such a process analogous to the procedure for administrative review in WAC 480-07-825(4)(c). Verizon alleges a number of procedural irregularities in its petition, but does not identify in its answer the specific harm or prejudice to Verizon that would justify the Commission accepting Verizon's request for interlocutory review.

35 MCI objects to Verizon raising additional issues in its answer to MCI's petition.[35]

36 ***Decision.*** As we discuss above, the arbitrator and Commission may apply other provisions of law, including the APA and Commission rules, in conducting the arbitration. In addition, interlocutory review is a matter of discretion for the Commission. Thus, we allow Verizon to raise additional issues in its answer to MCI's petition for review as appropriate under WAC 480-07-630(11)(b) and WAC 480-07-810.

37 Parties seeking interlocutory review must demonstrate in their pleadings a basis for review under WAC 480-07-810(2). While Verizon did not specifically identify the harm or prejudice to Verizon posed by Order No. 10, we will not reject Verizon's request for review as the Arbitrator's notice did not provide guidelines for presenting additional issues in the context of an answer to a petition for

[35] *See* October 14, 2004, letter from Michel Singer Nelson to Carole Washburn in Docket No. UT-043013.

interlocutory review. The issues Verizon raises for interlocutory review are procedural in nature, and do not appear to meet the standards for accepting interlocutory review in WAC 480-07-810(2). However, the full arbitration proceeding in this docket will not likely be concluded until this summer, and the Commission is addressing the merits of the issues presented in this proceeding in Order No. 03 entered simultaneously in Docket No. UT-041127. We accept Verizon's petition filed with its answer to MCI's petition.

38 **2. Did Order No. 10 Unlawfully Order Emergency Injunctive Relief?** Verizon asserts that the arbitrator unlawfully granted emergency injunctive relief in Order No. 10.[36] Verizon asserts that the Commission cannot grant emergency relief unless there is an "immediate danger to the public health, safety, or welfare."[37] Verizon asserts that the arbitrator found no immediate harm to the public welfare from Verizon's proposed switch conversion, and that given this finding, could not lawfully grant the relief provided in the Order.[38]

39 MCI asserts that the arbitrator did not base Order No. 10 on the provisions for an emergency hearing under RCW 34.05.479, or as emergency injunctive relief.[39] MCI asserts that Order No. 10 arises out of a motion filed by a group of CLECs concerning potential violations of the Commission's status quo orders in Docket No. UT-043013, and that it is within the Commission's authority to enforce its orders to maintain the status quo.[40]

40 ***Decision.*** This arbitration proceeding is not an adjudicative proceeding under the APA, and the provisions of the APA do not govern this proceeding. The arbitrator may apply the provisions of the APA or Commission rule to the extent necessary to conduct the arbitration. Verizon's objection rests on the assumption

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[36] Verizon Answer, ¶ 21.
[37] *Id*., *citing* RCW 34.05.479 and WAC 480-07-620.
[38] *Id*.
[39] MCI Reply, ¶ 16, n.2.
[40] *Id*., ¶ 17.

that the September 9, 2004, hearing was an "emergency adjudicative proceeding" under the APA and Commission rules.[41] We deny Verizon's petition on this issue, finding that the September 9, 2004, hearing was conducted as a part of the arbitration proceeding in order to apply the Commission's status quo order, and not an emergency adjudicative proceeding. The relief granted in Order No. 10 was intended to maintain the status quo under Verizon's interconnection agreements in this arbitration proceeding, not as injunctive, interim, or emergency relief.

41 The status quo order in this proceeding, Order No. 05, requires Verizon to "continue to provide all of the products and services under existing interconnection agreements with CLECs at the prices set forth in the agreements, until the Commission approves amendments to these agreements in this arbitration proceeding or the FCC otherwise resolves the legal uncertainties presented by the effect of the mandate in *USTA II*."[42] The Order states that "[m]aintaining the status quo among parties to interconnection agreements will allow negotiation or arbitration of amendments to such agreements to proceed without the threat of sudden or unplanned discontinuation of service and products offered under the agreements."[43] In Order No. 08, we upheld the status quo order provisions of Order No. 05.[44]

42 The Joint CLECs' August 31, 2004, motion requests enforcement of the status quo provisions of Order No. 05 in this proceeding, as well as enforcement of their interconnection agreements and the Triennial Review Order, in connection with

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[41] *See* RCW 34.05.479 and WAC 480-07-620.

[42] *See* Order No. 05, ¶ 55.

[43] *Id*.

[44] *See 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,* Order No. 08; Order Granting Interlocutory Review of Order No. 05; Denying in Part Verizon's Petition for Review; Requiring Verizon to File Copies of Individual Interconnection Agreements, WUTC Docket No. UT-043013, ¶¶ 29-31 (Aug. 13, 2004) [Hereinafter "Order No. 08"].

Verizon's replacement of its circuit switch in Mount Vernon with a packet switch.

43 The notice of the September 9 hearing did not identify the hearing as an emergency adjudicative proceeding under RCW 34.05.479 or under WAC 480-07-620.[45] While the arbitrator is responsible under WAC 480-07-630(11)(b) for exercising all authority reasonable and necessary under the Commission's arbitration rule, Commission orders and "other provisions of law," the arbitrator is not required to apply the provisions of the APA in an arbitration proceeding. The notice identified issues of pricing and "potential harm to CLECs whose operational support systems cannot accommodate the resale platform offered."[46] The notice also provided that "[t]he Commission convenes a hearing to hear testimony and evidence from parties to this proceeding concerning the balance of harms presented by the switch conversion."[47] The notice further provided that "[t]he primary issue to be addressed at the hearing is whether the conversion is truly a pricing issue or if customers will be discontinued or affected by the conversion."[48] By addressing the potential pricing concerns, the notice addresses whether the pricing of the switching services, if not Verizon's decision to replace the switch, might be contrary to the status quo order in the arbitration proceeding.

44 Discussion during the hearing addressed narrow issues relating to enforcement of the status quo order – pricing and effect on CLECs' ordering processes that might affect CLEC customers. In view of the CLECs' assertion that they did not seek to stop the switch conversion from occurring, there was no "emergency" to address in the hearing, only concerns relating to how best to enforce the Commission's status quo order.

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[45] *See* September 8, 2004, Notice of Hearing in Docket No. UT-043013.
[46] *Id*.
[47] *Id*.
[48] *Id*.

45 Order No. 10 requires Verizon to maintain the status quo under its interconnection agreements in this arbitration proceeding pursuant to Order No. 08. The Order requires Verizon to charge CLECs no more than the UNE-P rate for the resale service Verizon will provide CLECs currently providing UNE-P service out of the Mount Vernon switch.[49] The Order provides that "[t]he Commission acts in this order to preserve the status quo consistent with our prior status quo order, not in the nature of temporary injunction, interim relief, or action upon emergency adjudication."[50] The Order provides that the Commission will determine the merits of the CLECs' arguments of violation of the status quo order, interconnection agreements, and the Triennial Review Order in a separate proceeding.[51]

46 Based on our review of the arbitration process, the hearing notice, the CLECs' motion, and Orders No. 05 and 10, we find that Order No. 10 did not grant emergency injunctive relief, but was an exercise of "all authority reasonable and necessary to conduct arbitration" under WAC 480-07-630(11)(b), and required Verizon to maintain its pricing of local circuit switching under the status quo order, Order No. 05. In addition to Order No. 05, Verizon was also obligated at the time of the September 9, 2004, hearing, to comply with the FCC's Interim Order, requiring that ILECs maintain the status quo under their interconnection agreements for provision of local circuit switching, including pricing. While we do not seek to enforce the FCC's Interim Order, we note that the Commission was not the only agency concerned with the confusion and uncertainty in the local telecommunications markets as a result of the *USTA II* decision.

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[49] *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,* Order No. 10; Order Granting in Part Motion for Enforcement; Requiring Verizon to Maintain Status Quo, WUTC Docket No. UT-043013, at 12, ¶ 35 (Aug. 13, 2004) [Hereinafter "Order No. 10"].

[50] *Id*., at 12.

[51] *Id*.

47 **3. Did Order No. 10 Improperly Grant Emergency Injunctive Relief?** In a related argument, Verizon asserts that the arbitrator granted emergency relief without considering the likelihood of success on the merits.[52] Verizon objects to the deferral of any discussion of the merits to a separate enforcement proceeding, and asserts that a party seeking preliminary relief must make a demonstration of the likelihood of success on the merits.[53] Verizon asserts that Order No. 10 must be vacated as it ignores a factor essential to granting any preliminary relief.[54]

48 In reply, MCI asserts that it was not necessary for the Commission to evaluate the likelihood of success on the merits, as the Commission based its decision on a finding that Verizon's actions fell within the scope of previous Commission Orders.[55] MCI asserts that the Commission may enforce its own orders without demonstrating a likelihood of success on the merits.[56]

49 ***Decision.*** As discussed above, we do not find that the September 9, 2004, hearing was an "emergency adjudicative proceeding," or that Order No. 10 intended to provide emergency injunctive relief. The September 9 hearing was conducted and Order No. 10 was entered as a part of the Commission's arbitration proceeding in this docket. We deny Verizon's petition for review as to this issue.

50 We also distinguish this situation from the one presented in the *Air Liquide* decision to which Verizon cites. The *Air Liquide* proceeding involved a complaint filed against Puget Sound Energy asserting that the company was charging

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[52] Verizon Answer, ¶ 22.
[53] *Id*., *citing Air Liquide America Corp., v. Puget Sound Energy*, Sixth Supplemental Order, WUTC Docket Nos. UE-001952, UE-001959, 2001 Wash. UTC LEXIS 216 (Jan. 22, 2001); *Tyler Pipe Indus. Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982).
[54] *Id*., ¶ 22.
[55] MCI Reply, ¶ 18.
[56] *Id*.

unfair, unjust and unreasonable rates. The complaint also requested an emergency adjudicative proceeding. The proceeding was a complaint filed under Title 80 RCW and was clearly an adjudicative proceeding subject to the APA. The Commission analogized the relief available under an emergency adjudicative proceeding to injunctive relief, and applied the criteria for injunctive relief to the parties' request.[57] The criteria include whether the person seeking relief "has a clear legal or equitable right," and a showing that the moving party is likely to prevail on the merits.[58]

51 This proceeding is an arbitration proceeding, not subject to the APA. The Commission ordered Verizon in Orders No. 05 and 08 to maintain the status quo under its interconnection agreements with CLECs in Washington until the arbitration proceeding had concluded or the FCC had clarified the legal uncertainties presented by the *USTA II* decision. Verizon has an obligation under Commission's orders and the FCC's Interim Order to maintain the status quo under its interconnection agreements for local switching. Order No. 10 does not prevent Verizon from pursuing its switch conversion, but enforces the Commission's status quo order as to pricing until the Commission resolves the merits of the CLECs' request. Such an action does not require a demonstration of whether the CLECs are likely to succeed on the merits of whether Verizon may lawfully replace its circuit switch in Mount Vernon with a packet switch.

52 **4. Was the September 9 Hearing Procedurally Improper?** Verizon asserts that the September 9, 2004, hearing was procedurally unlawful.[59] Verizon asserts that the notice of the hearing did not follow the requirements of the APA to provide seven days notice of hearing, a "statement of the legal authority and jurisdiction under which the hearing is to be held," or a "reference to the particular sections

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[57] *Air Liquide*, 2001 Wash. UTC LEXIS 216 * 8-9.
[58] *Id*., * 9, n.7, *quoting Tyler Pipe*, 96 Wn.2d at 793.
[59] Verizon Answer, ¶ 23.

of the statutes and rules involved."[60] Verizon asserts that the distinction drawn in Order No. 10 between "initial" and "continued" hearings is made in the Commission's procedural rules, not the APA, and that the continuation rule applies only when evidentiary hearings are not concluded as scheduled.[61] Verizon asserts that the hearing was unlawful and that any order arising from the hearing must be vacated.[62]

53 MCI asserts that the September 9, 2004, hearing was properly noticed pursuant to WAC 480-07-440(2), which provides that there are no specific timing requirements for providing notice of continued hearing sessions.[63] MCI asserts that the September 9 hearing was a continuation of the September 7 prehearing conference, at which the parties began discussing the merits of the CLECs' petition for enforcement.[64] MCI also asserts that Verizon suffered no undue harm as a result of the notice process relating to the hearing, as all parties received the same notice and Verizon fully participated in the hearing.[65] MCI asserts that Verizon entered appearances for five attorneys at the hearing, presented direct testimony through a witness, introduced exhibits, cross-examined other parties' witnesses, presented opening and closing comments, as well as an oral petition for reconsideration.[66]

54 ***Decision.*** Verizon raises two procedural concerns—improper timing of notice and lack of notice of statutory authority. As with Verizon's other claims, Verizon's claims of procedural irregularities in the notice of the September 9 hearing are based on the assumption that the APA applies to this proceeding. Similar to our analysis above, we deny Verizon's petition on this issue finding

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[60] *Id., quoting* RCW 34.05.434(2)(f), (g); *see also* WAC 480-07-440.
[61] *Id*., ¶ 24.
[62] *Id*.
[63] MCI Reply, ¶ 19.
[64] *Id*.
[65] *Id*., ¶ 20.
[66] *Id*.

that the APA does not apply to this arbitration proceeding. Even if the APA notice requirements applied to the proceeding, we find that Verizon received appropriate notice of the hearing. Further, if there were procedural irregularities, we find that vacating Order No. 10 is not the appropriate remedy.

55 The formal notice of the September 9, 2004, hearing was issued on September 8, 2004, following discussion of the Joint CLECs' motion at the September 7, 2004, prehearing conference. At that conference, the arbitrator indicated that she would notify the parties as soon as possible concerning how the Commission chose to proceed on the motion.[67] Order No. 10 identified that:

> The issue arose in the context of an existing proceeding, in which several prehearing conferences have been held, the parties were well identified, and a process for notifying parties of scheduling changes has been established, including e-mail notification and notices and orders service by the U.S. mail.[68]

The Order concluded that the notice was issued pursuant to the Commission's procedural rules, which provide that there are no specific timing requirements for giving prior notice of continued hearing sessions.[69]

56 The notice of hearing was issued in the context of an arbitration proceeding in an effort to determine whether to enforce the Commission's status quo order. As such, the notice requirements in RCW 34.05.434(1) did not apply. Even if the requirements did apply, we believe the arbitrator reasonably followed the APA and the Commission's procedural rules in issuing the notice.

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[67] TR. 206:13-207:10.
[68] Order No. 10, ¶ 29.
[69] *Id*., ¶ 30, n.3.

57 The Arbitrator provided one-day's notice of the hearing on the basis that the hearing was a continuation of the prehearing conference addressing the Joint CLECs' motion, and not the initial notice in the proceeding. An initial notice of hearing or prehearing conference must include all of the requirements identified in RCW 34.05.434, while subsequent notices of hearing or prehearing conference do not require the same information.[70] While Verizon asserts that WAC 480-07-440(2)(b) refers to continuation of evidentiary hearing sessions "when a hearing is not concluded as scheduled," we interpret the rule to apply not just to evidentiary hearings, but also to other hearings, including prehearing conferences, in a proceeding.

58 As with the issue of the timing of the notice, we find that the arbitrator was not required to provide notice of statutory authority under RCW 34.05.434(2)(f) and (g) in the context of an arbitration proceeding. While Verizon is correct that the notice does not identify the statutory authority for the hearing or reference particular sections of the statutes and rules involved, such notice was not required in this proceeding. If the APA did apply to this proceeding, we find, consistent with our discussion above, that the requirements in RCW 34.05.434(2)(f)and (g) apply only to the initial notice in the proceeding.

59 Verizon's remaining claim is that the alleged procedural irregularities require that the Commission vacate Order No. 10. An appropriate remedy for these alleged procedural errors must address the nature of the harm to Verizon.

60 Verizon raises issues primarily involving due process, *i.e.*, appropriate notice and the nature of the hearing. Verizon was afforded full due process in this matter. As Order No. 10 states, the matter occurred in a proceeding that was well under way, in which parties were accustomed to receiving notices and orders electronically as well as via U.S. mail. Verizon fully participated in the September 9 hearing, appearing at the hearing through counsel both in person

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[70] *See* WASHINGTON ADMINISTRATIVE LAW PRACTICE MANUAL, at 9-19 (rel. 14 – 12/04).

and over the teleconference bridge, providing a witness who testified during the hearing, submitting evidence, cross-examining witnesses present at the hearing, and providing comments before and after the hearing. We find that Verizon suffered no harm relating to any alleged irregularities in the notice of the September 9 hearing, as Verizon fully participated in the proceeding and was denied no due process at the hearing as a result of any problems with notice. We find that vacating Order No. 10 in this proceeding is not an appropriate remedy for such alleged irregularities.

61 Similarly, the only harm Verizon can claim it suffered as a result of the relief granted in Order No. 10 was the loss of revenue due to charging CLECs the UNE-P rate for resale service out of the new Mount Vernon switch. Verizon identified in the hearing that there are approximately 350 UNE-P accounts serviced from the Mount Vernon switch.[71] The likely difference between the resale rate and the UNE-P rate for these accounts is not likely to be substantial.[72] As the merits of the issue, including the pricing for resale service provided out of the Mount Vernon switch, are addressed in Docket No. UT-041127, we find that vacating Order No. 10 in this proceeding is not an appropriate remedy.

62 Given that we deny MCI's and Verizon's petitions for review, we must consider whether the arbitrator's decision in Order No. 10 is affected by our findings in Order No. 3 in Docket No. UT-041127, entered simultaneously with this Order. In that order, we find that Verizon's replacement of the circuit switch violated its interconnection agreements with affected CLECs. While we determine the appropriate remedy for Verizon's breach, we determine that Verizon may charge affected CLECs, beginning March 11, 2005, for resale service the FCC's transition

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[71] TR. 277:23-278:3 (McLean).

[72] UNICOM's witness, Mr. Daughtry, testified that the cost of UNE-P is approximately $18 while the cost of resale is $27. TR. 262:3-8 (Daughtry). Assuming, for purposes of determining a rough estimate, that the CLECs' cost is Verizon's price for the service, Verizon would not be able to charge an additional $9 per month for each of the 350 accounts, a total of approximately $3,150 per month.

UNE-P rate for the transition period identified in the FCC's recent Order on Remand. We modify the arbitrator's decision in Order No. 10 consistent with our decision in Order No. 03 in Docket No. UT-041127.

II. FINDINGS OF FACT

63 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

64 (1) Verizon Northwest Inc. is an incumbent local exchange company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.

65 (2) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.

66 (3) Advanced TelCom, Inc. (ATI), AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle (collectively AT&T), Covad Communications Company (Covad), MCI, Inc. (MCI), and United Communications, Inc., d/b/a UNICOM (UNICOM), are local exchange carriers within the definition of 47 U.S.C. § 153(26), providing local exchange telecommunications service to the public for

compensation within the state of Washington, or are classified as competitive telecommunications companies under RCW 80.36.310 - .330.

67 (4) Verizon filed its arbitration petition with the Commission on February 26, 2004, in order to amend interconnection agreements to include changes in unbundling obligations identified in the Triennial Review Order.

68 (5) Order No. 05, entered on June 15, 2004, requires Verizon to maintain the status quo in providing all of the products and services under existing interconnection agreements with CLECs at the prices set forth in the agreements, until the Commission approves amendments to these agreements or the FCC resolves the legal uncertainties presented by the effect of the mandate in *USTA II*.

69 (6) In Order No. 08, entered on August 13, 2004, the Commission upheld Order No. 05 after considering Verizon's petition for review.

70 (7) On August 31, 2004, ATI, AT&T, Covad, MCI, and UNICOM, collectively the Competitor Group, filed with the Commission a motion for enforcement of Order No. 05, the CLECs' interconnection agreements, and the Triennial Review Order, asserting that Verizon's planned conversion from a circuit switch to a packet switch in Mount Vernon, Washington, on September 10, 2004, would violate these orders and agreements.

71 (8) The arbitrator heard argument on the Competitor Group's motion at a prehearing conference held on September 7, 2004.

72 (9) Based upon concerns raised by the CLECs that Verizon's planned switch conversion might cause disruption to customers, the Commission issued a written notice on September 8, 2004, scheduling a hearing for September 9,

2004, to determine whether the switch conversion would affect customers served by the switch or was purely a matter of pricing.

73 (10) The September 8, 2004, notice of hearing provided one day's notice of the hearing, and did not identify the hearing as an emergency adjudicative proceeding, or identify legal authority or statutes and rules involved in the hearing.

74 (11) The Commission held a hearing on September 9, 2004, at which counsel for ATI, AT&T, Covad, Integra, Sprint, UNICOM, and Verizon entered appearances.

75 (12) During the September 9, 2004, hearing, the arbitrator heard the testimony of MCI's witness Ms. Sherry Lichtenberg, UNICOM's witness, Mr. Michael Daughtry, and Verizon's witness, Ms. Kathleen McLean. All parties appearing at the hearing were allowed the opportunity to cross-examine the witnesses.

76 (13) Verizon fully participated at the September 9, 2004, hearing, appearing through counsel both in person and by teleconference, providing a witness, submitting evidence, cross-examining witnesses, and providing comments before and after the hearing.

77 (14) Prior to and during the September 9, 2004, hearing, the CLECs stated that they did not seek to stop or prevent Verizon's planned switch conversion from going forward.

78 (15) Testimony by Ms. Lichtenberg and Ms. McLean established that MCI does not currently order resale products in Washington, and that MCI would have to create a new internal software interface and modify its billing

systems to order and bill for resale service from the new switch in Verizon's Mount Vernon central office.

79 (16) Ms. McLean testified that Verizon has not programmed the new switch in the Mount Vernon central office to accept or process UNE-P orders.

80 (17) On September 13, 2004, the arbitrator entered Order No. 10, allowing Verizon to proceed with its planned switch conversion, but requiring Verizon to charge affected CLECs the UNE-P rate for resale services provided out of the Mount Vernon switch until the Commission resolved the merits of the CLECs' motion in a separate enforcement proceeding.

81 (18) Order No. 10 included a notice that interlocutory review was a procedure available to the parties.

82 (19) The Commission's procedural rule governing interlocutory review, WAC 480-07-810, does not provide an opportunity for parties to raise additional issues in an answer to a petition for interlocutory review, or the opportunity for parties to file replies.

83 (20) On September 24, 2004, MCI filed a Petition for Review of Order No. 10 in this proceeding.

84 (21) On October 4, 2004, Verizon filed an Answer to MCI's Petition for Review of Order No. 10, as well as its own Petition to Vacate Order No. 10.

85 (22) On October 15, 2004, MCI filed a Reply to Verizon's Answer to MCI's Petition for Review of Order No. 10, as well as a Response to Verizon's Petition to Vacate Order No. 10.

86 (23) Order No. 03 in Docket No. UT-041127, entered simultaneously with this Order, provides that Verizon may charge affected CLECs, beginning March 11, 2005, the transition rate for UNE-P established in the FCC's recent Order on Remand, the UNE-P rate plus one dollar for twelve months, for resale services provided out of the Mount Vernon switch.

III. CONCLUSIONS OF LAW

87 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

88 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

89 (2) Under the Commission's procedural rules, arbitration proceedings are conducted pursuant to 47 U.S.C. § 252, and are *not* adjudicative proceedings under the Administrative Procedure Act (APA). *WAC 480-07-630(2).* The Commission may apply the Commission's procedural rules and provisions of the APA in an arbitration proceeding when reasonable and necessary to conduct the arbitration. *See WAC 480-07-630(11)(b).*

90 (3) Interlocutory review, the review of orders entered during the course of a proceeding, are a matter of discretion to the Commission. *WAC 480-07-810(2).* The Commission may accept review if a petition identifies certain criteria set forth in the Commission's rules, including substantial prejudice not remediable by post-hearing review. *See WAC 480-07-810(3).*

91 (4) MCI's petition for review establishes sufficient prejudice and harm to MCI to justify accepting interlocutory review, given the increased costs and effort MCI will likely incur to order and bill for resale service from the new switch.

92 (5) While Verizon's petition raises issues that are procedural in nature and do not appear to meet the standards for accepting interlocutory review in WAC 480-07-810(2), review is appropriate as the full arbitration proceeding in this docket will not likely be concluded until this summer, and the merits of the issues presented in this proceeding are addressed in Order No. 03 entered simultaneously in Docket No. UT-041127.

93 (6) It is appropriate to allow a party to challenge or raise additional concerns in an answer to a petition for interlocutory review pursuant to WAC 480-07-810, analogous to the procedures for administrative review in WAC 480-07-825(4)(c). The Commission has discretion under WAC 480-07-810 to allow parties to file a reply to an answer to a petition for interlocutory review.

94 (7) The arbitrator correctly determined, based upon the testimony of Ms. Lichtenberg and Ms. McLean, that MCI is capable of initiating and placing resale orders through Verizon's WISE GUI system, and that MCI would need to make certain system changes in order to initiate and process resale orders.

95 (8) The September 8, 2004, notice of hearing identifies as concerns the pricing of switching services, as well as Verizon's decision to replace a circuit switch, issues that might be contrary to Order No. 05, the status quo order in this proceeding.

96 (9) Given the facts presented at the hearing—that the CLECs did not seek to stop the switch conversion, and that Verizon did not program the switch to accept UNE-P orders—it was reasonable for the arbitrator to preserve the status quo for local circuit switching under Order No. 05 by requiring Verizon to maintain the pricing terms for local circuit switching in Verizon's interconnection agreements.

97 (10) MCI's claim that Order No. 10 is not consistent with language in its interconnection agreement with Verizon is an issue addressed on its merits in Docket No. UT-041127, and is not appropriate for review in this proceeding.

98 (11) The September 9, 2004, hearing was conducted as a part of the arbitration proceeding in order to apply the Commission's status quo order, and was not an emergency adjudicative proceeding.

99 (12) Order No. 10 did not grant emergency, injunctive, or interim relief, but was an exercise of "all authority reasonable and necessary to conduct arbitration" under WAC 480-07-630(11)(b) and to enforce the status quo order in place in the arbitration proceeding. Such an action does not require a demonstration of whether the CLECs are likely to succeed on the merits on the underlying legal issue.

100 (13) A notice of hearing in an arbitration proceeding is not required to comply with the notice requirements in RCW 34.04.434, as arbitration proceedings are not adjudications conducted pursuant to the APA.

101 (14) An initial notice of hearing or prehearing conference must include all of the requirements identified in RCW 34.05.434, while subsequent notices of hearing or prehearing conference do not require the same information.

102 (15) The arbitrator complied with the notice requirements of WAC 480-07-440(2)(b) for notice of continued hearings in issuing the September 8, 2004, notice of hearing.

103 (16) Verizon suffered no harm relating to any irregularities in the notice of the September 9 hearing, as Verizon fully participated in the proceeding and was denied no due process at the hearing.

104 (17) Vacating Order No. 10 in this proceeding is not an appropriate remedy for alleged procedural irregularities where Verizon has suffered no actual harm.

105 (18) Any harm Verizon may suffer as a result of the relief granted in Order No. 10 was not substantial, at most the loss of $9.00 per month for each of 350 UNE-P accounts served out of the Mount Vernon switch.

106 (19) Vacating Order No. 10 in this proceeding is not an appropriate remedy where the harm is not substantial and the merits of the issues, including pricing for resale service provided out of the Mount Vernon switch, are addressed simultaneously in Order No. 03 in Docket No. UT-041127.

IV. ORDER

THE COMMISSION ORDERS:

107 (1) MCImetro Access Transmission Services, LLC's, Petition for Review of Order No. 10 is denied.

108 (2) Verizon Northwest Inc.'s Petition to Vacate Order No. 10 is denied.

109 (3) Order No. 10 is modified, consistent with paragraph 140 of Order No. 03 in Docket No. UT-041127, to allow Verizon to charge affected CLECs the FCC's UNE-P transition rate for resale service provided out of the Mount Vernon switch, beginning March 11, 2005.

Dated at Olympia, Washington, and effective this 22nd day of February, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner