BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

In the Matter of THE JOINT PETITION FOR ENFORCEMENT OF INTERCONNECTION AGREEMENTS WITH VERIZON NORTHWEST INC.	)	DOCKET NO. UT-041127 **VERIZON'S MOTION FOR JUDGMENT ON THE PLEADINGS OF, AND ANSWER TO, JOINT PETITION FOR ENFORCEMENT OF INTERCONNECTION AGREEMENTS**

I. INTRODUCTION.

1. In this docket, five CLECs—Advanced TelCom, Inc. ("ATI"), AT&T Communications of the Pacific Northwest, Inc. ("AT&T"), AT&T Local Services on behalf of TCG Seattle ("TCG"), MCImetro Access Transmission Services, LLC ("MCI"), and United Communications, Inc. ("UNICOM")—are asking this Commission to violate the Telecommunications Act of 1996 (the "Act"), ignore controlling FCC orders implementing the Act, and "interpret" interconnection agreements to violate federal law and frustrate federal policy. Although the CLECs attempt to disguise their request as a garden-variety contractual dispute, the Joint Petition makes clear that they are asking this Commission to do what the FCC and the federal courts consistently have refused to do since the Act's inception: require ILECs to unbundle packet switches at artificially low TELRIC rates.

2. The Joint Petition argues that this Commission should rely solely on the various definitions of "local switching" in the CLECs' interconnection agreements to order ILECs to unbundle *packet* switches that are "used to provide traditional, narrowband voice services." Joint Pet. ¶ 12. The CLECs are in essence asking this Commission to declare that the FCC's current definition of unbundled *circuit* switching—the definition they concede is "consistent

with" the definitions contained in the parties' interconnection agreements, *id.* ¶ 19—applies to *packet* switches, *in direct contradiction of both the plain language of FCC regulations and numerous and specific FCC rulings that packet switches (regardless of the functions they provide) are not required to be unbundled.* Neither state contract law, nor this Commission's general authority over intrastate telecommunications, can be used to rewrite *federal* unbundling obligations or interconnection agreements whose only purpose is to implement federal law. There is no plausible legal argument that a general definition of "Local Switching" can trump the FCC's longstanding and specific decisions that packet switches—regardless of the functions they provide—lie entirely outside the federal unbundling regime created by Sections 251 and 252 of the Act.

3. This is also a case where law and good telecommunications policy yield the same result. As the FCC determined, any attempt to require the unbundling of packet switches would itself be an anti-competitive act. It would discourage both ILECs and CLECs from investing and deploying new broadband infrastructure, thereby impeding the deployment of new technologies and denying Washington consumers the benefits of new services and applications.

4. Verizon's conversion to packet switches is part of a larger initiative to upgrade its network to have the capacity to offer advanced services to subscribers in Washington. Saddling the deployment of new technology with burdensome new unbundling duties, including the development of the necessary wholesale operations support systems (OSS), is not only unnecessary and unlawful, but would render these upgrades uneconomic. Such an outcome would directly frustrate the national policy announced by Congress and the FCC of *removing* barriers to capital investment in advanced services and *promoting* new competition from incumbent telephone companies for advanced services. *See* Pub. L. No. 104-104, § 706, 110

Stat. 56, 153 (1996), *reprinted at* 47 U.S.C. § 157 note (directing the FCC and state commissions to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by, among other things, "measures that promote competition," and "other regulating methods that remove barriers to infrastructure investment").

5. It is beyond dispute that packet switches are not the kind of "bottleneck" facilities that would warrant unbundling. As the FCC has observed, three years ago more than 55 CLECs already had deployed at least 1,700 packet switches throughout the United States. *See infra* Part III.A.1, at p. 21 n. 17. There can thus be no doubt that competitive carriers have the ability and the economic incentives to deploy packet switches. The Joint Petitioners are attempting to use a "sharing" obligation that does not lawfully apply to packet switches to hamstring a competitor's deployment of new technology—technology that at least MCI and AT&T are themselves already deploying. This Commission should not countenance a regulatory ploy that will effectively shut down Verizon's investment in advanced services in Washington. Consumers will be the losers, as both ILECs and CLECs will be given strong disincentives to roll out these new technologies.

6. Because the Joint Petition has no basis in law, it must be dismissed on the pleadings pursuant to WAC 480-07-650(4)(b). As the Joint Petitioners concede, this proceeding presents the Commission with a pure issue of law, and the Petition itself recites no disputed material facts.[1] There is thus no need for an evidentiary record or for additional hearings or briefing for the Commission to decide one question of law: can this Commission disregard the FCC's repeated holdings that packet switches are exempt from all unbundling obligations. This

[1] The factual issues regarding irreparable injury and the balance of harms are not relevant at the merits stage of this proceeding. The merits issue is a pure issue of law involving application of FCC Orders and federal judicial decisions defining the scope of infrastructure sharing required under Section 251(d)(2), the nature and purpose of interconnection agreements, and the supremacy of federal law in this area. To the extent the Petitioners attempt to alter their present position and introduce purported "factual disputes" into the merits of this proceeding, Verizon reserves the right to call for a hearing or to submit factual declarations in rebuttal.

Commission should rule expeditiously on this matter, because it will directly influence Verizon's plans for capital upgrades and the offering of new services and applications not only in Washington, but in other areas of the country as well.

II. FEDERAL REGULATORY BACKGROUND AND THE RELEVANT TERMS OF THE INTERCONNECTION AGREEMENTS.

A. Federal Law Has Consistently Precluded UNE Treatment of any Packet Switching Facilities or Equipment.

7. Section 251(d)(1) of the Telecommunications Act of 1996 required the FCC to establish regulations to implement the requirements of Section 251 of the Act. *See* 47 U.S.C. § 251(d)(1). One of those requirements is for ILECs to provide "access to network elements on an unbundled basis." *Id.* § 251(c)(3). The term "network element" means "a *facility* or *equipment* used in the provision of a telecommunications service," and "includes features, functions, and capabilities that are provided *by means of such facility* or *equipment*." *Id.* § 153(29) (emphases added). Section 251(d)(2) further directs "the Commission"—*i.e.*, the FCC—to "determine[] what network elements should be made available for purposes of [Section 251(c)(3)]." *Id.* § 251(d)(2). To be subject to unbundling, the absence of access to a network element must impair the ability of competing carriers to provide local service. *Id.*

1. The FCC's 1996 *Local Competition Order.*

8. When it issued its *Local Competition Order* in August 1996, the FCC set out to establish the set of "network elements" that would be subject to unbundling requirements under Section 251(c)(3) & (d)(2) of the Act. *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499 (Aug. 8, 1996) ("*Local Competition Order*"). Leading up to that Order, "AT&T, MCI, and TCC . . . ask[ed] that the local switching element be defined to include data switching by packet switches," *id.* ¶ 407, and the FCC explicitly rejected

their request, making clear that packet switches were not "facilities or equipment" to be included in the UNE category:

> At this time, *we decline to find*, as requested by AT&T and MCI, *that incumbent LECs' packet switches should be identified as network elements*. . . . [T]he record is insufficient for us to decide whether packet switches should be defined as a separate network element. We will continue to review and revise our rules, but at present, *we do not adopt a national rule for the unbundling of packet switches*.

Id. ¶ 427 (emphases added).

9. Thus, when the FCC issued its *Local Competition Order* implementing Section 251 of the Act, three things were clear: (1) packet switches were not "network elements" and therefore were "facilit[ies] or equipment" *not* subject to unbundling; (2) "local switching," as a "network element," is a functionality that could be provided only by a "facility or equipment" subject to unbundling; and, therefore, (3) the only type of "facility or equipment" that could be unbundled to provide "local switching" as defined in the *Local Competition Order* was a *circuit* switch.

2. The FCC's *UNE Remand Order*.

10. In 1999, the FCC again refused to identify packet switches as "network elements" subject to unbundling obligations. *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 16 F.C.C.R. 1724, ¶ 306 (Nov. 5, 1999) ("*UNE Remand Order*").[2] This decision was based in part on the fact that CLECs and cable companies were "leading the incumbent LECs" in deploying packet switches, *id.* ¶ 307, and because the FCC concluded that unbundling packet switches would neither "open local markets to competition" nor "encourage

[2] The sole exception to the no-unbundling rule related only to the unbundling of Digital Subscriber Line Access Multiplexers at remote terminals, which are not at issue here. And last year's *Triennial Review Order* eliminated even this limited exception. 18 F.C.C.R. at 15,989 ("Incumbent LECs are not required to unbundle packet switching, including routers and Digital Subscriber Line Access Multiplexers . . . , as a stand-alone network element. The Order eliminates the current *limited requirement* for unbundled packet switching." (emphasis added)).

the rapid introduction of local competition to the benefit of the greatest number of customers," *id.* ¶ 309.

3. The FCC's 2003 *Triennial Review Order.*

11. Just last year, in the *Triennial Review Order*, the FCC for the third time affirmed its longstanding policy of refusing to require ILECs to unbundle packet switches. The FCC held:

> We find, *on a national basis*, that competitors are not impaired without access to packet switching . . . . Accordingly, *we decline to unbundle packet switching as a stand-alone network element.* We further find that the [FCC's] limited exception to its packet-switching unbundling exemption is no longer necessary. Lastly, our decision not to unbundle stand-alone packet switching is consistent with the goals of section 706 of the 1996 Act.

Triennial Review Order, 18 F.C.C.R. 16,978, ¶ 537 (footnotes omitted) (emphases added).

12. The FCC based its holding on two rationales. First, it noted that, "the record shows that a wide range of competitors are actively deploying their own packet switches," and "that these facilities are much cheaper to deploy than circuit switches." *Id.* ¶ 538. Based on this market evidence, and the conclusion that "any collocation costs and delays incurred by requesting carriers . . . do not rise to a level so as to require us to modify the [FCC's] previous finding not to unbundle packet switching," the FCC explicitly found that CLECs are *not* impaired without packet switches:

> [T]here do not appear to be any barriers to deployment of packet switches that would cause us to conclude that requesting carriers are impaired with respect to packet switching. We therefore find that the evidence in the record confirms the [FCC's] findings in the *UNE Remand Order* that competitors continue to actively deploy their own packet switches, . . . and *are not impaired without unbundled access to these facilities from incumbents.*

Id. ¶ 539 (footnotes omitted) (emphasis added).

13. Second, the FCC's refusal to order the unbundling of packet switches was guided in part by its goal (consistent with Section 706 of the Act) of encouraging further deployment of advanced telecommunications technology:

> Finally, because packet switching is used in the provision of broadband services, our decision not to unbundle stand-alone packet switching is also guided by the goals of, and our obligations under, section 706 of the 1996 Act. In order to ensure that both incumbent LECs and competitive LECs retain sufficient incentives to invest in and deploy broadband infrastructure, such as packet switches, we find that requiring no unbundling best serves our statutorily-required goal. Thus, *we decline to require unbundling on a national basis for stand-alone packet switching* because it is the type of equipment used in the delivery of broadband.

Id. ¶ 541 (footnotes omitted) (emphasis added); *id.* at ¶ 290 ("[B]y *prohibiting access* to the packet-based networks of incumbent LECs, we expect that our rules will stimulate competitive LEC deployment of next-generation networks." (emphasis added)). But the fact that packet switches can be used to provide advanced services was not determinative. To the contrary, in addition to concluding that packet switches were readily available to CLECs and therefore not bottleneck facilities subject to unbundling, the FCC also expressly held that the replacement of a circuit switch with a packet switch eliminates any unbundling requirement—even if the *sole purpose* of such deployment is to avoid having to continue to provide unbundled switching. It held:

> [T]o the extent that there are significant disincentives caused by the unbundling of circuit switching, incumbents can avoid them by deploying more advanced packet switching. This would suggest that incumbents have every incentive to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage.

Id. ¶ 446 n.1365. This makes perfectly clear that, under binding FCC precedent, ILECs "can avoid" the "unbundling of circuit switching" by "deploying more advanced packet switching."

14. Furthermore, the FCC specifically rejected the CLEC argument that ILECs have an obligation under the Act or FCC precedent to unbundle packet switches when they are used to provide voice services. Shortly after the FCC's issuance of the *UNE Remand Order*, MCI filed a petition for clarification with the FCC. *Pet. of MCI WorldCom for Clarification*, CC Docket No. 96-98, at 1 (filed Feb 17, 2000) ("MCI Pet. for Clarification"). As its first and foremost issue of "great importance" to "provide essential guidance to the industry," MCI urged "that even if it does not require ILECs to make packet switching available as an unbundled network element for the provision of advanced services," the FCC should clarify that "ILECs are required to make packet switching available as a UNE when the ILEC is using it to provide voice services." *Id.* at 1-2. In particular, while conceding that the FCC had "chosen to restrict CLEC access to unbundled packet switching," MCI nonetheless requested that "even if the Commission does not require ILECs to make packet switching available as an unbundled network element for the provision of advanced services, *it should clarify that packet switching must be made available as a UNE when the ILEC is using it to provide voice services.*" *Id.* at 2-3 (emphasis added); *id.* (MCI asking the FCC to "clarify that packet switching must be unbundled as a network element to the extent that it is used to provide narrowband or voice services").

15. The FCC rejected MCI's request, making abundantly clear that packet switching *equipment* need not be unbundled *even when used to provide voice services*. It held: "Because we decline to require unbundling of packet-switching *equipment*, we deny WorldCom's petition[] for . . . clarification requesting that we unbundle packet-switching *equipment* . . . ." *Triennial Review Order*, 18 F.C.C.R. 16,978, ¶ 288 n.833 (emphases added).

16. The FCC's general approach of encouraging capital investment and deployment by refusing to require the unbundling of advanced technologies was reaffirmed by the D.C.

Circuit. On appeal of the FCC's decision not to require ILECs to unbundle broadband facilities generally, including fiber loops, hybrid loops, and high capacity enterprise switching, the D.C. Circuit expressly endorsed the FCC's decision to refrain from imposing unbundling requirements in order to promote ILEC investment in new technologies. *USTA II*, 359 F.3d at 580 ("We therefore hold that the Commission reasonably interpreted § 253(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment.").

17. In sum, the CLECs lost the very issue they now bring before this Commission *three times* at the federal level, before the body to which Congress assigned the exclusive duty to define "network element" subject to unbundling obligations. *See infra* Part III.A.1, at pp. 19-22.

B. Verizon's Interconnection Agreements with the Joint Petitioners Embody this Binding Federal Law.

18. Verizon's interconnection agreements with Joint Petitioners are entirely consistent with—and must be read to conform to—this background of clear and consistent federal rulings that packet switches are not to be unbundled.

1. AT&T's Interconnection Agreement.

19. Soon after the FCC's initial refusal in the *Local Competition Order* to identify packet switches as a "network element" and thereby subject them to unbundling, AT&T petitioned this Commission on August 19, 1996, to arbitrate an interconnection agreement with Verizon pursuant to Section 252(b)(1) of the Act. *See Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest and GTE Northwest Incorporated*, Arbitrator's Report and Decision, Docket No. UT-960307, at 1 (Dec.

11, 1996) ("AT&T Arbitration Decision").[3] Both the administrative proceedings leading to the agreement and the agreement itself make plain that Verizon's unbundling obligations extend no further than the federal requirements, and do not require the unbundling of packet switches.

20. In the arbitration proceeding, the question of "What should the unbundled switch element include?" was contested. *Id.* at 33. Relying on the *Local Competition Order*, the arbitrator held that AT&T's proposal for switching was too broad and that Verizon's was too narrow, *id.* at 35 ("Decision: Neither offer complies on the FCC [*Local Competition Order*]."), and ordered Verizon to unbundle local switching to the extent required by the *Local Competition Order*, *id.* ("As a result, the Arbitrator orders that [Verizon] unbundle pursuant to the FCC [*Local Competition Order*]."). Later, in its post-arbitration brief submitted to this Commission, AT&T admitted both that "AT&T's proposed contract is consistent with the Act [and] the FCC [*Local Competition Order*]," and that "most of the requirements in that contract are derived directly from the Act, the FCC [*Local Competition Order*], and this Commission's Orders." Post-Arbitration Brief of AT&T Communications of the Pacific Northwest, Inc., filed in Docket No. UT-960307, at 7-8 (Nov. 15, 1996).

21. After further proceedings, the Commission approved the AT&T interconnection agreement on August 25, 1997. The Commission was required under Section 252(c)(1) to "ensure" that the conditions imposed on Verizon—including the designation of any switching facilities as "network elements"—"meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1); *see also id.* § 252(e)(2)(B). Accordingly, the Commission held as its first "conclusion of law" that "[t]he arbitrated provisions of the Agreement . . . meet the requirements of Section 251 of the

[3] Verizon is the successor to GTE Northwest Incorporated. For ease of reference, "GTE Northwest Incorporated" is referred to as "Verizon" throughout this pleading.

Telecommunications Act of 1996." *Petition for Arbitration of an Interconnection Agreement Between AT&T Comms. of the Pacific Northwest, Inc. and GTE Northwest, Inc.*, Docket No. UT-960307, at 38 (Aug. 25, 1997); *id.* at 15-17 (holding that "[t]he Arbitrator's approach to the general unbundling issue is consistent with the FCC's order and the Eighth Circuit decision").

22. The AT&T interconnection agreement itself confirms that it is not a mere "contract" under Washington law, but rather is a federal regulatory device, which exists solely to implement the network sharing duties imposed on Verizon by Section 251 of the Act. Indeed, even the opening recitals to the agreement make plain that it is merely an instrument to implement the unbundling requirements of the Act.[4]

23. In light of the FCC's decision in the *Local Competition Order* refusing to require the unbundling of packet switches, the AT&T Agreement's clear limitation of Verizon's unbundling obligations to those required under federal law[5] can compel only one conclusion: Verizon has no obligation to provide "local switching" from a packet switch.

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[4] *See, e.g.*, AT&T ICA at 1 ("WHEREAS, The Telecommunications Act of 1996 (the 'Act') was signed into law on February 8, 1996; and WHEREAS, the Act places certain duties and obligations upon . . . Telecommunications Carriers, with respect to . . . , in certain cases, the offering of certain unbundled network elements . . . ; and WHEREAS, AT&T . . . has requested . . . the provision of Network Elements . . . pursuant to the Act and in conformance with [Verizon]'s and AT&T's duties under the Act . . . ."). Moreover, in the "Introduction" to Part II, which governs "Unbundled Network Elements," the first principle put forth is that Verizon agrees to provide unbundling network elements only to the extent it is obligated to under Section 251(c)(3) and the relevant FCC rules: "This Part II sets forth the unbundled Network Elements that [Verizon] agrees to offer to AT&T *in accordance with its obligations* under Section 251(c)(3) of the Act and 47 CFR 51.307 to 51.321 of the FCC Rules." AT&T ICA § 31 (emphasis added). (The AT&T ICA definition of "Network Element" is substantively identical to the definition of that term in the Act. *Compare* AT&T ICA, Attach. 11 (definition of "Network Element" or "Element"), *with* 47 U.S.C. § 153(29)).

[5] Approximately a year and a half after the Commission approved the AT&T interconnection agreement, AT&T's affiliate, TCG, adopted the terms of the AT&T agreement. *See* TCG Adoption Letter Agreement between TCG and Verizon (April 5, 1999) ("TCG Adoption Agreement"). On May 12, 1999, the Commission approved TCG's adoption of the AT&T agreement, holding as a "conclusion of law" that "[t]he Agreement meets the criteria of Section 251 and 252 of the Act, including Section 252(e)." *Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between TCG Seattle and GTE Northwest Inc.*, Docket No. UT-990325, at 2 (May 12, 1999). The discussion above concerning the AT&T interconnection agreement therefore applies with equal force to its affiliate TCG.

2. The ATI and UNICOM Interconnection Agreements.

24. Well after the FCC's issuance of the *Local Competition Order* and the *UNE Remand Order*, Verizon and ATI entered into a supplemental agreement covering the terms and conditions of Verizon's provision of unbundled network elements to ATI, *see* ATI Supp. Agmt. No. 3 (June 18, 2001) ("ATI UNE Agmt."),[6] and Verizon and UNICOM entered into an interconnection agreement that became effective on May 30, 2001, *see* UNICOM ICA § 2.1 & Glossary § 2.35.

25. Both the ATI UNE Agreement and the UNICOM ICA are very clear that Verizon's obligation to provide unbundled network elements does not go beyond what is specifically required by the Act and FCC orders implementing the Act:

> Verizon shall provide to [ATI], in accordance with this Agreement . . . and the requirements of Applicable Law, access to Verizon's Network Elements on an unbundled basis and in combinations (Combinations); provided, however, that *notwithstanding any other provision of this Agreement*, Verizon shall be obligated to provide unbundled Network Elements (UNEs)[7] and Combinations to [ATI] *only to the extent required by Applicable Law* and *may decline to provide UNEs or Combination to [ATI] to the extent that provision of such UNEs or Combination are not required by Applicable Law.*

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[6] ATI had earlier adopted the arbitrated Interconnection, Resale and Unbundling Agreement between Verizon and Electric Lightwave ("ATI ICA"). *See* ATI UNE Agreement, Recitals; Adoption Letter between Verizon and ATI (Feb. 18, 2000) ("ATI Adoption Letter"). The ATI ICA and the ATI Adoption Letter, moreover, clearly demonstrate that those agreements are merely instruments to implement federal unbundling obligations and that Verizon's unbundling obligations do not go beyond those required by the Act. *See, e.g.*, ATI ICA § 32 ("[Verizon] and [ATI] 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 governmental authority will be deemed to automatically supersede any terms and conditions of this Agreement."); ATI Adoption Letter § 3 ("As the Interconnection and UNE Terms are being adopted by you pursuant to your statutory rights under section 252(i), [Verizon] does not provide the Interconnection and UNE Terms to you as either a voluntary or negotiated agreement."); *id.* § 4 ("[N]othing herein shall be construed as or is intended to be a concession or admission by either [Verizon] or [ATI] that any contractual provision required by the Commission in Docket No. UT-980370 (the ELI [*i.e.*, Electric Lightwave] arbitration) or any provision in the Interconnection and UNE Terms complies with the rights and duties imposed by the Act, the decision of the FCC and the Commissions, the decisions of courts, or other law, and both [Verizon] and [ATI] expressly reserve their full right to assert and pursue claims arising from or related to the Interconnection and UNE Terms.").

[7] The ATI ICA, like the Act, defines an Unbundled Network Element as "a facility or equipment used in the provision of a Telecommunications Service." ATI ICA § 1.79; *see* UNICOM ICA, Glossary § 2.65 ("Network Element" "[s]hall have the meaning stated in the Act.").

ATI UNE Agmt. § 1.1 (emphases added); UNICOM ICA, Unbundled Network Elements Attachment § 1.1 (same except for company names) ("UNICOM UNE Atchmt."); *see also* ATI UNE Agmt. § 10 ("Verizon shall provide [ATI] with access to the Local Switching Element . . . *in accordance with, but only to the extent required by*, Applicable Law." (emphasis added)); UNICOM UNE Atchmt. § 10 (same except for name of company).[8]

26. In approving the negotiated agreements of ATI and UNICOM, this Commission again entered specific conclusions of law that "[t]he Agreement meets the requirements of Section 251 and 252 of the Telecom Act, including Section 252(e)."[9] Again, the ATI and UNICOM agreements make no separate mention of packet switching or packet switches.

3. The MCI Interconnection Agreement.

27. Years after the *Local Competition Order* and the *UNE Remand Order*, and almost four months after the FCC's release of the *Triennial Review Order*, MCI filed on December 19, 2003, its intention to adopt the terms of the arbitrated AT&T interconnection agreement. The Commission approved the adoption and set an effective date of December 31, 2003.

28. Neither one of the two amendments to the MCI interconnection agreements addresses packet switches or purports to extend the underlying agreement itself

[8] Both agreements, moreover, establish that Verizon is not required to unbundle network elements if the requisite "facility or equipment" is not in Verizon's network, and that Verizon is not obligated to construct any new "facility or equipment" to offer an unbundled network element. *See* ATI UNE Agmt. § 1.2 ("Except as otherwise required by Applicable Law: (a) Verizon shall be obligated to provide a UNE or Combination pursuant to this Agreement only to the extent such UNE or Combination, and the equipment and facilities necessary to provide such UNE or Combination, are available in Verizon's network; [and] (b) Verizon shall have no obligation to construct or deploy new facilities or equipment to offer any UNE or Combination."); UNICOM UNE Atchmt. § 1.2 (same).

[9] *Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Advanced Telecom, Inc. and Verizon Northwest Inc.*, Docket No. UT-993018, at 2 (July 25, 2001); *Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between United Communications, Inc. and Verizon Northwest Inc.*, Docket No. UT-013061, at 2 (July 25, 2001) (same).

beyond what is required by federal law and FCC regulations.[10] The first amendment is meant to establish new reciprocal compensation rates and interconnection points; nothing in that amendment can be read to establish new rights to access that are not part of the federally established UNE regime. Indeed, the definitions of both "Applicable Law" and the "UNE-P" in that Agreement both reference and incorporate federal law and FCC decisions into the amendment itself. MCI ICA, Amdt. 1, §§ 4(b), 4(q) (Dec. 1, 2003). The second amendment addresses line-splitting provisioning and pricing, again it does not address packet switching and applies only to circuit-switched based services such as ISDN and to xDSL to the extent DSLAM unbundling was in place at that time.[11] Nothing in the second amendment purports to add UNEs contrary to federal law, or allow any state commission to do so.

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[10] Indeed, this reading of the MCI agreement and its subsequent amendments is confirmed by a December 31, 2003 adoption letter and pricing supplement, which was sent by Verizon to MCI and filed with this Commission. That letter provides in pertinent part:

> For the avoidance of doubt, adoption of the Terms [of the AT&T interconnection agreement] does not include adoption of any provision imposing an unbundling obligation on Verizon that no longer applies under the [*Triennial Review Order*] released by the Federal Communications Commission ("FCC") on August 21, 2003 in CC Docket Nos. 01-338, 96-98, 98-147 . . ., which became effective on October 2, 2003. In light of the effectiveness of the Triennial Review Order, any reasonable period of time for adopting such provisions has expired under the FCC's rules implementing section 252(i) of the Act (*see, e.g.*, 47 CFR Section 51.809(c)).

MCI Adoption Ltr. § 2. The letter also made clear to MCI that "Verizon reserves the right to deny MCIm's adoption and/or application of the Terms, in whole or in part, at any time . . . to the extent that Verizon otherwise is not required to make the Terms available to MCIm under applicable law." *Id.* § 10; *see also id.* § 8 ("As the Terms are being adopted by you pursuant to your statutory rights under section 252(i), Verizon does not provide the Terms to you as either a voluntary or negotiated agreement."); *id.* § 9 ("Nothing herein shall be construed as or is intended to be a concession or admission by Verizon that any contractual provision required by the Commission in Docket No. UT-960307 (the AT&T arbitration) or any provision in the Terms complies with the rights and duties imposed by the Act, the decisions of the FCC and the Commissions, the decisions of the courts, or other law, and Verizon expressly reserves its full right to assert and pursue claims arising from or related to the Terms."). MCI has used the pricing terms in this subsequent adoption letter and has therefore accepted all the terms of this letter.

[11] On July 1, 2004, MCI and Verizon amended the MCI interconnection agreement. In that amendment the parties agreed that:

> Nothing contained in the Terms [of the MCI interconnection agreement] or this Amendment shall be deemed to constitute an agreement by Verizon that any item identified in the Terms or this Amendment as a network element is (A) a network element under 47 U.S.C. § 251(c)(3) or 47 C.F.R. Part 51, or (B) a network element Verizon is required by 47 U.S.C. § 251(c)(3) or 47 C.F.R. Part 51 to provide to MCIW on an unbundled basis.

MCI ICA, Amdt. 2, § 1(c)(1).

C. Verizon's Maiden Attempt to Deploy New Packet Switches in The State Of Washington.

29. In April 2004, in reliance on the FCC's repeated rulings that subjecting packet switches to onerous unbundling obligations was "prohibited," *Triennial Review Order*, 18 F.C.C.R. 16,978, ¶ 290, Verizon announced that it would begin to replace its existing circuit switches with next-generation packet switches. Recognizing that its existing circuit switch at the Mt. Vernon, Washington facility was close to exhaust, Verizon scheduled Mt. Vernon to receive one of the first new packet switches. Verizon complied with the federal notice requirements by publicly posting a short-term network disclosure for the Mt. Vernon switch on April 28, 2004, and certified that posting with the FCC on May 6, 2004. Joint Pet. Ex. C-3, at 2 n.3. No CLEC objected to the network disclosure.

30. On June 8, 2004, Verizon mailed a notice to CLECs, including each of the Joint Petitioners, advising them of its plans to replace the existing Mt. Vernon Nortel DMS-100 Circuit Switch with a new Nortel Succession Packet Switch.[12] The cut over was scheduled to take place on September 10, 2004. Joint Pet. Ex. A, at 2. On July 20, Verizon mailed another notice reminding carriers of the impending cut over date. Joint Pet. Ex. B.

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[12] Verizon notes that the Joint Petitioners have not argued that Verizon was required to provide six months notice regarding Verizon's planned deployment of packet switches. Instead, AT&T alone asserts in an affidavit that Verizon did not comply with the "network modifications provisions" of its ICA, Affidavit of Mitchell H. Menezes ("Menezes Aff.") and attaches a letter where it asserted that Verizon failed to comply with a six-month notice provision. *Id.* ¶ 7 & Attach. 2, at 1 (7/30/04 Letter from Eileen M. Halloran to Jeffrey A. Masoner). This argument is not advanced in the Joint Petition itself and for that reason alone has been waived. Furthermore, this omission is not surprising because, as explained in the letter response AT&T itself attached to the Menezes Affidavit, Verizon was not required to give AT&T six months notice of its deployment of packet switches. *Id.* Attach. 3, at 2 & n.3 (8/4/04 Letter from John S. Cullina to Eileen M. Halloran). Even assuming, *arguendo*, that Verizon was subject to a six-month notice requirement under the ICA, AT&T's argument is now moot (and was implicitly rejected by ALJ Rendahl), because Joint Petitioners have not objected to Verizon's deployment of packet switches, and Verizon has been expressly permitted to deploy packet switches under the terms of *Order No. 10*. Last, Verizon notes that AT&T has expressly disclaimed that it is affected in any way by Verizon's deployment of a packet switch in Mt. Vernon, Menezes Aff. ¶ 6, and AT&T therefore suffered no contract damages even if Verizon had breached any notice requirement, which it has not. For all these reasons, the record is clear that the proper notice was given and certified by the FCC.

31. It was not until July 30 that AT&T sent a letter to Verizon contending for the first time that Verizon could not discontinue the provision of UNE-P service unless it first obtained AT&T's consent. Joint Pet. Ex. C-2. (Nowhere in its letter did AT&T argue, as it now does before this Commission, that Verizon must unbundle packet switches for voice services.). Verizon responded on August 4, pointing out that AT&T does not have any UNE-P customers who are served out of the Mt. Vernon switch, and explaining that both federal law and the interconnection agreement make plain that packet switches are not subject to unbundling requirements. Joint Pet. Ex. C-3.

32. None of the other Joint Petitioners claims to have communicated, or did communicate, any concerns or objections to Verizon. Nor does it appear that any of these carriers took any steps to prepare for the Mt. Vernon deployment. Indeed, as they admit in their Joint Petition, all of the carriers other than AT&T decided not to contact Verizon and made no effort to resolve their dispute. Joint Pet. ¶¶ 7-10. Instead, the Joint Petitioners bypassed discussion altogether, and then, at the eleventh hour, brought their alleged concerns directly to this Commission and demanded expedited review. The CLECs' strategy thus appears to have been to wait until the last minute—*i.e.*, just as Verizon was finalizing its deployment of the new packet switches—in order to create an artificial crisis around Verizon's planned upgrade of its network.

33. The CLECs' first suggestion that Verizon is required to unbundle packet switches was in their response to Verizon's petition for reconsideration of *Order No. 5*, in Docket No. UT-043013. On August 31, the Commission issued a new order in which it refused to "clarify" *Order No. 5* as the CLECs requested, explaining that the CLECs' claimed entitlement to unbundled packet switches from Verizon was a new issue that should be addressed in its own

separate proceeding. *Order No. 8* ¶ 35. The Commission thus directed the CLECs to file a petition for enforcement. *Id.* Instead of following this instruction, the CLECs filed a motion to enforce *Order No. 5*, not a separate petition for enforcement. Recognizing that their dilatory tactics had brought the cut over date even closer, the CLECs also sought expedited review.

34. During a prehearing conference on September 7, the CLECs argued—for the first time—that they would be harmed if Verizon exercised its right under federal law to cease offering local circuit switching (at a UNE-P rate) after the installation of the Mt. Vernon packet switch. *Order No. 10*, ¶ 11, Docket No. UT-043015 (Sept. 13, 2004). On September 9, the ALJ held an evidentiary hearing to consider the balance of harms and announced a preliminary ruling from the bench, declining to order Verizon to stop the cut over to packet switches. Verizon then performed the cut over and deployed the packet switch as planned on September 10, 2004.

35. On September 13, the ALJ released *Order No. 10* and formally authorized Verizon to make the cut over and to provision and bill existing UNE-P customers as resale customers (subject to the CLECs' right to dispute the amount of the resale bills). *Order No. 10* ¶ 35. The CLECs filed the Joint Petition that is the subject of the current proceeding. The sole issue presented by the CLECs' petition is a pure question of law, and the CLECs' sole claim is that Verizon has violated its interconnection agreements. Nowhere do the Joint Petitioners allege that federal law somehow obliges Verizon to make its packet switches available on an unbundled basis—which is the dispositive legal issue.

III. THE INTERCONNECTION AGREEMENTS CANNOT BE "ENFORCED" TO REQUIRE VERIZON TO UNBUNDLE PACKET SWITCHES OR TO REQUIRE VERIZON TO FORGO PACKET SWITCH DEPLOYMENT.

36. The Joint Petitioners assert that their "Petition is *not* . . . a request that Verizon unbundle packet switching." Joint Pet. ¶ 5. Nothing could be further from the truth. Verizon

has *already deployed* the Mt. Vernon packet switch, and unbundled circuit switching is no longer available in the affected wire centers. Joint Petitioners are asking for precisely this remedy.[13] This request violates, and conflicts with, federal statutory and regulatory law, as explained above, *see supra* Part II.A. ILECs have never been required under federal law to unbundle packet switches, regardless of the uses to which the ILECs put them. In fact, the FCC has expressly stated that it has prohibited such unbundling *on a nationwide basis* as contrary to the test embodied in Section 251(d)(2) and the focus on deployment of advanced telecommunications facilities by both ILECs and CLECs embodied in Section 706 of the 1996 Act. That should be the end of the matter, given that the unbundling regime is one of *federal law*, and the FCC's decision that packet switches cannot be unbundled pursuant to Section 251, as well as the balance the FCC has struck between infrastructure sharing and encouraging investment in new facilities, are determinations that cannot be overridden or second-guessed by any state commission. Undoubtedly this legal reality is why the Joint Petitioners make the inconsistent representation that they are not seeking UNE status for packet switches, while at the same time asking this Commission to impose UNE ordering, UNE provisioning, UNE billing, and UNE pricing on packet switches.[14] The argument is as self-contradictory and as absurd as it sounds.

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[13] Joint Petitioners could not plausibly be asking this Commission to force Verizon to abandon its deployment of packet switches altogether. *Order No. 10* permitted Verizon to perform the cut over at Mt. Vernon, and Verizon did perform that cut. Joint Petitioners nowhere allege (or offer any support for the absurd proposition) that Verizon could *reverse* deployment and cut its network back to *circuit switches*. Nor do they advance the equally absurd position that Verizon could be required to deploy *both* circuit switches and packet switches in the same location. Either of these alternatives would risk fundamental service disruptions for both CLEC and Verizon retail subscribers, and either of these alternatives would themselves violate, or be preempted by, federal law encouraging deployment of new technology and advanced services.

[14] Verizon has made the cut over to packet switching. Joint Petitioners are requesting access to this packet switching as "unbundled switching," Joint Pet. ¶ 5, and as part of "combinations of UNEs that include unbundled switching," *id.* ¶ 11, and are treating packet switching as an "unbundled network element" throughout their Joint Petition. *See, e.g., id.* ¶ 20 (arguing implicitly that it is "technically feasible to provide UNE-P over packet switches" and seeking the provision of what they call "traditional, narrowband services using unbundled switching

37. Joint Petitioners make only two feeble attempts at any legal argument and neither has any merit. First, they assert that the FCC somehow limited its decision not to require unbundling of "packet switching" only to the provision of broadband services from a packet switch. But this argument is refuted by the plain words of the 1996 Act and by the FCC's decisions to the contrary. Second, they argue that the interconnection agreements effectively trump any federal decision not to require unbundling. This argument also is inconsistent with the Act itself, with FCC precedent, and with the law of preemption.

A. Federal Law Prohibits this Commission from Making a Determination that Packet Switches Are a Network Element Subject to Unbundling.

38. Federal law and policy, as consistently articulated by the FCC and the federal courts, could not be clearer: packet switches are not a network element subject to unbundling requirements as a matter of law. Federal law affirmatively forbids burdening the deployment of this new switching technology—which CLECs themselves are deploying in their own networks—with regulatory requirements that apply only to legacy plant without access to which competitive carriers can show they are "impaired" in the provision of local service.[15]

39. Because the FCC has determined that packet switches (regardless of the function they serve) are *not* a "network element" subject to unbundling, *see supra* Part II.A, at pp. 4-9, Joint Petitioners' demand that they have access to voice service over Verizon's packet switch as

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in the are served by the Mount Vernon switch," which switch is a packet switch); *id.* ¶ 21 (arguing that only packet switching "used to provide broadband services" is not subject to federal unbundling requirements); *id.* ¶¶ 22-23 (seeking "to do the same" as Verizon, namely "to provide [so-called] traditional, narrowband voice service to [their] end users served by the Mount Vernon switch using the new packet switch" as "'elements of the UNE-P'" (citation omitted)); *id.* ¶ 27(1) (arguing that the Verizon is required to provide "unbundled switching . . . [in] the Mount Vernon switch," which is a packet switch).

[15] Just like CLEC deployment of packet switches, Verizon's deployment constitutes a risky capital investment in new technologies to provide new services and greater functionalities. Verizon's efforts to upgrade its network to compete with cable providers, VOIP providers, and facilities-based CLECs have been expressly encouraged by federal law, and there is no conceivable rationale why Verizon should be saddled with the unique burden of sharing new plant at TELRIC rates with all comers. *See, e.g., Triennial Review Order*, 18 F.C.C.R. 16,978, ¶ 446 n.1365; *UNE Remand Order*, 16 F.C.C.R. 1724, ¶¶ 316-17. Such a decision would send exactly the wrong message by discouraging the creation of new investment, new technology, and new jobs in Washington.

an unbundled network element subject to TELRIC rates is a naked demand to have *this Commission* find both the existence of a "network element" and make an "impairment" finding in the face of FCC decisions directly contrary to that result. This Commission has no authority under either federal or state law to do so.

40. Section 251(d), in no uncertain terms, assigns the task of "determin[ing] which network elements shall be made available to CLECs on an unbundled basis" *solely to the FCC. USTA II*, 359 F.2d at 565 (noting that Section 251(d)(2) "instructs 'the Commission' to 'determine[] which network elements shall be made available to CLECs on an unbundled basis"); *id.* at 574 ("[T]he [FCC] may not subdelegate its § 251(d) authority to state commissions."). As the Supreme Court's decision in *Iowa Utilities Board* and the D.C. Circuit's decisions in *USTA I and USTA II* make clear, part and parcel of this determination is the FCC's "balancing" between the Congressional directives of promoting entry into the telecommunications market through infrastructure sharing and creating incentives to invest in new technologies. *Iowa Utils. Bd.*, 525 U.S. at 429-30 (Breyer, J., concurring in part and dissenting in part); *accord USTA II*, 359 F.3d at 582 (emphasizing that, "while declining to unbundle hybrid loops might reduce broadband competition, the Commission reasonably concluded that such a decision might be effective in stimulating investment in all-fiber loops"); *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA I*") (recognizing that "unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation," but that "a broad mandate can facilitate competition by eliminating the need for separate construction of facilities," and mandating that *the FCC* strike the "'balance' between these competing concerns" (citation omitted)).[16]

[16] The *USTA II* Court noted quite pointedly that *other* provisions of Sections 251 and 252 explicitly recognized a larger state role in parts of the federal intrastate competition regime, in marked contrast to the designation of UNEs

41. Indeed, in performing this balancing, the FCC expressly recognized that, even if one result of the replacement of circuit switches with packet switches is the elimination of mass market unbundling, such an outcome is both appropriate and desirable. *See supra* Part II.A.3; *Triennial Review Order*, 18 F.C.C.R. at 17,253 & n.1365 (¶ 446) ("[I]ncumbents [would] have every incentive to deploy these more advanced networks, *which is precisely the kind of facilities deployment we wish to encourage.*" (emphasis added)).

42. No state can upset that balance by rendering decisions contrary to the FCC as to what is a "network element" subject to unbundling. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (obstacle preemption where the "somewhat delicate balance of statutory objectives" could "be skewed by allowing" state law claims); *see, e.g., Edgar v. Mite Corp.*, 457 U.S. 624, 634 (1982) (state law preempted by federal law where it "upset the careful balance struck by Congress"); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-52, 156-57 (1989) (state law preempted where it contravened the bargain struck by federal law, even though Congress was silent on the particular subject matter). Joint Petitioners' request that this Commission upset that delicate balance and exercise the Section 251 authority expressly delegated only to the FCC, therefore, should be rejected outright as a matter of law.[17] Quite simply, an FCC decision refusing to declare a

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themselves pursuant to Section 251(d)(2). *USTA II*, 359 F.3d at 568 ("[T]he fact that other provisions of the statute carefully delineate a particular role for the state commissions, but § 251(d)(2) does not, reassures us that our result is consistent with congressional intent.").

[17] Even if this Commission had the statutory authority to designate "network elements" beyond those identified by the FCC (which it does not), and further had authority to make impairment findings where the FCC has found no impairment (which it does not), *see* 47 U.S.C. § 251(d)(2); *USTA II*, 359 F.3d at 566, it could not "review" or "override" the specific conclusions reached by the FCC on these issues. The FCC's findings declining to unbundle packet switches were expressly made on a nationwide basis—they leave no room for a state commission to second guess them. *First*, the FCC has repeatedly found that the widespread deployment and availability of packet switches by CLECs themselves precludes any finding of impairment. As the FCC found three years ago, more than 55 CLECs already had deployed at least 1,700 packet switches throughout the United States. *Triennial Review Order*, 18 F.C.C.R. 16,978, ¶ 538. *Second*, both the FCC and the D.C. Circuit have recognized that CLECs have the same incentives to deploy packet switching technologies as do the ILECs, *e.g.*, lower cost, more reliable voice telephony

particular type of facility a network element subject to unbundling preempts and prohibits any state from imposing its own unbundling requirement.[18]

43. This Commission is simply not free to designate a UNE or make a finding of impairment on its own, where the FCC has made a contrary finding and the criteria established by FCC decisions and judicial review *all point strongly against unbundling.* Whether the decision is couched as interpretation or enforcement of an interconnection agreement or enforcement of Order No. 5 does not matter. *See infra* Part III.C. It would constitute an exercise of state authority contrary to federal law, federal regulation, specific FCC decisions, and the plain language and purposes animating the 1996 Act.

B. Federal Law Requires No Unbundling of Packet Switching Equipment, Irrespective of the Service Provided over the Equipment.

44. Joint Petitioners attempt to avoid this clear federal law and its application in this case by asserting that "Verizon's position ignores that the FCC's decision in the *TRO* not to unbundle[] packet switching was limited to the *functionality* of packet switching used to provide

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service, as well as the capability to offer more vertical services, advanced data services, VOIP, and video. *See USTA II*, 359 F.3d at 579-81 (upholding FCC decision not to unbundled fiber loops because CLECs had strong incentives to deploy). *Third*, both the FCC and the D.C. Circuit have held that the presence of strong intermodal competition in IP technologies carrying both voice and data from other wireline (cable) and wireless (satellite, PCS) providers precludes any finding that unbundling would promote competition or is necessary to protect consumers. *USTA I*, 290 F.3d at 428-29 (FCC *must* consider presence of intermodal competition in unbundling calculus); *USTA II*, 359 F.3d at 584-85 (upholding FCC decision *not* to require unbundling of upper bandwidth of local loop based on presence of intermodal competition). *Finally*, as the D.C. Circuit has made clear, the availability of equivalent services at the resale price (or by taking the entire loop at TELRIC rates and providing a switching functionality of the CLEC's choice) precludes a finding of "impairment" as a matter of law. *See USTA II*, 359 F.3d at 577 (FCC cannot ignore alternatives offered by ILECs to UNEs, such as tariffed services).

[18] Nor can a general "savings clause" negate the presence of conflict preemption where state action conflicts with or frustrates the purposes of federal law or regulation. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (savings clauses "[do] not bar the ordinary working of conflict pre-emption principles"). Indeed, 47 U.S.C. § 261(c) affirmatively precludes the Joint Petitioners' arguments here, for it expressly requires that any additional state regulation be "necessary to further competition" and "not inconsistent with this part or the Commission's regulations to implement this part." As noted above, the FCC has already made the decision that UNE treatment of packet switches is both unnecessary to further competition and would be inconsistent with FCC regulations and the Act itself. Neither aspect of this test can be met here, and this Commission does not have any authority to designate "network elements" or to make the necessary "impairment" findings on its own that would lead to unbundling at TELRIC rates.

broadband services." [19] Joint Pet. ¶ 21. But as Verizon has explained above, the Joint Petitioners' argument is refuted by the 1996 Act's definition of a network element and by the Act's requirement that the FCC take steps to encourage the deployment of advanced services. *See supra* Part II.A; 47 U.S.C. § 153(29). Moreover, the Joint Petitioners' claim has already been considered and expressly rejected by the FCC. The FCC refused MCI's request that it "clarify" that packet switches must be unbundled when used to provide voice services, *see supra* Part II.A.3; *Triennial Review Order*, 18 F.C.C.R. 16,978, ¶ 288 n.833. Furthermore, in the *Triennial Review Order*, the FCC stated that an ILEC's replacement of a circuit switch with a packet switch eliminates the ILEC's unbundling obligation; this determination hinges solely on whether a packet switch has been deployed, not on how the packet switch is used. *See supra* Part II.A.3.

C. This Commission Cannot "Interpret" or "Enforce" Federal Interconnection Agreements in a Manner that Violates Federal Law.

45. No doubt recognizing that the FCC has expressly rejected the invitation to require unbundling of packet switching equipment and that the Commission cannot *overtly* make its own Section 251(d)(2) determination, the Joint Petitioners seek to have the Commission make precisely the same determination *covertly*, under the guise of "enforcing" or "interpreting" Joint Petitioners' interconnection agreements. This request is as deceitful as it is unlawful. As demonstrated above, the interconnection agreements at issue explicitly restrict Verizon's unbundling obligations to those required by federal law—which precludes the unbundling of packet switches. In the absence of any explicit agreement to unbundle packet switches, the

[19] Because the FCC has rejected the unbundling of packet switches, it has no occasion to explore the technical feasibility of separating voice, data, and video services provided by a packet switch and offering only one of those functionalities to CLECs on an unbundled basis. Any such effort would require a conclusion that unbundling applies in the first instance to a functionality—which is directly contrary to the Act's definition of a "network element." 47 U.S.C. § 153(29). Moreover, any such a "walling off" of the full capabilities of a packet switch would itself entail significant additional costs on the deployment and maintenance of this new technology.

Commission cannot "interpret" those agreements to such a result in the face of a binding federal determination that such unbundling is not permitted under section 251 of the Act. This is because the interconnection agreements embody federal law and state law (to the extent relevant) must conform to that law.

46. First, interconnection agreements are federal mandates, entered and enforced by state commissions under federal law, with terms that would never be arrived at by arms-length bargaining in private transactions. *See BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003) (en banc) ("Interconnection agreements are tools through which the [Act is] enforced."). In binding arbitration, the state commission must ensure that its resolution and the resulting interconnection agreement "meet the requirements of Section 251 of [Title 47], *including* the regulations prescribed by the Commission pursuant to section 251 of this title." 47 U.S.C. § 252(c)(1) (emphasis added). Any residual doubt that state commissions can act only to effectuate federal regulations in this area is eliminated by the judicial review provisions of Section 252(e)(6), which authorizes review in federal district court to ensure that the agreement comports with federal law. In short, state commissions are acting solely as federal agents in this area, and their role is to apply federal law and federal regulations. *Iowa Utils. Bd.*, 525 U.S. at 384.

47. Second, federal law makes clear that a state cannot accomplish by contract (or enforcement of a contract by its adjudicatory bodies) what it is preempted by federal law from doing by affirmative regulation. Federal courts have consistently looked askance at a state's use of a "contract" to achieve regulatory goals in conflict with federal law. For example, in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), the Supreme Court held that a state contract regarding the sale of timber violated the Commerce Clause: "The State may not

impose conditions, whether by statute, regulation, *or contract*, that have a substantial regulatory effect outside of that particular market." *Id.* at 97 (emphasis added). In a similar vein, the Supreme Court in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 (1981), found that the enforcement of contracts by state courts was preempted to the extent such enforcement conflicted with Federal Power Commission jurisdiction to enforce filed rates. *See id.* at 580 ("It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do."). In *Norman v. Baltimore & Ohio Railroad*, 294 U.S. 240 (1935), the Supreme Court upheld a joint resolution of Congress which prohibited contract clauses requiring payment in gold. The Court stated: "Contracts, however express, cannot fetter the constitutional authority of the Congress. . . . Parties cannot remove their transactions from the reach of the dominant constitutional power by making contracts about them." *Id.* at 307-08. The *Norman* Court further noted that the rule was the same, "even if the contract be a charter granted by a state and limiting rates, or a contract between municipalities and carriers." *Id.* at 308 (citations omitted).[20]

48. For all of these reasons, the Commission must avoid any "interpretation" of the interconnection agreements to require Verizon to unbundle packet switches. This is because any such requirement plainly would violate, or conflict with, the federal regulatory decision not to

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[20] Even if this were a matter of state contract law (which it is not), it is well recognized that a state contract that violates federal law or frustrates federal policy is itself unenforceable as contrary to public policy. As one California appellate court recently explained:

> California law includes federal law. (*People ex rel. Happell v. Sischo* (1943) 23 Cal.2d 478, 491, 144 P.2d 785 [Federal law is "the supreme law of the land (U.S. Const., art. VI, sec. 2) to the same extent as though expressly written into every state law"]; 6A Corbin on Contracts, *supra*, § 1374, p. 7 ["Under our Constitution, national law is also the law of every separate State"].) Thus, a violation of federal law is a violation of law for purposes of determining whether or not a contract is unenforceable as contrary to the public policy of California.

Kashani v. Tsann Kuen China Enter. Co., Ltd., 13 Cal. Rptr. 3d 174, 181 (Cal. Ct. App. 2d Div. 2004). The same is true in the State of Washington. *E.g., Henrikson v. Pacific Coast Packing Co.*, 109 Wn. 644, 648-49 (1920) (contract in violation of federal law unenforceable as a matter of Washington law).

require unbundling and the federal statutory mandate to encourage the deployment of technology that enables more Americans to have access to higher quality telecommunications services.

49. It is no answer to say that where federal law does not *require* unbundling, there is no conflict because Verizon could comply with both federal *and* state law by unbundling. First, the FCC has indicated in no uncertain terms that it wishes to "prohibit" unbundling of packet switches to accomplish the primary goal of the 1996 Act, the deployment of advanced technologies and facilities-based local competition. *Triennial Review Order*, 18 F.C.C.R. 16,978, ¶ 290. There is no room for a state regulation or policy that purports to override any part of this prohibition. Second, an interconnection agreement is not just a contract under state law, but implements "federal law" as exemplified by the fact that federal courts have jurisdiction over both approval and enforcement decisions regarding such agreements. *See Verizon Maryland Inc. v. Pub. Serv. Comm'n of Maryland*, 122 S. Ct. 1753, 1759 (2002) (federal courts have subject matter jurisdiction over enforcement decisions made by state commission under interconnection agreements because they are federal instruments). Third, in the wake of the *Triennial Review Order* and the *USTA II* decision, it is crystal clear that states and state commissions are prohibited from imposing their own unbundling requirements—which is precisely what Joint Petitioners are asking this Commission to do. *See supra* Part III.A.

50. The 1996 Act plainly bars the Commission from imposing on Verizon any obligations that are "inconsistent with" federal law or that "substantially prevent implementation of the requirements of [section 251 of the Act] and the purpose of" the local competition provisions in the Act (47 U.S.C. §§ 251-261). 47 U.S.C. §§ 251(d)(3), 261(b)-(c). Thus, "[w]ith regard to the matters addressed by the Act," including unbundling determinations, this Commission is not "allowed to do [its] own thing." *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. Here,

any decision by the Commission to unbundle packet switches would conflict with the carefully crafted balance that Congress and the FCC already have struck between promoting competition through unbundling as to some equipment and facilities, on the one hand, and encouraging investment in new technologies that would support broadband, on the other. *See supra* Part III.A. Moreover, any such decision by this Commission would frustrate the will of Congress and the FCC by discouraging the very investment in new technologies that they both seek to encourage. *See, e.g.*, *City of New York v. FCC*, 486 U.S. 57, 63 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (explaining that a state law would be preempted by a deregulatory federal statute if it "frustrates the purpose of deregulation by acutely interfering with the forces of competition"); *accord Authority of County to Require Federal and State Agencies to Follow County Policies and Procedures*, AGO 1994 No. 10, 1994 WL 415259, at *2 (Wash. Att'y Gen. 1994) (explaining that the power to preempt state laws that frustrate federal policies "extends to both acts of Congress and to federal administrative regulations validly promulgated to implement such legislation" (citing *City of New York*, 487 U.S. at 63)).

51. Similarly, any attempt to re-price CLEC resale of local services provided on a packet switch to TELRIC rates would conflict not only with the fact that TELRIC rates can only lawfully be applied to network elements that are subject to Section 251 unbundling, but also with the resale discount rates the Commission has already set in fully litigated "avoided cost" resale pricing cases. This Commission is not free to ignore the FCC rules regarding the calculation of resale prices or reset on the fly the resale prices it has already established in its own proceedings.

Resale is a recognized mode of non-facilities based competition, and it is already used by many of the Joint Petitioners to provide local exchange service in Washington and elsewhere. Here, a state-created unbundling requirement would "interfere[] with the methods by which a Federal law is designed to reach its goals." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987); *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 477-78 (1984). It would "frustrate a federal scheme, *see, e.g.*, *Saridakis v. United Airlines*, 166 F.3d 1272, 1276 (9th Cir. 1999), by discouraging the very investments in new technologies that the FCC has conclusively determined that federal law must encourage.

IV. THE INTERCONNECTION AGREEMENTS, BY THEIR TERMS, DO NOT REQUIRE VERIZON TO UNBUNDLE PACKET SWITCHES AND DO NOT PREVENT VERIZON FROM DEPLOYING PACKET SWITCHES.

52. The Commission need not find that any terms of the interconnection agreements violate or are preempted by federal law. The interconnection agreements by their terms incorporate and do not deviate from federal law and, accordingly, *no terms or provisions require Verizon to unbundle packet switches*, and *no terms or provisions prevent Verizon from deploying packet switches*. What is more, even if the interconnection agreements were ambiguous on these points, this Commission is obligated to construe the interconnection agreements to avoid preemption and conflict with federal law. *See Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674 (1996) (contracts must be interpreted to comply with existing rules of law).

53. First and foremost, all of the interconnection agreements themselves explicitly embody federal law, and none of the agreements imposes any unbundling obligations that conflict with, or are not required under, federal law. *See supra* Part II.B.1, at pp. 9-11 (AT&T agreement (and Commission orders)); Part II.B.2, at pp. 12-13 (ATI and UNICOM agreements);

Part II.B.3, at pp. 13-14 (MCI agreement and amendments) (reserving Verizon's rights to object to any obligation as not required under federal law).

54. Second, consistent with the federal law, none of the agreements purports to classify packet switches (regardless of the functions they provide) as a "network element" subject to unbundling. Instead, the agreements either adopt the FCC's definitions of "local switching," which excludes packet switches, in substance, *see* AT&T ICA, Atchmt. 2 § 4.1[21]; or expressly incorporate the FCC's definition of "network element," *see supra* Part II.B.2, at pp. 12-13 & n. 7 (ATI and UNICOM agreements). *See also* Part II.B.3, at pp. 13-14 & nn. 10-11 (MCI agreement and amendments).

55. Indeed, the CLECs admit this when they state that the FCC's "definition of local switching is consistent with the ICAs' definitions" and then go on to prominently quote from paragraph 433 of the *Triennial Review Order*. *See* Joint Pet. ¶ 19. That paragraph is a definition of *circuit* switching—just like the paragraphs the Joint Petitioners quote from their interconnection agreements—*not* packet switching. Paragraph 433 not only appears directly under the heading entitled "Definition of Unbundled Local *Circuit* Switching Element," it states that "[w]e define local *circuit* switching to encompass line-side and trunk-side facilities." Thus, Verizon agrees with the Joint Petitioners that paragraph 433 is "consistent with the ICAs definitions," because those definitions—like the definition in paragraph 433—define *circuit* switching, *not* packet switching equipment or packet switches. *Compare Triennial Review Order* ¶ 433 (defining local *circuit* switching), *with id.* ¶¶ 535-41 (holding that there is no obligation to unbundle packet switches).

[21] The limitation of the AT&T agreement's definition of "Local Switching" to *circuit* switching is further confirmed by its reference to ISDN service. *See, e.g.*, AT&T ICA, Atchmt. 2, § 4.1.1. ISDN, or Integrated Services Digital Line, "is a set of international standards . . . for a *circuit-switched* digital network." NEWTON'S TELECOM DICTIONARY at 448 (20th ed. 2004) (emphasis added). ISDN is—and has always been—a feature, function, and capability of *circuit* switching technology, and has nothing to do with the packet switching at issue in this dispute.

56. Third, none of the interconnection agreements prevents Verizon from discontinuing use of circuit switches and, thereby, from deploying packet switches. The UNICOM agreement, for example, specifically provides that Verizon has the absolute right to upgrade its network by deploying packet switches and that UNICOM shall solely be responsible for dealing with the costs it may incur as a result of Verizon's network upgrade:

> Notwithstanding any other provision of this Agreement, Verizon shall have the right to deploy, upgrade, migrate and maintain its network at its discretion. . . . Nothing in this Agreement shall limit Verizon's ability to modify its network through the incorporation of new equipment or software or otherwise. UNICOM shall be solely responsible for the cost and activities associated with accommodating such changes in its own network.

UNICOM ICA § 42 (entitled "Technology Upgrades");[22] *see also* AT&T ICA § 3.3 (contemplating network upgrades); ATI Unbundling Agreement, Art. V, § 4.4 (same).[23]

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[22] The UNICOM agreement also makes perfectly clear in Section 50—entitled "Withdrawal of Services"—that Verizon is free to discontinue its unbundling of circuit switches when new packet switches are deployed, because a network element is defined in terms of a "facility" or "equipment" and thus is in no way agnostic as to the technology deployed:

> Notwithstanding anything contained in this Agreement, except as otherwise required by Applicable Law, Verizon may terminate its offering and/or provision of any Service under this Agreement upon thirty (30) days prior written notice to UNICOM.

Id. § 50.1. "Service" is defined as "[a]ny . . . Network Element . . . or other service, facility or arrangement, offered for sale by a Party under this Agreement," *id.* Glossary § 2.84, and "Network Element," in turn, "[s]hall have the meaning stated in the Act," *id.* Glossary § 2.65. And, the Act forecloses Joint Petitioners' claim that "Verizon is required to offer local switching regardless of the technology deployed," Joint Pet. ¶ 17, because it provides that "[t]he term 'network element' means a *facility* or *equipment* used in the provision of telecommunications service." 47 U.S.C. § 153(29) (emphases added).

[23] Furthermore, even if the ICAs were "technologically neutral" (which they decidedly are not), Verizon would not be required to unbundle its packet switches under the agreements because it has no OSS to allow for the back office functions necessary to provision UNEs from the new packet switches and it is not obligated to build such an OSS under either the agreements or federal law. Both the UNICOM and ATI agreements provide that "Verizon shall be obligated to provide a UNE or Combination pursuant to this Agreement only to the extent such UNE or Combination, and the equipment and facilities necessary to provide such UNE or Combination, are available in Verizon's network," and that "Verizon shall have no obligation to construct or deploy new facilities or equipment to offer any UNE or Combination." UNICOM UNE Atchmt. § 1.2(a) & (b); ATI UNE Agmt. § 1.2 (a) & (b) (same). Thus, Verizon is plainly not required to build an OSS to allow for the back office functions necessary to unbundle packet switches. Similarly, since Verizon is only obligated under federal law to unbundle circuit switches, the agreements preclude unbundling in the present circumstance because there are no circuit switches "available in Verizon's network" when packet switches are deployed. UNICOM UNE Atchmt. § 1.2(a); ATI UNE Agmt. § 1.2 (a) (same).

57. At the end of the day, Joint Petitioners are not seeking to "enforce" their interconnection agreements; they are seeking to rewrite these agreements by attempting to re-litigate the FCC's binding decisions that a "packet switch" is not a network element that may be unbundled pursuant to Section 251—regardless of the service it provides. It may well be that CLECs stand to turn greater profits if they receive unbundled switching as part of the below cost UNE-P rate. But Verizon cannot lawfully be required to subsidize these carriers' business models, and the fact that they may have a smaller profit margin under resale does not constitute a legally cognizable harm that this Commission should, or is lawfully able, to remedy. In other words, this fact simply shows that they profit from the UNE subsidy—it is not a legal argument for rejecting federal law. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90 (1999) ("[T]he Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services, is simply not in accord with the ordinary and fair meaning of those terms.").

V. VERIZON DENIES JOINT PETITIONERS' ASSERTIONS OF ERRONEOUS LEGAL CONCLUSIONS AS FACT.

58. Verizon agrees with Joint Petitioners that this matter involves a pure question of law; the Commission need not look any further than Joint Petitioners' petition and Verizon's response to conclude that there is nothing to "enforce" that would require Verizon, as a matter of law, to unbundle packet switches or to prevent Verizon from deploying packet switches. Nonetheless, out of caution, Verizon also answers the Joint Petition. Verizon notes that the un-numbered introductory paragraph in the Joint Petition requires no answer.

59. Answering paragraph 1 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on

factual allegations, those allegations are denied. Verizon admits that the interconnection agreements entered into between Joint Petitioners and Verizon were "negotiated, arbitrated and otherwise entered into" "[p]ursuant to 47 U.S.C. § 252."

60. Answering paragraph 2 of the Joint Petition, Verizon's June 8, 2004 industry-wide notice speaks for itself.

61. Answering paragraph 3 of the Joint Petition, Verizon's June 8, 2004 industry-wide notice speaks for itself.

62. Answering paragraph 4 of the Joint Petition, that paragraph includes information of which only Joint Petitioners have knowledge. Verizon admits that Joint Petitioners filed a Motion for Enforcement of Order No. 5 in Docket No. UT-43013, that Verizon filed a response to that Motion, that the Commission held a hearing on the Motion on September 9, 2004. Joint Petitioners' Motion and *Order No. 10* speak for themselves.

63. Answering paragraph 5 of the Joint Petition, the allegations in this paragraph are legal conclusions to which no response is required.

64. Answering paragraph 6 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied.

65. Answering paragraph 7 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied. This paragraph also includes information of which only Joint Petitioners have knowledge. Verizon admits that ATI did not seek to enter into negotiations with Verizon.

66. Answering paragraph 8 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied. This paragraph also includes information of which only Joint Petitioners have knowledge, and assertions regarding an "issue in relation to several California central offices," which is not relevant here. Verizon admits that AT&T and its TCG Affiliates did not seek to enter into negotiations with Verizon.

67. Answering paragraph 9 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied. This paragraph also includes information of which only Joint Petitioners have knowledge. Verizon admits that MCI, Inc. did not seek to enter into negotiations with Verizon.

68. Answering paragraph 10 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied. This paragraph also includes information of which only Joint Petitioners have knowledge. Verizon admits that UNICOM did not seek to enter into negotiations with Verizon.

69. Answering paragraph 11 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied.

70. Answering paragraph 12 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied.

71. Answering paragraph 13 of the Joint Petition, ATI's interconnection agreement speaks for itself.

72. Answering paragraph 14 of the Joint Petition, UNICOM's interconnection agreement speaks for itself.

73. Answering paragraph 15 of the Joint Petition, MCI's interconnection agreement speaks for itself.

74. Answering paragraph 16 of the Joint Petition, AT&T's interconnection agreement speaks for itself.

75. Answering paragraph 17 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied.

76. Answering paragraph 18 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied.

77. Answering paragraph 19 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied. The FCC Report and Order quoted in paragraph 19 speaks for itself. Verizon admits that the FCC's definition of local switching is consistent with the ICAs' definitions.

78. Answering paragraph 20 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied.

79. Answering paragraph 21 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied. The FCC's *Triennial Review Order* speaks for itself.

80. Answering paragraph 22 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied. The September 9, 2004 transcript hearing speaks for itself.

81. Answering paragraph 23 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied. The California ALJ's decision is not relevant to the matters here in dispute and speaks for itself.

82. Answering paragraph 24 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied.

83. Answering paragraph 25 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied.

84. Answering paragraph 26 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied.

85. Answering paragraph 27 of the Joint Petition, that paragraph consists of legal conclusions to which no response is required, but to the extent those conclusions are based on factual allegations, those allegations are denied.

86. Verizon's "affirmative defenses" are presented clearly and fully in the sections above. Among these "defenses," Verizon submits that: (1) the relief Joint Petitioners seek violates, or is conflict with and preempted by, federal law; (2) this Commission lacks authority under either state or federal law to: a) designate "network elements" under Section 251, b) make impairment findings under Section 251, c) override FCC findings on a nationwide basis that there is no impairment from lack of access to packet switches, d) override the balance struck by the FCC between unbundling and encouraging new investment under federal law, or e) interpret interconnection agreements contrary to FCC decisions and the FCC's own definition of "local switching," which excludes all packet switches; 3) any interpretation of an interconnection agreement to violate federal law is itself contrary to public policy under the law of contract in Washington.

CONCLUSION

87. For the foregoing reasons, Verizon respectfully submits that the Commission should enter judgment on the pleadings and dismiss the Joint Petition to Enforce with prejudice.

Respectfully submitted,

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