

SWIDLER BERLIN LLP

Edward W. Kirsch
Phone 202.424.7877
Fax 202.424.7643
ewkirsch@swidlaw.com

The Washington Harbour
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
Phone 202.424.7500
Fax 202.424.7647
www.swidlaw.com

April 1, 2005

VIA E-MAIL AND OVERNIGHT DELIVERY

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
PO Box 47250
Olympia, WA 98504-7250

Re: Docket No UT-043013 – Reply Brief of Focal Communications Corp. of Washington

Dear Ms. Washburn:

Enclosed for filing in the above-referenced docket, please find the original and twelve (12) copies of Focal Communications Corp. of Washington's ("Focal") Reply Brief. Consistent with Judge Anne Rendahl's email of March 29, 2005, this Brief is being filed electronically today, with hard copies to follow by overnight mail. Please date-stamp the enclosed extra copy of this filing and return it in the enclosed, self-addressed, postage prepaid envelop provided.

Should you have any questions regarding this filing, please do not hesitate to contact me.

Sincerely yours,



Edward W. Kirsch
Counsel for Focal Communications Corp.
of Washington

Enclosures

cc: Service List

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

| | | |
|--|---|-----------------------------|
| In the Matter of the Petition for Arbitration of an |) | |
| Amendment to Interconnection Agreements of |) | Docket No. UT-043013 |
| |) | |
| VERIZON NORTHWEST INC. |) | |
| |) | |
| with |) | |
| |) | |
| COMPETITIVE LOCAL EXCHANGE |) | REPLY BRIEF OF FOCAL |
| CARRIERS AND COMMERCIAL MOBILE |) | COMMUNICATIONS CORP. |
| RADIO SERVICE PROVIDERS IN |) | OF WASHINGTON |
| WASHINGTON |) | |
| |) | |
| Pursuant to 47 U.S.C. Section 252(b), and the |) | |
| <i>Triennial Review Order.</i> |) | |
| <hr style="border-top: 1px solid black;"/> | | |

REPLY BRIEF

Russell M. Blau
Edward W. Kirsch
Phillip J. Macres
Swidler Berlin LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
Tel: (202) 424-7500
Fax: (202) 424-7643
Email: rmbrau@swidlaw.com
ewkirsch@swidlaw.com
pjmacres@swidlaw.com

Counsel for Focal Communications Corp.
of Washington

John Gockley
Focal Communications Corp.
200 N. LaSalle Street, Suite 1100
Chicago, IL 60601
Tel: (312) 895-8471
Fax: (312) 895-8403
Email: john.gockley@broadwing.com

Dated: April 1, 2005

ARGUMENT

ISSUE 21: What obligations, if any, with respect to EELs should be included in the Amendment to the parties' interconnection agreements?

A. What information should a CLEC be required to provide to Verizon as certification to satisfy the FCC's service eligibility criteria to (1) convert existing circuits/services to EELs or (2) order new EELs?²

3. Verizon is dismayed that “[s]ome CLECs complain that it would be unduly onerous” to provide the detailed information Verizon demands as a prerequisite for ordering new enhanced Extended Loops (“EELs”) or to convert existing circuits to EELs.³ Verizon’s proposed ordering process violates established principles set forth in the FCC’s *Supplemental Order Clarification* as early as June 2000 and affirmed in the *TRO*.⁴ Verizon demands such extensive and detailed information that it would effectively require a CLEC to submit to an unlawful pre-audit before Verizon will process or provision an order for new EELs or conversion of existing circuits to EELs rather than the mere “self-certification” required by the FCC.⁵

4. Verizon’s attempt to impose a pre-audit by requiring such detailed information is an unlawful “delay” or “gating” tactic foreseen, and prohibited, by the FCC.⁶ The FCC determined that the ordering process for EELs and conversions should meet “the basic principles of entitling requesting carriers *unimpeded* UNE access upon self-certification, *subject to later verification*”

² This disputed item arises under Issues 21 and 25 in this proceeding. However, for brevity Focal only discusses Verizon’s unlawful pre-audit policy in Issue 21 in this Reply Brief.

³ Verizon’s Opening Brief, at ¶ 218.

⁴ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, Supplemental Order Clarification (rel. June 2, 2000) (“*Supplemental Order Clarification*”).

⁵ Verizon Amendment 2, § 3.4.2.3.

⁶ *Supplemental Order Clarification*, at ¶¶ 29, 31

in order to prevent “the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process.”⁷ The FCC underscored that “the ability of requesting carriers to begin ordering *without delay* is essential.”⁸ The FCC directed ILECs to “immediately process” such orders “upon receiving a request” from a CLEC which could take the form of a “letter” and “self-certification.”⁹

5. In both the *Triennial Review Order* and *Supplemental Order Clarification*, the FCC “emphasized ‘that incumbent LECs may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements.’”¹⁰ The FCC made clear that “audits will *not be routine practice*” and ILECs “have a limited right to audit every twelve months.”¹¹ Contrary to this clear direction, Verizon seeks to impose a pre-audit, rather than a mere certification, as a gating mechanism designed to impede CLEC access to EELs and conversions. Specifically, Verizon seeks the following information before it will process or provision an order for such services:

Each written certification provided by CLEC ... must contain the following information for each DS1 circuit or DS1 equivalent: (a) the local number assigned to each DS1 circuit or DS1 equivalent; (b) the local numbers assigned to each DS3 circuit (must have 28 local numbers assigned to it); (c) the date each circuit was established in the 911/E911 database; (c) the collocation termination connecting facility assignment for each circuit, showing that the collocation arrangement was established under a federal collocation tariff; (e) the interconnection trunk circuit

⁷ *TRO*, at ¶¶ 622-623 (emphasis added).

⁸ *TRO*, at ¶ 623 (emphasis added). The FCC recognized that CLECs have “experienced delays” and numerous “other difficulties in converting special access to UNEs” in the past. *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, at ¶ 64 (rel. Feb. 4, 2005) (“*TRO Remand Order*”).

⁹ *TRO*, at ¶¶ 620.

¹⁰ *TRO*, at ¶ 621; *Supplemental Order Clarification*, at ¶ 31.

¹¹ *TRO*, at ¶ 621, 626.

identification number that services each DS1 circuit. There must be one identification number per every 24 DS1 circuits; and (f) the local switch that serves each DS1 circuit. When submitting an ASR for a circuit, this information must be contained in the Remarks section of the ASR, unless provisions are made to populate other fields on the ASR to capture this information.¹²

6. These detailed information requirements directly contradict the FCC's "provision now, audit later" framework and its intent to preclude ILEC manipulation and delay tactics.¹³ Moreover, Verizon's proposed requirements act as a gating mechanism that enable it to engage in self-help to deny CLEC orders before the required audit is conducted. The FCC expressly prohibited such self-help measures. For example, the FCC stated:

[i]f a requesting carrier certifies that it will provide qualifying services over high-capacity EELs in accordance with the Commission's rules, an incumbent LEC that wishes to challenge the certification *may not engage in self-help by withholding the facility in question*. The success of facilities-based competition depends on the ability of competitors to obtain the unbundled facilities for which they are eligible in a timely fashion. Thus, an incumbent LEC that questions the competitor's certification may do so by initiating the audit procedures¹⁴

7. In sum, the Commission should hold that Verizon's information requirements constitute an unlawful gating requirement, a pre-audit and unlawful self-help measures; and, therefore, should reject Verizon's proposed language and adopt Focal's language.

B. Conversion of existing circuits/services to EELs:

1. Should Verizon be prohibited from physically disconnecting, separating, or physically altering the existing facilities when a CLEC requests a conversion of existing circuits/services to an EEL unless the CLEC requests such facilities alteration?

8. Verizon objects to a "prohibition" that might preclude Verizon (except upon CLEC request) from physically disconnecting, separating, or physically altering existing facilities when

¹² Verizon Amendment 2, § 3.4.2.3.

¹³ *TRO*, at ¶¶ 622-624, n. 1899.

¹⁴ *TRO*, at ¶ 623, n. 1899.

converting tariffed services to an EEL.¹⁵ Verizon's position violates FCC rule 51.315, which provides in relevant part that:

(b) Except upon request, an incumbent LEC *shall not separate* requested network elements that the incumbent currently combines. (c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner

47 C.F.R. § 51.315(b)-(c) (emphasis added).

9. Moreover, the FCC held that “[c]onverting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer’s perception of service quality.”¹⁶ Focal’s proposed language comports with these FCC determinations and should be adopted.

3. Should EELs ordered by a CLEC prior to October 2, 2003, be required to meet the FCC’s service eligibility criteria?

10. Under Verizon’s proposal, any EEL provided *prior to the effective date of the TRO*, October 2, 2003, must satisfy the eligibility criteria established as of October 2, 2003. The *TRO*’s eligibility requirements do not, however, apply retroactively and only apply prospectively. Paragraph 589 of the *TRO* specifically provides:

As a final matter, we decline to require retroactive billing to any time before the effective date of this Order. The eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past. To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order.

In addition, Paragraph 623 of the *TRO* states that “*new orders* for circuits are subject to the eligibility criteria.” Taken together, this language establishes that (1) if a circuit qualifies under the new standards but did not qualify under the old standards, a CLEC cannot recover the

¹⁵ Verizon’s Opening Brief, at ¶ 220.

¹⁶ *TRO*, ¶ 586.

excessive charges prior to the effective date; (2) if a circuit does not qualify under the new standards but did qualify under the old standards, the ILEC may not recover past losses; and (3) EELs may continue to be provided under the old standards up to the effective date. Focal's proposed language is therefore appropriate, and should be adopted.

4. For Conversion requests submitted by a CLEC prior to the effective date of the amendment, should CLECs be entitled to EELs/UNE pricing effective as of the date the CLEC submitted the request (but not earlier than October 2, 2003)?

11. Verizon argues that the *TRO's* "new" commingling and conversion obligations should take effect upon execution of an Amendment of the CLEC's interconnection agreement, rather than retroactively to the effective date of the *TRO* (*i.e.*, October 2, 2003).¹⁷ Verizon's position is predicated on the assumption that the *TRO* changed the law and imposed "new" obligations on Verizon to perform conversions to UNEs. Verizon is mistaken.

12. In fact, the Wireline Competition Bureau's recent Order denying Verizon's Petition for Stay of the *Triennial Review Remand Order*, in which Verizon challenged the FCC's policy allowing CLECs to "convert" services to UNEs, directly refutes Verizon's theory.¹⁸ In the relevant passage, the Bureau stated that the FCC:

did not reverse a previous policy barring conversions where competitive LECs were otherwise eligible for the UNE at issue. In fact, the Commission *has never adopted such a bar*. The *Triennial Review Remand Order* instead merely reaffirmed the [FCC's] preexisting policy allowing conversions of services obtained under tariff to UNE arrangements. That policy was reviewed by the U.S. Court of Appeals for the District of Columbia Circuit, which left the Commission's con-

¹⁷ Verizon's Opening Brief, at ¶ 230.

¹⁸ *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order, DA 05-675 at ¶ 1 (rel. March 14, 2005) ("*Stay Denial Order*").

version rules undisturbed. The ‘stay’ Verizon seeks thus would effect – not prevent – a change in *status quo*.¹⁹

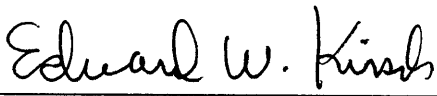
Since Verizon cannot credibly claim that the current combinations requirement represents a change in prior law, the Commission should adopt Focal’s position and proposed language on this issue.

CONCLUSION AND RELIEF

13. For the foregoing reasons and the reasons stated in Focal’s Initial Brief, the Commission should issue an order requiring Verizon to modify its Proposed Amendment to incorporate the contract language proposed by Focal.

DATED this 1st day of April, 2005.

Respectfully Submitted,

By 

Russell M. Blau
Edward Kirsch
Phillip Macres
Swidler Berlin LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
Tel: (202) 424-7500
Fax: (202) 424-7643
Email: rmbrau@swidlaw.com
ewkirsch@swidlaw.com
pjmacres@swidlaw.com

Counsel for Focal Communications Corp.
of Washington

John Gockley
Focal Communications Corp.
200 N. LaSalle Street, Suite 1100
Chicago, IL 60601

¹⁹ *Stay Denial Order*, at ¶ 3 (emphasis added).

Tel: (312) 895-8471
Fax: (312) 895-8403
Email: john.gockley@broadwing.com

CERTIFICATE OF SERVICE

Docket No. UT-043013

I hereby certify that I have this day served this document upon all parties of record in this proceeding by electronic mail and by overnight delivery:

Aaron M. Panner
Kellogg, Huber, Hansen, Todd & Evans,
PLLC
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036
E-mail: apanner@khhte.com

Timothy J. O'Connell
Stoel Rives, LLP
One Union Square
600 University Street, Suite 3600
Seattle, WA 98101
E-mail: tjoconnell@stoel.com
Tel: (206) 386-7562

Letty S.D. Friesen
Adam Walczak
AT&T Law Dept.
1875 Lawrence Street, Suite 1575
Denver, CO 80202
E-mail: lfriesen@att.com
awalczak@att.com
Tel: (303) 298-6475

Karen Shoresman Frame
Covad Communications Company
7901 Lowry Blvd.
Denver, CO 80230
E-mail: kframe@covad.com

William E. Hendricks, III
Sprint Corporation
902 Wasco Street
Hood River, OR 97031
E-mail: Tre.e.hendricks.iii@mail.sprint.com
Tel: (541) 387-9439

Genevieve Morelli
Michael B. Hazzard
Heather T. Hendrickson
Kelley Drye & Warren LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036
E-mail: gmorelli@kelleydrye.com
mhazzard@kelleydrye.com
hhendrickson@kelleydrye.com

Brooks E. Harlow
Miller Nash LLP
4400 Two Union Square
601 Union Street
Seattle, WA 98101
E-mail: brooks.harlow@millernash.com
Tel: (206) 777-7406

Hong Huynh
Miller Nash LLP
111 S.W. Fifth Avenue, Suite 300
Portland, OR 97204
E-mail: Hong.huynh@millernash.com

Gregory J. Kopta
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
E-mail: gregkopta@dwt.com
Tel: (206) 628-7593

Michel Singer Nelson
MCI, Inc.
707 17th Street, Suite 4200
Denver, CO 80202
E-mail: michel.singer_nelson@mci.com
Tel: (303) 390-6106

Anne E. Rendahl
1300 Evergreen Park Dr., SW
PO Box 47250
Olympia, WA 98504-7250
E-mail: arendahl@wutc.wa.gov

Simon Fitch
Public Counsel Section
Office of the Attorney General
900 Fourth Ave., Suite 2000
Seattle, WA 98164-1012
Email: ssmith@wutc.wa.gov

Ms. Carole J. Washburn, Secretary
Washington Utilities & Transportation
Commission
1300 S. Evergreen Park Drive, SW
Olympia, WA 98504-7250
E-mail: records@wutc.wa.gov

Sally Johnston
Senior Asst. Attorney General
1400 S. Evergreen Park Dr., S.W.
Olympia, WA 98504
E-mail: sjohnston@wutc.wa.gov



Edward W. Kirsch

Dated this 1st day of April, 2005