

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition for)	
Arbitration of an Amendment to)	
Interconnection Agreements of)	
)	
VERIZON NORTHWEST, INC.)	DOCKET NO. UT- 043013
)	
with)	PETITION FOR REVIEW OF
)	ORDER NO. 17
COMPETITIVE LOCAL EXCHANGE)	
CARRIERS AND COMMERCIAL)	
MOBILE RADIO SERVICE PROVIDERS)	
IN WASHINGTON)	
)	
Pursuant to 47 U.S.C. § 252(b), and the)	
<i>Triennial Review Order</i>)	

Pursuant to Order No. 17, AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle, TCG Oregon (collectively “AT&T”) hereby submits this Petition for Review of Order No. 17 in the above-captioned matter, and in support whereof, would show as follows.

1. On July 8, 2005, the Arbitrator in this proceeding issued Order No. 17, which resolved the disputed issues brought by the Parties. Before addressing the limited issues on which AT&T requests that the Commission review the Arbitrator’s determination, AT&T wants to take this opportunity to commend the Arbitrator for the Herculean task she accomplished. The Arbitrator was presented with a large number of issues on which to consider and rule in a relatively short period of time, and while AT&T believes the Arbitrator’s thoughtful consideration of the record produced the right result on most issues, for a limited number of issues AT&T must assert error in an effort to obtain a final interconnection agreement that complies with federal law.

2. AT&T has limited the issues on which it petitions for review to two issues, both of which involve routine network modifications. Specifically, AT&T petitions for the Commission to review the Arbitrator's determination in Issues 9 and 22.

3. In Issue 9, the Arbitrator established definitions of dark fiber, DS1 and DS3 loops. AT&T had proposed definitions that would include routine network modifications in these definitions. Specifically, AT&T proposed the following definition of a dark fiber loop:

Consists of fiber optic strand(s) in a Verizon fiber optic cable between Verizon's accessible terminal, such as the fiber distribution frame, or its functional equivalent, located within a Verizon wire center, and Verizon's accessible terminal located in Verizon's main termination point at an end user customer premises, such as a fiber patch panel, which fibers are "in place" or can be made spare and continuous via routine network modifications in Verizon's network and that Verizon has not yet activated through optronics that "light" it and render it capable of carrying communications services. It also includes strands of optical fiber existing in aerial, buried, or underground cables which may have lightwave repeater (regenerator or optical amplifier) equipment interspliced to it at appropriate distances, but which has no attached line terminating, multiplexing, or aggregation electronics.¹

AT&T's proposed definitions of DS1 and DS3 loops were similar, and began with the following language: "A digital transmission channel, **including any necessary Routine Network Modifications**, between the main distribution frame (or its equivalent) in an end user's serving wire center and the demarcation point at the end user customer's premises . . ."

4. On the issue of the appropriate definition of dark fiber loop, the Arbitrator concluded: "Verizon's proposed definition appears to properly track the FCC's definitions of "loop" and "dark fiber" in 47 C.F.R. §§ 51.319(a) and (a)(6)(i). AT&T

¹ AT&T March 14, 2005, Amendment, § 2.6.

modifies Verizon's basic definition by including language addressing use of dark fiber through routine network modifications, and further clarifying the forms of dark fiber to be made available. . . . The parties should include Verizon's definition in the amendment. It adequately describes what dark fiber is without adding terms or conditions for availability, *i.e.*, what is available or required through routine network modifications." Order No. 17 at p. 66 (footnote omitted). In ruling on the appropriate definitions of DS1 and DS3 loops, the Arbitrator again rejected AT&T's proposal to include a reference to routine network modifications, and referred to the discussion quoted above in reference to dark fiber loops. *See* Order No. 17 at ¶ 176.

5. The Arbitrator erred in rejecting AT&T's proposed references to routine network modifications in the definitions of dark fiber, DS1 and DS3 loops. In the *Triennial Review Order*, the FCC affirmed the obligation of ILECs to perform routine network modifications. *See TRO* at ¶ 632 et seq. In doing so, the FCC recognized that the obligation to perform routine network modifications is an extension of the requirement that ILECS provide CLECs with all of the functions of an element. *Id.* at ¶ 633. Given that routine network modifications simply are a mechanism for providing access to high capacity and dark fiber loops, they should be included in the definition of those loops, to avoid the potential of disputes as to their availability in the future. Specifically, AT&T requests that the Commission reverse the Arbitrator as to the definition of dark fiber, DS1 and DS3 loops, and adopt instead the definitions as proposed by AT&T.

5. With regard to Issue 22, the Arbitrator erred in ruling that Verizon's obligation to perform routine network modifications exists only upon amendment of the ICAs. See Order No. 17 at ¶ 483. The Arbitrator reasoned that

While the Eighth Circuit may have stated that ILECs have an obligation to modify their networks to allow access to network elements, the FCC did not adopt rules governing routine network modifications until it entered the Triennial Review Order. The FCC's discussion of ILEC obligations to perform routine network modifications is intended to resolve an outstanding contentious issue, *i.e.*, an unresolved issue of law. Whether or not ILECs had the obligation to provide routine network modifications previously, the FCC has adopted new rules to ensure ILECs meet their obligations. Language addressing the obligation to provide routine network modifications must be included in the amendment, and the amendment language will be come effective on the effective date of the amendment, not before. This aspect of Issue No. 23 is resolved in favor of Verizon.

7. It was legal error for the ALJ to conclude that an amendment to the ICA is necessary to obligate Verizon to perform routine network modifications. There should be no need to amend the ICA to reflect Verizon's obligation to provide routine network modifications because that requirement *pre-dated* the *TRO*. Indeed, that order simply clarified Verizon's existing obligation, rejecting Verizon's bogus "no build" policy as anticompetitive and discriminatory on its face. Thus, there has been no "change in law" that would necessitate an amendment to the ICA.

8. The D.C. Circuit has recognized this in the *USTA II* decision.² There, the Court noted that

In *Iowa Utilities I*, the Eighth Circuit struck down an FCC rule that required ILECs to provide interconnection and UNEs superior in quality to those that the ILEC provided for itself. 120 F.3d at 812-13. But the court nonetheless "endorse[d] the Commission's statement that 'the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to

² *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) cert. denied, 125 S.Ct. 313, 316, 345 (2004).


incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.' " *Id.* at 813 n. 33."³

The Court went on to uphold the FCC's routine network modification rules as a reasonable distinction between a "routine modification" and a "superior quality" alteration, and "consistent with the Act as interpreted by the Eighth Circuit."⁴ Given that the requirement to make modifications to ILEC facilities is an obligation imposed by the Act, as recognized by the Eighth Circuit in 1997, the Arbitrator erred in finding that the FCC's rules implementing that obligation represented a change in law, and that such obligations only become effective upon amendment of the interconnection agreements.

3. WHEREFORE, AT&T respectfully requests that the Commission grant this Petition for Review, and the relief requested herein.

Submitted this 8th day of August, 2005.

**AT&T COMMUNICATIONS OF THE
PACIFIC NORTHWEST, INC. AND
AT&T LOCAL SERVICES ON
BEHALF OF TCG SEATTLE AND
TCG OREGON**

By: 
Michelle Sloane Bourianoff
Lety S.D. Friesen
AT&T Law Department
919 Congress Avenue, Suite 900
Austin, TX 78701
(512) 370-1083
(512) 370-2096 (fax)
mbourianoff@att.com
by CAC
w/permission

³ *USTA II* at 577.

⁴ *Id.* at 578.

CERTIFICATE OF SERVICE

Docket No. UT-043013

I hereby certify that on the date given below the original and 12 copies of AT&T's Petition for Review of Order 17 were sent by overnight delivery to:

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

An electronic copy was also sent to records@wutc.wa.gov.

On the same date, a true and correct copy was sent by electronic mail and/or U.S. Mail to:

Edward W. Kirsch
Swidler Berlin Shereff Friedman LLP
300 K Street NW, Suite 300
Washington, DC 20007-5116

Andrew M. Klein
Kelley Drye & Warrem LLP
1200 19th Street NW
Washington, DC 20036

Brooks E. Harlow
Miller Nash LLP
4400 Two Union Square
601 Union Street
Seattle, WA 98101

Karen Shoresman Frame
Covad Communications
7901 Lowry Blvd.
Denver, CO 80230

Gregory J. Kopta
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688

William E. Hendricks III
Sprint Corporation
902 Wasco Street
Hood River, OR 97031

Timothy J. O'Connell
Stoel Rives LLP
One Union Square
600 University Street, Suite 3600
Seattle, WA 98101

Aaron M. Panner
Kellogg Huber Hansen Todd & Evans
Sumner Square
1615 M Street NW, Suite 400
Washington, DC 20036

Michel Singer Nelson
Regulatory Attorney
MCI, Inc.
707 17th Street, Suite 4200
Denver, CO 80202

Arthur A. Butler
Ater Wynne LLP
601 Union Street, Suite 5450
Seattle, WA 98101-2327

The Honorable Ann Rendahl
WUTC
1300 S. Evergreen Park Drive SW
Olympia, WA 98504-7250

DATED this 8th day of April, 2005.

By: Mary Anne Allen by CAO
Mary Anne Allen
w/permission