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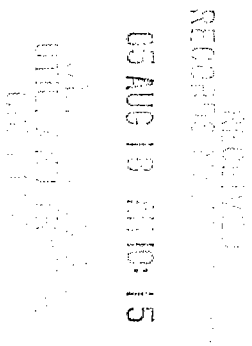

Ms. Carole J. Washburn
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504-7250

Re: Docket No. UT-043013

Dear Ms. Washburn:

Enclosed for filing in the above-referenced docket, please find the original and 12 copies of the following documents:

1. Joint CLEC Response to Verizon and AT&T Petitions for Commission Review of Arbitrator's Report and Decision; and

2. Certificate of Service.

Please call me if you have any questions about this filing. Thank you for your assistance.

Very truly yours,

Davis Wright Tremaine LLP

Melissa K. Geraghty
Assistant to Gregory J. Kopta

Enclosures
cc, w/encl: Service List

SEA 1681393v1 38936-1051
Seattle

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of VERIZON NORTHWEST INC. with COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN WASHINGTON Pursuant to 47 U.S.C. Section 252(b), and the *Triennial Review Order*.	)	Docket No. UT-043013 JOINT CLEC RESPONSE TO VERIZON AND AT&T PETITIONS FOR COMMISSION REVIEW OF ARBITRATOR'S REPORT AND DECISION

1. Integra Telecom of Washington, Inc., Pac-West Telecomm, Inc., and XO Communications Services, Inc. (collectively "Joint CLECs"), provide the following Response to the Petitions for Commission Review of Arbitrator's Report and Decision filed by Verizon Northwest Inc. ("Verizon") and AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively "AT&T"). The Joint CLECs address only those issues raised in the Petitions that require additional discussion, and otherwise rely on the opening and response briefs that they previously filed.

I. DISCUSSION

A. The Commission Should Affirm that Verizon's Wire Center Designations Under the TRRO Be Subject to Review in Docket No. UT-053025.

2. The Arbitrator concluded that the Commission should conduct a generic review of Verizon's designations of particular wire centers where Verizon will no longer provide certain high capacity unbundled network elements ("UNEs"), rather than undertake such a review in this proceeding or solely on a carrier-by-carrier basis. Verizon contends that this decision is

inconsistent with the Federal Communications Commission's ("FCC's") Triennial Review Remand Order ("TRRO"), "as well as pointless." Verizon is incorrect.

3. The FCC established a process in the TRRO by which a competitive local exchange carrier ("CLEC") could self-certify that its order for a high capacity UNE in a wire center that Verizon has designated as one in which that UNE is not available is nevertheless in compliance with the requirements in the TRRO. The FCC required CLECs to undertake a "reasonably diligent inquiry" prior to making any such self-certification. CLECs, however, do not have access to information sufficient to determine the number of business lines or fiber-based collocators in an incumbent local exchange carrier ("ILEC") wire center or to verify the accuracy of what little information the ILEC chooses to provide. The FCC has made no attempt to make the underlying ILEC data available to CLECs or to verify the accuracy of that data, and ILECs generally have refused to provide information sufficient for CLECs to make any informed determinations. The Commission has broad authority to investigate Verizon's intrastate operations – including the number of business lines and collocators in Verizon's Washington wire centers – and nothing in the TRRO constrains that authority. The Commission thus should determine, at least on an initial level, the accuracy of the data on which Verizon relies to designate "non-impairment" wire centers so that CLEC self-certifications can be more than just a shot in the dark.

4. Nor is a generic inquiry a waste of time and resources. As a practical matter, a CLEC will not order UNEs out of a wire center where Verizon claims they are not available. A CLEC needs certainty as to the price and availability of facilities it uses to serve its customers, and the only certainty in ordering a UNE to which Verizon believes the CLEC is not entitled is that the ordered facility will be far too expensive. No CLEC doubts that Verizon would challenge any such service order. The best case scenario would be that the Commission agrees

with the CLEC, but that decision would result only after the CLEC spends thousands of dollars defending its rights. At worst, the Commission agrees with Verizon, which would mean that in addition to those same legal fees, the CLEC would be required to pay Verizon's exorbitant special access rates retroactively to the date of the order. Under either outcome, the CLEC would pay far more for the facility than it could hope to generate in revenues from its customer.

5. A generic inquiry enables multiple parties to share the costs of a Commission review of Verizon's wire center designations and provides certainty as to the availability of high capacity UNEs in Verizon's ILEC service territory. Because Verizon has only designated two wire centers in Washington, those costs should be minimal for each party involved, and certainty can only assist the Commission in its efforts to encourage competitive entry into Verizon's service territory where it enjoys a 97% market share. The Commission should not modify the Arbitrator's Decision on this issue.

B. The Conversion Terms the Arbitrator Adopted Are Reasonable, and the Commission Should Adopt Them.

6. The Arbitrator concluded that a conversion from a special access or other wholesale service to a UNE should be deemed effective upon receipt of the conversion request and that billing changes should be reflected in the next billing cycle. Verizon challenges that conclusion, claiming that "conversions should be deemed completed for purposes of billing when the actual work of the conversion is completed pursuant to the standard conversion process." Verizon Petition ¶ 33. Specifically, Verizon proposes a delay of 30 days or longer before the UNE rates are effective. The Arbitrator correctly rejected that unreasonable proposal.

7. The FCC recognized in its Triennial Review Order ("TRO"), and Verizon has not denied, that conversions are "largely a billing function." TRO ¶ 588. Requiring 30 days or more to adjust a bill is nowhere within the realm of reasonableness, and reflects Verizon's desire to

continue to charge its excessive special access rates for as long as possible, rather than Verizon's alleged need to accommodate "practical concerns." The FCC, moreover, refused to adopt a default period of ten days only "because such time frames are better established through negotiations," *id.*, not as Verizon suggests, because that period is too short. The FCC also proposed the very condition that the Arbitrator adopted and Verizon opposes that "any pricing changes start the next billing cycle following the conversion *request*," not completion. *Id.* (emphasis added). The Arbitrator's Decision is fully consistent with the TRO, is reasonable, and should be affirmed.

C. The Arbitrator Properly Required the TRRO's Clarification that Verizon Remains Obligated to Provide Cost-Based Interconnection Facilities.

8. The Arbitrator properly required that the Amendments at issue in this proceeding include the FCC's clarification that its "finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." TRO ¶ 140 (footnote omitted). Verizon contends that including such a clarification in the Amendment is unnecessary and inconsistent with the existing interconnection provisions in some of its interconnection agreements ("ICAs"). Verizon is incorrect on both counts.

9. The FCC would not have devoted a separate paragraph in the TRRO to clarifying that its finding of non-impairment for entrance facilities did not extend to facilities used for interconnection if the FCC did not believe such clarification was necessary. It was and is. As should be abundantly clear by now, CLECs do not trust Verizon and seek to minimize any ambiguity that Verizon could and would use to its competitive advantage. Including an express

provision in the Amendment that Verizon's interconnection obligations remain unaffected by the TRRO does just that, and the Arbitrator properly required it.

10. Nor is this clarification inconsistent with existing ICAs. Contrary to Verizon's claims, CLECs' right to interconnection facilities at cost-based rates derives from the federal Telecommunications Act of 1996 and FCC rules, not individual ICAs. While some CLECs may have bargained away this right in "negotiations" with Verizon, the general right nevertheless remains. No fair reading of TRO ¶ 140 would have that provision supercede Commission-approved ICAs, and inclusion of the language from that paragraph also would not have that effect. That certainly is true for the Joint CLECs' ICAs. To address Verizon's concerns about the language the Arbitrator approved, the Joint CLECs would be willing to include the verbatim language from paragraph 140 quoted above rather than the interpretive language the Arbitrator approved or Verizon proposes. But inclusion of the FCC's language is the bare minimum the Commission should include in the Amendment.

D. The Arbitrator Correctly Interpreted the Materiality Standard for Determining Which Party is Eligible for the Costs of EEL Audits.

11. The Arbitrator properly interpreted federal law to require a CLEC to be responsible for the costs of an audit of its compliance with enhanced extended link ("EEL") certification requirements only if the CLEC has *materially* failed to comply with the service eligibility criteria. *See* TRO ¶ 627. Verizon takes issue with this conclusion, claiming that its proposed language accurately reflects the FCC's requirement. The Arbitrator correctly rejected Verizon's proposed language.

12. The proposed language that Verizon highlights in paragraph 67 of its Petition addresses one aspect of the materiality requirement, but the remainder of the paragraph effectively negates that requirement. Verizon proposes, "To the extent the independent auditor's

report concludes that [CLEC] failed to comply with the service eligibility criteria for ***any*** DS1 or DS1 equivalent circuit, . . . [CLEC must] reimburse Verizon for the entire cost of the audit." Verizon Petition ¶ 67 (quoting Verizon Amendment 2, § 3.4.2.7) (emphasis added). Corresponding, Verizon's proposed language provides, "Should the independent auditor confirm [CLEC]'s compliance with the service eligibility for ***each*** DS1 or DS1 equivalent circuit, . . . Verizon shall reimburse [CLEC] for its out-of-pocket costs." *Id.* (emphasis added).

13. Such language is not even arguably "verbatim" from the TRO. Rather, it is spun from the whole cloth of Verizon's unilateral and self-serving interpretation of TRO paragraph 599. That paragraph merely establishes how the service eligibility criteria are to be applied and in no way purports to apply to the materiality of a CLEC's compliance with those criteria for purposes of audit cost reimbursement. Indeed, that paragraph is not even in the audit section of the order. Verizon thus invents a requirement that would effectively eliminate any reasonable concept of materiality by requiring the CLEC to meet the eligibility criteria for each and every DS1 or equivalent circuit, even if there are hundreds or thousands of such circuits being audited. The FCC's standard of "compliance in all material respects with the service eligibility requirements," TRO ¶ 628, cannot be so interpreted.

14. The Arbitrator, therefore, correctly interpreted the FCC standard as requiring material *overall* compliance with the service eligibility criteria, not materiality on an individual circuit-by-circuit basis. The Commission should adopt this interpretation.

E. The Commission Should Modify the Arbitrator's Decision on When Verizon's Obligation to Undertake Routine Network Modifications Arose as AT&T Has Proposed.

15. The Joint CLECs echo AT&T's appreciation for the Arbitrator's outstanding efforts in thoughtfully and thoroughly evaluating and resolving the many issues and competing

Amendment language proposed by the parties. The Joint CLECs agree that on balance, the Arbitrator's Decision properly reflects the requirements of applicable federal law.

16. The Joint CLECs, however, also agree with AT&T that the Arbitrator incorrectly concluded that Verizon's obligation to perform routine network modifications exists only upon amendment of the ICAs. In addition to the federal law that AT&T discusses in its Petition, the Commission concluded long before passage of the TRO that an ILEC with responsibilities to provide UNEs under Section 251(c)(3) is obligated to undertake routine network modifications to the same extent that it undertakes such activities for its retail customers. *In re Investigation Into U S WEST Communications, Inc.'s Compliance with Section 271, et al.*, Docket Nos. UT003022 & UT-003040, Twenty-Fourth Supp. Order, ¶ 19 (December 20, 2001); *accord id.*, Twenty-Eighth Supp. Order, ¶ 22. Verizon, therefore, has never been justified in rejecting orders from CLECs because provisioning those orders required Verizon to make routine network modifications.

17. Even were that not the case, the Commission has interpreted the ICAs of some of the CLECs as automatically incorporating changes of law into the ICA. The Joint CLECs continue to dispute that interpretation and believe that at least some level of negotiation and memorialization of appropriate terms and conditions is required before the ICA reflects changes of law. Based on the Commission's interpretation, however, any ICA that automatically incorporates changes of law automatically incorporated the TRO's routine network modification requirements at least as of October 2, 2003, when the TRO became effective. Any automatic incorporation of changes of law applies equally to both parties, not just changes of law that benefit Verizon. Accordingly, to the extent that any ICA is interpreted automatically to incorporate changes of law, the CLEC party to that agreement was entitled to have Verizon

undertake routine network modifications, and Verizon breached its ICA each and every time it rejected a UNE order because Verizon refused to undertake such modifications.

18. The Commission, therefore, should revise the Arbitrator's Decision to reflect that Verizon's obligation to undertake routine network modifications arose and was applicable prior to the effective date of the Amendment that results from this proceeding.

II. CONCLUSION

19. For the foregoing reasons and the reasons addressed in the Joint CLECs' Initial and Response Briefs, the Commission should refuse to modify the aspects of the Arbitrator's Decisions discussed above that Verizon has challenged but should modify the issue discussed above that AT&T has raised.

RESPECTFULLY SUBMITTED this 18th day of August, 2005.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Integra Telecom of Washington, Inc., Pac-West Telecomm, Inc., and XO Communications Services, Inc.

By _____
Gregory J. Kopta

CERTIFICATE OF SERVICE
Docket No. UT-043013

I hereby certify that on the date given below the original and 12 true and correct copies of Joint CLEC Response to Verizon and AT&T Petitions for Commission Review of Arbitrator's Report and Decision, in the above-referenced docket were delivered by Federal Express to:

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

On August 18, 2005, a true and correct copy will be sent by regular U.S. Mail, postage prepaid, to:

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DATED this 17th day of August, 2005.

Melissa K. Geraghty

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