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

BRIEF ON CONFORMING LANGUAGE ISSUES OF

COVAD COMMUNICATIONS COMPANY,

INTEGRA TELECOM OF WASHINGTON, INC.,

PAC-WEST TELECOMM, INC., AND

XO COMMUNICATIONS SERVICES, INC.,

January 31, 2006

I. INTRODUCTION

1. Covad Communications Company, Integra Telecom of Washington, Inc., Pac-West Telecomm, Inc., and XO Communications Services, Inc. (collectively "Joint CLECs"), provide the following Brief on issues arising out of their negotiations with Verizon Northwest Inc. ("Verizon") and other interested parties to create an Amendment that conforms to the Commission's order in this proceeding.

2. The nature of the manner in which the parties presented their disputed issues to the Commission for resolution required the parties to devote considerable resources to developing an Amendment that is consistent with the Commission's determinations. Unfortunately, Verizon has used that process to attempt to revisit some of those determinations, as well as to raise new issues, many of which could and should have been raised earlier. The Commission should refuse to reconsider its prior decision and should resolve new issues only to the extent that the Commission required the parties to develop wholly new language. The CLECs have proposed language that adheres to the letter and the spirit of the Commission order and that reasonably resolves legitimate new issues. The Commission should adopt those proposals.

3. The Joint CLECs have organized this brief in the order of the provisions of the Amendment. In cases where an issue or disputed language is included in many different provisions, the Joint CLECs address the issue or language in the first section in which it appears. The black lined Amendment that Verizon files should reflect the disputed language in each section and permit the Commission to identify the subsequent provisions where the issue recurs. The Joint CLECs, however, are willing to provide the Commission with a list of Amendment provisions that relate to each issue discussed in this brief if the Commission so requests.

II. DISCUSSION

Section 1, Pricing Attachment, and Exhibit A

4. Verizon proposes to include a Pricing Attachment, including an Exhibit A, to the Amendment, which includes "general" language on charges for services and rates for removal of load coils and bridged taps.[1] Verizon's proposal is inconsistent with the Commission order. Far from authorizing Verizon to impose any new rates pursuant to the TRO or TRRO, the Commission rejected Verizon's proposals to impose any charges that the Commission has not previously authorized. *E.g.*, Order No. 17, ¶¶ 147-50. Specifically with respect to routine network modifications charges, the Commission ruled that "[t]he Commission should not approve Verizon's proposed interim rates for routine network modifications until Verizon demonstrates through a cost study or supporting evidence that it is not already recovering the costs in approved rates." Order No. 17, ¶ 486. The Commission adopted no new rates as a result of this arbitration. Nor does anything in the TRO, TRRO, or Commission's decision discuss, much less warrant, inclusion of "general" terms concerning when and under what circumstances rates should apply or be replaced by future proceedings. Verizon's proposed Pricing Attachment thus has no proper place in the Amendment.

5. Notwithstanding the Commission's decision, Verizon proposes to attach an "Exhibit A" to the Amendment, which includes several rates for routine network modifications. While it appears these rates were previously approved by the Commission, the Commission never authorized Verizon to include or add approved rates for routine network modification into the amendment. Verizon explained to the CLECs that it wants to include these rates to ensure it can charge for them in case a CLEC takes the position that such rates are not applicable under its

[1] Section 1 also includes a reference to "a Verizon tariff," to which the Joint CLECs object. This issue is addressed in the context of the following discussion of Section 2.2.

particular interconnection agreement. Verizon, however, failed to specify any agreement in which this would be an issue, much less how a CLEC could plausibly claim that it is not required to pay rates that the Commission has established. Whatever the merits of this argument, moreover, it was never arbitrated or decided in this docket.

6. The Commission, therefore, should reject Verizon's proposal to include the Pricing Attachment in the Amendment. Even if the Commission does not require removal of the Pricing Attachment in its entirety, the Commission should require that Exhibit A (or at least the rates for load coil and bridged tap removal) not be included in the Amendment.

Section 2.2: (a) "Notwithstanding" clause; and (b) legal references

7. Throughout the Amendment, Verizon insists on prefacing or conditioning substantive provisions with two phrases: (1) "Notwithstanding any other provision of the Agreement, this Amendment, or any Verizon tariff,"[2] and (2) "only to the extent required by the Federal Unbundling Rules and the Arbitration Orders." The Commission has already rejected the first phrase and the second phrase is inconsistent with the Commission Order.

8. The Commission concluded, "It makes no sense to include the 'notwithstanding' clause in the amendment in question" and resolved the issue in favor of the CLECs. Order No. 17, ¶ 494. Verizon's insistence on including the phrase directly conflicts with this Order. Verizon contends that the phrase is necessary to avoid internal confusion.[3] If Verizon believed

[2] In some cases, Verizon proposes "Notwithstanding any other provision of the Amended Agreement or any Verizon tariff," *e.g.*, Section 3.1.1, or "Notwithstanding any other provision of the Amended Agreement (but subject to and without limiting Section 2 above) or any Verizon tariff," e.g., Section 3.1.2.

[3] For example in Section 3.5.4, Verizon contends that the "notwithstanding" clause is necessary because the FCC has defined "Transport" to include Entrance Facilities, and Verizon is concerned that a CLEC will attempt to use that definition to insist on obtaining Entrance Facilities as UNEs, despite the express statement in Section 3.5.4 that Verizon is not obligated to provide such UNEs. The effectiveness of Section 3.5.4, however, is exactly the same whether or not the clause is included.

that was the case, it should have raised that issue in its petition for Commission review of that order. Having failed to do so, Verizon may not challenge this conclusion now. Even if the Commission were to entertain such a challenge, it should be rejected. The clause adds absolutely nothing to any of the provisions in which Verizon proposes to insert it and creates potential problems with its reference to Verizon tariffs that do not currently exist (except to reflect Commission-approved prices) in Washington.[4]

9. Verizon's other proposed phrase is similarly superfluous. Verizon does not need to include a reminder in every substantive provision of the Amendment that Verizon is only going to do the absolute minimum it is legally required to do. The Joint CLECs are also concerned that Verizon will use the clause "only to the extent required" as a legal justification to unilaterally modify the Amendment based on Verizon's interpretation of its legal obligations. The Commission, therefore, should require Verizon to remove this phrase.

10. If the phrase is to be included, however, the CLECs propose that it be revised to provide, "in accordance with the Federal Unbundling Rules, applicable state law, or the Arbitration Orders." The Commission specifically required that the parties develop language to recognize that Verizon must comply with state, as well as federal, unbundling laws. Order No. 17, ¶ 66. Verizon refuses to do so, offering to include only a reference to the Arbitration Orders. Those orders, however, only make a general reference to state law and "do[] not establish state unbundling requirements." *Id*. Merely stating that Verizon must make UNEs available "in accordance with . . . the Arbitration Orders" would not incorporate state unbundling requirements and thus does not comply with the Commission's order. The bottom line is that

[4] If the Commission were to permit Verizon to include its "notwithstanding" or "subject to and without limiting Section 2" clause – which it should not – the CLECs have proposed that the language also include a cross-reference to Section 4.4, which CLECs have proposed to modify to ensure that their rights under their interconnection agreements and applicable law are preserved.

Verizon vehemently disagrees that any state law could apply to Verizon's unbundling obligations, and it will not include such language in the Amendment despite the Commission's order to do so. The Commission should refuse to accept Verizon's recalcitrance and should require Verizon to delete this phrase or modify it as the CLECs have proposed.

Section 2.5: Reciprocity of pre-existing discontinuance rights

11. Verizon has included a provision in the Amendment that preserves Verizon's rights under the Agreement concerning Discontinued Elements. The CLECs similarly want to ensure that the Amendment does not alter their rights under the Agreement with respect to whether, and the extent to which, Verizon may discontinue providing UNEs and have proposed language that would make this provision reciprocal. Verizon has refused. Verizon's sole justification for its refusal is that the proposed language conflicts with the Amendment. The language does no such thing but merely preserves CLECs' pre-existing rights.

12. Even if the CLECs' proposed language could somehow be construed to conflict with the Amendment, that is not the intent. Verizon, however, did not propose any language that would address its concerns. Verizon appears to be more interested in enhancing its ability to unilaterally discontinue providing UNEs than preserving the integrity of its interconnection agreements. The Commission should adopt the CLECs' proposed language or alternatively, delete Section 2.5 in its entirety from the Amendment.

Sections 2.6 & 3.4.1: Applicable state law & limitation to Federal Unbundling Rules

13. The Commission directed the parties to modify the provisions of the Amendment "that limit unbundling obligations to those set forth in federal unbundling rules" to recognize that state law may also require unbundling. Order No. 17, ¶ 66. The CLECs have proposed to insert the phrase "applicable state law" in several provisions of the Agreement to comply with the Commission order. Similarly, the CLECs have proposed to specify that the limitations on high

capacity UNEs are "pursuant to the Federal Unbundling Rules," leaving open the possibility that state law may impose different requirements. Verizon refuses to include these provisions or propose any alternative language because, as discussed above, because Verizon disagrees with the Commission's decision that Verizon may have unbundling obligations derived from state law. The Commission should once again reject Verizon's position and adopt the CLECs' proposed language.

Section 3.4.1.1.2: Affiliates

14. The TRRO imposes caps on the number of certain high capacity UNEs that a CLEC can obtain even where there is impairment. Verizon proposes to impose that cap on a CLEC "and its Affiliates." Verizon claims that the limitation is necessary to ensure that CLECs do not attempt to evade the caps through the use of affiliates. Verizon's unsubstantiated paranoia notwithstanding, the TRRO does not include such a limitation, nor does the Commission order authorize such a limitation. Indeed, Verizon raised this issue for the first time during the negotiations on language to conform to the Commission order. The Commission, therefore, should reject Verizon's proposal.

Section 3.6.1.2: Access to data underlying wire center designations

15. The parties disagree on the data underlying its wire center designations that Verizon must make available to a CLEC to enable the CLEC to undertake the reasonably diligent inquiry required before certifying its entitlement to order certain UNEs in that wire center. The Commission order does not address this issue directly, but the CLECs have proposed reasonably prescriptive language in light of the problems they have had in obtaining any information from Verizon or other ILECs to ensure that the CLECs will have access to the data they need. Verizon, on the other hand, proposes more general language that on its face fails to provide sufficient information. Verizon, for example, proposes to mask the identity of the fiber-based

collocators, even when a non-disclosure agreement is in place. Without those identities, however, a CLEC cannot verify that Verizon has accurately characterized other CLECs as fiber-based collocators.

16. The CLECs have proposed reasonable access to the data underlying Verizon's wire center designations, and the Commission should adopt that language. Alternatively, the Commission should establish a generic process in which Verizon's existing and new wire center designations can be reviewed and verified by the Commission and all interested parties. *See* Order No. 17, ¶ 117.

Section 3.6.2.1: Resolution of wire center designation disputes

17. The parties agree that disputes over Verizon's designation of its wire centers should be resolved by the Commission or the FCC. Verizon, however, also proposes that it be able to elect to have the dispute resolved "through any dispute resolution process set forth in the Agreement," including private arbitration. The Commission should reject that proposal. The Commission recognized that a Commission proceeding – in particular a generic inquiry in which all interested parties can participate – is the appropriate means of determining the propriety of Verizon's wire center designations. Order No. 17, ¶ 117. Verizon should not be permitted to discourage a CLEC from initiating such a proceeding by requiring that they incur the time and expense of an individual private arbitration. The availability of UNEs, moreover, is an issue of Commission concern that has a substantial impact on the public interest. The Commission, not a private arbitrator, should determine the wire centers in which Verizon is no longer required to offer certain UNEs.

Section 3.6.2.2: Applicable charges if Verizon prevails on wire center designation dispute

18. The parties agree that if a wire center designation dispute is resolved in favor of Verizon, CLECs must pay Verizon the difference between the UNE rate they paid pending the resolution of the dispute and the rate for the comparable tariffed service from the date the circuit was provisioned. Verizon, however, seeks to impose additional conditions, including applying late payment and other unspecified charges and using the highest tariffed rate out of Verizon's interstate special access tariff, rather than any lower discounted rate that might be available.[5] Nothing in the TRRO or the Commission order contemplates, much less requires, such conditions. Verizon claims these conditions are necessary as financial penalties to discourage CLECs from making frivolous challenges to Verizon's wire center designations. CLECs, however, are fully aware that Verizon will aggressively defend its wire center designations and that they will be required to expend significant resources to litigate or otherwise resolve the dispute. No additional financial "disincentives" are warranted or authorized, and the Commission should reject them.

Section 3.6.2.3: Rejection of CLEC orders in designated wire centers

19. The parties agree that Verizon is entitled to reject any CLEC orders for applicable Discontinued Elements in wire centers that the Commission or FCC has confirmed that Verizon has properly designated as non-impaired. Verizon, however, proposes language that would authorize Verizon to reject such orders *before* such a Commission or FCC determination. Such language directly conflicts with paragraph 234 of the TRRO. Verizon also proposes to be able to reject orders if a private arbitrator has approved Verizon's wire center designation. As discussed

[5] Verizon also refuses to agree that its determination of a service analogous to Dark Fiber transport must be "reasonable" in Section 3.6.2.2.1. Verizon cannot credibly claim that it should not be required to act reasonably when making such a determination.

above in the context of Section 3.6.2.1, only the Commission or the FCC should resolve wire center designation disputes. Finally, Verizon seeks to be able to reject CLEC orders "as otherwise permitted by the Commission or the FCC." Such a condition is a best inapplicable and at worst another means for Verizon to incorporate future Commission or FCC determinations unilaterally. The Commission should reject Verizon's proposed language.

Section 3.6.3.1: Transition periods for additional designated wire centers

20. The Commission determined that "[b]ecause the basis for the FCC's choice of a twelve-month transition period is the same for future changes to UNE eligibility, a twelve-month transition period is appropriate in the interim until the Commission establishes a different transition period in Docket No. UT-053025." Order No. 17 ¶ 108. The parties have incorporated this transition period into the Amendment, but the CLECs have proposed that the period be 18 months for dark fiber transport. The FCC established an 18-month transition for dark fiber UNEs, and consistent with the Commission's rationale, the interim transition period should also be 18 months. The Commission, therefore, should adopt the CLECs' proposed language.

Section 3.8.2.3: Bills for transition rates and true ups

21. The CLECs have proposed a provision that would require Verizon to provide sufficient information in the bills it sends for transition rate or true up charges to enable the CLEC to verify the accuracy of the bills. Verizon refuses to accept this provision, claiming that its billing systems are not capable of providing such information. Verizon proposes that the CLEC should dispute the bill if the CLEC seeks such information. A CLEC, however, should not be required to initiate a billing dispute just to get the information it needs to determine the accuracy of the bill. Indeed, the CLEC would be penalized for seeking verifying information under such a process because Verizon would impose late payment charges if some or all of the amounts billed are accurate. The Commission, therefore, should adopt the CLECs' proposed

language, or alternatively require Verizon to waive any late payment charges or other penalties pending a reasonable time for the CLEC to verify the accuracy of the bills once Verizon has provided the necessary information.

Section 3.9.1: Timing of CLEC orders to convert UNEs to other services & transition rates

22. The CLECs are willing to make commercially reasonable efforts to place orders in time to have Discontinued Elements converted to tariffed services by March 11, 2006 (or September 11, 2006 for Dark Fiber). CLECs also agree that even if that conversion does not occur on March 11 (or September 11), Verizon may begin charging the tariffed rates as of those dates. CLECs are even willing to place orders early as long as the new pricing does not take effect until the required dates.

23. Verizon, however, proposes contract language that would require CLECs to determine how much time Verizon will need to process the orders and ensure that the order is processed by the required dates. Such language is simply unreasonable. Verizon tellingly has not offered to provide any information about how long it will take Verizon to process CLEC orders, and if Verizon does not know, it cannot expect the CLECs to know. Nor should Verizon expect CLECs to place orders early if it means that they will have to pay higher rates sooner than they must. The CLECs are willing to make reasonable efforts to accommodate Verizon's order processing constraints, and the Commission should adopt the language the CLECs propose to do that.

24. Verizon also proposes that it have the ability to reprice Discontinued Elements by applying a surcharge to existing rates until it can bill the new tariffed rates. CLECs do not object to that proposal, but only if the surcharge when added to the UNE rate equals the tariffed rate. Verizon, however, proposes only that the application of the surcharge be "equivalent" to the new

service rate. Such a standard is far too subjective. Verizon claims it is necessary because of the peculiarities of UNE-P and replacement services, but even if that were the case, Verizon has not proposed language that would limit its "equivalence" proposal to that situation. Regardless of how Verizon bills for the replacement service, the amount the CLEC is billed should be equal to the rates for the replacement service, and the Amendment should state just that.

Section 3.9.2: Disconnection of UNEs

25. The parties agree that Verizon may convert Discontinued Elements to an analogous service if the CLEC has not submitted an order to disconnect or convert those elements by March 11, 2006 (or September 11, 2006 for Dark Fiber).[6] Verizon also proposes to have the sole discretion to disconnect those Discontinued Elements, which would enable Verizon to take CLEC customers out of service. The Commission has never authorized such unilateral customer-affecting action and should not do so now. The Commission should accept the CLEC's proposed revisions to this section.

Section 3.9.3: Charges for converting Discontinued Facilities

26. Consistent with Order No. 17, ¶¶ 147-50, and Order No. 18, ¶ 23, the CLECs propose that Verizon charge nothing more for converting Discontinued Facilities to replacement services than the UNE disconnection charge that the Commission authorized in a prior cost docket.[7] Verizon, on the other hand, proposes that this limitation not apply if there are Verizon tariff provisions or agreements that impose additional charges or if the conversion is something other than a "records-only change" as defined by Verizon. The Commission rejected Verizon's proposal to impose any charge other than the disconnect charge the Commission previously

[6] This section incorporates the same problematic language concerning when the CLEC must place the necessary order that is discussed above in connection with Section 3.9.1.

authorized, and Verizon may not seek reconsideration of that decision now. The Commission should adopt the Joint CLECs' proposed language.[8]

Section 3.11.2.6: CLEC certification

27. The FCC did not specify how CLECs were to certify their compliance with the EEL certification requirements, but the CLECs have agreed to do so as part of the service order process. CLECs are willing to provide a notation in the "remarks" section of the access service request ("ASR") form, but Verizon insists that the notation be exactly as Verizon has prescribed (or the order will be rejected) until Verizon unilaterally changes that requirement at some future time. Verizon's proposal creates an unreasonable administrative burden that stands in sharp contrast to the certification requirement in Section 3.6.1. The Commission, therefore, should adopt the CLECs' proposed language.

Section 3.11.2.9: Audits

28. Two issues have arisen in the context of developing conforming language on Verizon's right to audit CLEC compliance with EEL eligibility criteria. The first issue is when Verizon must provide a copy of the audit report to the CLEC. Verizon proposes that the CLEC receive a copy only if Verizon asserts that the CLEC is not in compliance and the CLEC requests a copy – and even then, Verizon may provide only the portions of the report related to the asserted noncompliance. The audit, however, is of the CLEC's operations and the report contains information that is specific to the CLEC. If the CLEC must be forced to undergo an audit, it is entitled to receive a copy of the report, regardless of the auditor's findings. Verizon has offered no justification for refusing to provide the CLEC with a copy of the report in all

[7] The Joint CLECs propose that the phrase "other than the UNE disconnect charge authorized by the Commission" be added to the end of the CLEC-proposed language in the black lined document Verizon has submitted.

[8] This discussion also applies to the disputed language in Section 3.11.2.4.

circumstances, and no justification exists. The Commission should adopt the CLECs' proposed language on this issue.

29. The second issue concerns the costs of the audit. Verizon proposes that a CLEC recover only its "***reasonable and verifiable*** costs of complying with the requests of the independent auditor" (emphasis added) if the auditor confirms the CLEC's material compliance with the EEL eligibility requirements, but that the CLEC "must reimburse Verizon for the cost of the independent auditor" if the CLEC is not in material compliance. Restrictions on the costs the CLEC may recover are not reasonable if they do not also apply to Verizon's costs. A CLEC should not be required to pay unreasonable audit costs any more than Verizon. Accordingly, the CLECs have proposed that Verizon's costs be reasonable and that there be no "verifiable" condition on CLECs costs. The Commission should adopt the CLECs' proposed language.

Section 4.4: Scope of Amendment

30. The CLECs have proposed additional language in Section 4.4 to preserve CLECs rights under their existing interconnection agreements and to clarify that the Amendment addresses only modifications required pursuant to Section 251 of the Telecommunications Act of 1996. As discussed in the context of Sections 2.6 & 3.4.1, this language in large part reflects the Commission's determination that the Amendment should recognize that state law may impose other requirements. The Commission should adopt this language.

Section 4.7: Definitions

31. Verizon proposes to modify several of the definitions that the Commission required Verizon to incorporate in the Amendment. The CLECs propose that the Amendment include the definitions specified in the Commission orders. The Joint CLECs specifically address only a few of Verizon's proposed modifications, but the Commission should refuse to permit any of these modifications as inconsistent with the Commission orders.

32. Dedicated Transport. Verizon proposes to add a cross reference to Section 3.5.4 (concerning Entrance Facilities) to this definition, contending that it is needed to clarify that although Entrance Facilities are included in the definition of Dedicated Transport, Verizon is not required to provide them as UNEs. Section 3.5.4 already says that, and no further clarification is necessary.

33. Discontinued Element. The Commission ordered Verizon to include the definition of Discontinued Element proposed by MCI. Order No. 17 ¶ 174. Verizon has vastly expanded that definition, including adding a laundry list of elements affected by the TRRO and cross-references to the substantive provisions of the Amendment governing these elements despite the Commission's express rejection of Verizon's position that the list should include these elements. *Id*. ¶ 172. The Commission did not authorize and should not permit Verizon to impose an almost entirely new definition, particularly one that is over one page long, includes substantive provisions, and threatens to add confusion and ambiguity, rather than clarity.

34. Entrance Facility. The Commission adopted Verizon's original definition of Entrance Facility with the addition of a sentence clarifying that Entrance Facilities remain available as interconnection facilities at cost-based rates. *Id*. ¶ 179; Order No. 18 ¶ 49. Verizon proposes an entirely new definition in defiance of the Commission's orders. The Commission should reject Verizon's proposal.

35. Wire Center. The Commission adopted AT&T's definition of Wire Center. Order No. 17 ¶ 239. Verizon proposes to modify that definition to refer to "the Appendix to Part 36 of Chapter 47 of the Code of Federal Regulations." Such a reference is vague and ambiguous, as well as inconsistent with the Commission's order and should be rejected.

III. CONCLUSION

36. The language that the CLECs have proposed conforms to the letter and the spirit of the Commission's order, and the Commission should adopt that language to resolve the parties' outstanding disputes.

RESPECTFULLY SUBMITTED this 31st day of January, 2006.

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

By _____
Gregory J. Kopta