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April 6, 2004

VIA HAND DELIVERY

Ms. Carole Washburn, Executive Secretary
Washington Utilities & Transporation Committee
1300 Evergreen Park Drive, SW
Olympia, WA 98504

Re: Docket No. UT-043013 - Verizon's Memo in Opposition to Sprint's Motion to Dismiss

Dear Ms. Washburn:

Enclosed please find an original and two (2) copies of Verizon's Memo in Opposition to Sprint's Motion to Dismiss in the above-referenced matter.

Very truly yours,

Timothy J. O'Connell

Enclosures

cc: Aaron M. Panner, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
Scott H. Angstreich, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
Genevieve Morelli, Kelley Drye & Warren, LLP
William E. Henricks III, Sprint Communications Co. LP

BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment for 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 VERIZON'S MEMO IN OPPOSITION TO SPRINT'S MOTION TO DISMISS

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STATE OF WASH. UTIL. AND TRANSP. COMMISSION

Verizon Northwest Inc. ("Verizon") hereby opposes the motion to dismiss filed by Sprint Communications Co., L.P. ("Sprint"). Sprint argues first that Verizon failed to negotiate in good faith with Sprint, but, in fact, Verizon has negotiated in good faith; the parties simply have not reached agreement. Second, Sprint argues that Verizon has failed to comply with various procedural and formal requirements under 47 U.S.C. § 252. This, too, is incorrect. Verizon's petition conforms to all applicable formal requirements. Third, Sprint argues that Verizon has failed to comply with the procedures set out in the change-of-law provisions of the parties' interconnection agreement; but, not only does Sprint fail to explain how Verizon has failed to comply with its obligation under the contract, the *Triennial Review Order*[1] also makes clear that the timetable established in section 252(b)(2) applies even where parties' agreements do contain

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 (2003) ("Triennail Review Order" or "TRO"), vacated in part and remanded, United States Telecom Ass'm v. FCC, Nos. 00-1012 et al., 2004 WL374262 (D.C. Cir. Mar. 2, 2004) ("USTA II").

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change of law language. Finally, Sprint argues that the Commission should not consider Verizon's petition while the state of the law is unsettled. But the *TRO* was upheld by the D.C. Circuit in numerous respects, particularly insofar as it reduced prior federal unbundling requirements. And, Verizon's draft *TRO* amendment contains provisions designed to address the possibility of future legal developments with respect to the *TRO*. For these reasons, and as set forth in greater detail below, Sprint's motion should be denied.

DISCUSSION

I. Verizon Negotiated in Good Faith

In its petition, Verizon pointed out that "virtually none" of the CLECs provided a timely response to Verizon's October 2, 2003 notice initiating negotiations. Sprint is one of the very few CLECs that did. Contrary to Sprint's account, however, Verizon has not "failed to respond in any meaningful way" to Sprint's proposals. Sprint Motion at 6. For example, aside from numerous other contacts, on February 12, the parties' respective negotiating teams participated in a conference call to discuss, in detail, Sprint's desired revisions, so that Verizon could better understand the basis for Sprint's positions. Despite the parties' discussions, Sprint charges that Verizon acted in bad faith by allegedly failing to "specifically accept or reject any proposal Sprint has offered," and declining "to designate during the negotiations a representative authorized to negotiate." *Id.* at 5.

There is no merit to Sprint's bad faith allegation. Sprint's claim is, in effect, a complaint that Verizon did not agree to Sprint's changes to Verizon's amendment. As to Sprint's allegation that Verizon did not "specifically accept or reject" Sprint's proposals on the disputed issues, Sprint should have concluded that, because Verizon did not agree to Sprint's revisions, they were

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rejected. Nevertheless, to remove any doubt about Verizon's stance on the issues, Verizon did, in fact, send Sprint a point-by-point response to each of Sprint's proposals prior to the filing of Sprint's motion. In short, as Sprint well knows, it is not true, as Mr. Weyforth (Sprint's affiant) alleges, that Verizon never responded to Sprint's proposals. Verizon discussed those proposals with Sprint on a number of occasions and thoughtfully considered, but ultimately rejected, Sprint's changes to Verizon's amendment. Verizon's refusal to accept Sprint's proposals does not constitute bad faith negotiation. *See, e.g., NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1165 (D.C. Cir. 1992) (noting that the duty to bargain in good faith does not prohibit "adamant insistence" on one's own terms, and that "neither side is required to agree to a proposal or make concessions") (internal quotation marks omitted).[2]

Sprint's account of the communications between Sprint and Verizon, as reflected in Mr. Weyforth's affidavit, is also inaccurate and incomplete. For example, Mr. Weyforth's entry for "10/15, 16, 17/03" states that Sprint sent Verizon "a series of emails to schedule a conference call to review the Verizon TRO amendment . . . [but] received no response." Weyforth Aff. ¶ 6. Even on the face of Mr. Weyforth's affidavit, it is apparent this claim is wrong. If Verizon made "no response" to contacts on October 15, 16 and 17, the October 21 conference call between Verizon and Sprint could not have occurred. In fact, on October 15, 2003, Verizon negotiator Stephen Hughes responded to Sprint's e-mail with an e-mail asking for the Sprint team's availability for that week and next. After exchanging a few e-mails, the parties decided on a

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[2] The FCC itself relied on labor law precedents when it defined the "good faith" requirement of § 251. *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15577-78, ¶¶ 154-155 & nn.288, 292 (1996) (subsequent history omitted); *see also* First Report and Order, *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5454, ¶ 22 n.42 (2000) (noting that "the good faith negotiation requirement of Section 251 . . . relies substantially on labor law precedent").

1 time and date for the call, and, on October 17, Sprint forwarded a call-in number, at Mr. Hughes'
2 request. To take another example, contrary to Mr. Weyforth's entry for "3/02/04" (*see id.*),
3 Verizon did, in fact, provide Sprint, in a March 5 e-mail from Verizon's counsel to Sprint's
4 counsel, electronic copies of the petitions for arbitration Verizon had filed in other states. Aside
5 from factual inaccuracies, Mr. Weyforth's chronology includes information that is not relevant to
6
7 negotiation of a *TRO* amendment, such as Sprint's adoption of the AT&T Virginia agreement.

8 Further, as Mr. Weyforth's affidavit itself proves, Verizon did not fail to designate a
9 representative authorized to negotiate with Sprint. In fact, Verizon designated three--Mr.
10 Stephen Hughes, Mr. Gary Librizzi, and Verizon counsel Paul Rich--who are all named by Mr.
11 Weyforth and who regularly communicated with Sprint's negotiators. The fact that Verizon's
12 negotiators once informed Sprint that they would have to discuss certain of Sprint's proposals
13
14 with more senior legal counsel before definitively responding to them does not mean that
15 Verizon failed to authorize anyone to negotiate with Sprint.

16 The *WorldCom* case Sprint cites supports Verizon, not Sprint. There, WorldCom initially
17 negotiated, but later stopped doing so, expressly indicating that it "was not in a position to
18 negotiate a permanent interconnection agreement." *WorldCom, Inc. f/k/a MFS Intelenet of*
19 *Washington, Inc. v. GTE Northwest Incorporated*, Third Supplemental Order, Docket No. UT-
20
21 980338, at 23 (May 12, 1999). GTE charged WorldCom with bad faith because it had stopped
22 negotiating, yet had failed to initiate an arbitration within the timeframe established in section
23 252(b)(1) of the Act. The Commission, however, found that both parties had failed to negotiate
24 in good faith because neither had requested arbitration when negotiations did not conclude
25 successfully: "the obligation to seek arbitration did not rest solely on WorldCom. GTE could
26

have requested arbitration as well." *Id.* At 24. Here, Verizon has done exactly what it was supposed to do under the Act, the *TRO*, and the Commission's own precedent—it has initiated an arbitration when negotiations on a *TRO* amendment failed to reach a successful conclusion within the time allotted by the statute for negotiation.

As Verizon noted in its Petition, Verizon has reached agreement with some CLECs on a *TRO* Amendment. The fact that Verizon and most other CLECs have not yet executed *TRO* Amendments is not "in-and-of-itself evidence of [Verizon's] failure to conduct meaningful, good faith negotiations." (Sprint Motion at 6.) First, Sprint cannot make any representations about Verizon's negotiations with any other CLECs. Second, negotiation is a two-way street. Verizon cannot be blamed for failure to reach negotiated solutions with CLECs who did not even come to the table, as most declined to do. (See Verizon Petition at 3-4.)

In any event, while Verizon disagrees with Sprint's account of the its discussions with Verizon with respect to the *TRO* amendment, those kinds of arguments will not advance the process of promptly concluding the amendment process. It makes no sense for the Commission to dismiss the petition with regard to Sprint and order Verizon to re-initiate negotiations, just because Verizon and Sprint failed to reach agreement on an amendment. Dismissing Sprint from the proceeding would mean only that Verizon would have to file for individual arbitration against Sprint, raising the same issues as those presented in this consolidated arbitration. It is unlikely that, after conducting a consolidated arbitration, the Commission will make different

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decisions on the same issues in a Sprint-specific arbitration. That inefficient approach makes no sense, either for the Commission or the parties.[3]

II. Verizon's Petition Complies with the Applicable Requirements of § 252

Sprint claims that Verizon failed to satisfy the elements of § 252(b)(2)(A), which require the petitioning party to "'provide the State commission all relevant documentation concerning – (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issue discussed and resolved by the parties.'" Sprint also relies on the analogous requirement under the Commission's rules. Sprint Motion at 7. This argument is without merit.

As an initial matter, the requirements that apply to a petition for arbitration under § 252(b)(2) do not apply to Verizon's petition to amend existing agreements. To be sure, the FCC has held that the "section 252(b) *timetable*" and negotiation process applies. *Triennial Review Order*, 18 FCC Rcd at 17405-06, ¶¶ 703-704 (emphasis added). But the FCC never held that a petition seeking resolution of disputes over amendments with respect to the *TRO* would have to comply with all of the formal requirements of a petition for arbitration of a brand new agreement. Moreover, contrary to Sprint's mechanical reliance on WAC 480-07-630(5), the Commission's rules expressly recognize that the ALJ sitting as an arbitrator has "all authority reasonable and necessary" to conduct the hearing, WAC 480-07-630(11)(a), which is fundamentally designed "to resolve disputes efficiently and economically." *Id.,* subsection (1). Verizon's petition clearly is designed to resolve the issues raised by the *TRO* "efficiently and economically," and Sprint's arguments therefore provide no basis for dismissal.

[3] Even if the Commission were to consider dismissing Verizon's petition as to Sprint (which it should not do), there is no basis for considering Sprint's suggestion that Verizon's petition should be dismissed as to all CLECs. Sprint's spurious bad faith allegations pertain only to Sprint's dealings with Verizon, not to any other CLEC's dealings with Verizon. Even if Sprint's allegations had any merit (which they do not), they provide no basis for dismissing Verizon's Petition as to all other CLECs.

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Even if the technical requirements of § 252(b)(2) did apply, however, Verizon has complied with those requirements in light of the circumstances of this proceeding. Verizon *has* set forth in detail the issues presented by its draft amendment and has explained its position in detail. Because Verizon has initiated a consolidated proceeding – for the convenience of the Commission and the parties – it has not been possible to describe "the position of each of the parties" on the "unresolved issues." Indeed, because Verizon has received little in the way of response to its proposal, and because most of the responses that Verizon has received did not represent serious efforts at negotiation and arrived very late in the process (*e.g.*, about four months after Verizon made its draft amendment available to CLECs on October 2, 2003 – and only a couple of weeks before Verizon filed its petition), Verizon was simply unable to set forth each of the other parties' positions on the various issues. As this Commission is aware, however, each of the parties – including Sprint – will have an opportunity in its response to Verizon's petition to set forth its own position on each of the issues in its own words. Verizon has thus complied with the clear purpose behind § 252(b)(2), which is to set forth the disputed issues that the Commission may be called upon to resolve.

In light of the unique circumstances present here – including the failure of most CLECs to negotiate or state any disagreement with the terms of Verizon's draft amendment – the drastic remedy of *dismissal* would be an inappropriate response to any technical defects in Verizon's petition. The FCC has determined that "delay in the implementation of the new rules we adopt in [the *TRO*] will have an adverse impact on investment and sustainable competition in the telecommunications industry." *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 703. Verizon's petition frames the issues presented to the Commission for resolution and provides all parties

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clear notice of Verizon's position and a fully adequate basis to respond. The appropriate course, therefore, is for the Commission to allow this proceeding to move forward with an eye towards achieving prompt and equitable results, not satisfying empty formalities. *See also Virginia Order*,[4] 16 FCC Rcd at 6229, ¶ 9 (holding that, where a petition had failed to meet § 252's service requirement, a "draconian remedy, such as dismissing outright the preemption petition before us, would contravene the intent of section 252(b) – to ensure a forum for parties to bring interconnection disputes for timely resolution").

III. The Terms of the Parties' Agreement Do Not Alter the Timetable Applicable to this Arbitration

Sprint also argues that Verizon's petition is premature because the section 252(b) timetable was intended by the FCC to apply only "for 'modification of interconnection agreements that are silent concerning change of law and/or transition timing.'" Sprint Motion at 8 (quoting *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 703). Sprint's claim is incorrect.

As an initial matter, while Sprint alludes to dispute resolution provisions in the parties' agreement, it fails to explain how Verizon has failed to comply with those provisions. But even if Sprint had done so, its argument would still be inconsistent with (and trumped by) the FCC's ruling. As explained above, the FCC not only mandated the § 252(b) timetable for those interconnection agreements without any change-of-law provision, it also made clear that the § 252(b) timetable applies "in instances where a change of law provision exists." *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 704.

[4] Memorandum Opinion and Order, *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, 16 FCC Rcd 6224 (2001) ("*Virginia Order*").

IV. The D.C. Circuit's Decision Does Not Alter This Commission's Responsibility to Undertake This Arbitration

Sprint finally argues that the Commission should follow the lead of two other state commissions that have purportedly found that Verizon's petition is "inappropriate and premature." (Sprint Motion at 9.) Sprint refers to an order of the North Carolina Utilities Commission ("NCUC") holding in abeyance the proceeding that Verizon initiated in that state, and to a Maryland Public Service Commission letter declining to take up Verizon's petition for arbitration. The determinations of those two state commissions (both of which are being challenged by Verizon) do not support the motions to dismiss.

First, Sprint fails to acknowledge that, in approximately two dozen other states, proceedings to amend existing interconnection agreements are underway and have not been dismissed. Indeed, AT&T and MCI have opposed Sprint's motion to dismiss in other states.[5] Second, both the NCUC and the Maryland PSC acted as they did in large measure because they erroneously concluded that the D.C. Circuit's decision in *USTA II*, which vacated the *TRO* in part, warranted at least a delay in acting on Verizon's petition. But the fact that certain aspects of the *TRO* (in particular, that state commissions would make impairment determinations) have been vacated provides no basis to postpone the task of amending interconnection agreements to reflect the *TRO*'s limitations on unbundling, which were upheld essentially in their entirety in *USTA II.*

The D.C. Circuit's decision in *USTA II* did not affect the process the FCC expected carriers to use to make appropriate changes to their interconnection agreements in response to the

[5] *E.g.*, Maine Public Utilities Comm., Docket No. 2004-135 (AT&T of New England, Inc's Response to the Motions to Dismiss filed by the CLEC Coalition and Sprint, filed March 26, 2004); Massachusetts Dep't of Telecommunications and Energy, Docket No. 04-33 (same, filed March 26, 2004); New Hampshire Public Utilities Comm., Docket No. DT 04-018 (MCI's Response to Motions to Dismiss, filed April 1, 2004).

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TRO. The FCC directed carriers to use the timeline established in § 252(b), and the Commission has the responsibility, under binding federal law, to resolve disputed issues presented by Verizon's petition in accordance with that timeline. *See Triennial Review Order*, 18 FCC Rcd at 17405-06, ¶¶ 703-704.

Thus, although the D.C. Circuit vacated certain portions of the *TRO*, many of the FCC's rulings (and, in fact, all or almost all of the FCC's rulings delisting UNEs) were not overturned by the court's decision, either because the court upheld the relevant rules or because they were not challenged in the first place. There is thus no need to wait for the outcome of the D.C. Circuit's decision before amending interconnection agreements to reflect these rulings, to the extent that they are not self-effectuating. Indeed, the FCC specifically anticipated that some parties might argue that the new rules contained in the *TRO* should not be implemented until all appellate challenges were exhausted, and rejected that argument. *See id.* at 17406, ¶ 705.

The *TRO* decisions that remain effective under *USTA II* are of critical importance. Those *TRO* decisions include those where the FCC:

- Determined that the broadband capabilities of hybrid copper-fiber loops and fiber-to-the-home facilities are not subject to unbundling.
- Eliminated the obligation to provide line sharing as a UNE and adopted transitional line-sharing rules.
- Eliminated unbundling requirements for OCn loops, OCn transport, entrance facilities, enterprise switching, and packet switching.
- Eliminated unbundling requirements for signaling networks and virtually all call-related databases, except when provisioned in conjunction with unbundled switching.
- Required ILECs to make routine network modifications to unbundled transmission facilities.
- Required ILECs to offer subloops necessary to access wiring in multi-tenant environments.
- Eliminated unbundled access to the feeder portion of the loop on a stand-alone basis.
- Required ILECs to offer unbundled access to the network interface device (NID) on a stand-alone basis.

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1 • Found that the pricing and UNE combination rules in § 251 do not apply to portions of an incumbent's network that must be unbundled solely pursuant to § 271.

2

3 Interconnection agreements should promptly be amended to reflect these *TRO* rulings. The fact

4 that some other aspects of the *TRO* were vacated or remanded (*e.g.*, those concerning mass-

5 market switching and high-capacity facilities) is no reason to dismiss this arbitration. Verizon's

6 proposed amendment, with the revisions reflected in Verizon's March 19, 2004 filing,

7 accommodates any further legal developments, including those that may result from the D.C.

8 Circuit's decision and possible subsequent appellate and FCC actions. Thus, there is no need to

9 delay this proceeding as to any aspect of Verizon's proposed amendment.

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CONCLUSION

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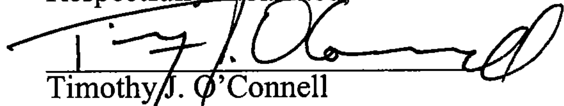
12 The Commission should deny Sprint's motion to dismiss.

13 Respectfully submitted,



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