BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of	)	DOCKET NO. UT- 041127
	)	
THE JOINT PETITION FOR	)	TEL WEST COMMUNICATIONS, L.L.C.
ENFORCEMENT OF	)	ANSWER TO VERIZON'S MOTION ON
INTERCONNECTION	)	THE PLEADINGS OF, AND ANSWER TO,
AGREEMENTS WITH VERIZON	)	JOINT PETITION FOR ENFORCEMENT
NORTHWEST, INC.	)	OF INTERCONNECTION AGREEMENTS
	)	

COMES Now, Tel West Communications, L.L.C. ("Tel West") and files this Answer to *Verizon's Motion for Judgment on the Pleadings of, and Answer to, Joint Petition for Enforcement of Interconnection Agreements*[1] (the "Motion for Judgment") and would respectfully show as follows:

I. INTRODUCTION

1. The issue before the Commission is "whether the provisions in the Triennial Review Order, other FCC Orders and interconnection agreements allow the replacement of existing circuit switches used for voice service with packet switches, rather than the mere deployment of packet switching." *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*,

[1] Though styled a "Motion for Judgment on the Pleadings," the Motion for Judgment was brought pursuant to WAC 480-07-650(4)(b). See *Motion for Judgment*, ¶ 6. A presiding officer has broad discretion in the manner of how a proceeding to enforce an interconnection agreement is conducted. WAC 480-07-650(5)(a).

Docket No. UT-043013, Order No. 10, Granting in Part Motion for Enforcement Requiring Verizon to Maintain Status Quo (Sept. 13, 2004) ¶ 36 ("Order No. 10").

2. Because the Federal Communications Commission ("FCC") has not determined that packet switches may replace existing circuit switches and not merely deployed, that in some cases potentially relevant herein CLECs must continue to have access to copper loops at total element long-run incremental cost ("TELRIC"), and that State commissions can require the unbundling of packet switches, Verizon's arguments are neither persuasive nor controlling.

II. PROCEDURAL BACKGROUND

3. On September 17, 2004, five competitive local exchange carriers (the "Joint CLECs") filed their *Joint Petition for Enforcement of Interconnection Agreements* (the "Joint Petition")[2]. Tel West Communications, L.L.C. ("Tel West") filed a *Petition to Intervene* on September 24, 2004, that was granted on October 11, 2004. On September 28, 2004, Verizon its *Motion for Judgment*.

III. VERIZON'S RECITATION OF THE FEDERAL REGULATORY BACKGROUND IS INCOMPLETE.

A. THE LOCAL COMPETITION ORDER

4. In its *Motion for Judgment*, Verizon asserts that the issue of whether packet switches can replace existing circuit switches used for voice service. rather than be merely deployed, has been definitively answered in various FCC Orders. Such is not the case. Verizon first cites to the *Implementation of the Local Competition Proceedings in the Telecomms. Act of* 1996, 11 F.C.C.R. 15,499 (August 8, 1996) (the "Local

[2] Tel West is not addressing herein whether the Joint CLECs are requesting unbundled packet switching; there is not enough information in the record to decide that issue at this point. Tel West is simply responding to the legal arguments raised in the *Motion for Judgment*.

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Competition Order"). *Motion for Judgment* ¶ 8. In the *Local Competition Order*, the FCC did not, as asserted by Verizon,[3] "explicitly reject," that packet switches were not a local switching element or that they need not be unbundled. Rather, the FCC merely stated that it was not making a determination at that time. *Id.* ¶ 427.

5. The failure to "adopt a national rule" does not mean that packet switches could not be ordered unbundled, nor that they should not be unbundled. The FCC admitted it did not have sufficient information to make a ruling one way or the other at that time. *Id.*

6. The reluctance of the FCC to adopt a national rule does not in any way preclude a State commission from adopting a rule requiring the unbundling of specific network elements, such as a packet switch.

B. THE UNE REMAND ORDER

7. Subsequently, the FCC did qualify packet switching as a "network element." See, *Implementation of the Local Competition provisions in the Telecomms. Act of 1996*, 16 F.C.C.R. 1724, ¶ 304 (Nov. 5, 1999) (the "UNE Remand Order") ("Because packet switching and DSLAMs are used to provide telecommunications services, *packet switching qualifies as a network element*.") (emphasis supplied) contra *Motion for Judgment*, ¶ 7.

[3] The *Motion for Judgment*, ¶ 8, quoted only part of Paragraph 427 of the *Local Competition Order*. Said paragraph should be read in full:

> *At this time*, we decline to find, as requested by AT&T and MCI, that incumbent LECs' packet switches should be identified as network elements. *Because so few parties commented on the packet switches in connection with section 251(c)(3)*, the record is insufficient for us to decide whether packet switches should be defined as a separate network element. We will continue to review and revise our rules, but at present, we do not adopt a national rule for the unbundling of packet switches.

Local Competition Order. ¶ 427 (emphasis supplied).

8. However, the FCC declined to require unbundling the packet switching functionality "as a general matter," "except in limited circumstances." *Id*. ¶ 306. The FCC explained:

> In other segments of the market [not medium and large business], namely, residential and small business, we conclude that competitors *may be impaired* in their ability to offer service without access to incumbent LEC facilities due, in part, to the cost and delay of obtaining collocation in every central office where the requesting carrier provides service using unbundled loops. We conclude, however, that given the nascent nature of the *advanced services marketplace*, we will not order unbundling of the packet switching functionality *as a general matter*.

Id. (emphases supplied).

9. Nonetheless, the FCC did not preclude State commissions ordering the unbundling of packet switches. *Id.* ¶ 312. e.spire/Intermedia had argued that lack of access to specific elements that are used to provide frame relay service impaired its ability to provide telecommunications services. The FCC refused to order the requested elements unbundled; however, the FCC held that State commissions could order the unbundling of specific network elements, including packet switches. *Id.*

> [CLECs] are free to demonstrate to a state commission that lack of unbundled access to the incumbent's frame relay network element impairs their ability to provide the services they seeks to offer. A state commission is empowered to require incumbent LECs to unbundle specific network elements used to provide frame relay service, consistent with the principles set forth in this order.

Id.

10. The authority of State commissions to ordering unbundling of network elements, including packet switches, is discussed further below.

C. THE TRIENNIAL REVIEW ORDER

11. On August 21, 2003, the FCC released the *Triennial Review Order*. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*).

12. The *Triennial Review Order* does not in any way compromise the authority of this Commission to order the Mount Vernon packet switch unbundled. Once again, the FCC found the record too inclusive to determine "the impact of unbundling on carriers' incentives to construct and deploy switching facilities." *Id.* ¶ 447.

> Here, we consider investment incentives in the context of unbundled local circuit switching, but conclude that given the *insufficient record* evidence on this issue and the fact that the *goals of section 706* are not directly implicated *in the context of switching*, our findings of impairment are not overcome in this context.

Id. ¶ 447 (emphases supplied). Cf. *Id.* ¶ 417 (distinguishing between impairment with respect to impaired access to unbundled local circuit switching when serving mass market customers and no impairment without access to unbundled local circuit switching when serving DS1 enterprise customers); *Id.* ¶ 218 ("By contrast, the feeder loop plant transporting the *broadband signal* terminates at a packet switch….) (emphasis supplied). The distinction between advanced services and voice services has been consistent in prior FCC orders regarding packet switching and it should not be muddled now.

13. To deal with the differing technologies and loops architectures, the FCC determined that "unbundling rules for local loops serving the mass market must account for [ ] different loop architectures." *Id.* ¶ 221. Loop architectures can consist of copper pairs or "loops consisting of DLC systems that are fed by fiber optic cable, which we refer to as 'hybrid loops,' or loops consisting entirely of fiber optic cable. *Id.*

14. The distinctions are important because at issue is whether the FCC has determined an ILEC may replace rather than merely deploy packet switches. *Order No. 10.* Since there is no evidence regarding the loop architecture at the Mount Vernon wire center, the *Motion for Judgment* must be denied.

15. Verizon's reliance on footnote 1365 of the *Triennial Review Order* for the proposition that it allows it to replace circuit switching to circumvent unbundling requirements is misplaced. *Motion for Judgment*, ¶ 12. In the same footnote, the FCC expressed its concern that existing competition should not be "thrown away." *Triennial Review Order,* ¶ 447 n. 1365 ("Unlike the approach advocated by the dissents, our approach maintains appropriate incentives without throwing away the competition that exists today.") There is a strong potential competition will be compromised if access to the Mount Vernon switch is not available at TELRIC rates. The factual question of whether competition will be "thrown away" is clearly before the Commission; therefore, the *Motion for Judgment* must be denied.

16. Likewise, Verizon's reliance on footnote 833 of the *Triennial Review Order* is also misplaced. *Motion for Judgment* ¶ 15. In that footnote, the FCC again limited unbundling obligations to broadband: "Because we decline to require unbundling of packet-switching equipment, we deny WorldCom's petitions for reconsideration and

clarification requesting that we unbundle packet switching equipment, DSLAMs, and other equipment used to deliver DSL service." *Triennial Review Order* ¶ 288, n. 833.

17. In the subsequent paragraph, paragraph 289, the FCC recognized the duty of Verizon to unbundled under certain circumstances.

> Although packetized fiber capabilities will not be available as UNEs, incumbent LECs remain obligated, however, to provide unbundled access to the features, functions, and capabilities of hybrid loops that are not used to transmit packetized information.

Id. ¶ 289. The same obligations are also applicable to copper loops. *Id.* ¶ 277.

18. Verizon's reliance on two footnotes is less than persuasive. Something as important as the unbundling of a packet switch is to Verizon, *Motion for Judgment*, ¶ 6 (Verizon's plans for upgrades are national in scope), and, more specifically, replacement versus deployment of packet switches should be dealt with unambiguously and not in footnotes to FCC orders.

IV. STATE ACCESS REGULATIONS

19. Pursuant to Sections 251(d)(3)(a) and (c) of the Federal Act, State commissions may prescribe and enforce regulations that establish the access and interconnection obligations of ILECs as long as they do not substantially prevent implementation of, in general, the purposes of the Federal Act. See also *Triennial Review Order* ¶ 186 ("We find further that the 1996 Act preserved the states authority to prescribe access obligations pursuant to state law in section 251(d)(3), but only to the extent that state laws or regulations do not conflict with or frustrate the Act and its purposes or substantially prevent the federal implementation regime.")

20. The question of federal preemption was at issue in *USTA II* when state petitioners argued that the Triennial Review Order improperly preempted state unbundling

regulations that existed independent of the Commission's federal unbundling regulations enacted pursuant to § 251. USTA II, 359 F.3d at 359. In short, the Court held that claims of conflict / preemption were not ripe. *Id.*

21. In this case there is no meaningful evidence that ordering Verizon to provide unbundled local switching albeit through a packet switch at the Mount Vernon wire center would prevent or compromise implementation of the Federal Act. In fact, finding the FCC orders only allows for the deployment, and not replacement, of package switches is consistent with the intent of the Federal Act to *"eliminate the monopolies* enjoyed by the inheritors of AT&T's local franchises." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko,* 540 U.S. ____, 124 S.Ct. 872, 883 (2004) quoting *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 476 (2002) (emphasis supplied by Supreme Court in *Trinko*). To allow replacement will compromise competition. As such, this Commission should deny the *Motion for Judgment.*

CONCLUSION

22. Pursuant to 251(c)(3), CLECs are entitled to "nondiscriminatory access to network elements on an unbundled basis…on rates, terms, and conditions that just, reasonable, and nondiscriminatory." In addition, pursuant to 47 C.F.R. § 51.309(a) the Commission's rules provide that an "ILEC shall not impose limitations, restrictions, or requirements on the use of unbundled network elements." Neither should this Commission.

23. Wherefore, Verizon's *Motion for Judgment* should be denied in full and Tel West be awarded such other and further relief to which it may be entitled.

Dated this 27th day of October, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served *Tel West Communications, L.L.P. Answer to Verizon's Motion for Judgment on the Pleadings of, and Answer to, Joint Petition for Enforcement of Interconnection Agreements* was served, with the correct number of copies, on the following by e-mail at records@wutc.wa.gov and by overnight delivery.

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I further certify that I served a true and correct copy of the foregoing document on the following parties by e-mail and U.S. Mail:

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Said copies were served by placing them in sealed envelopes addressed to said party's/attorneys' last know addresses as shown and deposited in the United States Mail in Santa Fe, New Mexico, and that the postage thereon was prepaid and also via electronic mail to the addresses indicated.

DATED this 27th day of October, 2004.

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