

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

In the Matter of)	
)	DOCKET NO. UT- 041127
THE JOINT PETITION FOR)	
ENFORCEMENT OF)	AT&T’S RESPONSE TO
INTERCONNECTION AGREEMENTS)	VERIZON’S MOTION FOR
WITH VERIZON NORTHWEST, INC.)	JUDGMENT ON THE PLEADINGS
)	OF THE JOINT PETITION FOR
)	ENFORCEMENT OF
)	INTERCONNECTION
)	AGREEMENTS
)	

AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively “AT&T”) hereby submit this Response in Opposition to Verizon’s Motion for Judgment on the Pleadings of, and Answer to, Joint Petition for Enforcement of Interconnection Agreements.

INTRODUCTION

1. Verizon has breached its interconnection agreement with AT&T, and it has violated a Washington Commission order to maintain the status quo with respect to that agreement.

2. While engaged in the game of the artful dodge, Verizon has yet to address the real issue at hand—*its breach of contract*. Instead, Verizon launches an attack against the Joint Petitioners alleging, among other things, that they seek to overturn federal law regarding Verizon’s unbundling obligations. In fact, the closest Verizon comes to actually addressing the real issue is its claim that the interconnection agreement is not a

“mere” contract, but rather it “is a federal regulatory device, which exists solely to implement the network sharing duties imposed [by the Act].”¹

3. If such an assertion were correct, then why did Congress provide statutory mandates aimed at developing and enforcing individual interconnection agreements between carriers?² Wouldn’t the FCC’s rules implementing the Act or the creation of SGATs³ or tariffs have been sufficient?

4. Moreover, if interconnection agreements are nothing more than a federal regulatory tool—which Verizon can choose to breach at will—then such agreements are of absolutely no value to either the Washington Commission or the competitive local exchange carriers (“CLECs”). Clearly, adopting Verizon’s view would make Washington contracts with Verizon “not worth the paper upon which they are written.”

5. Fortunately, neither the Federal Communications Commission (“FCC”) nor the Act support Verizon’s assertions or its failure to perform under the terms of its interconnection agreement with AT&T. Rather, AT&T relies, as contemplated by the FCC and the Act, upon Verizon’s promises as set forth in its interconnection agreement. More importantly, AT&T and other CLECs build their business plans based upon those promises.⁴ Under both state and federal law, in particular the FCC’s Interim rules, Verizon is bound by the terms of its contracts; therefore, the Washington Commission should reject Verizon’s latest ploy to avoid its contract obligations.

¹ Verizon Motion at 11, ¶ 22.

² 47 U.S.C. § 252(e)(2) & (e)(3) (preserving state authority).

³ SGAT is an acronym for Statement of Generally Available Terms; a description of which is found at 47 U.S.C. § 252(f).

⁴ Although regulatory uncertainty has caused AT&T to alter its long-term business focus, AT&T still maintains both small business and residential customers in Washington. Consequently, AT&T must be able to rely upon its contracts with Verizon and other carriers such that it can continue to provide all its customers with the high quality service they have come to expect from AT&T.

ARGUMENT

I. UNDER FEDERAL AND STATE LAW, VERIZON MUST CONTINUE TO PROVIDE ACCESS TO UNBUNDLED SWITCHING AND COMMON TRANSPORT AS PRESCRIBED IN AT&T'S INTERCONNECTION AGREEMENT.

6. Verizon's 36-page Motion makes but one point, "Verizon has no legal obligation to unbundle packet switching." Tenaciously clinging to that point while falsely accusing the CLECs of deceit,⁵ Verizon utterly ignores the fact that it has a federal obligation to abide by its interconnection agreement with AT&T and provide unbundled switching and common transport. That is, the FCC has ordered:

On an interim basis, we require incumbent local exchange carriers (LECs) to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (e.g., an order addressing pending petition for reconsideration) or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements.⁶

Because none of the factors releasing Verizon from its contract obligation presently exist, Verizon's current federal obligation is to abide by its interconnection agreements and provide unbundled switching, among other things. The FCC explained that if it did not

⁵ Verizon Motion at 23, ¶ 45.

⁶ *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order & Notice of Proposed Rulemaking, WC Docket No. 04-313 & CC Docket no. 01-338, FCC 04-172 at ¶ 1 (Rel. Aug. 20, 2004) (hereinafter "**Interim Order**").

issue this interim order, “the \$ 127 billion local telecommunications market [would] unnecessarily be placed at risk.”⁷

7. Likewise, Verizon utterly ignores its Washington state obligations that require it to continue to provide the products and services under interconnection agreements at the rates described therein until the Washington Commission approves amendments.⁸ It ignores further that in Washington, “[c]ontractual language also must be interpreted in light of existing statutes and rules of law.”⁹

8. Instead of interpreting its contracts in light of the existing law, Verizon relies on dicta in a footnote from the Triennial Review Order¹⁰ to assert its alleged right to breach interconnection agreements, ignore the FCC’s Interim Order and disregard this Commission’s Order No.s 5 and 10.

9. To be precise, Verizon would have this Commission take the rather large leap of faith that the FCC must have meant that incumbents could breach agreements and ignore FCC orders based upon the following quote from a large footnote discussing dissenting opinions. It states in pertinent part:

Moreover, dissents fail to consider the incentives created by our decisions on packet switching and advanced services. Specifically, we no longer unbundle packet switching and the advanced networks used with such switching. This means that to the extent there are significant disincentives caused by unbundling of circuit switching, incumbents can avoid them by deploying more advanced packet switching.”¹¹

⁷ *Id.*

⁸ *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*, Order No. 5, Docket No. UT-043013 (June 15, 2004). Verizon does admit in its Motion on page 24, paragraph 46, that the Washington Commission does have the authority to approve and enforce interconnection agreements; *see also*, 47 U.S.C § 252.

⁹ *Tanner Electric Coop. v. Puget Sound Power & Light Co.*, 911 P.2d 1301, 1310 (Wa. 1996), *Bort v. Parker*, 42 P3d. 980, 987 (Wa. Ct. App. 2002)(contracts must be interpreted in light of existing law).

¹⁰ 18 F.C.C.R. 16,978 [hereinafter “TRO”].

¹¹ TRO at ¶ 446, n. 1362 (4th paragraph).

10. This footnote does not state, as Verizon would have us believe, that it may avoid its legally binding contract obligations by replacing relatively new, fully digital, circuit switches—that are not likely to exhaust in such a small central office¹²—with Nortel Succession Switches for the purpose of providing, not advanced services, but plain old telephone service.

11. All the footnote expressly states is that Verizon may deploy packet switching for the purpose of providing advance services and not unbundle that particular element. It does not say Verizon may breach existing interconnection agreements by ceasing to provide circuit switching, by moving CLEC customers to a resale platform (presumably employing packet switching) and by ignoring any network modification contract provisions applicable to such conduct. Furthermore, the footnote relied upon by Verizon does not suggest, as Verizon has done, that it may unilaterally breach its contractual obligations in favor of whatever legal interpretation it hopes will defeat its competitors and raise barriers to that competition. Rather, the Interim Rules expressly preserve the terms of interconnection agreements in effect on June 15, 2004.

II. CONTRARY TO VERIZON’S ASSERTIONS, AT&T DOES NOT SEEK THE IMPOSITION OF AN UNBUNDLING REQUIREMENT RELATED TO PACKET SWITCHING.

12. AT&T explains, yet again, it is not seeking a Commission order demanding that Verizon unbundle packet switching. Under federal law, Verizon may move its own customers to a packet switch and it may deploy those switches wherever it sees fit. Verizon may not, however, use the deployment of a purported packet switch to breach AT&T’s or other CLECs’ interconnection agreements, violate the FCC’s Interim

¹² Verizon Motion at 15, ¶ 29. AT&T challenges Verizon’s claim of switch exhaust and notes further that Verizon has provided no evidence of exhaust.

Order and violate this Commission's *status quo* order by failing to provide local switching. It may not cease CLEC use of the circuit switch (that Verizon has admitted will remain in place, but will not be available to CLECs).¹³ Furthermore, it may not alter provisioning requirements for wholesale customers or service within any central office without adhering to its interconnection agreement obligations for network modifications.

13. As Verizon readily concedes, it has an obligation to provide unbundled circuit switching under the terms of every CLEC contract at issue in this proceeding and that those contracts do not conflict with federal law.¹⁴ How Verizon accomplishes the objective of providing circuit switching is largely irrelevant; it is, however, legally bound to accomplish it both from a state and federal law perspective.

14. Nonetheless, in flailing against its real obligation, Verizon asserts that the FCC "prohibits" the unbundling of packet switches.¹⁵ While it is true the FCC concluded that federal regulation will not mandate unbundling of "packet based networks," it does not prohibit voluntary unbundling of packet switching between a willing seller and a willing buyer.¹⁶ In fact, other incumbents and some CLECs willingly provide wholesale packet switching. That said, however, AT&T is not demanding through this Petition that the Commission order Verizon to unbundle packet switching; AT&T merely seeks the continued provision of local switching by Verizon in accordance with its contract—however Verizon wishes to accomplish such obligation.

¹³Verizon June 8, 2004 Notice to CLECs (attached to Petition) ; Verizon Motion at 18, ¶ 36 (confirming the unbundled switching is not available as of the deployment of the packet switch).

¹⁴ Verizon Motion at 28, ¶ 53.

¹⁵ Verizon Motion at 26, ¶ 49.

¹⁶ TRO at ¶ 290.

III. AT&T’S INTERCONNECTION AGREEMENT AND THIS COMMISSION’S ORDER NO. 5 ARE COMPLETELY CONSISTENT WITH FEDERAL LAW, AND THEREFORE, NEITHER IS SUBJECT TO PREEMPTION.

15. Verizon’s Motion goes on for pages decrying the impropriety of a contract interpretation that would conflict with the FCC’s unbundling limitations.¹⁷ What it identifies, but fails to appreciate and apply, however, is that the Commission is charged with the obligation “to construe the interconnection agreements to avoid preemption and conflict with federal law.”¹⁸ The Petitioners have provided the Commission with just such an interpretation; one that, in fact, is no interpretation at all, but a mere application of the express terms of AT&T’s interconnection agreement,¹⁹ the FCC’s Interim Order and the Washington Commission’s status quo order. AT&T’s interpretation of the contract is not only reasonable, but consistent with the law and intent of the parties.²⁰

16. The interpretation that fails to construe the agreements to avoid preemption and conflict is Verizon’s interpretation, which requires that the Commission read well beyond the four corners of the contracts to misinterpret a footnote in the TRO. Ultimately, it is Verizon’s interpretation of the contract that is unreasonable, and where contracts are unambiguous—as AT&T’s contract is, which requires Verizon to provide

¹⁷ E.g., Verizon Motion at 23, ¶ 45 – 27, ¶ 51.

¹⁸ Verizon Motion at 28, ¶ 52 (citing *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 911 P.2d 1301 (Wa. 1996) for the proposition that contracts must be interpreted to comply with existing law) cf. *Davidson v. Hansen*, 954 P.2d 1327, 1335 (Wa. 1998)(clarifying and limiting *Tanner*).

¹⁹ *BP Land & Cattle LLC v. Balcom & Moe, Inc.*, 86 P.3d 788, 789 (Wa. Ct. App. 2004)(“courts will not read an ambiguity into a contract that is otherwise unambiguous”).

²⁰ *Go2NET, Inc. v. CI Host, Inc.*, 60 P.3d 1245, 1251 (Wa. App. Ct. 2003)(“summary judgment is proper if the parties’ written contract, viewed in light of the parties’ other objective manifestations, has only one reasonable meaning.”) *State Farm Mutual Auto. Ins. Co. v. Avery*, 57 P.3d 300, 307 (Wa. Ct. App. 2002)(only if the “determination of intent depends on the credibility of extrinsic evidence or a choice among reasonable inferences drawn from the extrinsic evidence” does there exist an issue of fact).

unbundled switching and common transport—“summary judgment is appropriate ... even if the parties dispute the legal effect of a provision.”²¹

IV. VERIZON HAS BREACHED, NOT ONLY THE SWITCHING AND COMMON TRANSPORT PROVISIONS OF AT&T’S AGREEMENT, BUT ALSO THE CHANGE OF LAW AND NETWORK MODIFICATION PROVISIONS.

17. In a footnote, and providing absolutely no legal support, Verizon claims that AT&T has “waived” its right to discuss its network modification provisions because such provisions were not discussed in the Petition’s pleading, but rather, they were contained in AT&T’s affidavit.²² Contrary to Verizon’s view, the affidavits and relevant contract provisions are attached to the Petition pursuant to WAC 480-07-650(1)(a)(ii) and (iii), and as a consequence they are as much a part of the Petition as any other material contained in the pleading or attached to it. Under the rule defining the content of a Petition, it states:

(a) ***What the petition must contain.*** Each petition for enforcement must contain the following *elements*:

(i) A statement, including specific facts, demonstrating that the petitioner engaged in good faith negotiations to resolve the disagreement, and that despite those negotiations the parties failed to resolve the issue.

(ii) A copy of the provision of the interconnection agreement that the petitioner contends is not being complied with.²³

(iii) A description of facts demonstrating failure to comply with the agreement. One or more affidavits, declarations, or other sworn statements, made by persons having personal knowledge of the relevant facts must support the description.

AT&T along with the other Petitioning parties have complied with this rule and attached the necessary items.

²¹ *BP Land & Cattle LLC*, 86 P.3d at 789.

²² Verizon Motion at 15, ¶ 30 n. 12.

²³ WAC 480-07-650(1)(a).

18. AT&T's network modification provisions require in relevant part:

3.3 *GTE will not discontinue any unbundled Network Element, Ancillary Function or Combination thereof during the term of this Agreement without AT&T's written consent which consent shall not be unreasonably withheld, except (1) to the extent required by network changes or upgrades, in which event GTE will comply with the network disclosure requirements stated in the Act and the FCC's implementing regulations; or (2) if required by a final order of the Court, the FCC or the Commission as a result of remand or appeal of the FCC's order In the Matter of Implementation of Local Competition Provisions of the Telecommunications Act of 1996, Docket 96-98. In the event such a final order allows but does not require discontinuance, GTE shall make a proposal for AT&T's approval, and if the Parties are unable to agree, either Party may submit the matter to the Dispute resolution procedures described in Attachment 1. GTE will not discontinue and Local Service or Combination of Local Services without providing 45 days advance written notice to AT&T, provided however, that if such services are discontinued with less than 45 days notice to the regulatory authority, GTE will notify AT&T at the same time it determines to discontinue the service....*²⁴

23.18. Notice of Network and Technology Changes - GTE shall establish quarterly reviews of network and technologies plans. GTE shall notify AT&T at least six (6) months in advance of changes that would impact AT&T's provision of service.²⁵

19. Verizon has not complied with these provisions; instead it merely ceased providing switching and substituted what it has alleged is packet switching.

20. In short, the Petition clearly demonstrates that Verizon has breached, not only AT&T's interconnection agreement, but the other Petitioner's agreements as well, including all the contract provisions attached to the Petition—such as AT&T's network modification provisions.

V. VERIZON HAS FAILED TO DEMONSTRATE THAT IT IS ENTITLED TO JUDGMENT ON THE PLEADINGS BECAUSE: (1) IT HAS FAILED TO ADDRESS THE BREACH OF CONTRACT AT ISSUE IN THIS PROCEEDING AND (2) BECAUSE THERE EXIST GENUINE ISSUES OF MATERIAL FACT.

²⁴ Emphasis added.

²⁵ Emphasis added. There may be no impact to AT&T's provision of service because we have no UNE-P customers served out of the Mount Vernon central office.

21. To prevail on its Motion, Verizon must show that the “pleadings filed in the proceeding, together with any properly admissible evidentiary support ... show that there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.”²⁶ Case law cited by Verizon and discussing the issue of material facts related to contract interpretation states, in pertinent part:

Interpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.²⁷

Here, the problem with Verizon’s effort to obtain judgment on the pleadings is twofold. First, it must actually address the issue in the pleadings, namely the Petition alleging that Verizon has breached its interconnection agreements. Verizon has failed to address the issue by insisting on its position that CLECs are demanding unbundling of packet switching. Because these pleadings are to be judged in the light most favorable to the nonmoving party,²⁸ Verizon must lose by default, if nothing else.

22. And if taken as true, Verizon has breached its interconnection agreements by ceasing to provision unbundled switching, among other things. There exists no other contractual interpretation necessary, and thus, Verizon should lose based upon the pleadings alone.

23. Second, because Verizon accuses the CLECs of seeking unbundled packet switching, the factual issue exists as to whether that is in fact what Verizon would have to do to continue to perform under the terms of its agreements. Verizon asks the Commission to summarily determine, based upon Verizon’s notices and its pleadings,

²⁶ WAC 480-07-380(2)(a).

²⁷ *Tanner Elec. Coop.*, 911 P.2d at 1310; *Bort*, 42 P.3d at 987.

²⁸ *Id.* at 1307.

that the Nortel Succession Switch does in fact fall within the FCC's use of the term packet switching as contemplated by the following statement:

We find, on a national basis, that competitors are not impaired without access to packet switching, including routers and DSLAMs. Accordingly, we decline to unbundle packet switching as a *stand-alone* network element. We further find that the Commission's limited exception to its packet-switching unbundling exemption is no longer necessary.²⁹

Verizon has made various claims, through extrinsic evidence, that it is provisioning new "packet switches" consistent with all the FCC's proclamations regarding packet switching.³⁰ The basis for those statements has been challenged by the CLECs from the start of this dispute and Verizon had proffered nothing that suggests this factual dispute is resolved merely as a matter of law.³¹ As a consequence, Verizon must again lose on its request for judgment on the pleadings.

CONCLUSION

24. Based upon the foregoing discussion, AT&T respectfully requests that the Commission reject Verizon's Motion for Judgment on the Pleadings, or in the alternative grant judgment in favor of the Petitioners based upon the pleadings and Verizon's failure to address the issue of its breach.

²⁹ TRO at ¶ 537 (emphasis added).

³⁰ Verizon Motion at 1 – 8.

³¹ The factual challenge is clearly articulated in the Affidavit attached to the Joint CLEC response to Verizon's Motion for Judgment on the Pleadings as filed simultaneously with this response.

Submitted this 27th day of October, 2004.

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

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