ORDER NO. 04-369

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 531

In the Matter of	)	
	)	
VERIZON NORTHWEST INC.	)	
	)	
Petition for Arbitration of an Amendment	)	
to Interconnection Agreements with	)	ORDER
Competitive Local Exchange Carriers	)	
and Commercial Mobile Radio Service	)	
Providers in Oregon Pursuant to Section 252	)	
of the Communications Act of 1934, as	)	
Amended, and the Triennial Review Order.	)	

DISPOSITION: PETITION FOR CLARIFICATION OF ORDER NO. 04-306 DENIED

Procedural History

On October 2, 2003, the Federal Communications Commission (FCC) released its Triennial Review Order (*TRO*),[1] promulgating rules relating to the scope of unbundling required by incumbent local exchange carriers (ILECs) pursuant to the Telecommunications Act of 1996 (Act).

On February 26, 2004, Verizon Northwest Inc. (Verizon) filed a petition requesting that the Public Utility Commission of Oregon (Commission) initiate a consolidated arbitration proceeding to amend the interconnection agreements Verizon has executed with competitive local exchange carriers (CLECs) and commercial mobile radio service providers[2] in Oregon. The proposed amendments were designed to amend

[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) ("*Triennial Review Order"* or "*TRO*"), *reversed in part and remanded, United States Telecom Ass'n v. FCC*, Nos. 00-0012, 00-1015, 03-1310 *et al.* (D.C. Cir. March 2, 2004).

[2] Verizon sought to arbitrate with commercial mobile radio service providers only to the extent their current interconnection agreements provide for access to unbundled network elements (UNEs).

the interconnection agreements to correspond to changes in the unbundling obligations of ILECs, including Verizon, as a result of the *TRO*.

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) entered its opinion in *United States Telecom Ass'n v. FCC* (*USTA II*), vacating and remanding portions of the *TRO*, and, in particular, FCC rules relating to the unbundling of network elements (UNEs).[3] The D.C. Circuit voluntarily stayed its mandate through June 15, 2004.

On May 27, 2004, the Public Utility Commission of Oregon (Commission) entered Order No. 04-306, dismissing Verizon's petition for arbitration. The Commission reasoned that the issues raised by the TRO and *USTA II* decisions should be resolved pursuant to the terms of the interconnection agreements executed by Verizon and the CLECs rather than pursuant to the arbitration procedure and timetable set forth in §252 of the Act. The Commission also held that the petition did not meet the filing requirements set forth in §252(b)(2).

On June 4, 2004, the D.C. Circuit denied motions by the FCC and CLECs to extend the stay of the *USTA II* mandate.

On June 7, 2004, Integra Telecom of Oregon, Inc.; Eschelon Telecom of Oregon, Inc.; AT&T Communications of the Pacific Northwest, Inc.; and AT&T Local Services on behalf of TCG Oregon (collectively, "Joint CLECs") filed a petition for clarification of Order No. 04-306 (petition). The petition requests that the Commission clarify Order No. 04-306 to expressly provide that "if the D.C. Circuit's decision in *USTA II* becomes effective on or after June 15, 2004, Verizon shall remain obligated to provide unbundled loops, transport, and switching network elements on existing rates and terms unless and until interconnection agreement amendments that alter such obligations are approved pursuant to Section 252 of the Telecommunications Act of 1996 . . . ."[4] The Joint CLECs seek expedited consideration of the petition.

On June 9, 2004, the Solicitor General and the FCC announced that they would not file a petition for certiorari with the Supreme Court of the United States for review of the *USTA II* decision.

On June 14, 2004, Verizon filed a response opposing the Joint CLEC petition for clarification on Order No. 04-306. On the same day, Justice Rehnquist of the Supreme Court denied petitions for stay filed by other parties, thus allowing the *USTA II* mandate to take effect on June 16, 2004.

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[3] *United States Telecom Ass'n v. FCC*, 359 F3d 554 (D.C. Cir. March 2, 2004) (*USTA II*).

[4] Joint CLEC Petition at p. 2. Elsewhere in the petition, the Joint CLECs request that Verizon be required to "maintain the status quo and honor all of its obligations under existing ICAs . . . until final federal unbundling rules are in place or until the Commission can undertake a generic proceeding to determine the impact of the D.C. Circuit's decision on Verizon's existing obligations to provide these UNEs." *Id.* at 11.

On June 15, 2004, Integra Telecom of Oregon, Inc., and Eshcelon Telecom of Oregon, Inc., filed a notice of supplemental authority in support of the petition for clarification. Attached to the notice were two recent interlocutory decisions rendered by the Washington Utilities and Transportation Commission.

On June 17, 2004, Verizon filed a letter objecting to the notice of supplemental authority. Verizon requested that any decision be deferred pending the opportunity to respond and supply additional authorities. Verizon filed its response and additional authorities on June 18, 2004.

On June 18, 2004, Advanced TelCom Group; Global Crossing Local Services, Inc.; Covad Communications Company; XO Oregon, Inc.; and Centel Communications, Inc. (collectively, the "Supporting CLECs"), filed a response in support of the Joint CLECs' petition. On June 22, 2004, Verizon filed a reply opposing the Supporting CLECs' response.

Order No. 04-306

In Order No. 04-306, the Commission held, among other things, that Verizon and the CLECs are obligated to follow the procedures set forth in their interconnection agreements in determining the extent to which the *USTA II* decision must be integrated into those agreements. Generally, those interconnection agreements contemplate that the parties will engage in good faith negotiations, followed by dispute resolution if the negotiations are unsuccessful. The contracts typically allow the parties to seek dispute resolution from the Commission or another designated forum.

Joint CLEC Petition

In their petition, the Joint CLECs allege that they "have cause to believe that Verizon may unilaterally discontinue provisioning UNEs at TELRIC-based rates upon issuance of the *USTA II* mandate."[5] Accordingly, they "seek the requested clarification in order to ensure that service to its customers will not be disrupted due to unilateral actions taken by Verizon."[6] In support of the petition, the Joint CLECs allege the following:

1. Verizon has "failed to answer requests to confirm that it will not unilaterally and unlawfully alter or discontinue its provision of unbundled high-capacity loops, transport and switching at TELRIC-based rates if *USTA II* becomes effective," creating "tremendous uncertainty regarding a CLEC's ability to serve existing and new end-user customers;"[7]

[5] Petition at p. 2.
[6] *Id. at 2-3.*
[7] *Id. at 3.*

2. Verizon conceded in oral argument before the D.C. Circuit that it had a continuing "obligation to provide existing UNEs until new rules were implemented through contract amendments."[8]

3. Verizon's stated promise to honor its interconnection agreements does not remove the uncertainty faced by CLECs, because Verizon has taken the position that its agreements allow it to make unilateral changes. This position is contrary to ¶¶700-701 of the *TRO*, wherein the FCC "reaffirmed that the contract amendment process – and not unilateral action – must be used to implement its provisions."[9]

4. Although the Commission is not required to determine the impact of *USTA II* prior to the completion of the contract amendment process specified in the interconnection agreements, the Joint CLECs take the position that, "under applicable law Verizon would still be obligated to provide UNEs under the Bell Atlantic/GTE Merger Conditions and Section 251."[10] The Joint CLECs stress that these issues must be addressed "through the contract amendment process, and not by Verizon unilaterally."[11]

5. Both the Joint CLECs and the Supporting CLECs emphasize that the Commission has independent authority under state law and the Act to preserve the status quo by requiring Verizon to continue providing existing UNE and UNE combinations pursuant to the terms of existing interconnection agreements.

Verizon Response

Verizon opposes the Joint CLECs' petition. It argues:

> [T]he Joint CLECs do not seek clarification, but *modification* of the Commission's Order [No. 04-306]. They seek to obtain new affirmative relief that this Commission correctly did not grant, namely, a ruling that Verizon is required to continue providing certain UNEs in spite of the D.C. Circuit's decision vacating the federal rules imposing the requirement to provide those UNEs and notwithstanding the provisions of interconnection agreements that they voluntarily signed and that this Commission approved. The relief that they seek is unlawful, and amounts to a request that this Commission overrule the D.C. Circuit. Moreover, contrary to their claims, there is no immediate risk of disruption to their service, as

[8] *Id*. at p. 4. The Joint CLECs further state that Verizon "conceded to the Court that it must continue to provision UNEs under its existing [interconnection agreements] until the FCC issues new rules based on new impairment or non-impairment findings – just as it had done after the *Local Competition* and *UNE Remand Orders* were vacated." *Id.* at p. 5.
[9] *Id.* at p. 7.
[10] *Id.* at 10.
[11] *Id.*

> Verizon has publicly committed to provide at least 90 days' notice, after issuance of the D.C. Circuit's mandate, before taking any action pursuant to applicable law and its interconnection agreements with respect to the UNEs as to which the D.C. Circuit vacated the FCC's unbundling rules.[12]

Verizon emphasizes that the petition filed by the Joint CLECs is contrary to the terms of their interconnection agreements. It observes that "[m]ost, if not all, of Verizon's interconnection agreements in Oregon expressly permit Verizon, either immediately or after a specified notice period, to discontinue UNEs that it is no longer legally required to provide."[13] However, as emphasized above, Verizon has declined to seek immediate action and has instead agreed to provide at least 90 days notice after issuance of the D.C. Circuit's mandate before taking any action with respect to the FCC unbundling rules vacated by the Court.

Verizon also argues that the Commission does not have authority to override the terms of interconnection agreements by requiring Verizon to continue to provide access to UNEs in circumstances where the agreements provide otherwise. Nor may the Commission establish unbundling obligations binding on Verizon in absence of a valid finding of impairment under Section 252 of the Act.

Verizon disputes the Joint CLECs' arguments regarding the *Bell Atlantic/ GTE Merger Order,* and asserts that the *Order* cannot reasonably be interpreted to require Verizon to continue providing the UNEs at issue. Furthermore, Verizon emphasizes that the Commission need not address the matter, since "enforcement of the merger conditions is *the FCC's* responsibility, not this Commission's."[14]

Verizon also disputes the Joint CLECs' "claim that other states have required Verizon to continue to provide mass-market circuit switching, high-capacity loops and transport, and dark fiber as UNEs notwithstanding the D.C. Circuit's decision and the terms of existing interconnection agreements."[15] Rather, it asserts that "most other state commissions have held only that Verizon must act consistent with *all* of the terms of its interconnection agreements, including, where applicable, the change-of-law provisions."[16]

Verizon also asserts that statements made at the oral argument in *USTA II* do not preclude it from exercising any rights under existing agreements. It contends that the statements relied on by the Joint CLECs did not relate to any specific interconnection agreement, let alone any Verizon agreement.

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[12] Verizon Opposition at pp. 1-2. Verizon states that it informed the D.C. Circuit notice that Verizon would provide 90 days notice one week prior to filing of the Joint CLEC petition. *Id.* at 3.
[13] *Id.* at p. 2.
[14] *Id.* at p. 8.
[15] *Id.* at p. 14.
[16] *Id.*

As a final matter, Verizon states that the Joint CLECs will not be harmed by denial of the petition, because "[e]ven after Verizon takes action pursuant to applicable law and its interconnection agreements, CLECs in Oregon can continue providing service to end-user customers on a resale basis under § 251(c)(4) or pursuant to commercial agreements," including Verizon's Wholesale Advantage offering "which provides end-to-end service like that available today under UNE-P arrangements."[17] Verizon emphasizes that denial of the petition "could not plausibly give rise to any harm to the Joint CLECs" in any event, because of the limited UNEs and UNE-P arrangements purchased by those carriers from Verizon in Oregon.[18]

Commission Disposition

After reviewing the filings, the Commission finds that the petition should be denied for the following reasons:

1. There is no basis for granting the emergency relief requested by the Joint CLECs. The petition is premised on the threat that Verizon will take immediate unilateral action to discontinue providing UNEs, thereby disrupting service to CLEC customers. There is no risk of service disruption, however, since Verizon has publicly stated that it will provide at least 90 days notice after issuance of the D.C. Circuit's mandate before attempting to take any action pursuant to the terms of its interconnection agreements. [19]

We recognize that Verizon and the CLECs may disagree regarding whether and to what extent *USTA II* represents a change of law. If the parties cannot resolve these issues through the negotiation process, we presume they will proceed pursuant to the dispute resolution provisions of their contracts. As emphasized in Order No. 04-306, the interconnection agreements govern the contractual relationship between the parties and specify the procedures the parties must follow in the event of disputes regarding the responsibilities of the parties under the agreement. Absent an immediate threat to the parties or the public interest, the Commission will not interfere in the contract process.

[17] *Id.* at p. 16. Verizon also notes that CLECs may purchase special access instead of UNEs, and that virtually all of Verizon's carrier customers already purchase those services. Typically, special access services are offered under volume and discount plans, providing discounts ranging from 35-40 percent off basic monthly rates.

[18] This information was provided in a confidential attachment. We do not rely upon it for purposes of this decision.

[19] In addition, the Chairman and Chief Executive Officer of Verizon, Mr. Ivan Seidenberg, has informed the FCC that Verizon will not "unilaterally increase the wholesale price we charge for UNE-P arrangements that are used to serve mass market customers (those with fewer than 4 lines) for 5 months." Letter from Ivan Seidenberg to the Honorable Michael K. Powell, Chairman, Federal Communications Commission, dated June 11, 2004, attached to Verizon's Response to Joint CLEC Notice of Supplemental Authority.

During the 90-day notice period, we expect Verizon and the CLECs to engage in good faith negotiations designed to resolve outstanding issues relating to the implementation of the *USTA II* decision. Although we see no reason why the parties cannot reach agreement during that time frame, there remains the possibility that some issues may not be resolved.[20] Depending upon the interconnection agreement in question, the Commission may then be requested to provide dispute resolution.[21] At this point, however, it would be unproductive to speculate on such issues, particularly since the parties still have ample time to reach agreement on how *USTA II* should be integrated into their contracts.

2. Contrary to the claims made by the CLECs, the Commission is not empowered under state law to require Verizon to continue providing UNEs where the statutory prerequisites of the Act have not been met. As noted recently in docket UM 1100:

> The CLECs emphasize that the Commission has independent authority under state law 'to require Qwest to continue to provide existing UNEs under current ICAs and Qwest's SGAT.' As Qwest points out, however, the Commission may not lawfully enter a blanket order requiring continuation of unbundling obligations that have been eliminated by the *TRO* or *USTA II* (once the D.C. Circuit's mandate takes effect). Although the Act clearly preserves the authority of State Commissions to authorize unbundling beyond that mandated by the FCC, any such decision must be consistent with the requirements of §251(d).[22] Thus, before a State Commission may authorize unbundling of additional network elements, it must first determine that 'failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.'
>
> The UNEs currently authorized in Oregon mirror the national list of UNEs adopted by the FCC in its UNE Remand Order. The Commission did not conduct a separate impairment analysis for those UNEs, but rather relied upon the impairment findings made by the FCC. To the extent the D.C. Circuit has

[20] For example, the parties may seek a determination concerning whether the interconnection agreements permit Verizon to unilaterally discontinue providing UNEs during the pendency of the dispute resolution process.

[21] There is no guarantee that disputes will be brought before the Commission for resolution. As noted in Order No. 04-306, some of Verizon's interconnection agreements permit the parties to seek dispute resolution in other forums. Order No. 04-306 at pp. 4-5, Footnote 10.

[22] Verizon appears to disagree with this proposition, but it is not a matter that requires resolution at this time. See, *e.g.*, Verizon Opposition at p. 11.

> concluded that the impairment analysis conducted by the FCC for certain network elements is flawed, there is no legal basis for this Commission to require continued unbundling of those network elements. Before the Commission could mandate such unbundling, it would first have to develop and apply an impairment analysis consistent with the requirements of §251(d)(2). (Footnotes from original text omitted).[23]

The response filed by the Supporting CLECs states that the "the *USTA II* decision does not 'invalidate' any UNEs that Verizon must provide; nor does it change the terms and conditions pursuant to which Verizon must provide such UNEs under existing interconnection agreements, *at least until there is a subsequent finding that CLECs are not impaired without access to certain UNEs.*"[24] The Commission agrees that the parties must implement any change in law resulting from *USTA II* pursuant to the procedural mechanisms set forth in their interconnection agreements. We do not, however, agree with the assertion that Verizon must continue providing the UNEs at issue until there is a finding that CLECs are *not impaired* without access to those elements. Section 252(d) requires an affirmative finding of impairment before an incumbent telecommunications carrier can be required to provide a UNE. Absent a legally sufficient finding of impairment by the FCC or this Commission, there is no obligation to unbundle.

3. Although we agree with the Joint CLECs that it is appropriate for the parties to discuss the *Bell Atlantic/GTE Merger Order* during the course of their contract negotiations, we do not agree that the Commission is the proper forum for interpreting the *Merger Order* in the event of a disagreement. As Verizon points out, "[t]he merger conditions . . . are 'express conditions of [*the FCC's*] approval of the' merger."[25] Accordingly, the parties should petition the FCC if they require assistance in interpreting and enforcing the terms of the merger.

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[23] Ruling Denying Joint CLEC Motion, *Re Investigation to Determine Whether Impairment Exists in Particular Markets if Local Circuit Switching is No Longer Available as an Unbundled Network Element*, Docket UM 1100, dated June 11, 2004, at pp. 6-7.
[24] Supporting CLEC Response at p. 3. (Emphasis added.)
[25] Verizon Response at p. 8.

ORDER

IT IS THEREFORE ORDERED that the petition for clarification of Order No. 04-306 is denied.

Made, entered, and effective _____.

_____	_____
Lee Beyer	**John Savage**
Chairman	Commissioner
	_____
	Ray Baum
	Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.