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IDAHO PUBLIC UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF)
DIECA COMMUNICATIONS, INC. D/B/A)
COVAD COMMUNICATIONS COMPANY FOR)
ARBITRATION OF AN INTERCONNECTION)
AGREEMENT WITH QWEST CORPORATION)

Case No. CVD-7-05-01
PETITION

DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") through its undersigned counsel, hereby petitions the Idaho Public Utilities Commission ("Commission") to arbitrate, pursuant to Idaho Code § 61-614, and Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act"), certain terms and conditions of a proposed Interconnection Agreement between Covad and Qwest Corporation ("Qwest") (hereafter, Covad and Qwest are collectively referred to as the "Parties") for the State of Idaho.

A. Name, Address, and Telephone Number of the Petitioner and its Counsel

1. Petitioner's full name and its official business address are as follows:

DIECA Communications, Inc.
d/b/a Covad Communications Company
110 Rio Robles
San Jose, California 95134-1813

DIECA Communications, Inc. is a Virginia corporation, and provides telecommunications service in Idaho. Covad is, and at all relevant times has been, a "local exchange carrier" ("LEC") under the Act.

2. The names, addresses, and contact numbers of Covad's representatives in this proceeding are as follows:

Dean J. (Joe) Miller
McDevitt & Miller LLP
420 West Bannock Street
Boise, ID 83702
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B. Name, Address, and Telephone Number of the Other Party to the Negotiation and its Counsel

3. Qwest is a corporation organized and formed under the laws of the State of Colorado, having an office at 1801 California Street, Denver, Colorado 80202. Qwest provides local exchange and other services within its service territory in Idaho. Qwest (in current name or as U S WEST Communications, Inc.) is, and at all relevant times has been, a "Bell Operating Company" and an "incumbent local exchange carrier" ("ILEC") under the terms of the Act.

4. The names, addresses, and contact numbers for Qwest's representatives during the negotiations with Covad are as follows:

Linda Miles
Qwest Corporation
1600 7th Ave
Room 3007
Seattle, Washington 98191
(206) 447-3890 (Tel)
(206) 345-0225 (Fax)

John Devaney
Mary Rose Hughes
Perkins Coie, LLP
607 Fourteenth Street, N.W., Suite 800
Washington, DC 20005-2011
(202) 628-6600 (Tel)
(202) 434-1690 (Fax)

Qwest is represented in Idaho by its counsel:

Mary Hobson
Stoel Rives
101 S. Capitol Blvd.
Suite 1900
Boise, ID 83702
(208) 389-9040 (Fax)

C. Brief Summary of Negotiation History

5. The Parties have worked in good faith from language supplied by both Covad and Qwest to resolve the vast majority of issues raised during the negotiations. Notwithstanding these negotiations, Covad and Qwest have been unable to come to agreement on all terms, particularly certain terms relating to Qwest's continuing obligations to provide unbundled access to certain elements pursuant to section 271 of the Act and Idaho law. The remaining issues that Covad understands to be unresolved between the Parties are addressed below in Section G – Unresolved Issues Submitted for Arbitration and Positions of the Parties.

6. A draft of the Interconnection Agreement (“Agreement”) reflecting the Parties' negotiations to date is attached hereto as Exhibit A. Unless otherwise expressly marked in the Agreement as the proposal of one Party or another, agreed upon language is shown in normal type. Covad will continue to negotiate in good faith with Qwest to resolve disputed issues and will advise the Commission in the event arbitration, or arbitration on particular issues, is no longer necessary.

7. Covad requests that the Commission approve the Agreement between Covad and Qwest reflecting: (i) the language agreed to in Exhibit A, and (ii) the resolution in this arbitration proceeding of unresolved issues in accordance with the recommendations made by Covad below and in Exhibit A.

D. Date of Initial Request for Negotiation and Dates 135 days, 160 days, and Nine Months After that Date

8. Covad initiated negotiations by a letter dated January 31, 2003. The Parties have agreed to numerous extensions, agreeing that the final day for either party to seek arbitration before the Idaho Public Utilities Commission would be February 28, 2005. Pursuant to Section 252(b)(1), arbitration must be requested between the 135th day (February 3, 2005) and the 160th

day (February 28, 2005) following the date negotiations were requested. The Parties agree this Petition is timely filed.

E. Issues Resolved by the Parties

9. The Parties have resolved the issues and negotiated contract language to govern the Parties' relationship with respect to most of the provisions set forth in Exhibit A. These negotiated portions of the Agreement are shown in normal type. To the extent Qwest asserts that any provisions remain in dispute, Covad reserves the right to present evidence and argument as to why those provisions were considered closed and why they should be resolved in the manner shown in Exhibit A.

F. Unresolved Issues Not Submitted for Arbitration

10. There are no unresolved issues that are not being submitted for arbitration. While other issues remain disputed by the Parties in other states, Covad has chosen not to raise those issues in Idaho for business reasons.

G. Unresolved Issues Submitted for Arbitration and Positions of the Parties

ISSUE 1 (Section 4 Definition of "Unbundled Network Element," Sections 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.1.8, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6, 9.6.1.5.1 [and related 9.6.1.5], 9.6.1.6.1 [and related Section 9.6.1.6], and 9.21.2)

Issue: *Should the Parties' Agreement provide for access to network elements pursuant to Section 271 of the Telecommunications Act of 1996 and Idaho law, as well as Section 251 of the Telecommunications Act of 1996?*

The Parties disagree with respect to Qwest's continuing obligations to provide certain network elements, including certain unbundled loops (including high capacity loops, line splitting arrangements, and subloop elements) and dedicated transport, after the FCC's recent analysis in the *Triennial Review Order*. Covad maintains that the FCC's explicit direction was to continue the obligations of Regional Bell Operating Companies ("RBOCs") to provide all network elements listed in the provisions of Section 271 of the Act outlining specific RBOC

obligations to maintain authority to provide in-region interLATA service (the “271 Checklist” or “Checklist”). Qwest believes its obligations under Section 271, if any, are outside the Commission’s jurisdiction.

Furthermore, Covad believes that Qwest continues to be obligated under Idaho law to provide unbundled access to network elements pursuant to Idaho Code §§ 61-503, 61-513, 61-514, 62-602 and that the Commission further possesses the authority to establish the rates for these elements pursuant to Idaho Code § 61-503. Qwest argues this Commission’s authority to regulate access to these facilities has been preempted by congressional and FCC action.

A. Section 271

This Commission can, and should, use its authority to enforce the unbundling requirements of Section 271 of the Act. The FCC made clear in the *Triennial Review* that Section 271 creates independent access obligations for the RBOCs:

[W]e continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

Triennial Review Order, ¶ 653.

Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under Section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.

Triennial Review Order, ¶ 655.

Thus, there is no question that, regardless of the FCC’s analysis of competitor impairment and corresponding unbundling obligations under Section 251 for *ILECs*, as a Bell Company Qwest retains an independent statutory obligation under Section 271 of the Act to provide competitors with unbundled access to the network elements listed in the Section 271

checklist.¹ Other states have begun enforcing section 271 unbundling obligations, and have denied RBOCs' attempts to discontinue unbundled offerings as a result of the *Triennial Review Order*. See *Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market*, Pennsylvania Public Utility Commission Docket No. I-00030100, Reconsideration Order (May 27, 2004) at 4 (upholding a prior order determining that the *Triennial Review Order* relieved Verizon of its section 251 obligation to provide certain elements, but upholding its determination that access to those elements remained under as a result of Verizon's section 271 long distance entry and state law). A copy of this decision is attached hereto as Exhibit B.

Moreover, there is no question that these obligations include the provision of unbundled access to loops and dedicated transport under checklist item #4:

Checklist items 4, 5, 6, and 10 separately impose access requirements regarding **loop, transport, switching**, and signaling, without mentioning section 251. [emphasis added]

Triennial Review Order, ¶ 654.

In addition, the Commission has independent authority to enforce these Section 271 RBOC obligations. This enforcement authority encompasses the authority to ensure that Qwest fulfills its statutory duties under Section 271, including its ongoing unbundling obligations. Furthermore, there can be no argument that the Commission's enforcement of Qwest's Section 271 checklist obligations would substantially prevent the implementation of any provision of the Act. Indeed, where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly authorized. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity "in

¹ See 47 U.S.C. § 271(c)(2)(B).

the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.” *De Canas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Avocado Growers*, 373 U.S. at 142, 83 S.Ct. at 1217). The Act, however, hardly evinces an unmistakable indication of Congressional intent to preclude state enforcement of federal 271 obligations. Far from doing so, the Act expressly preserves a state role in the review of a RBOC’s compliance with its Section 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a RBOC’s Section 271 compliance.² Thus, the Commission clearly has the authority to enforce Qwest’s obligations to provide unbundled access to loops (including high capacity loops, line splitting arrangements and subloop elements) and dedicated transport under Section 271 checklist item #4.

The FCC did make clear in the *Triennial Review Order* that a different pricing standard applied to network elements required to be unbundled under Section 271 as opposed to network elements unbundled under Section 251 of the Act. Specifically, the FCC stated that “the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202.” *Triennial Review Order*, ¶ 656. In other words, according to the FCC, the *legal standard* under which pricing for Section 271 checklist items should be determined is a different *legal standard* than that applied to price Section 251 UNEs. Thus, “Section 271 requires RBOCs to provide unbundled access to elements not required to be unbundled under Section 251, but does not *require* TELRIC pricing.” *Triennial Review Order*, ¶ 659 (emphasis added).

² See 47 U.S.C. § 271(d)(2)(B) (requiring the FCC to consult with state commissions in reviewing RBOC compliance with the 271 checklist).

Notably, in the *Triennial Review*, the FCC nowhere forbids the application of state commission pricing of network elements required to be unbundled under Section 271. Rather, the FCC merely states that unbundled access to Section 271 checklist items is not *required* to be priced pursuant to the particular forward-looking cost methodology specified in the FCC's rules implementing Section 252(d)(1) of the Act – namely, TELRIC. The FCC states that the appropriate legal standard to determine the correct price of Section 271 checklist items is found in Sections 201 and 202. However, nowhere does the FCC state these two different legal standards may not result in the same, or similar, rate-setting methodology.

Furthermore, the FCC does not preclude the use of forward-looking, long-run incremental cost methodologies *other than TELRIC*, such as TSLRIC, to establish the prices for access to Section 271 checklist items. As the FCC made clear when it adopted the TELRIC pricing methodology in its *Local Competition Order*, there are various methodologies for the determination of forward-looking, long-run incremental cost. *Local Competition Order*, FCC 96-325, ¶ 631. TELRIC describes only one variant, established by the FCC for setting UNE prices under Section 252(d)(1), derived from a family of cost methodologies consistent with forward-looking, long-run incremental cost principles. *See Local Competition Order*, FCC 96-325, at ¶¶ 683-685 (defining “three general approaches” to setting forward-looking costs). Thus, the FCC's *Triennial Review Order* does not preclude the use of a forward-looking, long-run incremental cost standard *other than TELRIC* in establishing prices consistent with Sections 201 and 202 of the Act.³

³ For example, where the 271 checklist item for which rates are being established is not legacy loop plant but next-generation loop plant, incumbents might argue for the use of a forward-looking, long-run incremental cost methodology based on their *current network technologies* – in other words, a non-TELRIC but nonetheless forward-looking, long-run incremental cost methodology. *See, e.g., Local Competition Order*, FCC 96-325, ¶ 684.

B. State Law Unbundling Authority

The Idaho Legislature, in enacting the Telecommunications Act of 1988 stated:

(4) The legislature further finds that the telecommunications industry is in a state of transition from a regulated public utility industry to a competitive industry. The legislature encourages the development of open competition in the telecommunications industry *in accordance with provisions of Idaho law* and consistent with the federal telecommunications act of 1996.

(5) The commission shall administer these statutes with respect to telecommunication rates and services *in accordance with these policies* and applicable federal law.

Idaho Code § 62-602(4) and (5). [emphasis added].

The above policy statements make clear that the Idaho Legislature intended the Commission to possess independent, state law authority to promote competition within the state of Idaho, in addition to the authority delegated to it under the federal Act. In fact, the Commission's authority to implement the Act, also granted by the legislature, is contained in a separate section of the Idaho Code. See Idaho Code § 62-615. In order to implement these policies, the Idaho Code contains specific requirements that public utilities provide for the joint use of their plant and equipment, and allow physical connections with other telephone corporations. See Idaho Code §§ 61-513, 61-514.

This Commission therefore has the requisite authority and policy directives to require access to loops, including high capacity loops, line splitting arrangements and subloop arrangements, as well as dedicated transport, under its independent, state law authority. Idaho Code §§ 61-513, 61-514, 62-602. This independent state law authority is not preempted by the FCC's recent *Triennial Review Order*. Nowhere does Section 251 of the Act evince any general Congressional intent to preempt state laws or regulations providing for competitor access to unbundled network elements or interconnection with the ILEC. In fact, as recognized by the FCC in its *Triennial Review Order*, several provisions of the Act expressly indicate Congress'

intent not to preempt such state regulation, and forbid the FCC from engaging in such preemption:

Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.

Triennial Review Order, ¶ 191.

As the FCC further acknowledges in the *Triennial Review Order*, Congress expressly declined to preempt states in the field of telecommunications regulation:

We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.

Triennial Review Order, ¶ 192.

In fact, the FCC only identified a narrow set of circumstances under which federal law would act to preempt state laws and rules providing for competitor access to ILEC facilities:

Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not "substantially prevent" the implementation of the federal regulatory regime....

[W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.

Triennial Review Order, ¶¶ 192, 194.

Notably, in reaching these conclusions, the FCC was simply restating existing, well-known precedents governing the law of preemption. Specifically, the long-standing doctrine of

federal conflict preemption provides for exactly the limited sort of federal preemption acknowledged by the FCC's *Triennial Review Order*. Courts have long held that state laws are preempted to the extent that they actually conflict with federal law. As noted by the FCC's *Triennial Review Order*, such conflict exists where compliance with state law "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Triennial Review Order*, ¶ 192 n. 613 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Even more notably, in its *Triennial Review Order*, the FCC did not act to preempt any existing state law or regulation inconsistent with the FCC's rules, nor did it act to preclude the adoption of future state laws or regulations governing the access of competitors to ILEC facilities which are inconsistent with the FCC's rules. In fact, following the governing law set out in the Eighth Circuit's *Iowa Utilities Board I* decision, the FCC specifically recognized that state laws or regulations which are inconsistent with the FCC's unbundling rules are not ipso facto preempted:

That portion of the Eighth Circuit's opinion reinforces the language of [Section 251(d)(3)], *i.e.*, that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).

Triennial Review Order, ¶ 192 n. 611 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806).

In so doing, the FCC made clear that it was acting in conformance with the governing law set out in the *Iowa Utilities Board I* decision:

We believe our decision properly balances the broad authority granted to the Commission by the 1996 Act with the role preserved for the states in section 251(d)(3) and is fully consistent with the Eighth Circuit's interpretation of that provision.

Id.

Thus, far from taking any specific action to preempt any state law or regulation governing competitor access to incumbent facilities, the FCC merely acted in the *Triennial*

Review to restate the already-existing bounds on state action recognized under existing doctrines of conflict preemption. Furthermore, the FCC's *Triennial Review Order* recognized that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules would be insufficient to create such a conflict. Instead, consistent with existing doctrines of conflict preemption, the FCC recognized that the state laws would have to "substantially prevent implementation" of Section 251 in order to create conflict preemption.

Of course, the FCC's *Triennial Review Order* could not have concluded that all state rules unbundling network elements not required to be unbundled nationally by the FCC create conflict preemption. Had the FCC reached such a conclusion, the FCC would have rendered Section 251(d)(3)'s savings provisions a nullity, never operating to preserve any meaningful state law authority in any circumstance. Rather than reaching such a conclusion, the FCC created a process for parties to determine whether a "particular state unbundling obligation" requiring the unbundling of network elements not unbundled nationally by FCC rules creates a conflict with federal law. The *Triennial Review Order* invited parties to seek declaratory rulings from the FCC regarding individual state obligations. An invitation to seek declaratory ruling, however, hardly amounts to preemption in itself – it merely creates a process for interested parties to establish in future proceedings before the FCC whether or not a particular state rule conflicts with federal law.

The FCC did give interested parties some indication of how it might rule on such petitions. Specifically, the FCC stated that it was "*unlikely*" that the FCC would refrain from finding conflict preemption where future state rules required "unbundling of network elements for which the Commission has either found no impairment ... or otherwise declined to require unbundling on a national basis." *Triennial Review Order*, ¶ 195. The FCC's statement, however, that such future rules were merely "*unlikely*" – as opposed to simply unable – to

withstand conflict preemption leads to the inevitable conclusion that there are some circumstances in which the FCC would find that such future rules were not preempted. Moreover, with respect to state rules in existence at the time of the *Triennial Review Order*, the FCC's indications that it might find conflict preemption are even more muted. Specifically, the FCC merely stated that "in *at least some circumstances* existing state requirements will not be consistent with our new framework and may frustrate its implementation." *Triennial Review Order*, ¶ 195.

Thus, while the FCC's *Triennial Review Order* indicates that under some circumstances the FCC would find conflict preemption for state rules requiring the unbundling of network elements not unbundled nationally under federal law, the decision also indicates that in some circumstances the FCC would decline to find that such state rules substantially prevent implementation of Section 251.⁴ In fact, the FCC's decision gives some direction on the circumstances that would lead the FCC to decline a finding of conflict preemption for state rules unbundling network elements the FCC has declined to unbundle nationally. Specifically, in its discussion of state law authority to unbundle network elements, the FCC states that "the availability of certain network elements may vary between geographic regions." *Triennial Review Order*, ¶ 196. Indeed, according to the FCC, such a granular "approach is required under *USTA*." *Triennial Review Order*, ¶ 196 (citing *USTA*, 290 F.3d at 427). Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements

⁴ Notably, the FCC's statements indicating when it is 'likely' to find preemption for particular state rules appear to conflict with a recent Sixth Circuit decision. The Sixth Circuit has stated that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted." The court further noted that a state commission is permitted to "enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement" entered into pursuant to section 252 of the Act, "as long as the regulations do not interfere with the ability of new entrants to obtain services." See *Michigan Bell v. MCIMetro*, 323 F.3d 348, 359 (6th Cir. 2003).

not required to be unbundled nationally are permissible in that state, and would not substantially prevent the implementation of Section 251.

In addition, state determinations to require the unbundling of elements also subject to the unbundling requirements of Section 271 of the Act, such as switching, dedicated transport and loops, could not, as a matter of law, be subject to preemption analysis. The inclusion of these requirements in the Act clearly indicates that, far from frustrating the implementation of the Act, these unbundling requirements are critical components of the Act.

While Covad believes preemption of Idaho law mandating unbundling is unlikely, it is also irrelevant. This Commission should exercise its authority as it is delineated by Idaho statute, irrespective of preemption analysis, as the adjudication of the constitutionality of legislative enactments is generally beyond the jurisdiction of administrative agencies. *Johnson, Administrator of Veterans' Affairs, et. al. v. Robison*, 415 U.S. 361, 368; 94 S. Ct. 1160, 1166; 39 L.Ed. 2d 389, 398 (1974), *see also Alpert v. Boise Water Corp.*, 795 P.2d 298, 302 (Idaho 1990) (Commission possesses only the authority conferred by statute).

It should also be noted, however, that Qwest has not yet sought to remove the elements requested by Covad from its Statement of Generally Available Terms (SGAT) in Idaho. Under this Commission's rules, Qwest must continue to provide access to these elements on the rates, terms and conditions contained in Qwest's SGAT unless and until Qwest is granted permission to remove them. IDAPA 31.42.203. As a result, Covad is not asking for access to any new essential facilities; it is merely asking this Commission to confirm that elements listed in Qwest's Idaho SGAT remain available. Should Qwest wish to implement its proposals in this arbitration, it would be required to initiate a proceeding to reclassify the elements.

Consistent with the discussion above, Covad has proposed language maintaining access to network elements that may, in the future, no longer be available pursuant to Section 251 of the Act, but must nevertheless remain available pursuant to Section 271 of the Act and Idaho law.

H. Proposed Schedule for Implementing Terms and Conditions Imposed in the Arbitration

11. Covad proposes that terms and conditions imposed in the arbitration take effect immediately upon their approval by the Commission.

I. Recommendation as to What Information Other Parties to the Negotiation Should Provide

12. Covad does not anticipate the need for discovery in this matter, but reserves its right to seek such information as may become necessary for an adequate development of the record pertinent to the determination of the issue presented for resolution by the Commission.

REQUEST FOR RELIEF

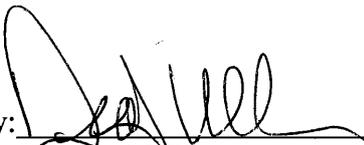
WHEREFORE, Covad respectfully requests that the Commission grant the following relief:

- (a) Arbitrate the unresolved issues between Covad and Qwest;
- (b) Issue an order directing the Parties to submit an Agreement reflecting: (i) the agreed upon language in Exhibit A and (ii) the resolution in this arbitration proceeding of the unresolved issues in accordance with the recommendations made by Covad herein and in Exhibit A;
- (c) Retain jurisdiction of this arbitration until the Parties have submitted an Agreement for approval by the Commission in accordance with section 252(e) of the Act;

- (d) Further retain jurisdiction of this arbitration and the Parties hereto until Qwest has complied with all implementation time frames specified in the arbitrated Agreement and has fully implemented the Agreement; and
- (e) Take such other and further actions as it deems necessary and appropriate.

Respectfully submitted, this 28th day of February, 2005.

DIECA COMMUNICATIONS, INC., D/B/A
COVAD COMMUNICATIONS COMPANY

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Its attorneys.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2005, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Mary Hobson
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Stephanie M. Sealord

**PETITION OF DIECA COMMUNICATIONS, INC., D/B/A COVAD
COMMUNICATIONS COMPANY FOR ARBITRATION**

EXHIBIT A

Draft Interconnection Agreement

One copy delivered separately to the Idaho Public Utilities Commission

**PETITION OF DIECA COMMUNICATIONS, INC., D/B/A COVAD
COMMUNICATIONS COMPANY FOR ARBITRATION**

EXHIBIT B

*Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local
Circuit Switching for the Enterprise Market, Pennsylvania Public Utility Commission Docket
No. I-00030100, Reconsideration Order (May 27, 2004)*

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265**

Public Meeting held May 27, 2004

Commissioners Present:

Terrance J. Fitzpatrick, Chairman
Robert K. Bloom, Vice Chairman
Glen R. Thomas
Kim Pizzingrilli
Wendell F. Holland

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for
the Enterprise Market

Docket No. I-00030100

RECONSIDERATION ORDER

BY THE COMMISSION:

Before the Commission is Verizon Pennsylvania Inc.'s (Verizon's) Petition for Reconsideration of that section of our December 18, 2003 Order (*December Order*) that addresses the continuing obligations of Verizon to provide competitors with access to its local circuit switching. In that Order, we found on the record before us no compelling justification to petition the Federal Communications Commission (FCC) for a waiver of its "no impairment" finding for local switching in the enterprise market. Verizon takes no issue with this finding. We further stated, however, that pursuant to our *Global Order* and 47 U.S.C. § 271(c)(2)(B)(vi) Verizon has a continuing obligation to provide requesting carriers with access to its local circuit switching at the rates contained in Verizon's Tariff 216. It is this continuing obligation section of the *December Order* to which Verizon's petition is directed. We will grant-in-part and deny-in-part the petition.

Factual and Procedural Background

In 1996, Congress adopted a national policy of promoting local telephone competition through the enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *amending* the Communications Act of 1934, *codified at* 47 U.S.C. §§151, *et seq.* (Act). The Act relies upon the dual regulatory efforts of the FCC and its counterpart in each of the states, including the Commission, to foster competition in local telecommunications markets. *See generally Verizon Communications Inc. v. Trinko*, 124 S. Ct. 872, 881-883 (2004) (discussing regulatory structure of the Act). The goals of the Act are accomplished in part through the imposition of particular access obligations upon incumbent local exchange carriers, like Verizon, and Regional Bell Operating Companies (BOCs), also including Verizon. Relevant access obligations are set forth in 47 U.S.C. §§ 251(c)(3) and 271(c)(2)(B)(vi), respectively. Additional relevant obligations may also be imposed by state law on a state-specific basis. 47 U.S.C. § 251(d)(3) (preserving state access regulations).

In 1999, in order to promote competition in local markets, we ordered Verizon to provide the Unbundled Network Element Platform (UNE-P) to competitors for service to business customers with total billed revenue from local services and intraLATA toll services at or below \$80,000 annually. *Global Order*¹ at 85-92. UNE-P was defined to be “a combination of all network elements required to provide local service to an end user. It contains, at a minimum, the loop, switch port, switch usage, and transport elements.” *Id.* at 85. The obligation to provide UNE-P was imposed through December 31, 2003, after which time Verizon was invited to demonstrate to the Commission that the obligation should no longer be imposed. *Id.* at 90. Our *December Order* at 14 observed the continuation of the *Global Order* obligation. Concurrently, the *December*

¹ *Joint Petition of Nextlink et al.*, Opinion and Order (entered Sep. 30, 1999), Docket Nos. P-00991648 and P-00991649 (*Global Order*).

Order at 16 cautioned Verizon's competitors against assuming that this state law obligation would continue indefinitely.

In 2001, the FCC granted Verizon's request for authorization to provide in-region, interLATA services in Pennsylvania. *Pennsylvania 271 Order*.² Authorization was granted as in the public interest because, in part, this Commission had put into place and was actively providing oversight of Verizon's performance assurance plan (PAP), which provided the FCC with assurance the local market would remain open. *Pennsylvania 271 Order* at 127. The PAP measures, among other things, aspects of Verizon's UNE-P performance.

In 2003, the FCC issued an order relieving Verizon of its obligation under 47 U.S.C. § 251(c) to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS1 capacity and above loops, except where a state commission petitions the FCC for waiver and waiver is granted. *Triennial Review Order* (or *TRO*)³ at ¶¶ 451-458; 47 C.F.R. § 51.319(d)(3). Absent switching, there is no UNE-P by definition. After review of the record in this proceeding, we decided not to petition the FCC for waiver. *December Order*. Since § 251(c) does not presently impose upon Verizon an obligation to provide carriers with access to local circuit switching for service to end-user customers using DS1 capacity and above loops, the availability of UNE-P under § 251(c) for service to such customers has been eliminated.

² *In the Matter of Application of Verizon Pennsylvania Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, FCC 01-269, CC Docket No. 01-138, Order (rel. Sep. 19, 2001).

³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, FCC 03-36, as corrected by FCC 03-227, CC Docket No. 01-338, Report and Order (rel. Aug. 21, 2003).

The FCC's *Triennial Review Order* was challenged by various petitioners, including this Commission, in the United States Court of Appeals for the District of Columbia. The case was argued January 28, 2004. On March 2, 2004, the court decided, among other things, that the Commission's challenge to the preemptive scope of the *TRO* was not ripe because the FCC "has not taken any view on any attempted state unbundling order." *U.S.T.A. v. F.C.C.*, 359 F.3d 554, 594 (D.C. Cir. 2004). The court also denied petitions for review of the FCC's determination regarding the unbundling of enterprise switches. *Id.* at 586-587. Regarding § 271, the court decided that there was "nothing unreasonable in the [FCC's] decision to confine TELRIC pricing to instances where it has found impairment [under § 251]." *Id.* at 589. The court also decided that the FCC was not unreasonable in deciding that any duty to combine network elements under § 251 does not apply to § 271 unbundling obligations. *Id.* The court distinguished its holding, however, from the separate question of whether the FCC's decision not to require combinations under § 271 satisfies the general nondiscrimination requirement of § 202. *Id.* at 590.

Our *December Order* distinguishes Verizon's distinct access obligations stemming from the *Global Order* (an exercise of our independent state law authority), the *Pennsylvania 271 Order* (memorializing federal requirements imposed on Verizon as a condition of entry into the long distance market pursuant to 47 U.S.C. § 271), and the *Triennial Review Order* (establishing minimum federal requirements pursuant to 47 U.S.C. § 251(c)). We recognized the FCC had relieved Verizon of the relevant obligation under § 251, but correspondingly recognized the continuation of the relevant access obligations under state law and, to an extent, under § 271.

On January 2, 2004, Verizon filed a Petition for Reconsideration of our *December Order*. Verizon challenges the lawfulness of that section of the *December Order* which recognized Verizon's continuing obligation to provide access to UNE-P under state law. Verizon also seeks clarification of our position on the rate at which carriers can obtain

access to local switching under § 271. On January 21, 2004, we granted the petition pending consideration on the merits.

An answer to the petition was filed by the Pennsylvania Carrier's Coalition (PCC).⁴ A joint answer was filed by ARC Networks, Inc. d/b/a InfoHighway Communications Corp. and Metropolitan Telecommunications Corporation of PA (collectively ARC). A third answer was filed by MCI WorldCom Network Services, Inc. (MCI).

Verizon moved to strike MCI's answer. MCI answered Verizon's Motion to Strike.

Further, on April 16, 2004, before the FCC, Verizon filed an Emergency Request for Declaratory Ruling and Preemption. Verizon's filing urges the FCC to issue a declaratory ruling that the *December Order*—to the extent that it requires Verizon to continue to provide unbundled access to its local switching serving the enterprise market at TELRIC prices—is inconsistent with, and therefore preempted by, federal law. *In the Matter of Verizon Pennsylvania Inc. Petition for Declaratory Ruling and Order Preempting the Pennsylvania Public Utility Commission's Order Directing Verizon Pennsylvania Inc. To Provide Unbundled Access to Its Enterprise Switches*, File No. _____, Emergency Request for Declaratory Ruling and Preemption (filed April 16, 2004).

⁴ The PCC is an informal group of competitive local exchange carriers comprised of Full Service Computing Corp. t/a Full Service Network ; ATX Licensing, Inc.; Remi Retail Communications, LLC; and Line Systems, Inc.

Position of the Parties

Verizon's position is that the *December Order*:

appears to suggest (1) that Verizon PA has a separate and continuing additional unbundling obligation under the Commission's *Global Order* to provide unbundled switching and UNE-P to enterprise customers—a conclusion directly at odds with the 1996 Act, binding case law, and the FCC's express conclusions; and (2) that the TELRIC rates that apply to network elements unbundled pursuant to section 251 of the 1996 Act must also be applied to network elements unbundled pursuant only to section 271—an assumption expressly and unambiguously rejected by the FCC, which has controlling authority over this question.

Petition at 1. “Simply put, a state conclusion that ‘yes, an ILEC is required to unbundle’ actually and directly conflicts with the federal conclusion that ‘no, the ILEC does not have to unbundle.’” *Id.* at 9. Thus, Verizon argues that the Commission's reading of the *Global Order* as imposing a continuing obligation to provide access to local switching directly conflicts with the FCC's national finding of non-impairment for enterprise switching, a finding made pursuant to § 251(d)(2). *Id.* Further, Verizon argues that any continuing access obligation imposed by § 271 does not require TELRIC pricing, rather Verizon is permitted to price access at a “market-based” rate. *Id.* at 12-13.

In support, Verizon cites a variety of authorities and theories. Verizon's petition cites: 47 U.S.C. § 251(d)(2) (requiring FCC to determine which network elements should be made available for purposes of § 251(c)(3)); 47 U.S.C. § 252(c)(1) (requiring state commissions to resolve arbitration disputes consistent with regulations prescribed by the FCC pursuant to § 251); *USTA v. FCC*, 290 F.3d 415, 417-18 (D.C. Cir. 2002) (opining that § 251 requires Verizon to unbundle its network elements on terms prescribed by the FCC); *TRO* ¶ 186 (stating that the FCC has responsibility for establishing a framework to implement the unbundling requirements of § 251(d)(2)); *AT&T v. Iowa Utils. Bd.*, 525

U.S. 366, 371, 378 n. 6, 387 n. 10 (1999) (for the assertion that state-specific unbundling requirements that do not mirror FCC requirements impede competition and are prohibited by the Act); *TRO* ¶¶ 187, 192, 195 (requiring state commissions to amend and alter state-specific decisions to conform to the FCC's unbundling rules); Brief for Respondents at 92-93, *U.S.T.A. v. F.C.C.*, No. 00-1012 (D.C. Cir., filed Dec. 13, 2003) (explaining FCC view that a FCC decision not to require an ILEC to unbundled a particular element reflects a "balance" struck by the agency and that any state rule that struck a different balance would conflict with federal law, thereby warranting preemption); and, *TRO* ¶ 72 (stating that FCC must interpret the Act's "impair" standard as requiring the FCC to determine the elements that "should or should not be unbundled").

Verizon also cites *TRO* ¶ 655, n. 1990 (declining to require BOCs, pursuant to § 271, to combine network elements that no longer are required to be unbundled under § 251); *TRO* ¶ 659 (concluding that § 271 requires BOCs to provide unbundled access to elements not required to be unbundled under § 251, "but does not require TELRIC pricing"); *TRO* ¶¶ 663 (discussing pricing of unbundled access pursuant to § 271 and deciding that the pricing methodology applicable to elements accessed pursuant to § 271 is the "basic just, reasonable, and nondiscriminatory rate standard of [47 U.S.C. §§ 201, 202] that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate service) the Communications Act."); *TRO* ¶¶ 659, 662-64 (further discussing pricing and enforcement); *Proceeding by the Dep't of Telecoms. And Energy on its own Motion to Implement the Requirements of the F.C.C.'s Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops*, D.T.E. 03-59, Order (issued Nov. 25, 2003) at 19 (holding that market prices that are subject to the disciplining effects of competitive forces are presumptively just and reasonable and that Verizon's pricing under § 271 would be subject to competitive forces).

PCC's position is that the *December Order* is consistent with federal law and that Verizon's Petition "fails miserably under the Commission's long-established standards

for reconsideration.” PCC Answer at 2. “The bottom line is that this Commission is free and should continue its current policies originally established in the *Global Order* until a party, including Verizon, convinces this Commission that the policies should be changed.” *Id.* at 4. Further, PCC argues that the FCC has not exercised exclusive jurisdiction over Verizon’s § 271 obligations and notes Verizon’s agreement to unbundle its network as a condition of providing in-region, interLATA service. *Id.* at 12, 20.

ARC’s position, like PCC’s, is that the Commission “clearly has the authority to take the actions it took in the [*December Order*], and the conclusions the Commission reached in the [*December Order*] are fully consistent with the 1996 Act.” ARC Answer at 3. “Section 251(d)(3) does not preclude states from modifying the federal unbundling regime, as Verizon suggests, but rather, it bars only measures that require incumbents to violate the Act or preclude competitors from using elements to provide competing services.” *Id.* at 5. “[T]he Act does not demand that state rules mirror exactly the FCC’s regulations. Section 251(d)(3) of the Act clearly contemplates that the states will co-administer Section 251’s market-opening mechanisms.” *Id.* at 6. Regarding § 271 pricing, ARC notes that the *December Order* does not require TELRIC pricing, rather, the Commission held that Tariff No. 216 rates satisfy the “just and reasonable” pricing standard for § 271 elements, especially given the fact that the FCC has determined in the course of Verizon’s § 271 proceeding that the Tariff No. 216 rates are just and reasonable. *Id.* at 8-9.

MCI’s position on the merits of the *December Order* is substantially the same as the positions taken by PCC and ARC. The distinguishing feature of MCI’s Answer⁵ is

⁵ Verizon moves to strike MCI’s Answer on the ground that MCI was not one of the petitioners in this case and has never filed a Petition to Intervene in this proceeding. Alternatively, Verizon argues that Verizon had consented to an extension of time for “parties” to answer the petition. Given that MCI is not a “party,” and therefore not subject to the extension, Verizon argues the MCI Answer should be stricken as untimely. Verizon Motion at 2. MCI responds that it is true that MCI did not formally intervene, but that is because MCI did not intend to present evidence on issues specifically dealing with the enterprise market. When Verizon’s Petition brought other issues into the case, MCI argues its rights became

that MCI did not participate in the development of the factual record in this CLEC-initiated investigation, but now argues that this proceeding is not the place for Verizon to challenge the Commission's *Global Order* decision because many CLECs interested in the preservation of the *Global Order* requirements are not on this Docket's service list. MCI Answer at 1-2. MCI argues that Verizon's Petition broadens the scope of this proceeding by challenging the viability of the *Global Order* requirements generally. MCI accepts that Verizon has a procedural right to make such a challenge, but argues that "[i]f Verizon disagrees that the *Global Order* creates a continuing obligation, it should petition the Commission separately, but should not use this proceeding to make such a monumental change in the current legal landscape in Pennsylvania." *Id.* at 3.

In opposition to Verizon's Petition, opponents' citations include *TRO ¶¶* 191-93, 653, 662, 665; the FCC's *USTA* Brief at 90-91; 47 U.S.C. §§ 152(b), 251(d)(3), 252(e)(3), 253(b), 254(i), 261(b)&(c), 153(41), 601(c), and 706(c); *Verizon Communications Inc. v. Trinko, supra*; *Application of Verizon Pa. Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pa., supra*.⁶

Analysis

Whether the Commission Will Consider the Merits of Verizon's Petition

The Commission will only address reconsideration requests that raise new and novel arguments, not previously heard, or considerations that appear to have been overlooked or not addressed by the Commission. *Duick v. Pennsylvania Gas & Water Co.*, 56 Pa. P.U.C. 553 (1982). Thus, reconsideration petitions that raise the same questions as raised previously are improper.

directly affected, and therefore, it is entitled to respond to the petition. MCI Answer to Verizon Motion at 1-2.

In this case, we will consider the merits of Verizon's Petition in order to address the guidance and clarifications of the Act and *Triennial Review Order* provided by the federal courts and the FCC since issuance of our *December Order*.

Whether the Commission Will Consider the Merits of MCI's Answer

The section of the *December Order* that is challenged by Verizon's Petition for Reconsideration merely reminded Verizon and the CLECs of the continuing obligations of the *Global Order*, absent further proceedings. Preemption arguments made by the parties in this proceeding had prompted our decision to be clear on the point of whether we viewed the *Global Order* requirements as remaining intact. We specifically stated: "Given the lack of record development and the uncertainty as to an actual conflict, as well as our open and unanswered invitation to [Verizon] to demonstrate that the *Global Order* requirement can be retired, we will not change the *status quo* vis-à-vis access at this time." *December Order* at 15. Similarly, we left the Tariff No. 216 pricing in place. *Id.* at 16.

We continue to believe it was beneficial to the competitive markets to be clear on the status of the *Global Order*. We also note recent support for our position. The D.C. Circuit has decided that the concern we expressed in December about the preemptive effect of the *Triennial Review Order* was premature. *U.S.T.A. v. F.C.C.*, 359 F.3d at 594. Further, the FCC recently observed that uncertainty can be harmful to telephone consumers. Letter of FCC Commissioners to Verizon President & CEO Ivan Seidenberg, dated March 31, 2004, available at http://www.fcc.gov/commissioners/letters/triennial_review/verizon.pdf (stating "telephone consumers are served best by ending this uncertainty and getting back to

⁶ Due to our disposition of the Petition, we do not add parentheticals to these citations.

business”). These actions favor our decision to maintain the status quo pending formal proceedings.

Formal proceedings initiated to address the issue of whether we should amend the *Global Order* would provide all interested parties with notice and an opportunity to be heard as well as assure development of an adequate record. See 66 Pa.C.S. §§ 501(a), 703(g). Because of this, we will simply apply 52 Pa. Code § 1.2(c), which permits a liberal construction of our formal proceeding rules when necessary and appropriate, to allow consideration of MCI’s Answer. Therefore, Verizon’s Motion to Strike MCI’s Answer to Verizon’s Petition for Reconsideration will be denied.

Consideration of the Merits of Verizon’s Petition for Reconsideration

We grant the petition in part to clarify our position on the pricing of network elements unbundled pursuant to § 271. Contrary to Verizon’s suggested interpretation, the *December Order* does not mandate that TELRIC pricing be used to price such network elements. Rather, as observed by ARC, the order merely provides that existing Tariff No. 216 rates be used at present because they are currently in effect and fall within the range of a just and reasonable price. Verizon remains free to exercise all of its rights to propose the establishment of new just and reasonable prices applicable to § 271 network elements.

Since the *Triennial Review Order* did not fully flesh out all the processes, procedures and requirements associated with Verizon’s § 271 access obligations, we recognize that it remains unclear as to where and how Verizon’s “just and reasonable” rate for access in a particular state (since § 271 is granted on a state-by-state basis) is established and/or disclosed to the requesting carrier. Our review of the *TRO*, the D.C. Circuit’s opinion, and even the FCC’s brief in the *USTA* litigation, has not provided any clarity on this point. However, given that the Tariff No. 216 is filed with the

Commission, the Commission's existing procedures for tariff changes, namely 66 Pa. C.S. §§ 1301 and 1308, are available to be used if Verizon seeks to establish new non-TELRIC rates for enterprise switching. Meanwhile, the uncertainty again supports our observation that the Tariff No. 216 rates are currently in effect and should be used until a new rate is properly established.⁷

We deny the remaining portion of the petition. We are not persuaded that maintaining the status quo vis-à-vis the *Global Order* requirements is improper. We continue to believe that absent further proceedings, which Verizon is free to initiate, Verizon has a separate and continuing additional unbundling obligation under the *Global Order* to provide unbundled switching and UNE-P to enterprise customers. Support for our view is found in multiple sources, specifically including 47 U.S.C. § 251(d)(3) (preserving state access requirements); and, *U.S.T.A. v. F.C.C.*, 359 F.3d at 594 (holding that our challenge to the preemptive scope of the *TRO* is not ripe because the general prediction voiced in *TRO* ¶ 195 does not constitute final agency action). In particular, the *Global Order* provides that the availability of UNE-P for enterprise customers would not be indefinite and that Verizon may request its termination after December 31, 2003. Verizon has yet to avail itself of this opportunity.

Furthermore, even if the *Global Order* requirements are deemed to be preempted (and no court has so determined), there is support for finding a continuing access obligation in § 271's requirement that Verizon provide access to its local switching. Presently, no FCC decision has relieved Verizon from its ongoing § 271 obligations in Pennsylvania, or fully defined what those obligations are in the wake of the *Triennial*

⁷ The Commission has tariffs on file that allow Verizon pricing flexibility. See, e.g., Verizon Pennsylvania Inc. Informational Tariff for Competitive Services, Pa. P.U.C. No. 500, Section 2, 1st Revised Sheet 13 at ¶ 29 (providing that the rates for Centrex Service packages "will be determined by the Telephone Company...[and] will range from a floor represented by the costs of furnishing service to a ceiling represented by the rates set forth in Sections 2 and 2A of this Informational Tariff.").

*Review Order.*⁸ We conclude that there is no firm basis for this Commission to unilaterally sanction removal of a § 271 element from Verizon's offerings in Pennsylvania under the present state of FCC orders. If Verizon believes that its § 271 obligations in Pennsylvania have changed, it should put that issue to the FCC. Upon FCC approval of Verizon's position, modifications of relevant offerings would then be appropriate.

We also note that Verizon may not have to offer such switching in combination under § 271 by virtue of § 251, but it has not been decided whether Verizon must combine the switching with other elements under another legal theory. See *U.S.T.A. v. F.C.C.*, 359 F.3d at 590; *Verizon v. Trinko*, 124 S. Ct. at 882-83 (holding that Verizon may subject itself to state commission oversight under a performance assurance plan).⁹ We do not imply a viewpoint on the merits of alternative legal theories, rather, we make these observations to explain why we maintain the status quo in the absence of a fully developed record on the issues raised in Verizon's instant Petition for Reconsideration.

Our action in this regard is without prejudice to Verizon's right to seek further administrative relief, and we invite Verizon to initiate appropriate formal proceedings to address the preemption and pricing issues raised in its Petition for Reconsideration;
THEREFORE,

IT IS ORDERED:

1. That the Petition for Reconsideration of our Order entered December 18, 2003, filed by Verizon Pennsylvania Inc. on January 2, 2004, and granted pending review

⁸ On October 24, 2003, the Verizon telephone companies filed a petition asking the FCC to forebear from § 271 obligations. See *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; CC Docket No. 01-338. The matter is pending.

⁹ The Pennsylvania Performance Assurance Plan measures aspects of Verizon's UNE-P performance.

and consideration of the merits by Order entered January 21, 2004, is hereby granted-in-part and denied-in-part consistent with the discussion contained in the body of this Order.

2. That Verizon's Motion to Strike the Answer of MCI to Verizon's Petition for Reconsideration is denied.

3. That this record shall be marked closed.

BY THE COMMISSION

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: May 27, 2004

ORDER ENTERED: May 28, 2004