Mailed 9/30/2004

Decision 04-09-056 September 23, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AT&T Communications of California, Inc. (U 5002 C), TCG Los Angeles, Inc. (U 5462 C), TCG San Diego (U 5389 C) and TCG San Francisco (U 5454C), Complainants, vs. Verizon California Inc. (U 1002 C), Defendant.	Case 04-08-026 (Filed August 19, 2004)

INTERIM ORDER CONFIRMING THE ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE RULING GRANTING EMERGENCY MOTION FOR AN ORDER MAINTAINING THE STATUS QUO

I. Summary

This order confirms the September 15, 2004 Assigned Commissioner and Administrative Law Judge's (ALJ) Ruling on AT&T's Emergency Motion for Order Maintaining the Status Quo Pending Resolution of the Complaint (September 15 Ruling Maintaining Status Quo), as clarified in today's decision. A copy of this ruling is attached hereto as Appendix A.

II. The September 15, 2004 Ruling

The Assigned Commissioner and ALJ issued the September 15, 2004 Ruling Maintaining the Status Quo after all affected parties fully briefed the motion, including offering supporting declarations.

Because the ruling is attached to this decision, we do not repeat its contents. Briefly, the ruling restrains Verizon California Inc. (Verizon) from eliminating the ability of AT&T[1] to purchase unbundled Local Switching and/or Common Transport network elements, alone and in combination with other network elements, until AT&T's complaint is resolved, or until further order of the Commission or the Assigned Commissioner and ALJ. The ruling is predicated on contractual interpretation of two interconnection agreements between the parties to this action.

Several other California competitive local exchange carriers (CLECs) filed motions to intervene, or other complaints at the Commission with similar requests to maintain the status quo as to their interconnection agreements. To maintain a level playing field and treat Verizon's interconnection agreements with all similarly situated California CLECs in the same way, the ruling maintains the status quo by extending the restraint to Verizon's performance under its California interconnection agreements with substantially similar provisions concerning Verizon's obligation of providing the functionality of access to the Local Switching and Common Transport network elements.

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[1] Complainants are AT&T Communications of California, Inc., TCG Los Angeles, Inc., TCG San Diego, and TCG San Francisco, collectively referred to here as "AT&T".

The ruling also permits Verizon to record and accrue the difference between the status quo (unbundled network elements platform) prices and the proposed (resale platform) process for each CLEC affected by the ruling commencing on the date Verizon's letter to the CLEC stated it was upgrading to packet switches. The ruling states that any decision resolving the complaint in Verizon's favor may include a plan for recovery of the total differential from each affected CLEC.

The September 15, 2004 Ruling Maintaining the Status Quo made clear that it does not prohibit Verizon from deploying its new packet switches. Nor does the ruling require Verizon to unbundle and provide the advance services capabilities of its packet switches to AT&T. The ruling requires Verizon to continue to provide AT&T access to unbundled Local Switching and Common Transport elements under the terms of the interconnection agreements, regardless of what type of hardware Verizon uses to do so. The ruling does so because the agreements address the functionality, and not the specific hardware of the switch providing the Local Switch and Common Transport elements.

The ruling finds that AT&T has met the burden for obtaining injunctive relief by showing (1) a likelihood of prevailing on the merits; (2) irreparable injury to the moving party without the order; (3) no substantial harm to other interested parties; and (4) no harm to the public interest.

III. The September 17, 2004 Hearing

On September 16, 2004, Verizon filed a notice regarding compliance with the ruling. In that notice, Verizon clearly informed the Commission for the first time that it was unable at this time to deploy the packet switches and continue to provide AT&T the access required by the ruling due to the lack of operational support system (OSS) capabilities currently in place. Verizon stated it could not

comply with the September 15 Ruling Maintaining the Status Quo if the packet switches are put in operation and, therefore, would not deploy the packet switches in California while the ruling remained in place.

In light of this new information, the Assigned Commissioner and ALJ convened an emergency hearing on September 17, 2004, so that AT&T and Verizon could offer witnesses on the issue of the parties' respective harms, with a particular focus on the end-user customer. As stated by Commissioner Brown at the hearing:

> "The reason we are here today as opposed to allowing this matter just to go for ratification to the Commission or further is because both the Administrative Law Judge and myself are concerned about the issue of harm in both directions. And we felt that this was a fairly momentous action that we undertook when we signed the temporary restraining order; however, we wanted to assure ourselves that we were doing the right thing, and we did not want to impose harm in either direction."[2]

The expert testimony in the five-hour hearing confirmed the harm to AT&T set forth in the attached ruling, which the ruling found to be a sufficient showing of irreparable injury. Mainly, this harm is AT&T's immediate inability to respond properly to mass market small business and residential customers' requests that AT&T make account changes so that these customers can obtain the services they have chosen. Such customer requests could include adding or removing features, and disconnecting or adding new services. Additionally, AT&T stated that billing problems would arise, such as a customer being billed after the customer requests that his or her service be discontinued.

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[2] Transcript of September 17, 2004 hearing at p. 12, lines 7-16.

Verizon testified that it has performed due diligence in making certain that none of its customers would suffer harm as a result of Verizon not deploying its packet switch on September 17. Thus, Verizon now states that the harms it previously alleged would occur to end-user customers if it did not deploy its packet switch on September 17 will not occur. Therefore, for purposes of this motion, the existing harm to Verizon and its customers is the harm to California consumers who would potentially lose the future efficiencies and service improvements that are the ultimate goal of any upgrade, as well as any lost value of the investments Verizon has made.

Thus, if the status quo is maintained, the current service to both AT&T and Verizon customers should not be disrupted. Verizon customers may not realize the potential for new options immediately. However, maintaining the status quo while we expeditiously process this case should eliminate (or is the best way to mitigate) immediate concrete harm to the end-user customers which would otherwise result.

At the September 17 emergency hearing, Verizon indicated that it cannot at this time comply with the September 15 ruling and deploy packet switches, but did not state that it could not do so under any circumstances. Because the emergency hearing focused on harm, this is an issue that can be more fully explored when the Commission considers the merits of the complaint. Under the existing record, we do not change our conclusion (on the issue of the likelihood of success on the merits) that Verizon's proposed network change does not require discontinuance of unbundled network elements.

We encourage the deployment of new technology in California. However, we recognize that existing interconnection agreements must also be honored. Maintaining the status quo while the Commission builds a record on these issues

and carefully evaluates potential outcomes will further the public interest, and will provide certainty to these parties. On balance, the fairest outcome for all concerned is to maintain the status quo while we expeditiously resolve this case. With these clarifications, we confirm the attached September 15, 2004 Ruling Maintaining the Status Quo.

IV. Comments on Proposed Decision

This is an unforeseen emergency in that the request for relief is based on extraordinary conditions in which time is of the essence. (See Rule 81(f) of the Commission's Rules of Practice and Procedure.) We therefore waive the 30-day period set forth in Pub. Util. Code § 311(d) as well as the comment period in Rule 77.1 *et seq.*

V. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janet A. Econome is the assigned ALJ in this proceeding.

Findings of Fact

1. The September 15, 2004 ruling on AT&T's motion was made after full briefing, including declarations under penalty of perjury.

2. In Verizon's September 16, 2004 notice regarding compliance with the ruling, Verizon clearly informed the Commission for the first time that it was unable at this time to deploy the packet switches and continue to provide AT&T the access required by the ruling due to the lack of OSS capabilities currently in place. Verizon stated it could not comply with the September 15 Ruling Maintaining the Status Quo if the packet switches are put in operation and therefore would not deploy the packet switches in California while the ruling remained in place.

3. In light of Verizon's September 16 compliance filing, an emergency September 17, 2004 evidentiary hearing was held on the issue of harm to the parties, with particular focus on harm to the end-user customer.

4. The testimony at the September 17, 2004 hearing confirmed the harms to AT&T set forth in the attached ruling, which the ruling found to be a sufficient showing of irreparable injury.

5. At the September 17 hearing, Verizon testified that it has performed due diligence in making certain that none of its customers would suffer harm as a result of Verizon not deploying its packet switch on September 17. Thus, Verizon now states that the harms it previously alleged would occur to end-user customers if it did not deploy its packet switch on September 17 will not occur.

6. For purposes of this motion, the harm to Verizon and its customers is the attenuated harm to California consumers who would potentially lose the future efficiencies and service improvements that are the ultimate goal of any upgrade, as well as any lost value of the investments Verizon has made.

7. This is an unforeseen emergency in that the request for relief is based on extraordinary conditions in which time is of the essence.

Conclusions of Law

1. The September 15, 2004, Ruling Maintaining the Status Quo (attached to and incorporated in today's decision) sets forth the standards for obtaining injunctive relief and applies those standards appropriately.

2. The September 15, 2004 Ruling Maintaining the Status Quo, as clarified by today's decision, should be affirmed by the Commission.

3. On balance, the fairest outcome for all parties is to maintain the status quo while we expeditiously resolve this case.

4. The same circumstances requiring immediate action by the Commission also require that today's order take effect immediately.

IT IS ORDERED that:

1. The Assigned Commissioner and Administrative Law Judge's Ruling on AT&T's Emergency Motion for Order Maintaining the Status Quo Pending Resolution of the Complaint, dated September 15, 2004 and attached hereto as Appendix A, as clarified by today's decision, is confirmed.

2. The Commission's Process Office shall serve this order on the service list of this proceeding, as well as on the service list in Case (C.) 04-09-001 and C.04-09-010.

This order is effective today.

Dated September 23, 2004, at San Francisco, California.

CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
Commissioners

I dissent.

/s/ MICHAEL R. PEEVEY
President

I will file a dissent.

/s/ SUSAN P. KENNEDY
Commissioner

APPENDIX A

GFB/JJJ/jva 9/15/2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AT&T Communications of California, Inc. (U 5002 C), TCG Los Angeles, Inc. (U 5462 C), TCG San Diego (U 5389 C) and TCG San Francisco (U 5454C), Complainants, vs. Verizon California Inc. (U 1002 C), Defendant.	Case 04-08-026 (Filed August 19, 2004)

ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE'S RULING ON AT&T'S EMERGENCY MOTION FOR ORDER MAINTAINING THE STATUS QUO PENDING RESOLUTION OF THE COMPLAINT

I. Summary

This ruling grants the August 19, 2004 emergency motion of complainants (collectively AT&T[1]) for an order maintaining the status quo pending resolution of the complaint. The ruling is predicated on contractual interpretation of two interconnection agreements between the parties to this action. It restrains Verizon California Inc. (Verizon) from eliminating the ability of AT&T to

[1] Complainants are AT&T Communications of California, Inc, TCG Los Angeles, Inc., TCG San Diego, and TCG San Francisco.

purchase unbundled Local Switching and/or Common Transport network elements, alone and in combination with other network elements, until AT&T's complaint is resolved, or until further order of the Commission or the undersigned. To maintain a level playing field and treat Verizon's interconnection agreements with all similarly situated California competitive local exchange carriers (CLECs) in the same way, we maintain the status quo as follows. We extend this restraint to Verizon's performance under its California interconnection agreements with substantially similar provisions concerning Verizon's obligation of providing the functionality of access to the Local Switching and Common Transport network elements. This ruling will be placed before the Commission at its next meeting, where the full Commission will have the opportunity to consider it.

This ruling does not prohibit Verizon from deploying its new packet switches. Nor does it require Verizon to unbundle and provide the advance services capabilities of its packet switches to AT&T. This ruling merely acquiesces in AT&T's request to enforce existing interconnection agreements and maintain the status quo. It requires Verizon to continue to provide AT&T access to unbundled Local Switch and Common transport elements under the terms of the agreements, regardless of what type of hardware Verizon uses to do so. It does so because the agreements address the functionality, and not the specific hardware of the switch providing the Local Switch and Common Transport elements.

II. The Problem

AT&T has two valid interconnection agreements with Verizon. Pursuant to those agreements, Verizon currently provides AT&T with unbundled Local Switching and Common Transport network elements. These two network elements are part of the unbundled network elements platform (UNE-P) by

which AT&T provides local service to many California consumers in Verizon's service territory.

This complaint arises from a June 15, 2004 Verizon letter to AT&T which stated that, beginning September 17, 2004, Verizon will convert its Class 5 circuit switches to packet switches in two of its five central offices. In so doing, Verizon will eliminate AT&T's access to the Local Switching and Common Transport network elements. Verizon has stated it will serve AT&T's customers through a resale platform, as opposed to the UNE-P.

III. Circuit Switches vs. Packet Switches

Verizon currently provides AT&T with unbundled Local Switching and Common Transport network elements through its circuit switches. Verizon claims here that it is no longer required to do so when it deploys its packet switches.

Before further discussion, it is useful to understand in lay terms the difference between circuit and packet switches. With a circuit switch, when person "A" calls person "B", a dedicated circuit is created between these two points. This path is not shared by anyone else while the call takes place. A packet switch, in contrast, is more like a freeway, on which multiple vehicles with differing originations and destinations share the same path. A packet switch is more efficient than a circuit switch because calls and other data are packaged (i.e., digitized and packetized), sent through a shared network, and are reassembled at their respective destinations.

Packet technology is not new. It was first deployed over 15 years ago, replacing high-capacity telecommunications circuits, and is currently used by carriers to route long distance traffic. The technology has evolved such that it can now be deployed into additional branches of the telecommunications

network. The benefits from such deployment include many advanced service features, including broadband capabilities.

IV. Authority to Order Injunctive Relief

The Commission's authority to provide injunctive relief is firmly rooted in the California Constitution, the Pub. Util. Code, and case law.

> "The Commission is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers. The California Constitution, Article XII, Sections 1-6, grants the Commission plenary power over the regulation of public utilities. The Commission has broad authority to regulate public utilities, including the power to fix rates, hold hearings, and establish its own rules and procedures.[2] Our reliance in the Interim Decision on Pub. Util. Code § 701 and *Consumers' Lobby* is well founded. We noted that in *Consumers' Lobby*, [25 Cal3d at 907] the California Supreme Court recognized that the Commission has equitable jurisdiction, which permits it to issue injunctions: 'The commission often exercises equitable jurisdiction as an incident to its express duties and authority. For example, the Commission may issue injunctions in aid of jurisdiction specifically conferred upon it. [citations omitted.]" (See *Southern California Edison Company et al.*, Decision (D.) 01-07-033, 2001 Cal. PUC LEXIS 877 **11-12.)

Verizon argues that only the Commission, and not an individual Commissioner or Administrative Law Judge (ALJ), has authority to issue a temporary restraining order in this instance. We disagree.

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[2] Citing *Consumers' Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 905; *Wise v. Pacific Gas & Electric Co.* (1999) 77 Cal.App.4th 287, rehearing denied, review denied.)

An individual assigned Commissioner or ALJ may issue a temporary restraining order or preliminary injunction in order to preserve the status quo, subject to its ratification or reversal by the full Commission. (See the California Constitution, Article XII, Section 2 ["Any commissioner as designated by the commission may hold a hearing or investigation or issue an order subject to commission approval."]; see also Pub. Util. Code § 310; *Systems Analysis and Integration, Inc. dba Systems Integrated v. Southern California Edison Company*, D.96-12-023, 69 CPUC2d 516, 522 [ALJ issued temporary restraining order on November 21 and a preliminary injunction on November 30, and dissolved the injunction on March 21. The Commission issued its decision the following December].)[3]

Verizon recognizes some of this authority but argues that it is more appropriate in individual complaints, rather than in the present circumstances, where multiple carriers are affected or broader interests are at stake. We do not find this argument to be a valid distinction here.

The Commission has the authority to order a utility to refrain from doing something that violates the law, i.e., to maintain the status quo after discovery of a likely violations. Because the Commission generally holds meetings twice a month, Verizon's argument would tie the Commission's hands in granting such

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[3] Verizon also believes that an individual ALJ or Commission can only issue a temporary restraining order in the context set forth in D.98-12-075, 84 CPUC2d 155, to enforce our affiliate transaction rules for energy utilities and their affiliates. Under such rules, the temporary restraining order could only stay in effect until the end of the day of the next Commission meeting, under the theory that the Commission can then act on the order. However, in D.96-12-023, cited in the text of this order, the ALJ's orders for temporary injunctive relief concerned issues other than enforcement of the affiliate transaction rules and were for a longer duration.

emergency relief until the full Commission can determine whether to impose a more permanent restraint. Neither law nor logic supports such a result.

V. Standard of Review

The Commission uses the same test for temporary restraining orders that it uses for preliminary injunctions. (See *Westcom Long Distance, Inc. v. Pacific Bell et al.*, D.94-04-082, 54 CPUC 2d 244, 259; see also *Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, D.98-12-075, 84 CPUC2d 155, 169.) To obtain a temporary restraining order, the moving party must show (1) a likelihood of prevailing on the merits; (2) irreparable injury to the moving party without the order; (3) no substantial harm to other interested parties; and (4) no harm to the public interest.

Although consideration of the likelihood of complainants' ultimate success on the merits is not a final adjudication of the parties' ultimate rights, it does affect the balancing of the respective hardships between complainants and defendant. For example, the more likely it is that complainants will prevail, the less severe must be the alleged harm if injunctive relief does not issue. (See *King v. Meese* (1987) 43 Cal.3d 1217, 1227; see also *Los Angeles Memorial Coliseum Com'n v. Nat. Football* (9th Cir. 1980) 634 F.2d 1197, 1201 and 1203 [requiring a showing of all required elements for injunctive relief, and defining the analysis as discretion exercised along a "single continuum", such that a "minimal showing on the merits is required even when the balance of harms tips decidedly toward the moving party. Conversely, at least a minimal tip in the balance of hardships must be found even when the strongest showing on the merits is made."]) We will apply these standards in evaluating this motion.

VI. The Parties' Positions[4]

A. AT&T

AT&T states that it meets the standards for injunctive relief because it likely to prevail on the merits. According to AT&T, its interconnection agreements with Verizon require Verizon to provide AT&T with unbundled Local Switching and Common Transport Network elements, currently provided through Verizon's circuit switch. AT&T believes that Verizon's failure to provide these elements by unilaterally discontinuing them after installing packet switches would breach these interconnection agreements, absent a valid amendment to them. According to AT&T, the hardware or technology used is irrelevant to Verizon's obligation to provide these elements, in that Verizon must do so whether Local Switching or Common Transport passes through a packet or a circuit switch.

AT&T contends that even if the Telecommunications Act of 1996 and Federal Communication Commission (FCC) decisions no longer require Verizon to provide Local Switching and Common Transport to AT&T because of Verizon's upgrades, Verizon must follow the change in law provisions under the interconnection agreement for incorporating this change. AT&T also argues that Verizon must follow the network change provisions of the interconnection agreement, which prohibit Verizon from discontinuing network elements in the manner Verizon is attempting here.

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[4] The parties have fully briefed this motion, and both AT&T and Verizon have also submitted declarations supporting their positions. Verizon filed its response to AT&T's emergency motion on September 2, 2004, and AT&T filed its reply on September 8, 2004. Verizon also filed its response to Telescape's petition to intervene and concurrence in the emergency motion on September 9, 2004.

AT&T believes it will suffer irreparable injury without the restraining order because Verizon plans to switch AT&T customers to a resale platform which will disable AT&T from electronically processing resale orders. AT&T asserts that it would be unable to respond to a customer's request to make changes to an existing account, such as adding and removing features or disconnecting or adding new service. AT&T also alleges billing problems would arise if it cannot maintain the functional means to accomplish the task of Local Switching and Common Transport. AT&T states it needs to conduct a study well into 2005 to upgrade its systems to accommodate Verizon's change.

AT&T alleges that its customers would also be harmed because there is no guarantee, or suggestion, that the products, feature sets, and services available through resale are the same as those that consumers are currently receiving from AT&T through UNE-P. AT&T also states that its customers would be harmed because Verizon's action would require AT&T to raise prices to its customers in Verizon's service territory. AT&T alleges it will also suffer irreparable damage to its reputation in that AT&T's customers will blame AT&T, not Verizon, for the associated harm that they may suffer.

AT&T alleges no harm will occur to Verizon or others from the granting of this temporary restraining order because AT&T is not asking the Commission to prevent Verizon from making the network changes it wishes to make. AT&T believes that a temporary restraining order is in the public interest because it would provide the Commission with an opportunity to determine whether Verizon must continue to provide AT&T with the network elements.

B. Telescape[5]

Petitioning intervenors, collectively "Telescape", filed a concurrence in AT&T's emergency motion on September 1, 2004. Telescape's concurrence attached a complaint (also separately filed with the Commission as Case (C.) 04-09-001) to support the allegations that Telescape is threatened by the same action that prompted AT&T to file its emergency motion. As a result, Telescape alleges that it, as well as the public interest, will suffer irreparable harm.

C. Verizon

Verizon states that AT&T has not established the requisite elements for a temporary restraining order. Verizon believes that its upgrade, replacing five circuit switches with two new host packet switches, is a step in Verizon's ongoing process of building a next-generation network in California, and that federal law precludes any state law solution.

First, Verizon contends that AT&T's request must fail because AT&T waited over two months before bringing its motion. Verizon also states that federal law has never required unbundled packet switching. According to Verizon, its interconnection agreements with AT&T, adopted under and incorporating federal law, have never required unbundled packet switching, and do not require it now. Accordingly, Verizon believes that federal law preempts any contrary state Commission ruling.

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[5] Telescape Communications, Inc., Wholesale Airtime, Inc., and Blue Casa Communications, Inc. filed a concurrence to AT&T's motion on September 1, 2004.

Verizon also states that AT&T and its customers will not suffer irreparable injury because AT&T has hundreds of resale lines in California and has placed many orders on those lines within the past year. Verizon believes that the sole effect of its contemplated action would be a small reduction in AT&T's profit margin, which does not satisfy the irreparable harm criteria for issuing a temporary restraining order.

Verizon states that it will be irreparably harmed by any delay of its network upgrades, which would throw into chaos the complex industry-wide process of changing switch records and arranging for call rerouting through new switches. According to Verizon, call completion for thousands of its customers will be jeopardized, and its business plans for capital upgrades and entry into new service markets will be adversely affected. Verizon states that delayed deployment of the new packet switches is the outcome that will accompany a grant of AT&T's motion, since the only way Verizon will continue to provide unbundled switching at these offices is to keep the current switches in place and reevaluate deploying packet switches in California.

Verizon also believes the public interest will be adversely affected if AT&T's request is granted because California consumers will potentially lose the future efficiencies and service improvements that are the ultimate goal of any network upgrade, and that the Commission will discourage technological innovation.

Verizon opposes Telescape's request to intervene in AT&T's emergency motion, because Telescape neither sought expedited injunctive relief, nor satisfied the requirements for obtaining such relief with its conclusory allegations. However, Verizon does not oppose Telescape's motion to consolidate its own complaint case with this one.

VII. Discussion

A. Likelihood of Success on the Merits

1. The Interconnection Agreements[6]

We first evaluate AT&T's likelihood of success. At issue are two currently valid interconnection agreements with Verizon: (1) the AT&T Communications ICA; and (2) the TCG ICA. We must determine whether the relevant sections of these agreements preclude Verizon's announced actions.[7]

The AT&T Communications ICA requires Verizon to provide AT&T Communications with access to UNEs identified in Attachment 2 to the agreement.[8] Attachment 2 to the AT&T Communications ICA lists and defines Local Switching and Common Transport network elements as two of the network elements to which Verizon must provide AT&T access. (See Sections 60 and 63 of Attachment 2 respectively.)

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[6] On January 23, 1997, AT&T Communications entered into the *Interconnection, Resale and Unbundling Agreement between GTE California Incorporated, Contel of California, Inc. and AT&T Communications of California, Inc.* (AT&T Communications ICA). The Commission approved the arbitrated AT&T Communications ICA in D.97-01-022. In 1998, the TCG Companies adopted the terms of the arbitrated *Interconnection Agreement between MCImetro and GTE* (TCG ICA). The Commission approved the TCG ICA in Resolution T-16185. Verizon is the successor in interest to GTE and assumed GTE's obligations under these agreements.

[7] Because the interconnection agreements are quite lengthy, we discuss the most relevant provisions in this order.

[8] See General Terms and Conditions Section 29 and 30. Specifically, Section 29, Introduction, provides that "This Part II sets forth the unbundled Network Elements that GTE agrees to offer to AT&T in accordance with its obligations under Section 251(c)(3) of the Act and 47 CFR 51.307 to 51.321 of the FCC Rules. The specific terms and conditions that apply to the unbundled Network Elements are described below and in Attachment 2. Prices for Network Elements are set forth in Part V and Attachment 14 of this Agreement."

The AT&T Communications ICA definition of Local Switching speaks in terms of "functionality" e.g., the functional means to accomplish the task of Local Switching. ("Local Switching is the Network Element that provides the functionality required to connect the appropriate originating lines or trunks wired to the Main Distributing Frame (MDF) or Digital Signal Cross Connect (DSX) panel to a desired terminating line or trunk. Such functionality shall include *all of the features, functions, and capabilities* of the GTE switch including but not limited to…") (Italics added.).

Similarly, the TCG ICA requires Verizon to provide TCG Companies with access to unbundled Local Switching and Common Transport network elements.[9] This agreement also speaks in terms of functionality, and provides that Verizon (GTE's successor in interest) shall have the full burden of proving that access requested by [TCG] is not "technically feasible."[10] Sections 7 and 8 define Local Switching and Common Transport respectively, in language similar to the AT&T Communications ICA.

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[9] See Sections 23.2 and 23.5. Because the TCG Companies adopted the MCIMetro ICA, the language of the agreement that refers to MCIm should be read to refer to the TCG Companies.

[10] Section 23.2 provides in relevant part that "GTE will provide to MCIm [MCIMetro] on a nondiscriminatory basis unbundled Network Elements and ancillary services, including but not limited to local loop, local switching, tandem switching/transit switching, transport, data switching, … , and any other function or functionality associated directly or indirectly with unbundled Network Elements and ancillary services. These services, or their functional components, will contain all the same features, functions and capabilities and be provided at a level of quality at least on parity with which it provides to itself or its Affiliates. GTE shall have the full burden of proving that access requested by MCIm is not technically feasible. … ."

2. Verizon's Obligations to Provide Local Switching and Common Transport Elements Pursuant to the Interconnection Agreements

Based on the sections of the interconnection agreements referenced by the parties, AT&T is likely to prevail on the merits of its argument that Verizon may not unilaterally discontinue AT&T's access to the Local Switching and Common Transport elements of the UNE-P, but rather, must comply with the terms of the interconnection agreements. Based on the facts before us, the agreements do not limit Verizon's obligation based on the technology or hardware used to provide these network elements.

Verizon argues that this interpretation is contrary to the law existing at the time the interconnection agreements were entered into. Verizon states that, as early as 1996, when the FCC first established a national list of UNEs in the *Local Competition Order*[11], the FCC explicitly declined to find that incumbent local exchange carriers' packet switches should be identified as network elements subject to unbundling under the Act. According to Verizon, this contract must be interpreted in light of the laws in effect at the time it was entered into. Verizon believes the definition of "local switching" in the parties' interconnection agreements tracks the definition of "Local Switching" in FCC's *Local Competition Order*, and does not include packet switching within its ambit.

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[11] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, released August 8, 1996.

We respectfully disagree. In 1996, because of an insufficient record, the FCC did not finally decide the issue of whether to unbundle packet switches in the *Local Competition Order*, and stated it would continue to review and revise the rules. Paragraph 427 of the *Local Competition Order* provides:

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

Therefore, the law at the time the interconnection agreements at issue in this proceeding were entered into was unsettled as to whether packet switches were to be unbundled.

Next, Verizon argues that its actions comply with the interconnection agreements because both the AT&T and TCG ICAs expressly limit the network elements that must be unbundled to those offered "in accordance" with Verizon's statutory obligations, i.e., those under § 251(c)(3) of the Act, and as well as the FCC rules applicable to these obligations.[12] According to Verizon, the FCC has concluded three times that packet switches do not have to be unbundled pursuant to § 251 and the federal D.C. Circuit has now affirmed this conclusion.[13]

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[12] Verizon cites to Section 29 of the AT&T Communications ICA and to Article VI, Section 1 of the TCG ICA.

[13] Verizon cites *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (USTA II).

We need not address the issue of whether or not the FCC has finally determined that Verizon does not have to unbundle packet switches because we are not ordering Verizon to do so. Rather, we determine whether, under the terms of the interconnection agreements, Verizon may unilaterally discontinue providing certain network elements which they are obligated to provide.

In order to give effect to every part of the contract, we note other contract sections provide more detail on what network elements Verizon is to provide AT&T. For example, Section 29 of the AT&T Communications ICA states that "the specific terms and conditions that apply to the unbundled Network Elements are described below and in Attachment 2." As stated above, Attachment 2 requires Verizon to provide AT&T the functionality required to accomplish Local Switching and Common Transport network elements. Section 23.2 of the TCG ICA similarly specifically lists "local switching" as a network element Verizon is to provide TCG. Verizon's interpretation of the agreements would make these change of circumstance provisions superfluous.

Verizon also argues that the exclusion of packet switching from the interconnection agreements' unbundling obligations is clear in the definitions contained in the agreements. For example, the AT&T Communications ICA provides that Local Switching is the network element providing the functionality to connect originating lines or trunks wired to the main distributing frame to the desired terminating line or trunk. Packet switching, according to Verizon, is very different, and is defined by the FCC as "the function of routing individual data units, or 'packets,' based on address or other routing information contained in the packets." However, Verizon has not stated that a packet switch cannot connect particular lines and trunks, or that there is a functional difference between a packet switch and a circuit switch for routing basic telephone service across the local network.

3. Verizon Cannot Unilaterally Discontinue These Network Elements Under the Interconnection Agreements

a) Discontinuing a Network Element

The interconnection agreements are not static. They have provisions for dealing with changed circumstances in fact and in law. Section 3.3 of the General Terms and Conditions in the AT&T Communications ICA addresses how a network change contemplated by Verizon should be handled.[14] According to Section 3.3, Verizon may unilaterally discontinue an unbundled network element (such as the Local Switching and Common Transport elements) only after giving proper notice, "to the extent required by network changes or upgrades." (Emphasis added.)

Verizon has not indicated anything about the change from circuit switches to packet switches that would make Verizon unable technically to provide Local Switching or Common Transport, without providing AT&T access to the other features provided by packet switching. In fact, AT&T states that Verizon intends to use the packet switches to provide local switching for its own retail customers and Verizon did not dispute this statement. Thus, we conclude that it is likely

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[14] "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 96-08. 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 Alternative Dispute Resolution procedures described in Attachment 1. …" Section 2.1 of the TCG ICA provides for a similar provision.

that AT&T will prevail on its position that Verizon is not "required" by its network changes or upgrades to discontinue Local Switching and Common Transport network elements from the UNE-P.

Verizon believes that it is required to discontinue unbundling Local Switching and Common Transport network elements when it replaces the circuit switch with a packet switch because it is not longer using a circuit switch to provide these network elements. Verizon contends that it is a matter of longstanding federal law that packet switching is not subject to unbundling. Verizon believes that under the interconnection agreement, it is only required to provide AT&T with these unbundled network elements through a circuit, and not a packet switch, and thus, discontinuing unbundled circuit switching is required on this ground as well.

As stated above, the law concerning unbundling of packet switches was unsettled when the parties entered into the interconnection agreement in 1996. Thus, any subsequent change in federal law, if applicable, should be governed by the change of law provisions set forth below. Also as stated above, we are not persuaded by Verizon's argument that the hardware or technology that provides Local Switching and Common Transport determines whether Verizon must provide these services.

b) Change In Law

The interconnection agreements also provide that if a change in applicable law materially affects any material term, after proper notice, the parties may renegotiate in good faith mutually acceptable new terms. If such terms are not renegotiated within 90 days after such notice, the dispute is then tendered to

alternative dispute resolution.[15] In the event a final court or FCC order allows but does not require discontinuance of an unbundled network element, the interconnection agreements also provide that the parties must try to reach agreement, and if unsuccessful, either party may submit the matter to alternative dispute resolution.[16]

Verizon argues at length that packet switching is not subject to unbundling, citing the *Local Competition Order* discussed above, as well as subsequent FCC and federal court decisions.[17] AT&T disputes Verizon's interpretation of federal law. However, we need not address the question of what the Triennial Review Order requires with respect to packet switching. As stated above, the law on unbundling packet switching was unsettled at the time the interconnection agreements were entered into. Any changes of law after that time, if applicable, can be addressed through the change of law provisions in the interconnection agreements. Furthermore, assuming *arguendo* Verizon's interpretation of the Triennial Review Order is correct, nothing forbids Verizon from providing only the Local Switching and Common Transport elements to AT&T through its packet switches (without providing AT&T with access to the

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[15] See Section 8.3 of the General Terms and Conditions of the AT&T Communications ICA and Section 12.1 of the TCG ICA.

[16] See Section 3.3 of the General Terms and Conditions of the AT&T Communications ICA and Section 2.1 of the TCG ICA.

[17] Verizon cites the Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *implementation of the Local competition provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, released November 5, 1999 at ¶ 306, 313, 316 (UNE Remand Order), which had limited exceptions not applicable here; Report 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, ¶ 290 and 541, released August 21, 2003 (Triennial Review Order), and USTA II.

other advanced services of packet switching) under the terms of the interconnection agreements. Thus, the change of law provisions do not alter our conclusion that AT&T is likely to prevail on the merits.

4. Verizon's Other Arguments

Verizon's other arguments do not affect our conclusion that AT&T is likely to prevail. Verizon believes that state commissions lack independent authority to determine which network elements should be unbundled. However, we do not determine what network elements require unbundling; rather, we restrain a likely violation of existing interconnection agreements. Verizon's other argument, that federal law on packet switching preempts any contrary state unbundling order, fails for similar reasons.

Finally, Verizon argues that granting AT&T's requested order would frustrate state telecommunications policy encouraging the rapid implementation of advanced information and communications technologies through adequate long-term investment in the necessary infrastructure. However, we do not prohibit Verizon from implementing its upgrade.

In summary, for the reasons stated above, AT&T is likely to succeed on the merits in this case.

B. Irreparable Injury to Moving Party

We next determine whether AT&T will suffer irreparable injury as a result of Verizon's actions.

1. Injury to the Ordering Process and Business Reputation

One alleged injury is in the ordering process. Before setting forth the allegations, it is helpful to understand that there are two interfaces for ordering: (1) Electronic Data Interexchange (EDI) and (2) Wholesale Internet Service Engine (WISE). EDI is the only fully-mechanized (i.e., machine-to-machine)

system for order processing. WISE is a human-to-machine interface that a competitive local exchange carrier (CLEC) can access from a personal computer by internet, a dedicated or private line, or a dial-up service. Verizon states that WISE provides all the functionality the CLECs require to service end use customers via resale or UNE services. AT&T disputes this statement, describing WISE as requiring much more cumbersome and time consuming human-to-machine interface.

a) AT&T's Alleged Injury

AT&T states that it currently has no system in place to handle mechanized order processing for Verizon resale products (i.e. through EDI) for AT&T's small business and residential customers.[18] Therefore, according to AT&T, its customers will suffer irreparable injury because AT&T will not be able to respond to a customer's request for changes to an existing account such as

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[18] AT&T offered the declaration of Corbin E. Coombs, employed by AT&T as Group Manager – Local Products Management. Coombs has worked for AT&T in product management and operations since 1998. He is responsible for managing different aspects of AT&T's consumer UNE-P products. In the past, Coombs has had responsibility for AT&T's Consumer UNE-P Customer Accounts Record Exchanges, billing, and bill establishment processes. Coombs also had full end-to-end product and process responsibility based on the Total Service Resale platform.

Coombs' assertion of other enumerated injuries do not serve as the basis for this ruling. For example, Coombs states that the switch from UNE-P to resale may also affect the features and services a customer will be receiving. According to Coombs, for the transition from UNE-P to resale to be handled correctly, AT&T and Verizon would have to conduct a study before converting from UNE-P to resale to ensure that the features available via UNE-P are also available under resale, and are available in the same combinations that consumers currently purchase from AT&T. Verizon states that it is unaware of any feature or service that falls under this category and AT&T has not specified any. Similarly, we do not base our finding of injury for this ruling on AT&T's allegations of financial harm. (See *Los Angeles Memorial Coliseum Com'n v. Nat. Football*, 634 F.2d at 1202 [Monetary injury alone is not normally considered irreparable.])

adding or removing features, disconnecting service or adding new service. The lack of mechanized ordering capability, according to AT&T, will also prevent AT&T from notifying other carriers in the industry of changes to AT&T customer accounts via the Customer Account Records Exchange (CARE) process. Because of this, AT&T will be unable to properly service customer requests by changing their accounts to obtain the services that they choose to receive from the carrier of their choice. AT&T states that upgrading its systems to do this is not a small or inexpensive undertaking, and because of a required time and cost study, the changes could be designed sometime in 2005.

AT&T also states that it will suffer injury to its reputation because customers will blame AT&T for any harm which may result from Verizon's actions. Although AT&T has stopped marketing to obtain new residential and small business local customers, it maintains that it still wishes to provide quality service to the customers it has. According to AT&T, the damage to its business reputation will be irreparable.

b) Verizon's Response

Verizon states that AT&T currently has hundreds of resold lines in service in Verizon's California service territory and so far, during the ordering process, has submitted to Verizon hundreds of Local Service Requests for resale service.[19] Verizon states that AT&T is using both EDI and WISE for ordering in California,

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[19] Verizon offered the declaration of Beth E. Cohen to rebut AT&T's allegations of irreparable injury. Cohen is Verizon's Director of Customer Relationship and System Management in Wholesale Markets. Employed with Verizon since 1995, Cohen has held various positions of increasing responsibility in the Information Technology and Wholesale Markets organizations. She has also provided testimony regarding Verizon's operational support systems in several states.

and that AT&T currently has the ability to make changes to those end-user accounts.[20]

According to Verizon, the WISE interface provides AT&T with the ability to track order status, and that hundreds of CLECs in Verizon's footprint are using WISE to do business with Verizon. Verizon states that, in California alone, about 50 local service providers, including AT&T, are using WISE to process large volumes of resale orders. Also, according to Verizon, it is unclear whether AT&T has taken any steps to cooperate with Verizon in the change of deployment following the June 15 notification.

c) AT&T's Reply

AT&T clarified that it uses both EDI and WISE for ordering in California, but for the most part, AT&T's mechanized ordering systems are designed to support UNE-P, not resale ordering. AT&T states it cannot use EDI to order resale from Verizon to support mass-market small business and residential orders on the scale that will occur should Verizon take its contemplated action.

The resale lines for which AT&T uses WISE service large military contracts with lines located in three locations which are handled by one account representative. According to AT&T, it is not possible to have a single person responsible for all of the mass market lines, and multiple representatives may handle a single mass market customer over the course of the ordering process. Under those circumstances, according to AT&T, it is not feasible for those representatives to rely solely on WISE human to machine interface to handle all of the orders. Furthermore, AT&T states there are no processes in place at AT&T

[20] Verizon also discusses the pre-ordering and maintenance and repair processes. AT&T's articulated injury does not concern either of these processes.

today for serving mass market customers via WISE, and this implementation would involve significant ordering and platform changes to facilitate.

d) Discussion

AT&T has sufficiently shown irreparable injury because AT&T's declarations indicate it will be unable to respond to mass market small business and residential customers' requests that AT&T make account changes so that these customers can obtain the services they have chosen. The fact that AT&T has the ability to process its unique, less labor intensive, military accounts through the WISE system does not change our determination, because this situation is not analogous to a mass market situation. Furthermore, potential damage to AT&T's business reputation also constitutes irreparable injury, because AT&T could lose current customers if it is unable to provide them the service they request in a timely manner.

C. No Substantial Harm to Other Interested Parties

Determining AT&T's irreparable harm is not the end of the inquiry. We also must determine that no substantial harm to other interested parties will occur.

1. Verizon

Verizon states that the outcome of an order maintaining the status quo would delay or prevent deployment of the new packet switches, since the only way Verizon will continue to provide unbundled switching to AT&T is to keep the circuit switches in place and to reevaluate the deployment of packet technology in California. Verizon then lists a host of problems that will occur if the deployment of this new technology is delayed. Some of these problems are a retroactive loss of value of capital investments made, and substantial confusion and harm to other carriers who may have taken steps to reroute their traffic to

the new switches, including blocked or dropped calls and other customer impacts.

Verizon also states that, due to AT&T's eleventh hour request, Verizon has not engineered the required power, air conditioning, and other physical plant requirements to keep the circuit switches "live" past the conversion date (i.e. September 17). According to Verizon, without proper engineering, there is no way to ensure proper protection and operation of the circuit switches or, consequently, quality of service for California consumers.

Verizon also asserts that the Commission should not issue this order because AT&T delayed over two months in bringing this issue to the Commission's attention.

2. AT&T

AT&T asserts it is not asking the Commission to stop Verizon from deploying packet switching. Therefore, AT&T claims Verizon will suffer no harm by maintaining the status quo, and that any harm which may result from Verizon failing to deploy its change to packet switching is of its own making.

3. Discussion

As stated above, we do not prohibit Verizon from deploying packet switching. Rather, we require Verizon to continue to provide AT&T with Local Switching and Common Transport network elements regardless of the technology employed until this complaint is resolved or upon further order of the Commission. Thus, any delay in deploying packet switching would be Verizon's choice, and not a result of this ruling.

Verizon has not stated that it <u>cannot</u> provide AT&T with the Local Switching and Common Transport network elements through its packet

switches.[21] It has stated that it will not do so. The host of problems set forth above only occur if Verizon chooses not to deploy its packet switches as planned, and not as a basis of this ruling. Thus, we find no substantial harm to other interested parties as a result of this ruling.

Our conclusion is not affected by AT&T's timing in bringing this motion. Once AT&T received notice on June 15 of Verizon's intended actions, it tried to resolve this matter informally by letter.[22] AT&T filed this motion on August 19, 2004, about two weeks after Verizon's letter rejecting AT&T's position. Under these circumstances, we do not find AT&T unreasonably delayed in bringing this motion.

D. The Public Interest

We next must determine if this ruling will harm the public interest. This ruling does not impede the deployment of new technology. We recognize that existing interconnection agreements must also be honored. Maintaining the status quo while the Commission builds a record on these issues and carefully evaluates potential outcomes will further the public interest. Thus, we conclude that this ruling will not harm the public interest.

E. Other Similarly Situated California CLECs

As stated above, Telescape Communications, Inc., Wholesale Airtime, Inc., and Blue Casa Communications filed C.04-09-001 alleging issues similar to AT&T, as well as filing a petition to intervene in this proceeding, concurring in AT&T's request. A petition to intervene by nii communications Ltd., was filed in

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[21] Again, we do **not** require Verizon to provide AT&T with any of the other, new features that packet switches offer.

[22] AT&T sent its letter on July 20, 2004, and Verizon's response is dated August 2, 2004.

both this proceeding and C.04-09-001. We also take official notice that by C.04-09-010, ACN Communications Services, Inc., Covad Communications Co., and Vycera Communications, Inc. have filed a similar complaint against Verizon, and also request injunctive relief similar to that requested by AT&T.[23] These carriers all allege that their respective interconnection agreements with Verizon, like AT&T's, provide these carriers with the functionality of access to the local switch network element, without regard to the technology employed.

In addition to the named CLECs, Verizon provides access to the UNE-P to many other California CLECs with interconnection agreements that may include substantially similar provisions providing for the functionality of access to the Local Switch and Common Transport network elements, without regard to technology employed. As Verizon's date to switch over service (September 17, 2004) is only two days after the date of this ruling, we lack sufficient time to review each agreement and factual circumstance. If Verizon transfers some but not all other CLECs with substantially similar provisions in their interconnection agreements to the resale platform as of September 17, the irreparable injury will be the lack of a level playing field among competitors to encourage and enable competition. To maintain the level playing field and treat all substantially similar interconnection agreements in the same way, we extend this restraint to Verizon's performance under its California interconnection agreements with

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[23] Rule 73 of the Commission's Rules of Practice and Procedure permits the Commission to take official notice of such matters as may be judicially noticed by California state courts. C.04-09-010 was filed on September 7, 2004, and complainants in that case filed their motion for injunctive relief on September 9, 2004. A Chief ALJ Ruling permitted Verizon until September 14, 2004 to respond to the motion.

substantially similar provisions concerning Verizon's obligation of providing the functionality of access to the Local Switching and Common Transport network elements.[24]

To ensure that Verizon is made whole should it ultimately prevail in the case, we will allow Verizon to record and accrue the difference between the status quo (UNE-P) prices and the proposed (resale platform) prices for each included CLEC commencing on the date its letter to the CLEC stated it was upgrading to packet switches. Any decision resolving this complaint in Verizon's favor may include a plan for recovery of the total differential from each CLEC.

We, therefore, direct Verizon to notify all similarly situated CLECs that, should Verizon prevail, Verizon may be able to recover the recorded price differential, in addition to requiring the CLEC to purchase the higher-priced resale platform service. Verizon is directed to provide notice to all similarly situated CLECs of this potential charge within 10 business days of the date of this ruling, as well as to provide a notice of availability of this ruling to all affected CLECs, with copies to the Commission. Verizon shall confer with, and receive approval from, the Commission's Public Advisor regarding the precise content of this notification prior to mailing it. Given this determination, we defer ruling on the motions to intervene until later in this proceeding.

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[24] While we are reluctant to extend the effect of this restraint to interconnection agreements not before us, our market concerns require we direct Verizon to treat all similarly situated agreements with competitor CLECs the same. (See Pub. Util. Code § 701. [The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.])

F. Conclusion

After weighing and balancing the above factors, we determine that the status quo should be maintained pending the outcome of this proceeding or until further order of the Commission or the undersigned. We therefore restrain Verizon from eliminating the ability of AT&T to purchase unbundled Local Switching and/or Common Transport network elements, alone and in combination with other network elements, until AT&T's complaint is resolved, or until further order of the Commission or the undersigned. We also extend this restraint to Verizon's performance under its California interconnection agreements with substantially similar language concerning Verizon's obligation of providing the functionality of access to the Local Switching and Common Transport network elements.

We will place this ruling before the Commission at its next meeting, where the full Commission will have the opportunity to consider it. We intend to proceed with this case expeditiously and to set a prehearing conference as soon as possible.

Findings of Fact

1. AT&T has two valid interconnection agreements with Verizon. Pursuant to those agreements, Verizon currently provides AT&T with unbundled Local Switching and Common Transport network elements. These two network elements are part of the UNE-P by which AT&T provides local service to may California consumers in Verizon's service territory.

2. Verizon currently provides AT&T with unbundled Local Switching and Common Transport network elements through its circuit switches. Verizon claims that it is not longer required to do so when it deploys its packet switches.

3.The AT&T interconnection agreements require Verizon to provide the functionality of access to the Local Switching and Common Transport network elements. Based on the facts before us, these interconnection agreements do not limit Verizon's obligation to provide AT&T with access to the Local Switching or Common Transport elements of the UNE-P based on the technology or hardware used to provide these network elements.

4. The interconnection agreements are not static. They have provisions for dealing with changed circumstances in fact and in law.

5. Verizon has not indicated anything about the change from circuit switches to packet switches that would make Verizon unable technically to provide Local Switching or Common Transport, without providing AT&T access to the other features provided by packet switching.

6. If this ruling does not issue, AT&T will be unable to respond to mass market and small business customers' requests that AT&T make account changes so that these customers can obtain the services they have chosen. AT&T could also suffer damage to its business reputation in losing current customers if it is unable to provide them the service they request in a timely manner.

7. This ruling does not require any delay in Verizon's deployment of packet switching.

8. Verizon provides access to the UNE-P to many other California CLECs with interconnection agreements that may include substantially similar provisions providing for the functionality of access to the Local Switch and Common Transport network elements.

9. If Verizon transfers some but not all other CLECs with substantially similar provisions in their interconnection agreements to the resale platform as of September 17, 2004, the irreparable injury will be the lack of a level playing field among competitors to encourage and enable competition.

Conclusions of Law

1. The Commission's authority to provide injunctive relief is firmly rooted in the California Constitution, the Public Utilities Code, and case law.

2. An individual Commissioner or ALJ may issue a temporary restraining order or preliminary injunction in order to preserve the status quo, pending ratification of the full Commission.

3. To obtain a temporary restraining order, the moving party must show (1) a likelihood of prevailing on the merits; (2) irreparable injury to the moving party without the order; (3) no substantial harm to other interested parties; and (4) no harm to the public interest.

4. AT&T is likely to prevail on the merits of its argument that Verizon may not unilaterally discontinue AT&T's access to the Local Switching and Common Transport elements of the UNE-P pursuant to the interconnection agreements.

5. AT&T has sufficiently shown irreparable injury if this ruling does not issue.

6. There will be no substantial harm to other interested parties as a result of this ruling.

7. This ruling will not harm the public interest.

8. This ruling maintaining the status quo should be extended to Verizon's performance under its California interconnection agreements with substantially similar provisions concerning Verizon's obligations to provide the functionality of access to the Local Switch and Common Transport network elements.

9. To ensure Verizon is made whole should it ultimately prevail in this case, Verizon should notify all similarly situated CLECs that Verizon may be able to recover the recorded price differential (the difference between the status quo (UNE-P) prices and the proposed (resale platform) prices) for each included CLEC commencing on the date its letter to the CLEC stated it was upgrading to packet switches. Verizon should provide notice of this to all similarly situated CLECs as set forth in the ruling paragraphs below.

10. This case should proceed expeditiously and a prehearing conference should be set as soon as possible.

IT IS RULED that:

1. Verizon California Inc. (Verizon) shall maintain the status quo during the pendency of this proceeding, or until further order of the Commission or the undersigned Assigned Commissioner and Administrative Law Judge. Verizon is restrained from eliminating the ability of AT&T Communications of California, Inc., TCG Los Angeles, Inc., TCG San Diego, and TCG San Francisco (collectively AT&T) to purchase unbundled Local Switching and/or Common Transport network elements, alone and in combination with other network elements, until AT&T's complaint is resolved, or until further order of the Commission or the undersigned.

2. The restraint set forth in paragraph 1 is extended to Verizon's performance under its California interconnection agreements with substantially similar provisions concerning Verizon's obligation of providing the functionality of access to the Local Switching and Common Transport network elements.

3. To ensure that Verizon is made whole should it ultimately prevail in the case, Verizon may record and accrue the difference between the status quo (uniform network elements platform) prices and the proposed (resale platform) prices for each included competitive local exchange carrier (CLEC) commencing

on the date its letter to the CLEC stated it was upgrading to packet switches. Any decision resolving this complaint in Verizon's favor may include a plan for recovery of the total differential from each CLEC.

4. Verizon shall provide notice to all similarly situated CLECs that, should Verizon prevail, Verizon may be able to recover this recorded price differential, in addition to requiring the CLEC to purchase the higher-priced resale platform service. Verizon shall provide such notice within 10 business days of the date of this ruling, as well as to provide a notice of availability to all similarly situated CLECs of this ruling, with copies to the Commission. Verizon shall confer with, and receive approval from, the Commission's Public Advisor regarding the precise content of this notification prior to mailing it.

5. This ruling shall be placed before the Commission at its next meeting, where the full Commission will have the opportunity to consider it.

6. This case shall proceed expeditiously and a prehearing conference shall be set as soon as possible.

7. The Commission's Process Office shall serve this ruling on the service list of this proceeding, as well as on the service lists in Case (C.) 04-09-001 and C.04-09-010.

Dated September 15, 2004, at San Francisco, California.

/s/ GEOFFREY F. BROWN	/s/ JANET E. ECONOME
Geoffrey F. Brown	Janet A. Econome
Assigned Commissioner	Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Assigned Commissioner and Administrative Law Judge's Ruling on AT&T's Emergency Motion for Order Maintaining the Status Quo Pending Resolution of the Complaint on all parties of record in this proceeding or their attorneys of record.

Dated September 15, 2004, at San Francisco, California.

/s/ JANET V. ALVIAR
Janet V. Alviar

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TTY# 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.

(END OF APPEDIX A)

Dissent of Commissioner Susan P. Kennedy

Item 32: Emergency Motion of AT&T For Order Maintaining Status Quo

September 23, 2004

I dissent.

When the ALJ and the Assigned Commissioner granted the temporary restraining order to AT&T on September 15, they effectively reversed years of FCC interpretation of Section 251 of the Federal Telecommunications Act and put an immediate stop to the deployment of modern telecommunications technology in California. This shocking result is supposedly based on AT&T having made a showing that it was entitled to temporary relief. I do not believe AT&T came anywhere near making the requisite showing, and for that reason I oppose this decision.

As the ALJ's opinion notes, a party requesting a temporary restraining order must show four things: (1) a likelihood that it will prevail on the merits, (2) irreparable injury if the order is not granted, (3) no substantial harm to other interested parties, and (4) no harm to the public interest. For reasons that I set out below, I do not believe that AT&T carried its burden of proof on any of these requirements.

Likelihood of Success on the Merits

There is little chance that AT&T will prevail on the merits, no matter what this Commission decides. The ALJ reaches the opposite conclusion by assuming that the relevant legal question is how to interpret the interconnection agreement between the parties. But the interconnection agreement comes into play if and only if there has been a change of law that triggers its mandatory negotiation provisions. The applicable law, Section 251 of the federal Telecommunications Act, has not changed nor has the FCC's interpretation of that Section. Accordingly, there has been no "change of law" and the related sections of the interconnection agreement are inapplicable.

Since the interconnection agreement does not govern the rights of the parties to this dispute, AT&T must show that it is likely to prevail in an argument about the applicability and effect of Section 251. Specifically, AT&T has to show that it is likely to prevail on the question of whether Section 251 requires Verizon to unbundle packet switches. For reasons set out below, I think the answer to that question is clearly, "No."

When the FCC first established a national list of Unbundled Network Elements in the Local Competition Order over eight years ago,[1] it explicitly "declin[ed] to find, as requested by AT&T and MCI, that incumbent LECs' packet switches should be identified as network elements" subject to unbundling under the Act.[2] The FCC has never deviated from that clear ruling. The FCC reiterated its rejection of packet switching unbundling five years ago in the UNE Remand Order[3] because CLECs and cable companies – even in 1999 – seriously outpaced the ILECs in the deployment of advanced services using packet switching technology. The FCC explained:

> Our decision to decline to unbundle packet switching therefore reflects our concern that we not stifle burgeoning competition in the advanced service market. We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation.[4]

The FCC reinforced this finding a third time in its Triennial Review Order. The FCC's decision not to order unbundling of packet switching – both standing alone and in the context of packet-switched networks – was guided not only by the lack of impairment clearly demonstrated by the extensive deployment of packet switching by

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First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act or 1996, CC Docket No. 96-98, released August 8, 1996, at ¶ 407 ("Local Competition Order").

2 Id. at ¶ 427.

3 Id. at ¶ 427.

4 Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act or 1996, CC Docket No. 96-98, released November 5, 1999, at ¶ 306, 313 ("UNE Remand Order"). The sole exception to the no-unbundling rule related only to the unbundling of Digital Subscriber Line Access Multiplexers ("DSLAMs") at remote terminals, which is not at issue here. And the Triennial Review Order eliminated even this limited exception.

CLECs across the country, but also by the FCC's desire to encourage further deployment of advanced telecommunications technology, consistent with section 706 of the Act:

> [B]y prohibiting access to the packet-based networks of incumbent LECs, we expect that our rules will stimulate competitive LEC deployment of next-generation networks.[5]

In fact, the FCC has expressly noted that even if one result of replacing circuit switches with packet switches is the elimination of mass market unbundling, such an outcome is both appropriate and desirable:

> [T]o the extent that there are significant disincentives caused by the unbundling of circuit switching, incumbents can avoid them by deploying more advanced packet switching. This would suggest that incumbents have every incentive to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage.[6]

Finally, the FCC's conclusions have been recently upheld in court. On appeal, the United States Appeals Court for the District of Columbia Circuit rejected all of the CLECs' challenges to the FCC's decision not to require unbundling of ILEC broadband facilities "in light of evidence that unbundling would skew investment incentives in undesirable ways."[7]

In short, Verizon is not, and has never been, obligated – under Section 251 or FCC rules or precedent – to unbundle packet switches. To the contrary, federal law not only sanctions but is designed to promote and protect the precise type of network upgrade that Verizon is engaging in, and it is highly unlikely that AT&T could convince either the FCC or a federal court to the contrary.

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5 Id. at ¶ 316 (emphasis added).

6 Report 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, ¶ 290, released August 21, 2003 ("Triennial Review Order"); see also id. ¶ 541 ("In order to ensure that both incumbent LECs and competitive LECs retain sufficient incentives to invest in and deploy broadband infrastructure, such as packet switches, we find that requiring no unbundling best serves our statutorily-required goal.").

7 Triennial Review Order ¶ 446, n. 1365 (emphasis added).

Irreparable Injury to the Moving Party without the Order

AT&T's claims of irreparable injury are thin. It claims that customer orders won't be processed as rapidly after Verizon changes its circuit

switches to packet switches; that not all features available via UNE-P are available via resale; and that it may raise prices to its customers if it has to pay more for resale services than for UNE-P elements. These claims, even if true, hardly rise to the level of irreparable injury. As Verizon pointed out in its response to the motion for a temporary restraining order, AT&T already provides numerous customers with services purchased from Verizon on a resale basis. Those customers enjoy a bundled package of services virtually identical to the UNE-P services available to other AT&T customers. Finally, there is no reason to suppose that AT&T will not choose to absorb a price increase rather than drive its existing customers away by charging higher prices than its competitor.

Harm to Other Interested Parties

The ALJ's opinion concludes, amazingly, that Verizon has suffered no harm from the entry of the temporary restraining order because it has chosen not to deploy packet switches prior to the resolution of this proceeding. Verizon has suffered the considerable harm of having to wait six months or more to replace circuit switches with packet switches. Among other things, packet switches are far less costly to operate, so Verizon has lost at least six months' worth of cost savings, not to mention the substantial cost of delays in implementing system features that are only possible after a transition to packet switches.

Harm to the Public Interest

The public interest has suffered substantial harm by the granting of this temporary restraining order. California telephone customers have been denied the availability of new telephone technology and the possibility of receiving more features at lower prices that is inherent in a change to packet switches. California has suffered economic harm that may be difficult to quantify, but is nonetheless real. For example, a loss of orders from Verizon will hurt many California companies that supply and build the packet switches and associated hardware and software.

I conclude that AT&T has simply failed to make any of the requisite showings necessary to support issuance of a temporary restraining order.

As the FCC clearly stated in the portion of the Triennial Review Order quoted above, it doesn't require unbundling of packet switches in order to encourage ILECs to replace legacy technology with new technology and for CLECs to enter the market using new technology. Verizon was acting to achieve that goal by replacing its old-technology circuit switches with new-technology packet switches. On September 16, one day after the temporary restraining order was entered, Verizon formally notified us that it was unable to comply with the terms of the temporary restraining order and was therefore postponing, for at least six months, its plans to migrate from circuit switches to packet switches. The technical and legal difficulties inherent in complying with an order affecting packet switches are essentially identical to those that would be encountered by Verizon or any other ILEC in connection with upgrading any other part of the legacy phone system. In other words, by entering the temporary restraining order we have effectively put a stop to deployment of new telephone technology by California ILECs until they can be certain that they do not have to unbundle that new technology, whether it is packet switches, dark fiber or any other new technology.

The irony of this situation should not be lost on anyone. California is the world leader in the development and manufacturing of new communications technology. While our dynamic innovators in Silicon Valley and elsewhere are creating the means to revolutionize telephony, this Commission is halting the dissemination of the very same technology. Ignoring clear legal precedent while doing so, this Commission is apparently acting out of a mistaken belief that it is somehow pro-consumer to hold back progress.

Technological progress and the deployment of advanced telecommunications services have now been halted by the Commission's action. This not only harms the customers who would have been served by Verizon's new switches, but also will have a general chilling effect on investment by other carriers and technology developers.

To summarize, AT&T has not shown any of the elements required to justify a temporary restraining order. It is not likely to succeed on the merits. Its customers will continue to receive service without interruption, and the resale of basic services is an almost perfect substitute for UNE-P. Verizon has been severely harmed, as has the public interest. At bottom, this case is solely about how much money AT&T has to pay Verizon for handling its traffic – the kind of matter

this Commission considers every day without resorting to the issuance of a temporary restraining order.

/s/ SUSAN P. KENNEDY
Susan P. Kennedy
September 23, 2004
San Francisco, California