The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 04-33 December 15, 2004

Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934,as amended, and the Triennial Review Order

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PROCEDURAL ORDER

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PROCEDURAL ORDER

I. INTRODUCTION

On February 20, 2004, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") filed with the Department of Telecommunications and Energy ("Department") a Petition for Arbitration. In its Petition, Verizon requests that the Department initiate a consolidated arbitration proceeding to amend the interconnection agreements between Verizon and approximately 130 competitive local exchange carriers and commercial mobile radio service providers (collectively, "CLECs").[1] Verizon asserts that amendment to the interconnection agreements is necessary to implement changes in its network unbundling obligations to reflect the rules promulgated in the Triennial Review Order[2] issued by the Federal Communications Commission ("FCC") on August 21, 2003.

On March 2, 2004, the United States Court of Appeals for the D.C. Circuit ("D.C. Circuit Court") issued its decision in USTA II in which it affirmed in part and vacated in part the FCC's Triennial Review Order. The D.C. Circuit Court originally stayed the issuance of its mandate until May 3, 2004, but on April 13, 2004, the D.C. Circuit Court granted the

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1 Verizon identifies the CLECs with interconnection agreement to be amended in Exhibit A of its Petition for Arbitration.

2 Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 01-36 (rel. Aug. 21, 2003) ("Triennial Review Order"), vacated in part and remanded in part by United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"), cert. denied, Nos. 04-12, 04-15, 04-18 (Oct. 12, 2004).

Consent Motion of the FCC and the United States to extend the stay of the mandate in USTA II until June 15, 2004. Further requests to the D.C. Circuit Court to stay the mandate were denied on June 4, 2004. Additionally, on June 14, 2004, Chief Justice William H. Rehnquist denied requests for a U.S. Supreme Court stay of the issuance of the D.C. Circuit Court's mandate in USTA II. Consequently, the vacatur went into effect on June 16, 2004. Notwithstanding the FCC's and the Solicitor General's decision not to support an appeal of USTA II, several CLECs as well as the National Association of Regulatory Utility Commissioners appealed the USTA II decision to the U.S. Supreme Court. The U.S. Supreme Court denied certiorari on October 12, 2004.

On March 16, 2004, the Department received the Attorney General's Notice of Intervention as well as responses to the Petition from the following CLECs: the Competitive Carrier Coalition[3]; Conversent Communications of Massachusetts, LLC ("Conversent"); MCImetro Access Transmission Services LLC, Brooks Fiber Communications of Massachusetts, Inc., MCI WorldCom Communications, Inc., MCI WorldCom Communications, Inc. as successor to Rhythms Links, Inc., and Intermedia Communications

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[3] The members of the Competitive Carrier Coalition ("CCC") are: Allegiance Telecom of Massachusetts, Inc., ACN Communications Services, Inc. ("ACN"), Adelphia Business Solutions Operations, Inc. d/b/a Telcove, CoreComm Massachusetts, Inc., CTC Communications Corp. ("CTC"), DSLnet Communications, LLC ("DSLnet"), Focal Communications Corporation of Massachusetts ("Focal"), ICG Telecom Group, Inc., Level 3 Communications, LLC, Lightship Telecom, LLC ("Lightship"), LightWave Communications ("LightWave"), Inc., PAETEC Communications, Inc. ("PAETEC"), RCN-BecoCom, LLC, and RCN Telecom Services of Massachusetts, Inc.

(collectively, "MCI"); the Competitive Carrier Group[4]; RNK, Inc. d/b/a RNK Telecom[5] ("RNK"); AT&T Communications of New England, Inc. ("AT&T"); Cellco Partnership d/b/a Verizon Wireless and its affiliates Pittsfield Cellular Telephone Company and AirTouch Paging d/b/a Verizon Wireless Messaging Services[6]; and BrahmaCom, Inc. ("BrahmaCom"). Additionally, Qwest Communications Corporation filed a Motion for Extension of Time to Respond.[7]

The Department also received letters of intent[8] regarding participation in this proceeding from the following CLECs: 1-800-Reconex, Inc.; AboveNet, Inc.; Arch Wireless

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4 The members of the Competitive Carrier Group ("CCG") are: A.R.C. Networks Inc. ("A.R.C."), Broadview Networks Inc. and Broadview NP Acquisition Corp. ("Broadview"), Bullseye Telecom Inc. ("Bullseye"), Choice One Communications of Massachusetts Inc. ("Choice One"), Comcast Phone of Massachusetts Inc. ("Comcast"), DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), DSCI Corporation ("DSCI"), Equal Access Network LLC, Essex Acquisition Corp. ("Essex"), Global Crossing Local Services Inc., IDT America Corp., KMC Telecom V Inc. ("KMC"), SpectroTel Inc. ("SpectroTel"), Talk America Inc. ("Talk America"), Winstar Communications LLC, and XO Communications, Inc. ("XO").

5 Although filed as a response to the Petition, RNK's March 16, 2004 filing merely provided comments in support of the Motions to Dismiss filed separately by Sprint and the Competitive Carrier Coalition.

6 In its response, Cellco Partnership d/b/a Verizon Wireless and its affiliates Pittsfield Cellular Telephone Company and AirTouch Paging d/b/a Verizon Wireless Messaging Services states that they are negotiating with Verizon regarding the terms of a stipulation of dismissal as to Verizon Wireless.

7 Qwest, however, never filed a formal response to the Petition, but filed a Letter of Intent, as permitted by the Arbitrator's March 26, 2004 Memorandum. See n.8, infra.

8 On March 26, 2004, the Arbitrator issued a memorandum permitting a CLEC, in lieu of filing a formal response, to file a Letter of Intent regarding the type and extent of participation that can be expected by that CLEC.

Operating Company, Inc.; CoreTel Massachusetts, Inc.; Freedom Ring Communications L.L.C.; Global NAPs, Inc.; Looking Glass Networks Inc.; Metropolitan Telecommunications of Massachusetts, Inc. d/b/a MetTel[9] ("MetTel"); NEON Communicatios, Inc. d/b/a NEON Connect Inc.; Richmond Connections, Inc. d/b/a Richmond NetWorx ("Richmond Networx"); United Systems Access Telecom, Inc.; Volo Communications of Massachusetts Inc.; Budget Phone Inc., Covista, Inc., McGraw Communications, Inc., New Horizons Communications Corp.[10] ("New Horizons"), NUI Telecom Inc., WorldxChange Corporation d/b/a Acceris Communications Solutions d/b/a Acceris Communications Partners d/b/a Acceris Local Communications, collectively; Qwest; and the Competitive Carrier Group.[11]

Also on March 16, 2004, Sprint Communications Company L.P. ("Sprint"); Z-Tel Communications Inc. ("Z-Tel"); and the Competitive Carrier Coalition filed separate Motions to Dismiss the Petition.[12] Verizon, MCI, Sprint, AT&T, RNK[13] and Richmond Networx filed

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9 MetTel was not included in Exhibit A of the Petition.

10 New Horizons was not included in Exhibit A of the Petition.

11 In the letters of intent, only Global NAPs, Richmond Networx and the Competitive Carrier Group indicated their intent to participate actively in this proceeding. We note that only active participants to this proceeding will be permitted to issue discovery, to sponsor and file testimony, and to cross-examine witnesses.

12 Sprint's March 16, 2004 filing was titled "Response and Motion to Dismiss," but aside from providing its October 29, 2003 red-lined version of Verizon's proposed amendment (which was provided as an exhibit to the Affidavit in support of its Motion to Dismiss), Sprint failed to respond directly to the Petition or amendment. Similarly, Z-Tel's March 16, 2004 filing in this docket was titled "Motion to Dismiss and Response," however, Z-Tel's filing did not respond directly to the Petition or to Verizon's proposed amendment.

13 RNK addresses the Motions to Dismiss in its Response. See, n.5, supra.

comments to the Motions to Dismiss. Sprint also filed on April 9, 2004 a supplemental response to the Petition as well as a supplemental filing that attached the Procedural Arbitration Decision issued by the Rhode Island Public Utilities Commission in Docket No. 3588.[14] Replies to the comments on the Motions to Dismiss were filed by Verizon and Conversent on April 16, 2004.

On May 5, 2004, Verizon filed with the Department a Motion to Hold Proceedings in Abeyance until June 15, 2004. Comments to the Verizon Motion were filed on May 12, 2004 by AT&T,[15] Sprint, Conversent, the Competitive Carrier Group, and the Competitive Carrier Coalition. MCI filed comments to Verizon's Motion on May 20, 2004. Verizon filed reply comments on May 21, 2004, and AT&T responded to Verizon's Reply on June 1, 2004.[16]

On August 20, 2004, the FCC issued its Interim Rules Order[17] setting forth a comprehensive twelve-month plan to govern the provision of unbundled network elements ("UNEs") by incumbent local exchange carriers ("ILECs") until the FCC establishes permanent unbundling rules pursuant to the D.C. Circuit Court's vacatur and remand of the

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[14] On April 15, 2004, Sprint filed a corrected version of the Rhode Island Procedural Arbitration Decision.

[15] On May 13, 2004, AT&T filed a revised response to the Verizon Motion.

[16] Due to the passage of time, Verizon's Motion to Hold Proceeding in Abeyance is moot. It is noted to provide a complete procedural history of this proceeding thus far.

[17] In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313 and CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. August 20, 2004) ("Interim Rules Order").

FCC's Triennial Review Order. The FCC voted to adopt new network unbundling rules on December 15, 2004, however, the text of the FCC order has not yet been released.

Also on August 20, 2004, Verizon filed a Notice of Withdrawal of Petition for Arbitration as to Certain Parties ("Withdrawal Notice").[18] Comments on the effect of the Interim Rules Order and the Withdrawal Notice on the present arbitration proceeding were submitted on September 1, 2004, by Verizon, AT&T, Richmond Networx, Sprint, the Competitive Carrier Group,[19] the Competitive Carrier Coalition,[20] and Conversent. Replies

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[18] The CLECs which Verizon seeks to have withdrawn from this proceeding are identified in Exhibit A of the Withdrawal Notice. Approximately 100 of the nearly 130 CLECs originally named in the Petition for Arbitration are identified on Exhibit A of the Withdrawal Notice. The CLECs with which Verizon seeks to have this proceeding proceed against are identified in Exhibit B of the Withdrawal Notice. We note that the following CLECs were included in Exhibit A of the Withdrawal Notice, but were not included in Exhibit A of the Petition: BCN Telecom Inc.; Charter Fiberlink MA-CCO, LLC; Comm South Companies, Inc.; Cornerstone Telephone Company LLC; Crocker Telecommunications, LLC; Cypress Communications Operating Company Inc.; Sprint Spectrum LP, General Partner of WirelessCo LP dba Sprint PCS; Think 12 Corp.; Trans National Communications International Inc.; and, VIC-RMTS-DC LLC. Because these CLECs were never named as respondents to Verizon's Petition for Arbitration, our rulings herein do not apply to these CLECs.

Additionally, despite being identified in Exhibit A of the Petition, we note that Verizon failed to include Talk Unlimited Now Inc. or Global Broadband Inc. in either Exhibit A or B of the Withdrawal Notice. We direct Verizon to clarify whether it wishes to pursue its Petition for Arbitration as to these two carriers. Because neither Talk Unlimited Now, Inc. or Global Broadband Inc. filed a response or Letter of Intent, if Verizon determines that these two carriers were inadvertently omitted from Exhibit A of the Withdrawal Notice, our determinations in Section III.A.2, infra, apply to these two carriers.

[19] The comments were sponsored by only a subset of the members of the Competitive Carrier Group, namely, A.R.C., Broadview, Bullseye, Essex (currently known as Cleartel Telecommunications, Inc.), Choice One, Comcast, Covad, DSCI, KMC, SpectroTel, Talk America and XO. For convenience, we continue to refer to this

(continued…)

were submitted on September 8, 2004 by Verizon, AT&T, MCI, Choice One,[21] and Conversent.

On September 14, 2004, Verizon filed an updated amendment to its interconnection agreements for arbitration in this proceeding. According to Verizon, this amendment was revised to reflect changes in unbundling obligations resulting from the Triennial Review Order, USTA II, and the Interim Rules Order. Verizon's proposed amendment replaces the amendment originally filed with the Petition for Arbitration on February 20, 2004. Verizon also proposed a procedural schedule for this proceeding. Additionally, on September 17, 2004, AT&T also filed a proposed amendment which it argues is consistent with the Triennial Review Order.

In this Order, we first address Verizon's Withdrawal Notice. Additionally, we clarify the scope of this arbitration proceeding and establish a procedural schedule for the orderly conduct of this arbitration proceeding.

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19 (…continued)
subset of Competitive Carrier Group members as the Competitive Carrier Group, but we do not attribute any positions or opinions contained in these comments to remaining members of the Competitive Carrier Group.

20 The comments were sponsored by only a subset of the members of the Competitive Carrier Coalition, namely, ACN, CTC, DSLnet, Focal, Lightship, LightWave, and PAETEC. For convenience, we continue to refer to this subset of Competitive Carrier Coalition members as the Competitive Carrier Coalition, but we do not attribute any positions or opinions contained in these comments to remaining members of the Competitive Carrier Coalition.

21 Choice One, a member of the Competitive Carrier Group, filed reply comments individually.

II. POSITIONS OF THE PARTIES

A. Verizon

In its Withdrawal Notice, Verizon states that its interconnection agreements with certain CLECs in Massachusetts listed on Exhibit A of the Withdrawal Notice contain specific terms permitting Verizon upon specified notice to cease providing UNEs that are no longer subject to an unbundling obligation under 47 U.S.C. § 251(c)(3) and 47 C.F.R. §§ 51.00 et. seq. (Withdrawal Notice at 1). According to Verizon, these agreements need not be amended to implement Verizon's contractual right to cease providing UNEs that were eliminated by the Triennial Review Order or USTA II (id. at 1-2).

Verizon disputes claims that its Withdrawal Notice is untimely or otherwise deficient (Verizon Reply at 3-4). First, Verizon argues that withdrawal of Verizon's Petition is the appropriate course of action in those instances where it no longer seeks relief from the Department (id.). Verizon relies on 220 C.M.R. § 1.04(4) which allows withdrawal of an initial pleading prior to the commencement of a hearing (id. at 4). Moreover, Verizon argues that withdrawal of its Petition as to a majority of the CLECs will promote administrative efficiency and simplify the proceedings (id.).

Second, Verizon contends that it did not forfeit its rights under its interconnection agreements by filing for arbitration (Verizon Reply at 4). Verizon points to decisions in other states to support its position (id.). Verizon further notes that in its Petition for Arbitration, Verizon specifically reserved its rights under the terms of existing interconnection agreements to cease providing UNEs once applicable law no longer requires Verizon to provide such access (Verizon Reply at 4).

Third, Verizon dismisses the argument that the failure to discuss the specific terms of the various CLECs' interconnection agreements renders the Withdrawal Notice deficient (Verizon Reply at 4). Verizon states that it no longer sought relief, and therefore withdrew its Petition as a matter of right (id.). Nevertheless, Verizon contends that if the Department were to examine the terms of the specific interconnection agreements, the Department, according to Verizon, would agree with Verizon's interpretation (id. at 5). Verizon submits the applicable interconnection agreement provisions from each objecting party in an attachment to its Reply (see Verizon Reply, Att.).

Verizon, however, also argues that the Department need not decide at this time whether Verizon's interpretation of the interconnection agreements for the carriers in Exhibit A is correct (Withdrawal Notice at 2). Rather, Verizon states that the Department need only construe the agreements if an actual disagreement regarding Verizon's interpretation develops (id.). Verizon further maintains that waiting until an actual disagreement arises is appropriate because virtually all of the agreements specify processes to be followed when a disagreement over interpretation arises, and that after these preconditions are met, the CLEC may bring a complaint to the Department for resolution (id.).

Verizon urges the Department to proceed forward with this arbitration with the carriers Verizon has designated as remaining in the arbitration (Verizon Comments at 1). Verizon argues that delaying this arbitration until permanent rules are adopted is contrary to the approach the FCC approved in the Interim Rules Order (Verizon Reply at 1-2). Verizon maintains that the transitional unbundling obligations imposed by the Interim Rules Order apply only to de-listed UNEs and, thus, there is no reason to delay arbitration of appropriate

contract language to reflect the Triennial Review Order rulings that were affirmed by USTA II or not challenged (Verizon Comments at 2; Verizon Reply at 2). Verizon further argues that there is no reason to delay the UNEs affected by the Interim Rules Order either (Verizon Reply at 2). Verizon points out that the FCC in its Interim Rules Order expressly preserved an ILEC's right to initiate change-of-law proceedings, and that the FCC stated that such proceedings are to presume the absence of unbundling obligations for switching, enterprise market loops, and dedicated transport (id., citing Interim Rules Order at ¶¶ 22, 23).

Verizon further argues against any standstill order (Verizon Reply at 2-3). Verizon notes that the Interim Rules Order removes any claimed uncertainty as to the binding effect of the Triennial Review Order rulings that were not affected by USTA II, and that, as to mass market switching and high capacity facilities, Verizon cannot change the terms of their provisions while the Interim Rules Order remains in effect (id. at 3). In response to Conversent's request to dismiss any claim that Verizon is not required to provide high-capacity loops at TELRIC rates, Verizon states that Conversent ignores the holdings of USTA II and the Interim Rules Order (Verizon Reply at 5).

Lastly, Verizon proposed a procedural schedule which includes a 30-day negotiation period regarding its updated amendment (Verizon Amendment Transmittal Letter at 1; Verizon Reply at 3). Verizon urges the Department to reject AT&T's proposed 60-day negotiation period which, according to Verizon, is designed to avoid the implementation of the FCC's rulings delisting UNEs (Verizon Reply at 3). In addition to the 30-day negotiation period, to begin and end on September 20, 2004 and October 20, 2004, respectively, Verizon also proposes due dates for the filing of a joint list of issues (November 10, 2004), and for the

submission of initial and reply briefs (December 15, 2004 and January 18, 2005, respectively) (Verizon Amendment Transmittal Letter at 1-2).

B. AT&T

AT&T notes that the basis for the original Petition and AT&T's response was the Triennial Review Order which has now been vacated in part and remanded in part (AT&T Comments at 2-3). AT&T states that it intends to seeks contract amendments to its interconnection agreement based upon the Interim Rules Order to address the transition process for the future elimination of unbundling requirements (id. at 3). AT&T states that it also has remaining unresolved Triennial Review Order issues that are still relevant post USTA II (id. at 3-4). Furthermore, AT&T states that parties may wish to modify their positions in light of USTA II and the Interim Rules Order (AT&T Comments at 3-4).

AT&T argues that because we are effectively starting over, any party who believes that its contract permits it to renegotiate provisions upon a change-of-law should be given an opportunity to present, and to negotiate, its proposed changes to the other party to the interconnection agreement (AT&T Comments at 4). AT&T therefore recommends a 60-day negotiation period from the date on which the Interim Rules Order is published in the Federal Register (id.). AT&T states that any shorter time is insufficient to comply with the statutory obligation to negotiate in good faith (id. at 4-5). Thereafter, AT&T proposes that parties should be allowed to file a petition to arbitrate any unresolved issues (AT&T Comments at 5). Consistent with its suggested approach, AT&T submits its proposed Triennial Review Order amendment to its interconnection agreements between Verizon and AT&T (see AT&T

Amendment Proposal). AT&T states that it has provided a copy of its proposed amendment to Verizon for purposes of initiating negotiations (AT&T Amendment Proposal Letter at 1).

AT&T states that its proposed procedural approach would obviate the need to address the Withdrawal Notice, and that such elimination would be appropriate given that CLECs may have relied upon Verizon's Petition as the vehicle to presenting contract changes that they seek as a result of a change in law (AT&T Comments at 5). AT&T argues that permitting Verizon to withdraw its Petition after those CLECs refrained from filing their own petitions in reliance of Verizon's Petition, would be unfairly prejudicial (id.). In any event, AT&T continues, the Interim Rules Order has triggered a new schedule for seeking contract amendments as a result of a change-of-law and CLECs may file their own petitions to arbitrate if their negotiations with Verizon fail (id. at 6).

Finally, AT&T notes that Verizon fails to acknowledge the Department's authority and obligation to enforce state policy to promote competition when arbitrating interconnection language (AT&T Reply at 2). AT&T points out that state commissions have authority to implement unbundling obligations including those established by the FCC, and to make unbundling determinations left open by the FCC (id.). AT&T further states that the Telecommunications Act of 1996 ("Act") expressly permits states to adopt and enforce pro-competitive measures beyond federal requirements and also prohibits the FCC from restricting a state from enforcing unbundling requirements beyond those established by the FCC so long as they are consistent with and do not substantially prevent implementation of the Act (id.). AT&T urges the Department to remain cognizant of the full range of "applicable law" to which interconnection agreements are subject (id.).

C. MCI

MCI requests the Department to hold in abeyance those arbitration issues addressed in the Interim Rules Order, but to proceed with those issues relating to those aspects of the Triennial Review Order that were affirmed or not affected by the Court's decision in USTA II (MCI Reply Letter at 1). MCI argues that conducting a change-of-law proceeding on the requirements imposed in the Interim Rules Order would be a waste of time, noting that the FCC supports this point (id. at 2, citing Interim Rules Order at ¶ 17). MCI acknowledges that the FCC did not restrict state commissions from presuming the absence of unbundling obligations, but MCI argues that the FCC did not mandate such an approach by state commissions if an ILEC chooses to press ahead with change-of-law proceedings prior to the release of permanent unbundling rules (id. at 3).

Additionally, MCI notes that Verizon fails to point out that Verizon has challenged the Interim Rules Order by the filing of a petition for a writ of mandamus with the D.C. Circuit, and therefore, MCI urges the Department to question the sincerity of Verizon's request to press forward with the arbitration issues affected by the Interim Rules Order (MCI Reply Letter at 2). With regard to Triennial Review Order rulings that have gone into effect, including the new rules concerning EELs and commingling which., MCI notes, Verizon also neglected to point out, MCI urges the Department to press ahead with arbitration of these disputed issues (id. at 3).

D. Sprint

Sprint disputes Verizon's contention that the Sprint/Verizon interconnection agreement permits Verizon to unilaterally cease providing UNEs to Sprint only upon the

provision of a specified notice period (Sprint Comments at 2). Sprint contends that notice alone is insufficient to implement the change-of-law provisions of its interconnection agreement with Verizon (id. at 3-4). Sprint maintains that its current interconnection agreement with Verizon contains several provisions that relate to changes in applicable law, including Section 8.3 which requires both parties to renegotiate in good faith to agree to acceptable new terms as permitted or required by the change-of-law when a change in applicable law materially affects Sprint's or Verizon's rights or obligations (id.).

Sprint also challenges Verizon's contention that USTA II eliminated the unbundling obligations imposed by Section 251(c)(3) of the Act and 47 C.F.R. §§ 51.00, et. seq. (Sprint Comments at 5). For instance, Sprint argues that USTA II did not vacate those Triennial Review Order rules pertaining to the unbundling of high-capacity loops (id.). Furthermore, Sprint maintains that USTA II had no impact on the underlying right the Act conferred on CLECs to access UNEs at TELRIC prices, did not invalidate existing interconnection agreements and does not equate to a nationwide finding of non-impairment; accordingly, Sprint argues, there is no basis for Verizon to argue that specific UNEs that were the subject of the FCC's vacated rules may be withdrawn immediately (id. at 6).

Moreover, Sprint contends that Verizon remains obligated to provide UNEs pursuant to the terms of the GTE/Bell Atlantic Merger Order[22] and Section 271 of the Act

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[22] GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184, Memorandum Opinion and Order, FCC 00-221 (rel. June 16, 2000) ("BA/GTE Merger Order"). The Merger Conditions appear as Appendix D to

(continued…)

(Sprint Comments at 6-8). Sprint argues that because there are numerous grounds under which Verizon must continue to provide UNEs to CLECs, the Department should reject Verizon's claims that the change-of-law provisions of the Sprint/Verizon interconnection agreement permit Verizon to cease providing UNEs only upon notice to Sprint (id. at 8-9). Sprint insists that the conclusions about Verizon's obligations in this regard must be made by the Department, not Verizon (id. at 9). Accordingly, Sprint urges the Department to reject Verizon's attempt to restrict the parties against whom it will arbitrate in this proceeding by making unilateral and unsupported interpretations of its obligations under its interconnection agreements (id.).

Sprint further argues that the Interim Rules Order essentially freeze for six months, and limit ILEC increases during a six-month transition period, the rates, terms and conditions for ILECs' provision of unbundled access to switching, enterprise market loops, and dedicated transport (Sprint Comments at 9-11). According to Sprint, by freezing obligations with respect to switching, enterprise market loops and dedicated transport and limiting price increases, subject to certain exceptions, the FCC prohibits unilateral pricing actions by Verizon during the six-month interim or transition periods (id. at 12).

Finally, Sprint states that besides switching, enterprise market loops, and dedicated transport, the Interim Rules Order does not impact any other issues or elements that are pending in the present arbitration proceeding and nothing prevents the Department from arbitration those issues (Sprint Comments at 11, 12). In sum, Sprint urges the Department to

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[22] (…continued)
the Order.

reject Verizon's attempt to circumscribe Sprint's rights under prevailing law and its interconnection agreement, and thus requests that the Department permit Sprint to participate in this arbitration proceeding should the Department decide to move forward with this proceeding (id. at 13).

E. Competitive Carrier Coalition

The CCC argue that Verizon may not unilaterally terminate a UNE, by notice letter or otherwise, in instances where Verizon and a CLEC disagree as to whether an unbundling obligation remains because any disputes regarding Verizon's obligations under the interconnection agreement would first need to be resolved through the dispute resolution process set forth in the agreement before Verizon discontinues any UNE offering (CCC Comments at 1). The CCC notes that Verizon's acknowledges in its Withdrawal Notice that disputes first need to be resolved through the dispute resolution process before it discontinues any UNE offering (id.). Moreover, the CCC states it is not opposed to Verizon's Withdrawal Notice because it has always believed that this arbitration was premature and maintains that the Department's treatment of the Withdrawal Notice should be consistent with the Vermont Public Service Board's Hearing Officer Order regarding Verizon Vermont's Notice of Withdrawal (id. at 1-2).

F. Competitive Carrier Group

The CCG contends that the Interim Rules Order preserves the rates, terms and conditions applicable to switching, enterprise market loops, and dedicated transport under existing interconnection agreements, and thus, any immediate action by the Department to arbitrate an interconnection agreement between Verizon and CLECs would be premature

(CCG Comments at 2). Instead, the CCG suggests that the Department maintain the current proceeding to arbitrate an interconnection agreement amendment between Verizon and CLECs that reflects the permanent unbundling rules that will be promulgated by the FCC (id.). The CCG further states that maintaining the current proceeding would be consistent with the Interim Rules Order as well as promote administrative efficiency (id.). Additionally, the CCG notes that FCC Chairman Powell has committed to issuing permanent unbundling rules by the end of this year, and thus, the CCG argues that the Department should not require Veirzon or the CLECs to expend additional resources to initiate a second consolidated proceeding that would be duplicative of the current proceeding (id.).

The Competitive Carrier Group further states that Verizon fails to offer any contractual change-of-law provision to support its assumption that certain interconnection agreements between Verizon and CLECs permit unilateral termination by Verizon of the UNEs no longer required under Section 251(c)(3) of the Act (CCG Comments at 3). Moreover, CCG claims that any claim by Verizon that certain interconnection agreements do not require a written amendment to terminate UNEs was waived by Verizon's failure to omit the appropriate carriers from its Petition (id.). CCG notes that the Department and many CLECs have devoted time and resources to arbitrate an amendment to their agreements and the CCG contends that Verizon cannot now unilaterally exclude over 100 CLECs which Verizon entangled in this proceeding (id.). Thus, the CCG urges the Department to preclude Verizon's Withdrawal Notice from taking effect (id.).

G. Choice One

Choice One disagrees with Verizon's contention that it can unilaterally cease provisioning UNEs under Choice One's interconnection agreement with Verizon (Choice One Reply at 1). Choice One argues that even if its interconnection agreement permits Verizon to discontinue Section 251(c)(3) UNEs upon notice, Choice One points out that the definition of "Law" in its interconnection agreement with Verizon includes any statute, rule, regulation, applicable court ruling or FCC or Department decision, order or ruling (id.). Choice One claims that for Verizon's interpretation to hold true, Verizon erroneously assumes that neither Section 271, nor the GTE/Bell Atlantic Merger Conditions, nor any other state law obligations exist to compel Verizon to open its network to competition (id. at 1-2).

Additionally, Choice One maintains that Verizon is not free to withdraw its Petition against any CLEC who has filed an answer and identified additional issues to be resolved because those responses are equivalent to a counter-petition for arbitration (Choice One Comments at 2). Accordingly, Choice One urges the Department to reject Verizon's unilateral attempt to dismiss Choice One from this proceeding and to hold open this proceeding until such time as permanent rules are issued (id.).

H. Richmond Networx

Richmond NetWorx states that the Interim Rules Order binds Verizon to a transition scheme and a rate stability and escalation scheme during the interim period (Richmond NetWorx Comments at 4). Richmond NetWorx further states that as to the change-of-law provisions underlying interconnection agreements, the Interim Rules Order contains an exception to the FCC's transition scheme that allows a truncated transition period if an ILEC,

pursuant to contractual change-of-law provisions, receives state commission approval to eliminate affected UNEs before expiration of the full transition period (id.). Richmond Networx argues that Verizon must abide by the transition scheme and may only discontinue providing certain UNEs to Richmond NetWorx in accordance with that scheme (id. at 5).

I. Conversent

Conversent argues that the Interim Rules Order: (1) confirmed that USTA II did not eliminate Verizon's obligation to provide unbundled DS1, DS3, and dark fiber high-capacity loops at TELRIC; and, (2) requires Verizon to continue to provide unbundled DS1, DS3, and dark fiber high-capacity loops and DS1, DS3, and dark fiber dedicated transport for six months, or until the FCC issues permanent rules (Conversent Comments at 1). Conversent also requests that the Department: (1) issue a standstill order to require Verizon to continue to provide DS1, DS3, and dark fiber high-capacity loops and DS1, DS3, and dark fiber dedicated transport; and (2) rule that Verizon has an obligation to perform routine network upgrades, without requiring amendment of interconnection agreements (id.).

Additionally, Conversent acknowledges that the FCC preserved an ILEC's right to initiate change-of-law proceedings, but, according to Conversent, this does not mean that the Department should proceed directly to arbitration (Conversent Reply at 1). Conversent argues that many interconnection agreements, such as Conversent's, require amendment after negotiation to effectuate changes-of-law and, according to Conversent, requiring such negotiations is in the interest of administrative efficiency (id. at 2). Accordingly, Conversent urges the Department not to proceed with the arbitration of provisions to reflect the Interim

Rules Order unless and until Verizon complies with the appropriate procedures to amend interconnection agreements or otherwise to effectuate changes-of-law (id.).

III. ANALYSIS AND FINDINGS

A. Verizon's Withdrawal Notice

1. Introduction

In its Withdrawal Notice, Verizon does not withdraw its initial pleading in its entirety, as contemplated by our procedural rules at 220 C.M.R. § 1.04(4). Rather, Verizon is seeking only to withdraw those parties identified in Exhibit A of its Withdrawal Notice from its initial pleading (i.e., Verizon's Petition for Arbitration). Therefore, Verizon's reliance on Section 1.04(4) is misplaced. Section 1.04(3) of our regulations, however, states that "[l]eave to file amendments to any pleading will be allowed or denied as a matter of discretion." Accordingly, we shall consider Verizon's Withdrawal Notice as a request for leave to amend its Petition for Arbitration to withdraw from further participation those parties included in Exhibit A of the Withdrawal Notice. We determine that the requirements imposed upon us as arbitrator of this proceeding pursuant to the Telecommunications Act, as well as requirements imposed upon us by our regulations, require that, in ruling on Verizon's Withdrawal Notice, we must look to whether the parties Verizon seeks to have withdrawn have filed a response or otherwise indicated an interest in participating in this proceeding, and that we must give those that have filed a response or otherwise indicated an interest in participating an opportunity to continue to participate in this proceeding.[23]

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[23] Our treatment of the Withdrawal Notice is informed by the Massachusetts Rules of (continued…)

2. Non-Responding Parties

There are a number of CLECs included in Exhibit A of Verizon's Petition for Arbitration that failed to submit either a response to the Petition for Arbitration or to file a Letter of Intent as to participation in this proceeding. We determine that the CLECs who failed to express any interest in participating in this proceeding prior to the submission of Verizon's Withdrawal Notice will not be harmed by the Department's granting of Verizon's request to formalize those CLECs' non-participation. The fact that none of these CLECs have contacted the Department in response to Verizon's Withdrawal Notice further supports our determination. Therefore, we conclude that because these CLECs failed to express any interest in participating in this proceeding, even on a limited basis, amendment of Verizon's Petition to withdraw those CLECs as parties is appropriate. Consequently, we grant, as of the date of this Order, Verizon's request for leave to amend its Petition to withdraw these CLECs as parties to this proceeding.[24]

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[23] (…continued)
Civil Procedure. Under Rule 41 of the Massachusetts Rules of Civil Procedure, an action may be dismissed by the plaintiff without order of the court by either filing a notice of dismissal at any time before service by the adverse party of an answer, or, by filing a stipulation of dismissal signed by all parties who have appeared in the action. See Mass. R. Civ. P. 41(a)(1). Otherwise, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Mass. R. Civ. P. 41(a)(2). Although we are not bound by the Massachusetts Rules of Civil Procedure, our treatment of the Withdrawal Notice, as discussed in the following sections, is consistent with the practice in Massachusetts courts for dismissals.

[24] Accordingly, the Petition for Arbitration is withdrawn, without prejudice, as to the following CLECs: ACC National Telecom Corp., Access Point Inc., AccessBridge Communications, Inc., AccessPlus Communications, Inc., AirCover Network
(continued…)

We emphasize that by permitting the amendment of the Petition for Arbitration to allow withdrawal of those CLECs who failed to file a response or a Letter of Intent as to participation, we express no view of Verizon's interpretation of its interconnection agreement with these CLECs. Nor do we preclude an affected CLEC from filing a separate action with the Department to resolve any dispute over Verizon's contract interpretation. Rather, we agree with Verizon that the best approach to resolve any dispute over Verizon's interpretation is to wait until an actual dispute about the effect of a change-of-law, if any, arises.[25]

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[24] (…continued)
Solutions, AmeriVision Communications Inc., Aquis Wireless Communications Inc., AT&T Wireless Services Inc., Avatar Telecom Inc., BroadBand Office Communications Inc., BroadRiver Communications of the Northeast Corp., Broadstream Corp., Cablevision Lightpath - MA Inc., Cat Communications International Inc., CCG Communications LLC, Ciera Network Solutions Inc., CO Space Services LLC, Coastal Internet Access Inc., Community Networks of Massachusetts, Dark Air Corp., Excel Telecommunications Inc., GFC Communications Inc., Granite Telecommunications LLC, Health Care Liability Management Corp., IDS Telecom LLC, International Telecom Ltd., Line 1 Communications LLC, Local Telecom Holdings LLC, Manhattan Telecommunications Corp., MegaCLEC Inc., Metro Teleconnect Companies Inc., Metrocall Inc., Mezco LLC, Navigator Telecommunications LLC, NECLEC LLC, Network Services LLC, New Access Communications LLC, New Edge Network Inc., New Rochelle Telephone Corp., NEXTEL Communications of the Mid-Atlantic Inc., Norfolk County Internet, Inc., North Atlantic Networks LLC, NOS Communications Inc., NOW Communications Inc., ONEStar Long Distance Inc., OnSite Access Local LLC, PNG Telecommunications Inc., Preferred Carrier Services Inc., Premiere Network Services Inc., Prospeed.Net Inc., QuantumShift Communications Inc., SmartBeep, Inc., Swift River Telecom Inc., Teleconex Inc., TeleServices Group, Inc., Transbeam, USA Telephone Inc., VarTec Telecom Inc., Weblink Wireless Inc., Williams Local Network LLC, and WINSTAR Wireless of Massachusetts, Inc.

[25] Regardless of Verizon's interpretation of the effect of change-of-law provisions in interconnection agreements, the Interim Rules Order requires Verizon to continue to provide delisted UNEs for six months under the rates, terms and conditions in interconnection agreements as of June 15, 2004, a fact that Verizon acknowledges. See (continued…)

3. Responding Parties That Have Raised Additional Issues

Conversely, we find that Verizon's request for leave to amend its Petition for Arbitration to withdraw parties who raised additional issues in their response to Verizon's Petition is inconsistent with the Act. Section 252(b)(3) of the Act permits a responding party to provide in its response to a petition for arbitration "such additional information as it wishes." We determine that "such additional information" may include the presentation of additional disputed issues for the Department's consideration. This interpretation is consistent with the express directives in Sections 252(b)(4)(A) and (C) of the Act. More specifically, Section 252(b)(4)(A) states that state commissions shall limit its consideration of the petition (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under Section 252(b)(3). Similarly, Section 252(b)(4)(C) states that state commissions "shall resolve each issue set forth in the petition and the response." Thus, we find that a response to a petition for arbitration is, as Choice One claims, equivalent to a counter-petition for arbitration (see Choice One Comments at 2).

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[25] (…continued)
Verizon Reply at 3. Additionally, provided that the FCC has not yet issued permanent unbundling rules, the Interim Rules Order also permits specified price increases for an additional six months. Interim Rules Order ¶¶ 1, 16, and 21.

Moreover, although we acknowledge that Verizon has filed a petition for mandamus seeking to invalidate the Interim Rules Order, we note that the D.C. Circuit Court indicated that it would not act on ILEC mandamus petitions to enforce USTA II before January 4, 2005. See USTA v. FCC, No. 00-1012 (D.C. Cir. Oct. 6, 2004). We will not speculate on the outcome of the petition for mandamus if the FCC fails to meet its December 2004 objective. The Interim Rules Order is currently the law and, unless and until that changes, we will proceed on that basis.

Indeed, in arbitrations conducted by the FCC, the FCC resolves issues raised in the response of a non-petitioning party. See, e.g., In the Matter of Petitions of WorldCom, Inc., Cox Virginia Telecom, Inc., and AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., CC Docket Nos. 00-218, 00-249, 00-251, Memorandum Opinion and Order, DA 02-1731 (rel. July 17, 2002). In this FCC proceeding, the FCC addressed 68 additional issues raised by Verizon in its answer to the petitions. See id. at ¶ 9.

In the present case, AT&T, the CCC, BrahmaCom, the CCG, MCI and Conversent have raised additional issues in their response to Verizon's Petition. Verizon, however, seeks to amend its Petition to withdraw as parties BrahmaCom and several members of both the CCC and the CCG.[26] Because granting Verizon's Withdrawal Notice would unilaterally eliminate the ability of these CLECs to have the issues they raised in their response resolved in this arbitration proceeding, we find that Verizon's request to amend its Petition to withdraw these CLECs as parties must be rejected.[27] If, however, any of the CLECs that have included additional issues in their responses assents to Verizon's proposed amendment to withdraw it as

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[26] Verizon seeks to have the following CCC members withdrawn: ACN, Adephia, CTC, DSLnet, Focal, ICG, Leval 3, Lightship, Lightwave and PAETEC. Verizon also seeks to have the following CCG members withdrawn: Broadview, Bullseye, ChoiceOne, Covad, DSCI, Equal Access, Essex, KMC, Talk America, and Winstar.

[27] The ability of any withdrawn CLEC to initiate a separate petition to arbitrate any issue it raised in its response does not affect our determination. The directive in Section 252(b)(4(C) explicitly mandates we resolve issues set forth in the response, and we determine that CLECs should not be required to file a separate petition to raise the same issues as they raised in their responses.

a party to this proceeding (although none have indicated as such to date), we will not require those CLECs to continue to participate. A CLEC's assent to Verizon's proposed withdrawal must be filed with the Department within seven (7) business days from the date of this Order.[28]

4. Responding Parties That Did Not Raise Additional Issues

With regard to CLECs that did not raise additional issues in their response, and those CLECs that only filed a Letter of Intent indicating a desire to participate in this proceeding, whether as a full participant or on a limited basis, the Department finds that Verizon's request to amend its Petition to withdraw these CLECs is also inappropriate. Regardless of Verizon's stated "reservation of rights" to discontinue offering delisted UNEs under the terms of an existing interconnection agreement, we find that our ultimate determinations of the issues in dispute here may substantially affect the interests of many, if not all, CLECs in Massachusetts. By filing a response or Letter of Intent in this proceeding, such CLECs expressed their interest in participating in this proceeding. Therefore, we deny Verizon's request for leave to amend its Petition to withdraw these CLECs,[29] provided that

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[28] As with non-responding parties, we express no view of Verizon's interpretation of its interconnection agreement with any CLEC who assents to its withdrawal, nor do we preclude an assenting CLEC from filing a separate action with the Department to resolve any dispute over Verizon's contract interpretation. On the other hand, we note that, as a general rule, a CLEC's assent to being withdrawn as a party to this arbitration may preclude that CLEC from future participation in this proceeding or in any separate proceeding to arbitrate the specific issues being addressed in this case.

[29] The following CLECs filed a response, but did not raise additional issues therein, or only filed a Letter of Intent: 1-800-Reconex; Arch Wireless; CoreTel; Global NAPs; MetTel; NEON; Richmond Networx; SBC Telecom; United Systems Access Telephone; Volo; Cellco; AboveTech; Comtech21; Budget, Covista, McGraw, Worldxchange, NUI, and New Horizons. We also include Z-Tel and Sprint in this

(continued…)

these CLECs submit, and the Department approves, a written request to continue to participate in this proceeding. This Letter of Continued Participation must be filed within seven (7) business days of the date of this Order, or by December 24, 2004, and must demonstrate specifically why a CLEC's continued participation is warranted. This Letter of Continued Participation shall also indicate whether the CLEC seeks to participate as a full party or a limited participant should the Department grant that CLEC's request to continue to participate.[30] If a CLEC, identified in note 28, supra, does not file a Letter of Continued Participation within the required time, Verizon's request to amend its Petition to withdraw that CLEC will be deemed granted as to that CLEC.

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[29] (…continued)
group of CLECs. Sprint and Z-Tel filed separate Motions to Dismiss, but did not respond directly to the Petition. See, n.11, supra.

Additionally, we note that Verizon listed New Horizons in Exhibit A of its Withdrawal Notice (Exhibit A being the list of CLECs Verizon seeks to have withdrawn) and listed MetTel, Neutral Tandem-Massachusetts, LLC, Vylink Communications, Inc., and WilTel Local Network, LLC in Exhibit B of the Withdrawal Notice (Exhibit B of the Withdrawal Notice being the list of CLECs Verizon seeks to proceed forward against). None of these carriers, however, were included in Exhibit A of the Petition. Because Notwithstanding the fact that these carriers were not identified in Verizon's Petition, both New Horizons and MetTel timely filed Letters of Intent. Given this demonstrated interest in participating, we will afford MetTel and New Horizons an opportunity to file a Letter of Continued Participation if they choose to do so. With regard to Neutral Tandem, Vylink and WilTel, if Verizon seeks to amend its Petition to name them as parties, Verizon must, pursuant to 220 C.M.R. § 1.04(3), seek leave to do so.

[30] We remind any CLEC requesting to remain as a named party to this proceeding that, should their request be granted, their interconnection agreement will be bound by our final arbitration order in this proceeding.

B. Procedural Approach Going Forward

Next, we address the manner in which we shall proceed with this arbitration.[31] We note that Verizon filed its Petition for Arbitration on February 20, 2004 prior to both the issuance of the D.C. Circuit Court's decision in USTA II in March 2004 and the release of the FCC's Interim Rules Order in August 2004. On September 14, 2004, Verizon has filed an updated amendment to its interconnection agreements to reflect USTA II and the Interim Rules Order. Additionally, on September 17, 2004, AT&T also proposed an amendment for its interconnection agreement with Verizon. Neither Verizon's updated amendment nor AT&T's proposed amendment have been reviewed by any of the other parties prior to their filing with the Department, and thus, we are, as AT&T accurately points out, effectively starting over. Therefore, we find it appropriate to restart the arbitration "clock" and to move forward with

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[31] In this Order, we do not address directly the Motions to Dismiss filed separately by Sprint, Z-Tel and the CCC. Rather, we determine that the procedural guidelines we establish herein in conjunction with our findings with regard to the Withdrawal Notice, adequately address the concerns raised in the Motions to Dismiss. More specifically, we address in this Order the arguments concerning routine network upgrades as well as the arguments that other sources of applicable law, namely, Section 271, the BA/GTE Merger Order, and state law require Verizon to continue to provision delisted UNEs. Additionally, we note that we require in this Order an additional negotiation period as well as the filing of a joint stipulation of disputed issues. These requirements address the CLECs' allegations of a lack of negotiation on the part of Verizon and the alleged procedural deficiencies in Verizon's Petition. Accordingly, with this Order, we have addressed the issues contained in the pending Motions to Dismiss, and, thus, hereby deny the Motions to Dismiss as moot.

Furthermore, as to those CLECs that moved for dismissal, we note that Verizon seeks to proceed forward only against three members of the CCC, namely, Allegiance, RCN Beco and RCN Telecom. See Withdrawal Notice, Exh. B. As to the remaining CLECs moving for dismissal, they may, at their option, assent to their withdrawal as a party to the Petition in accordance with our findings herein.

the arbitration proceeding anew.[32] In that respect, we make the following procedural determinations.

First, both Verizon and AT&T requested a period of negotiation concerning their respective contract amendment proposals. Because Verizon's updated amendment has not been presented to other parties prior to its filing with the Department, we find it appropriate to allow the parties the opportunity to engage in negotiations concerning Verizon's updated amendment, as well as the opportunity for AT&T and Verizon to engage in negotiations concerning AT&T's proposed amendment.[33]

Second, we require the parties to engage in negotiations for a 30-day period. We note that Section 252(b)(1) of the Act incorporates a negotiation period of 135 days before a party may file for arbitration. But here, Verizon's original and updated amendment overlap in

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[32] We note that this proceeding has been fraught with uncertainty from the beginning. Only 11 days after Verizon's filing of the present Petition for Arbitration, the D.C. Circuit, in USTA II, vacated and remanded to the FCC significant portions of the Triennial Review Order upon which the Petition was based. This resulted in numerous requests to stay the effect of the vacatur as well as appeals of USTA II that only further muddied the waters. By requiring incumbent local exchange carries to continue provisioning delisted UNEs, the FCC's Interim Rules Order did little to clarify matters on a going forward basis. Rather, USTA II and the Interim Rules Order compelled Verizon to file a revised interconnection agreement amendment proposal to replace its original proposal and, effectively, to start this proceeding anew. In response to the continuing uncertainty in which we are faced, and in order to move forward with this arbitration under these extraordinary circumstances, we are compelled to restart the arbitration clock. We do not make this decision lightly and limit our action to the specific facts and circumstances we face in this proceeding. It is highly unlikely that we will encounter such unusual circumstances in future arbitration proceedings that would warrant modifying the arbitration clock.

[33] Those CLECs who remain parties to this proceedings may also propose amendments to their respective interconnection agreements for Verizon's consideration during the negotiation period we prescribe here.

many respects, and thus, we find that a 30-day negotiation period is sufficient to allow the parties to engage in productive good faith negotiations as required under the Act. Accordingly, the 30-day negotiation period will begin on December 27, 2004, the next business day after the filing of the above-required Letters of Continued Participation. The 30-day negotiation period will end on January 26, 2005. We do not anticipate allowing any extension of the 30-day negotiation period. Of course, the parties may continue negotiations beyond the 30-day period we require here; however, this proceeding has already been delayed far too long, and we are not persuaded that a longer Department-mandated negotiation period would be beneficial under the circumstances.[34]

Third, we direct the parties to file within 14 business days after the end of the negotiation period, or by February 15, 2005, a joint stipulation of disputed issues (if any) which shall list and summarize the disputed issues, the positions of the parties on each disputed issue, and the relevant contract language. Any and all disputed issues, whether raised by Verizon or by a CLEC, shall be included in this joint stipulation. By requiring all disputed issues, along with positions of the parties, to be included in the joint stipulation, we find that any additional response by CLECs to Verizon's updated amendment unnecessary at this time. Additionally, we shall regard the filing of the joint stipulation of disputed issues as the 135th day in the restarted Section 252 arbitration "clock".

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[34] Moreover, given the interval since the filing of Verizon's updated amendment, we presume that parties have already initiated negotiations concerning the revised amendment.

Fourth, in addition to filing a joint stipulation of disputed issues, the parties may propose a procedural schedule for the completion of this proceeding. We note, however, that we endeavor to complete this arbitration proceeding by June 30, 2005, the 270th day of the restarted arbitration "clock", and any proposed procedural schedule must incorporate this completion date. A procedural conference will be held on **Wednesday, January 5, 2005 at 10:00 a.m.** at the Department's offices, One South Station, Second Floor, Boston, Massachusetts, to resolve any additional procedural matters and to finalize the procedural schedule.

Fifth, with regard to the scope of this arbitration proceeding, with regard to the scope of this arbitration proceeding, the Department will examine all issues related to the Triennial Review Order, USTA II, and the FCC's newly adopted unbundling rules. Additionally, we determine that routine network modifications[35] are also within the scope of this proceeding. We conclude that the FCC's rulings concerning routine network modifications in the Triennial Review Order constitutes a new obligation. In the Triennial Review Order, the FCC stated that "the routine modification requirement that we adopt today resolves a controversial competitive issue . . . and is designed to provide competitive carriers with greater certainty as to the availability of unbundled high-capacity loops and other facilities throughout the country." Triennial Review Order at ¶ 632 (emphasis added). Furthermore, the FCC explicitly acknowledged that in adopting its routine modification requirement it was

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[35] The FCC explained that "[b]y 'routine network modifications' we mean that incumbent LECs must perform those activities that incumbent LECs regularly undertake for their own customers." Triennial Review Order at ¶ 632.

conforming its regulations to the Eighth Circuit Court of Appeal's holding in Iowa Utilities Board v. FCC[36] that the obligations imposed by Sections 251(c)(2) and 251(c)(3) include modifications to ILEC facilities to the extent necessary to accommodate interconnection or access to network elements. Triennial Review Order at ¶ 633 (citing Iowa Utilities Board v. FCC, at 813, n.33). Accordingly, we find that the routine modification requirement represents a change-of-law that the Department will consider in this proceeding.

With regard to the charges Verizon proposes for routine network modifications, the FCC stated that:

> [T]he costs associated with [routine network] modifications often are reflected in the recurring rates that competitive LECs pay for loops. Specifically, equipment costs associated with modifications may be reflected in the carrier's investment in the network element, and labor costs associated with modifications may be recovered as part of the expense associated with that investment (e.g., through application of annual charge factors (ACFs)). The Commission's rules make clear that there may not be any double recovery of these costs (i.e., if costs are recovered through recurring charges, the incumbent LEC may not also recover these costs through a [non-recurring cost]).

Triennial Review Order at ¶ 640. In the present case, whether the costs for which Verizon seeks to recover in any charge for routine modifications are not already being recovered in existing loop rates is an issue we must determine. Therefore, in order for us to approve any charges for routine modifications, we require Verizon not only to demonstrate that the proposed charges for routine modifications are just and reasonable, but also that there is no double recovery of costs in any charges it seeks to impose for routine modifications.

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[36] Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

Finally, in our D.T.E. 03-60/04-74 Consolidated Order,[37] we addressed CLEC arguments that Verizon is obligated to continue providing delisted UNEs pursuant to state law, the BA/GTE Merger Order, and/or Section 271 of the Act. Those same arguments have been made in this proceeding, and our conclusions in the D.T.E. 03-60/04-73 Consolidated Order regarding these issues apply with equal force to this proceeding. In that Order, we determined that the Department did not have any basis under state law, the BA/GTE Merger Order, or Section 271 upon which we could, at this time, require Verizon to continue provisioning UNEs delisted by USTA II. See D.T.E. 03-60/04-73 Consolidated Order at 21-26, 67 (state law), 46-48 (BA/GTE Merger Order), and 55-57 (Section 271).

Nevertheless, the Interim Rules Order maintains the rates, terms and conditions contained in interconnection agreements as of June 15, 2004 for the provision of delisted UNEs. While the Interim Rules Order remains in effect,[38] Verizon is obligated to continue provisioning delisted UNEs, and, thus, a standstill order by the Department regarding UNEs provided under parties' interconnection agreements is unnecessary at this time. For delisted

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[37] Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers, D.T.E. 03-60, and Investigation by the Department of Telecommunications and Energy on its own Motion as to the Propriety of the Rates and Charges Set Forth in the following tariffs: M.D.T.E. No. 17, filed with the Department on June 23, 2004 to become effective on July 23, 2004 by Verizon New England, Inc., d/b/a Verizon Massachusetts, D.T.E. 04-73, Consolidated Order Dismissing Mass Market Switching Investigation; Commencing Independent Hot Cuts Investigation; and Vacating Tariff Suspension, (November 30, 2004) ("D.T.E. 03-60/04-73 Consolidated Order").

[38] As noted at n.29, supra, the D.C. Circuit has delayed its review of the mandamus petition until January 4, 2005.

UNEs not addressed by the Interim Rules Order, (e.g., enterprise switching including the four-line carve out), we note that Verizon is prohibited from discontinuing those UNEs to carriers in Exhibit B of the Withdrawal Notice, or to any other carrier the Department permits to participate further in this proceeding, pending a Department ruling in this proceeding on Verizon's rights and responsibilities.[39]

We determine that our decision in the D.T.E. 03-60/04-73 Consolidated Order, at 66-72, to vacate the July 22, 2004 suspension of the tariff revisions applicable to enterprise switching and the four-line carve out does not impede our ability to prohibit application of the FCC's enterprise switching rule as to those CLECs who remain parties to this arbitration, pending our final order in this proceeding. Verizon's obligations under its interconnection tariff are distinct from its obligations under effective interconnection agreements with individual CLECs, and, in vacating the suspension of the tariff revisions, we made no determination regarding Verizon's obligations pursuant to individual interconnection agreements with respect to enterprise switching and the four-line carve out. See D.T.E. 03-60/04-73 Consolidated Order at 67. Indeed, Verizon's proposed tariff revisions applicable to enterprise switching and the four-line carve out recognizes the distinction between its obligations pursuant to the tariff and pursuant to effective interconnection agreements. Specifically, Verizon's tariff revisions propose to cease provisioning new orders for enterprise switching, including the four-line carve out, and to bill existing enterprise switching or UNE-P arrangements at a rate equivalent to the FCC's resale rates for business

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[39] Of course, Verizon or any other party may raise the issue of retroactive application of any rate-related changes if they consider such to be warranted.

service in order to avoid disruption "except as otherwise required under an effective interconnection agreement between [Verizon] and the [requesting carrier]." See M.D.T.E. 17, Part B, § 6.1.1.A. Accordingly, our prohibition of the FCC's enterprise switching rule to carriers who, on a going-forward basis, are parties to this proceeding, is consistent with our vacatur of the July 22, 2004 suspension of Verizon's tariff revisions applicable to enterprise switching and the four-line carve out.

In conclusion, we will proceed forward with the arbitration proceeding in accordance with our directives outlined above. The procedural schedule established herein is summarized below:

December 24, 2004	Letters of Continued Participation due.
December 27, 2004	Negotiation period begins.
January 5, 2005	Procedural conference.
January 26, 2005	Negotiation period ends.
February 15, 2005	Joint Stipulation of Disputed Issues due. Resumption of Section 252 arbitration "clock" as of the 135th day.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That the effect of Verizon's Withdrawal Notice is granted, in part, and denied, in part, as outlined herein; and it is

FURTHER ORDERED: That responding parties, as required in this Order, file a Letter of Continued Participation within seven (7) business days of the date of this Order, or by December 24, 2004; and it is

FURTHER ORDERED: That parties remaining in this arbitration engage in good faith negotiations for thirty (30) days to commence on December 27, 2004 and to conclude on January 26, 2005; and it is

FURTHER ORDERED: That the parties file a joint stipulation of disputed issues within fourteen (14) business days after the conclusion of the 30-day negotiation period, or by February 15, 2005; and it is

FURTHER ORDERED: That a procedural conference will be held on Wednesday, January 5, 2005 at 10:00 a.m. at the Department's offices; and it is

FURTHER ORDERED: That the parties comply with all other directives contained herein.

By Order of the Department,

/s/
Paul G. Afonso, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Eugene J. Sullivan, Jr., Commissioner

/s/
Deirdre K. Manning, Commissioner