The Commonwealth of Massachusetts

DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY

D.T.E. 04-33-A December 16, 2005

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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RECONSIDERATION ORDER

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TABLE OF CONTENTS

RECONSIDERATION ORDER

I. INTRODUCTION

On July 14, 2005, the Department of Telecommunications and Energy ("Department") issued its final Order in D.T.E. 04-33 ("Arbitration Order") resolving the 36 issues presented to the Department for arbitration. Motions for clarification or reconsideration of the Arbitration Order were filed on August 24, 2005 by AT&T Communications of New England, Inc. and Teleport Communications-Boston ("AT&T"); Conversent Communications of Massachusetts, Inc. ("Conversent"); Verizon New England, Inc., d/b/a Verizon Massachusetts ("Verizon"); CTC Communications Corp. and Lightship Telecom, LLC ("CTC" and "Lightship"); and XO Communications Services, Inc. (formerly, XO Massachusetts, Inc. and Allegiance Telecom of Massachusetts, Inc.) ("XO").[1] Oppositions to the motions were filed by AT&T; Verizon; CTC and Lightship; XO; and Conversent on September 14, 2005.

Additionally, in the Arbitration Order, the Department directed the parties to submit a single final Amendment to the parties interconnection agreements ("ICA") applicable to all parties, consistent with the Department's findings in the Order. Arbitration Order at 290. Pursuant to this directive, on October 7, 2005, a compliance Amendment was submitted to the Department on behalf of Verizon, AT&T, Conversent, DSLnet Communications, LLC,

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[1] On September 30, 2005, Verizon withdrew its request for clarification of the Department's findings regarding the provision of unbundled local switching for the embedded base of UNE-P arrangements from packet switches until the end of the FCC's transition period (Letter from Bruce P. Beausejour to Mary L. Cottrell, D.T.E. 04-33 (Sept. 30, 2005)). Similarly, AT&T withdrew its request for reconsideration of the Department's findings regarding entrance facilities (AT&T Partial Withdrawal of Motion for Reconsideration (Oct. 7, 2005)).

RCN-BecoCom LLC, RCN Telecom Services of Massachusetts, Inc, and the Competitive Carrier Group ("CCG").[2] As a result of further negotiations, the parties submitted a revised Amendment on October 27, 2005. Because the parties were unable to agree on appropriate contract language for a number of issues, the compliance Amendment contains opposing language proposed by one or more competitive local exchange carriers ("CLECs") or by Verizon. The parties proposed to file briefs on the remaining disputes over contract language to assist the Department in resolving these disputes over contract language.

II. STANDARD OF REVIEW

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

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[2] CCG includes the following carriers: A.R.C. Networks, Inc. d/b/a InfoHighway Communications Corporation: Broadview Networks Inc. and Broadview NP Acquisition Corp.; Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp.; DIECA Communications Inc. d/b/a Covad Communications Company; DSCI Corp; IDT America Corp.; KMC Telecom V, Inc.; and XO Communications Services, Inc. (formerly XO Massachusetts, Inc. and Allegiance Telecom of Massachusetts, Inc.

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is sufficiently ambiguous to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

III. ISSUES

A. CTC Interconnection Agreement

In the Arbitration Order, the Department determined that no amendment of the interconnection agreement between Verizon and CTC is necessary in order to implement the terms of the Triennial Review Order[3] and the Triennial Review Remand Order[4] withdrawing the availability of certain unbundled network elements ("UNEs"). Arbitration Order at 25. The Department determined that § 1.5 of the parties' UNE Remand Amendment, which grants Verizon the right to terminate its provision of certain UNEs, has the effect of modifying the underlying agreement, such that the duty under § 8.2 of the agreement to renegotiate terms applies "only when the change of law results in an ongoing right or obligation under the interconnection agreement, not when it eliminates entirely such rights or obligations." Id. at 15-16, 25.

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3 In the Matter of 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 No.98-96; 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" or "TRO"), 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").

4 In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) ("Triennial Review Remand Order" or "TRRO").

1. Positions of the Parties

a. CTC

CTC argues that the Department misconstrued the interconnection agreement between CTC and Verizon on two grounds. First, CTC argues that the Department inadvertently overlooked § 3 of the Pricing Appendix to CTC's UNE Remand Amendment, and thus mistakenly concluded that the Triennial Review Order and the Triennial Review Remand Order triggered § 1.5 of CTC's UNE Remand Amendment (CTC/Lightship Motion at 11). Section 3 of the Pricing Appendix states as follows:

> If Verizon is a Bell Operating Company (as defined in the Act) and in order to comply with Section 271(c)(2)(B) of the Act provides a Service under the Agreement, the UNE Remand Attachment and this Pricing Appendix to the UNE Remand Attachment that Verizon is not required to provide by Section 251 of the Act, Verizon shall have the right to establish Charges for such Service in a manner that differs from the manner in which under Applicable Law (including, but not limited to, Section 252(d) of the Act) Charges must be set for Services provided under Section 251.

CTC argues that § 3 provides specific terms confirming Verizon's ongoing obligation under the interconnection agreement to provide a facility under § 271(c)(2)(B) after it is no longer required under § 251 (CTC/Lightship Motion at 12). CTC emphasizes that it is not attempting to seek reconsideration of Arbitration Issue 31 (id.).[5]

Second, CTC argues that even if § 1.5 applies, the Department erroneously held that the provision trumped § 8.2's requirement of an amendment (CTC/Lightship Motion at 13). CTC relies on § 2 of the preamble to CTC's UNE Remand Amendment, which states:

> Conflict between the Amendment and the Terms. This Amendment shall be deemed to revise the terms and provisions of the Terms [of the underlying Agreement] to the extent necessary to give effect to the terms and provisions of this Amendment. In the event of a conflict between the terms and provisions of this Amendment and the terms and provisions of the Terms, this Amendment shall govern, provided, however, that the fact that a term or provision appears in this Amendment but not in the Terms, or in the Terms but not in this Amendment, shall not be interpreted as, or deemed grounds for finding, a conflict for purposes of this Section 2.

(Id., citing UNE Remand Amendment preamble § 2) (emphasis added). CTC argues that § 8.2 does not conflict with § 1.5, because § 1.5 includes provisions that do not appear in the underlying agreement, and § 8.2 of the agreement includes provisions that do not appear in the UNE Remand Amendment (id.). CTC argues therefore that although § 1.5 states that Verizon may terminate UNEs when it is relieved of an unbundling obligation, it does not specify that Verizon may do so without an amendment, whereas § 8.2 specifically requires one. Thus,

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5 Thus, in the Department's analysis of CTC's interconnection agreement, the Department will not review its determination that the Department could not require the parties to include § 271 checklist obligations in an interconnection agreement to be arbitrated under § 252, and that the Department would not review such terms unless the parties adopted them by negotiation. Arbitration Order at 262. The Department understands CTC's argument to be limited to the issue of whether § 3 of the Pricing Appendix demonstrates that CTC and Verizon had agreed to the continuation of § 271 services under their interconnection agreement.

CTC reasons, there is no conflict, and the provisions must be interpreted to require an amendment before Verizon terminates any UNE offering as a result of a change of law (id. at 14).

b. Verizon

Verizon responds that while § 3 of Pricing Appendix to the UNE Remand Amendment does refer to Verizon's independent obligations under § 271, this provision does so only to make clear that such obligations are not covered by the interconnection agreement or by TELRIC pricing under § 251 (Verizon Opposition at 29). Section 3, Verizon emphasizes, provides that "if" Verizon provides a service "under the Agreement" that it is required to provide by § 271, but not by § 251, then Verizon's prices need not comply with § 251 (id.). According to Verizon, § 3 comes into play only if it chooses to provide such services under the agreement (id.). Verizon argues that in fact it does not provide such services under the interconnection agreement, and CTC has made no claims to the contrary (id.).

Verizon disputes CTC's interpretation of the effect of § 2 of the UNE Remand Amendment (id. at 30). Verizon argues that § 2 does not preclude the Department from ever finding a conflict between the Amendment and the ICA, but only clarifies that the mere fact that different terms appear in the interconnection agreement and the amendment should not alone be read to create a conflict (id. at 31). Verizon argues that the Department's analysis does not rest on the mere differences in language, but rather upon a "real-world conflict" between those terms (id.). Verizon argues that the Department correctly found and resolved a conflict between the general terms of the interconnection agreement and the specific terms of

§ 1.5 of the UNE Remand Amendment (id.). Verizon maintains that CTC's reading of UNE Remand Amendment § 1.5 and the interconnection agreement §§ 8.2 and 8.3 would improperly reduce § 1.5 to a statement that Verizon is entitled to a contract amendment in order to effectuate an FCC decision to de-list a UNE, a right that is already fully provided by §§ 8.2 and 8.3.

2. Analysis and Findings

The Department determines that § 3 of the Pricing Appendix to the UNE Remand Attachment does not give rise to an ongoing obligation of Verizon to provision de-listed network elements pursuant to § 271(c)(2)(B). Section 3 is a conditional clause providing only that "if" Verizon provides a service under the agreement in order to comply with § 271(c)(2)(B) of the Act, then Verizon may establish charges that differ from the requirements of § 252(d) and § 251. While this section contemplates that Verizon may provide such a service under the agreement, it does not demonstrate that Verizon and CTC agreed that Verizon must continue to provide such a service under the agreement when the FCC determines that Verizon is not required to provide it under § 251.

The Department also determines that § 2 of the preamble to the UNE Remand Amendment does not preclude the Department from finding conflict between § 8.2 of the interconnection agreement and § 1.5 of the UNE Remand Amendment. The language that CTC highlights in § 2 does not affect the Department's decision. The Department's finding in the Arbitration Order of a conflict between § 8.2 of the interconnection agreement and § 1.5 of the UNE Remand Amendment was not based on "the fact that a term or provision appears in [the UNE Remand Amendment] but not in the Terms [of the underlying interconnection agreement], or in the Terms but not in this Amendment." Compare Arbitration Order at 15-16, 25 with UNE Remand Amendment preamble § 2. Rather, the Department determined that the general obligation to negotiate amendments required by a change of law under § 8.2 would be unenforceable given Verizon's specific right under § 1.5 to terminate its provision of de-listed UNEs. Arbitration Order at 15-16. The Department therefore interpreted § 1.5 to operate as a modification of § 8.2, such that "the duty to negotiate applies only when the change of law results in an ongoing right or obligation under the interconnection agreement, not when it eliminates entirely such rights or obligations." Id. at 16. This is in accord with § 2 of the UNE Remand Amendment preamble, which provides that the Amendment "shall be deemed to revise the terms and provisions of the Terms [of the underlying agreement] to the extent necessary to give effect to the terms and provisions of this Amendment."

After consideration of § 3 of the Pricing Appendix to the UNE Remand Amendment and § 2 of the preamble to the UNE Remand Amendment, the Department finds that these provisions do not change the Department's determination in the Arbitration Order that no amendment of the interconnection agreement between Verizon and CTC is necessary in order to implement the terms of the Triennial Review Order and the Triennial Review Remand Order withdrawing the availability of certain UNEs. Thus, CTC's motion for reconsideration of that determination with respect to the interconnection agreement between Verizon and CTC is denied.

B. Lightship Interconnection Agreement

In the Arbitration Order, the Department determined that the terms of the Triennial Review Order and the Triennial Review Remand Order, which eliminated the availability of certain UNEs, may be implemented without amendment of the terms of the interconnection agreement between Verizon and Lightship, because the new unbundling rules triggered § 11.0 of the interconnection agreement and § 1.5 of the UNE Remand Amendment. Arbitration Order at 22. Section 11 of the interconnection agreement provides, in part:

> To the extent required by Applicable Law, and subject to the provisions of this Section 11.0 (including, without limitation, Section 11.7 hereof), BA[6] shall offer to [CLEC] nondiscriminatory access to Network Elements on an unbundled basis at any technically feasible point pursuant to, and in accordance with the terms and provisions of, this Agreement; provided, however, that BA shall not have any obligation to continue to provide such access with respect to any Network Element listed in Section 11.1 (or otherwise) that ceases to be subject to an unbundling obligation under Applicable Law; provided further that, if BA intends to cease provisioning a Network Element that it is no longer required by Applicable Law to provision, the Parties agree to work cooperatively to develop an orderly and efficient transition process for discontinuation of provisioning of such Network Element.

The Department held that the term "Network Elements on an unbundled basis" under § 11.0 of the interconnection agreement refers to "network elements on an unbundled basis" that Verizon must provide under § 251(c)(3) of the Telecommunications Act. Arbitration Order at 20-21. The Department further held that the term "on an unbundled basis" under § 11.0 did not refer to Verizon's independent obligation to provide interconnection and access on just and reasonable terms under § 271. Id. at 21.

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[6] Verizon's predecessor was Bell Atlantic ("BA").

1. Positions of the Parties

a. Lightship

Lightship argues that the even though the Triennial Review Order and the Triennial Review Remand Order relieved Verizon of its § 251(c)(3) obligation to unbundle loops, switching, and transport in certain circumstances, it was plain error to conclude that these network elements need not be provided under § 271 "on an unbundled basis" (CTC/Lightship Motion at 15). Lightship claims that the use of the word "unbundled" in describing Verizon's obligation to provide interconnection and access to loops, transport, and switching under § 271(c)(2)(B)(iv), (v), and (vi) demonstrates that Verizon is still explicitly required to provision them on "an unbundled basis" under the interconnection agreement (id.). Moreover, Lightship contends, § 3 of the Pricing Appendix to Lightship's UNE Remand Amendment, containing the same language relied upon by CTC in its UNE Remand Amendment, confirms Verizon's obligation to offer UNEs pursuant to § 271(c)(2)(B). Thus Lightship argues that the applicable change of law provision is not § 11.0,[7] but rather, § 27.3, which provides that "in the event of a change in Applicable Law that materially affects any material term of this Agreement . . . the Parties shall renegotiate in good faith such affected provisions . . ." (id. at 16).

[7] Lightship states that § 27.4 of the interconnection agreement and § 1.5 of the UNE Remand Amendment also do not apply, but because Lightship does not advance its argument on these provisions, this Order will not reconsider those points. In any event, Lightship's point rests on the scope of "Applicable Law" under the agreement, which Lightship raises in its main argument.

b. Verizon

Verizon counters that elements provided under § 271 are not "unbundled network elements" (Verizon Opposition at 34). Verizon argues that its obligations under the § 271 checklist items 4, 5, 6, and 10, which never use the terms "network element," "unbundled network element," or "network elements on an unbundled basis," are independent of any unbundling analysis under § 251 (id. at 34, citing Triennial Review Order at ¶ 653; USTA II, 359 F.3d at 589; Arbitration Order at 262). Verizon argues that § 271 uses the term, "unbundled," only in the sense of "separate" or "disconnected," but not to raise the unbundling conditions and pricing terms raised by § 251(c)(3) (id.).

Verizon disputes Lightship's claim that the interconnection agreement includes § 271 obligations. Verizon argues that the express terms of the interconnection agreement and the UNE Remand Amendment manifest the parties' intent to effectuate the terms of § 251, as evidenced by language contained in the introductory "whereas" clauses, as well as the use in § 11.0 of the interconnection agreement of the precise language used in § 251(c)(3), and by the lack of any express contract term implementing any obligations imposed by § 271 (id. at 35-36).

2. Analysis and Findings

Section 11.0 of the interconnection agreement provides that Verizon is obligated to provide, to the extent required by Applicable Law, "nondiscriminatory access to Network Elements on an unbundled basis," but that Verizon is not obligated to provide such access with respect to any network element that ceases to be subject to an unbundling obligation under

Applicable Law. The parties clearly adopted word for word the language from § 251(c)(3), which establishes Verizon's obligation to provide nondiscriminatory access to network elements on an unbundled basis when the FCC finds impairment. Lightship does not appear to dispute the principle that Verizon's obligations under § 251 and § 271 are independent, or that although loops, transport, and switching are the subject of both statutes, the standards for pricing, terms, and conditions are different. See Triennial Review Order at ¶¶ 656-64. Indeed, Lightship relies on the proposition that Verizon may still have an obligation to unbundle loops, transport, and switching under § 271, even if the Triennial Review Order or the Triennial Review Remand Order have changed Verizon's § 251 obligations (CTC/Lightship Motion at 16).

Yet, at the same time, Lightship equates Verizon's § 271 obligation to offer interconnection to local loops "unbundled" from local switching, local transport "unbundled" from switching, and local switching "unbundled" from transport, local loop transmission or other services with Verizon's obligation to provide nondiscriminatory access to network elements on an unbundled basis under § 11.0 of the interconnection agreement. We are not convinced that this section's use of the phrase "nondiscriminatory access to network elements on an unbundled basis" encompasses Verizon's independent "unbundling" obligations under § 271. Verizon's citations to the "whereas" clauses in the preambles to the interconnection agreement and the UNE Remand Amendment further support our conclusion that the parties only intended to implement the terms of § 251. Therefore, the Department affirms its previous determination that the new unbundling rules triggered § 11.0 of the interconnection agreement and § 1.5 of the UNE Remand Amendment, and that the de-listed UNEs could be withdrawn without first amending the interconnection agreement. The Department clarifies, however, that its determination was not that these elements need not be unbundled under § 271, as Lightship suggests, but rather that, whatever Verizon's obligation, if any, to provide access and interconnection may be under § 271, it is not on an unbundled basis within the meaning of § 11.0 of the interconnection agreement. Arbitration Order at 21, 261-62.

C. Case-by-Case Dispute Resolution Process (Supplemental Issues 1-3)

1. Positions of the Parties

a. XO

XO seeks reconsideration of the Department's decision to litigate wire center designations on a case-by-case basis, arguing that the case-by-case approach deprives CLECs of any opportunity to undertake a meaningful review of the data supporting Verizon's claims that unbundling relief is available and also frustrates a CLEC's efforts to self-certify (XO Motion at 9-10). XO states that the Triennial Review Remand Order does not foreclose the Department from approving, in the course of an arbitration proceeding, contract language that provides all parties with the certainty a wire center verification process overseen by the Department would provide, and that its proposed contract language provides the parties a mutual opportunity to analyze Verizon's wire center designations (id. at 10-11, citing Triennial Review Remand Order at ¶ 234).

XO further argues that the case-by-case approach undermines regulatory certainty, because the possibility of Verizon-initiated litigation to challenge a CLEC's self-certification threatens to consume substantial CLEC resources (XO Motion at 10-11). And if Verizon prevails in challenging a CLEC's self-certification, XO states, the CLEC will be subject to retroactive billing at higher wholesale rates (id.). Thus, in order to avoid the burden and expense of multiple, successor proceedings, XO urges the Department to reconsider its decision to litigate wire center designations on a case-by-case basis (id.).

b. Verizon

Verizon states that XO's concerns were fully addressed in the Arbitration Order (Verizon Opposition at 26). First, Verizon points to the Department's requirement that the amendment incorporate an obligation for Verizon to produce back-up data, and argues that, contrary to XO's claims, the FCC process provides CLECs the opportunity to verify and contest Verizon's back-up data (id. at 26, citing Arbitration Order at 286). Second, responding to XO's argument that a case-by-case approach is expensive, Verizon maintains that XO has offered no new information to justify reconsideration of the Department's finding that a case-by-case approach is more efficient (id. at 26-27, citing Arbitration Order at 279). Third, Verizon argues that XO has no basis for reconsidering the Department's analysis regarding the appropriateness of the risk associated with placing an order for unbundled network element ("UNE") loops or transport (id. at 27). Finally, Verizon notes that the Department rejected the CLEC wire center proposals based upon the independent ground that incorporating a Department-approved list could allow CLECs to obtain exempt UNEs by limiting Verizon's ability to update its non-impaired wire center list (id., citing Arbitration Order at 282).

2. Analysis and Findings

In its Motion for Reconsideration, XO's argues that the case-by-case approach: (1) deprives CLECs of the opportunity to access and conduct a meaningful review of the data supporting Verizon's wire center designations thereby frustrating a CLEC's efforts to self-certify; and (2) undermines regulatory certainty due to the possibility of Verizon-initiated litigation and the expense of such litigation (XO Motion at 9-12). XO's motion, however, merely attempts to reargue the issues considered and decided in the main case.

In rejecting the CLECs' proposals for a single generic proceeding, the Department noted that a single generic proceeding would only determine exempt wire centers at a given point in time, and thus, future proceedings to verify additional wire centers, and possibly to arbitrate amendments to interconnections agreements to reflect any verified wire center, would have been inevitable. Arbitration Order at 280-83. Accordingly, the Department determined that committing resources to a single proceeding would be less efficient than waiting until an actual dispute, if any, arises. Id. at 278-79. Furthermore, the Department also concluded that the "reasonably diligent" requirement contained in the FCC's case-by-case approach "appropriately balances the risk associated with a request for access to high-capacity loops and dedicated transport." Id. at 280. Nothing in XO's motion regarding the expense and uncertainty of the case-by-case approach persuades us to reconsider these findings or our decision to adopt a case-by-case approach.

Additionally, by requiring parties to incorporate terms requiring Verizon to produce supporting data in order for CLECs to verify Verizon's wire center designations, the

Department explicitly addressed XO's concerns regarding a CLEC's ability to access and review Verizon's underlying data. See Arbitration Order at 286. To assist CLECs in reviewing Verizon's data, the Department also required that Verizon clarify the source of the data provided, that the data provided be updated to the month in which a CLEC requests such data, and that the data be provided within 10 days. Id. at 286-87. Furthermore, we note that any failure of Verizon to provide the necessary back-up data in accordance with the Department's determinations (see XO Motion for Reconsideration at n.29) would be an issue for dispute resolution pursuant to a CLEC's interconnection agreement, rather than warranting reconsideration of the case-by-case approach we adopted.

The concerns that XO raises in its motion for reconsideration were fully addressed in the Arbitration Order. XO presents no previously unknown or undisclosed facts that would have a significant impact upon the decision rendered. Nor does XO claim that the Department's decision was the result of mistake or inadvertence. Accordingly, the Department denies XO's motion for reconsideration of the Department's determination that wire center designations be conducted on a case-by-case basis.

D. Date of Non-Impairment Determination (Supplemental Issues 1-3)

1. Positions of the Parties

a. Verizon

Verizon argues that the FCC's rules dictate that the relevant date for determining whether a wire center satisfies the FCC's non-impairment criteria for loops and transport is March 11, 2005, not the date on which a CLEC places an order for facilities, unless the wire center met the non-impairment thresholds after March 11, 2005 (Verizon Motion at 9-10). Verizon asserts that the Department may have created an ambiguity through statements that may be read to imply that, in deciding whether a disputed wire center satisfies the non-impairment criteria, the Department would assess the status of that wire center as of the date the order was placed or the date the issue comes up for decision (id. at 9). The claimed ambiguities that Verizon raises are: (1) the Department's statement that, in connection with the definition of "affiliate," the case-by-case approach minimizes the impact of the announced merger between MCI and Verizon on wire center designations; and, (2) the Department's directive that Verizon back-up data must be updated to the month in which a CLEC requests such data" (id. at 10, citing Arbitration Order at 286).

In support of its contention that March 11, 2005 is the relevant date for determining whether a wire center satisfies the FCC's non-impairment criteria, Verizon maintains that each of the FCC's transition rules for UNE loops and transport defines the embedded base of UNEs that must be transitioned to alternative services as those UNEs that existed as of the effective date of the Triennial Review Remand Order, but which the incumbent local exchange carrier ("ILEC") is no longer required to make available under the substantive rules for that UNE (Verizon Motion at 10). Verizon therefore contends that, by definition, the embedded base consists of those UNE loops and dedicated transport facilities that were provisioned out of, or between, wire centers that satisfied the applicable FCC non-impairment criteria as of March 11, 2005 (id. at 10-11). Once a wire center is classified as exempt from unbundling, Verizon states that it cannot be reclassified, and thus, Verizon argues, changes after

March 11, 2005 can only move wire centers from the impaired to the non-impaired (id. at 11, citing Triennial Review Remand Order at ¶ 167 n.466 and 47 C.F.R. § 51.319(e)(3)(I)). According to Verizon, a Department rule that would allow a CLEC to show that a wire center that had met the non-impairment criteria on March 11, 2005 no longer met those criteria on the date that the CLEC submitted its order would be inconsistent with the FCC's rules on changes in the classification of wire centers over time (id.).

Additionally, consistent with its position that March 11, 2005 is the relevant date for determining whether a wire center meets the FCC's criteria, Verizon further asks the Department to clarify that the back-up data provided to a CLEC need only be updated beyond March 11, 2005, if Verizon determines that the relevant wire center first met the FCC's non-impairment threshold after that date, and that the CLEC's definition of "affiliate" be rejected because there is no dispute that MCI and Verizon were not affiliates as of March 11, 2005 (Verizon Motion at 12).

b. CLECs

Several CLECs oppose Verizon's motion for clarification of this issue. CTC and Lightship argue that the clarifications that Verizon seeks are unwarranted and merely a backdoor attempt for a blind endorsement of Verizon's list of wire centers that it believes meet the non-impairment thresholds (CTC/Lightship Opposition at 5). CTC and Lightship state that Verizon may discover, after March 11, 2005, that the assumptions that it employed when it established the March 11, 2005 list were flawed or that the information that it relied on was incorrect (id. at 6). Citing the Verizon New Hampshire Wire Center Investigation, DT 0583, CTC and Lightship maintain that they have a strong basis for believing that Verizon's list for Massachusetts is indeed flawed (id. at 6-7). Under such circumstances, CTC and Lightship assert that it would be unreasonable for the Department to close the books on Verizon's wire center list before the list is ever examined (id. at 7).

XO and Conversent note that the Department's ruling to resolve disputes as they arise, and in particular, to reserve expressly the issue of MCI's status, was consistent with Verizon's argument against determining the list of wire centers in a single proceeding (Conversent Opposition at 4, citing Verizon Reply Brief at 20; XO Opposition at 2, citing Verizon Initial Brief at 143 and Verizon Reply Brief at 20). Conversent contends that by seeking to resolve the status of MCI in the absence of a specific dispute, Verizon now argues exactly the opposite of what it did in the proceeding (Conversent Opposition at 4). XO insists that Verizon cannot have it both ways (XO Opposition at 3). XO and Conversent contend that, having decided to defer scrutiny of the wire center list until a specific dispute arises, the Department should stay its course and consider whether Verizon and MCI are "affiliated" carriers only in the context of a live dispute (Conversent Opposition at 5; XO Opposition at 3).

XO also disputes Verizon's claim that the pending merger of Verizon and MCI was only speculative as of March 11, 2005 (XO Opposition at 3). XO notes that Verizon and MCI executed an Agreement and Plan Merger approved by MCI's Board of Directors nearly one month prior to March 11, 2005; thus, XO insists that on March 11, 2005 the merger was imminent (id.).

2. Analysis and Findings

Verizon's motion for clarification claims ambiguity in two statements in the Arbitration Order that "might be read to imply" that a date other than March 11, 2005 would be used to assess whether a particular wire center satisfied the FCC's non-impairment criteria. Verizon's clarification request does not demonstrate that the language in the Arbitration Order contains language that is "so ambiguous as to leave doubt as to its meaning." Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). In fact, the alleged ambiguities to which Verizon points do not exist. The Arbitration Order explicitly addresses the issue at hand. By adopting a case-by-case approach for assessing whether a wire center is non-impaired, the Department intended that issues related to whether a wire center is in fact non-impaired would be determined when a dispute, if any, arose.

In this proceeding, Verizon had argued against the CLECs' proposals to conduct a single proceeding to verify Verizon's list of exempt wire centers. Indeed, as the CLECs point out, Verizon argued:

> There is no reason to litigate in advance any issues regarding whether wire centers satisfy the FCC's non-impairment criteria for high-capacity loops under the TRRO. Verizon has not challenged any CLEC order for DS1 or DS3 loops in Massachusetts, so there is nothing, yet, for the Department to do. There are enough issues for the Department to resolve in this arbitration without trying to address hypothetical disputes. If Verizon wishes to challenge a future order from a CLEC for high-capacity loops or transport, Verizon will raise that dispute in the manner the FCC prescribed in the TRRO, not in this arbitration.

(Verizon Reply Brief at 20). Verizon further argued:

> It is Verizon's obligation - not the CLECs' - to bring any dispute over particular UNE orders to the Department for resolution. Until and unless Verizon does

> so, litigation over the classification of wire centers would be premature and wasteful of the parties' and the Department's resources.

(id. at 23-24). Verizon therefore urged the Department to adopt a case-by-case approach, stating that if specific disputes arise, "they can be litigated on an individual carrier and individual central office basis" (Verizon Initial Brief at 143-44).

In agreement with Verizon's position, the Department concluded that the case-by-case is more efficient and "takes into account future changes to wire center designations and gives effect to any changes on a rolling basis." Arbitration Order at 279, 283. The Department therefore made no findings whatsoever related to the accuracy of Verizon's proposed list of exempt wire centers.

Rather than litigating issues as disputes arise, Verizon now requests the Department to resolve conclusively the relevant date for determining whether a wire center satisfies the FCC's criteria. Verizon's request, however, is inconsistent with the case-by-case approach that Verizon advocated and the Department adopted.

Paragraph 234 of the Triennial Review Remand Order merely prescribes a case-by-case approach governing the ordering and provisioning of UNE loops or transport, including the process for Verizon to dispute a CLEC's order, and the Department's decision to assess whether a wire center satisfies the FCC's non-impairment criteria if and when a dispute arises is consistent with ¶ 234. Thus, clarification is not warranted.[8]

Moreover, in arguing that a case-by-case approach is somehow inconsistent with FCC rules on classification of wire centers, Verizon ignores the Department's finding that Verizon's list of non-impaired wire centers filed with the FCC "is not conclusive as to whether a particular wire center in fact satisfies the non-impairment criteria." See Arbitration Order at 278-79. To date, the Department has made no determinations as to which wire centers in Massachusetts are non-impaired, and thus, the FCC's rules prohibiting reclassification of wire centers from non-impaired to impaired have not yet been triggered. To find otherwise would, as the CLECs assert, legitimize Verizon's proposed list of non-impaired wire centers without the requisite Department review.

Finally, because the Department fully intended that all issues related to whether a wire center satisfies the FCC's non-impairment criteria would be determined if, and when, a dispute arises, the additional clarifications sought by Verizon are rejected. Specifically, the Department's observation that the effect of the announced merger between MCI and Verizon on wire center designations "is minimized because wire center designations will not be litigated

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[8] If Verizon's intent in seeking clarification is the inclusion or exclusion of certain MCI-owned facilities in the calculation of non-impaired wire centers, then its voluntary commitment to the FCC in the merger proceeding to exclude MCI fiber-based collocation arrangements when calculating non-impaired wire centers renders that concern moot. See, FCC Press Release, FCC Approves SBC/AT&T and Verizon/MCI Mergers (rel. October 31, 2005); see also Applications for Consent to Transfer Control of Filed by Verizon Communications, Inc. and MCI, Inc., WC Docket No. 05-75, Verizon Ex Parte to Chairman Kevin Martin at 3, Att. A (October 31, 2005).

until a dispute arises," as well as our updated data requirement, are fully consistent with the case-by-case approach adopted in the Arbitration Order. Furthermore, regarding the updated data requirement, Verizon's only challenge to the updated data requirement sought by the Competitive Carrier Group was that such a requirement was onerous (see Verizon Brief at 150).

E. 30-day Interval to Challenge CLEC Self-Certifications (Supplemental Issues 1-3)

1. Positions of the Parties

a. Verizon

Verizon urges the Department to reconsider the 30-day interval adopted by the Department for Verizon to dispute a CLEC's certification of entitlement to a UNE loop or transport facility and to seek retroactive pricing because, Verizon argues, it was selected without the benefit of briefing by the parties, and is unnecessary and unreasonable (Verizon Motion at 12-13). Verizon argues that if a CLEC orders a UNE facility that is not a UNE under the FCC's non-impairment criteria, then as a matter of law the facility was never a UNE and the CLEC was never entitled to obtain it at UNE rates (id. at 13). Verizon therefore argues that it is inappropriate to require Verizon to bear the risk of missing an artificial 30-day deadline to recover charges to which Verizon is legally entitled (id.). Furthermore, Verizon asserts that any such deadline creates an arbitrage opportunity, and that there is no reason to depart from the practice in its interconnection agreements that typically permit backbilling for any period of time for which a service has been provided but not fully billed, limited only by the applicable statute of limitations (id.).

Verizon also argues that the Department's decision adopting the 30-day deadline was mistakenly based on insufficient information (Verizon Motion at 14). Verizon insists that 30 days is not enough time for Verizon to identify the loop or transport orders that are inconsistent with Verizon's wire center data and to generate letters notifying the CLEC of Verizon's intent to dispute their certifications (id. at 13). Verizon notes that it has implemented a process by which review of its monthly billing reports triggers the preparation of a dispute notice letter to a CLEC where the certification is inconsistent with Verizon's data (id. at 13-14). Because Verizon's billing reports are generated only once a month, an erroneous CLEC certification received at the beginning of a month would not trigger the notice letter within the 30-day period and provide sufficient time to generate a notification letter to the CLEC (id. at 14). Verizon suggests that if the Department determines that any time limit is justified, a 90-day limit is more appropriate and would have little impact on the total amount of a retroactive bill to the CLEC should Verizon prevail (id.).

b. CLECs

The CLECs urge the Department to deny Verizon's motion for the Department to reconsider the 30-day time period to dispute a CLEC's self-certification. Noting the Michigan Public Service Commission's 10-day deadline requirement for Verizon and SBC, CTC and Lightship state that a 30-day period is generous (CTC/Lightship Opposition at 8). CTC and Lightship assert that Verizon has the capability to generate pre-bills on an hourly, daily or weekly basis to trigger when a dispute notice letter is sent, and that Verizon could implement a more time sensitive solution, as it must do in Michigan to comply with the 10-day deadline (id. at 9).

AT&T also maintains that the accrual of large retroactive bills is a real concern for CLECs and creates contingent liabilities and problems for CLECs (AT&T Opposition at 2). XO argues that the ongoing threat of litigation by Verizon would also adversely impact the abilities of CLECs to manage long term development of their networks (XO Opposition at 4). CTC and Lightship further note that allowing Verizon to delay before filing a dispute exposes CLECs to financial liabilities that it would unlikely be able to recover from customers (CTC/Lightship Opposition at 8). AT&T states that the Department's decision reflects a reasonable balance that allows Verizon to challenge a CLEC's certification, but imposes a reasonable deadline necessary to prevent accrual of large retroactive bills if Verizon delays challenging a CLEC certification (AT&T Opposition at 1).

AT&T further argues that neither Verizon's concern regarding arbitrage nor its argument that backbilling is a routine practice warrants reconsideration of the Department's order (AT&T Opposition at 2). AT&T states that arbitrage would require CLECs systemically to commit fraud and Verizon to fail to implement systems to catch it, neither of which, argues AT&T, is likely (id.). According to AT&T, if Verizon fails to implement systems to challenge a CLEC certification within 30 days, then the likelihood of false certifications is so low as to not justify the incurrence of costs to detect them (id.). AT&T asserts that the risk of missing the 30 day deadline is completely within Verizon's control, and that any cost to Verizon to implement systems to challenge CLEC certifications within 30 days must be balanced against the costs that CLECs must bear in the absence of a challenge deadline (id.). Moreover, AT&T contends that Verizon has abused its right to backbill and, thus, Verizon's second basis for opposing a deadline - that backbilling is a routine practice - supports the Department's 30 day deadline by preventing such abuse (id. at 2-3). Finally, AT&T notes that Verizon does not argue that it cannot implement systems in order to meet the 30-day requirement, and that this issue, says AT&T, is simply a matter of cost (id. at 3).

XO notes that the information necessary to identify wire centers that satisfy the FCC's non-impairment criteria is within Verizon's exclusive control and that Verizon unquestionably maintains the capability to immediately analyze whether a CLEC certification should be disputed (XO Opposition at 5). XO therefore argues that identifying those CLEC orders that conflict with Verizon's proposed list of exempt wire centers and notifying the CLEC of within 30 days presents no genuine burden to Verizon (id.).

Similarly, Conversent maintains that only ministerial tasks are involved in challenging a CLEC certification (Conversent Opposition at 2). Conversent states that Verizon's decision to initiate dispute resolution is simply based on whether the UNE ordered is in a wire center on the list of wire centers that Verizon believes are non-impaired and, given that Verizon has already automated the process for sending dispute letters, there is, according to Conversent, no reason why Verizon cannot comply with a 30-day deadline (id.). Conversent also maintains that Verizon's argument that a facility that does not meet the non-impairment criteria is not, as a matter of law, a UNE to which a CLEC is entitled, has no merit (id. at 2-3). Pointing to statutes of limitations and statutes of repose, Conversent notes that the law provides many examples of situations where a party's failure to timely assert its rights risks losing those rights (id. at 3).

Finally, CTC and Lightship argue that Verizon's criticism that 30 days is unreasonable are untimely (CTC/Lightship Opposition at 9). CTC and Lightship note that the Competitive Carrier Coalition ("CCC")[9] proposed 30 days in its TRRO Amendment and advocated for it in its initial brief (id., citing CCC TRRO Amendment, § 8.3 and CCC Initial Brief at 128). Because Verizon neither provided any basis for opposing this proposal in its reply brief nor provided a counter proposal, CTC and Lightship urge the Department not to give any weight to Verizon's arguments now (id.).

2. Analysis and Findings

For the following reasons, we reject Verizon's claim in its motion for reconsideration that the Department's decision on this issue was mistakenly based upon insufficient information. In § 8.3 of its TRRO Amendment, the CCC proposed a 30-day time limit for Verizon to dispute a CLEC's self-certification that it is entitled to high capacity loop and transport UNEs at a particular wire center. The CCC supported its 30-day time limit proposal in its initial brief, arguing that the time limit was necessary "to ensure that CLECs are not unreasonably subjected to eternal uncertainty as to whether Verizon will dispute the order,

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[9] CCC consists of the following carriers: Allegiance Telecom of Massachusetts, Inc., ACN Communications Services, Inc., Adelphia Business Solutions Operations, Inc. d/b/a Telcove, CoreComm Massachusetts, Inc., CTC Communications Corp., DSLnet Communications, LLC, Focal Communications Corporation of Massachusetts, ICG Telecom Group, Inc., Level 3 Communications, LLC, Lightship Telecom, LLC, LightWave Telecommunications, INC., PaeTec Communications, Inc., RCN-BecCom, LLC, and RCN Telecom Services of Massachusetts, Inc.

specifically in the event that Verizon seeks retroactive repricing of the UNE if the order ultimately is determined to be inconsistent with applicable standards" (D.T.E. 04-33, CCC Initial Brief at 128 (filed with the Department April 5, 2005)). The CCC further maintained that the 30-day time limit was "generous" to Verizon in comparison to the Michigan Public Service Commission's directive requiring Verizon to file such disputes within 10 days (id.).

Despite Verizon's assertion (see Verizon Motion at 12-14) that the matter was not briefed, the CCC, as noted above, did in fact include the matter in its brief (see D.T.E. 04-33, CCC Initial Brief at 128 (filed with the Department April 5, 2005)). Verizon, however, did not address CCC's proposal in its brief or reply brief, but waited until its motion for reconsideration to argue that the Department should not have approved CCC's proposal. Therefore, we do not regard the record information on this issue as "insufficient." Rather, deficiencies, if any, should have been addressed by Verizon during the underlying proceeding.

Moreover, even if the Department were to consider the arguments that Verizon presents for the first time on reconsideration, the Department would deny Verizon's request. In its motion for reconsideration, Verizon explains that the process it has implemented for triggering a dispute letter is based upon its billing reports, which Verizon states are generated only once a month, and thus, according to Verizon, 30 days is not enough time to trigger and generate the CLEC notice letter. We are not persuaded by Verizon's argument, however.

As AT&T points out, nowhere in its motion for reconsideration does Verizon argue that it is unable to implement systems, or to modify its current process, to meet the 30-day time limit. While Verizon's systems may not now be able to identify those CLEC orders which involve a wire center that Verizon believes is non-impaired,[10] and generate CLEC notice letters within the 30-day time limit we impose, we conclude that adjustments to its current process in Massachusetts is feasible when such a process is already required of Verizon in order to meet the 10-day time limit imposed by the Michigan Public Service Commission.

Lastly, we remain unpersuaded by Verizon's claim of a risk of arbitrage from the 30-day interval. By implementing systems to meet the 30-day limit, a task we regard as feasible, Verizon should be able to reduce and likely eliminate arbitrage opportunity. Accordingly, we disallow Verizon's request for reconsideration on this point. We note, however, that, if, during the term of the arbitrated interconnection agreements, Verizon detects a pattern of error in self-certification, suggesting that arbitrage may have become a problem, Verizon is at liberty to draw pertinent evidence of such behavior to our attention and request an investigation. Establishing arbitration terms that streamline business dealings is our goal in this docket; but pursuing that goal should not provide an opportunity for unacceptable practices.

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[10] Of the 125 wire centers in Massachusetts, Verizon identifies 28 wire centers (about 20 percent) as non-impaired with respect to high-capacity loop and/or dedicated transport UNEs. See Verizon Ex Parte, from Susanne G. Geyer to Marlene H. Dortch, In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, CC Docket No. 01-338 (filed with the FCC Feb. 18. 2005). Tracking orders that are eligible in only 28 wire centers does not appear infeasible in 30 days.

F. DS1 Cap (Issues 3, 4 and 5)

1. Positions of the Parties

a. CTC/Lightship

CTC and Lightship argue that the Department erred when it applied the FCC's requirements regarding the cap on 10 DS1 transport circuits (CTC/Lightship Motion at 3). CTC and Lightship argue that the Department should have looked to the text of the FCC's Triennial Review Remand Order rather than rely solely on the plain language of the rule because the FCC has stated that its orders are part of its rules and must be read in conjunction with them (id. at 4).[11] In addition, CTC and Lightship argue that the Department should not apply a "blind"approach (i.e., relying only on rule language and not language in the text of an order) because the Department is statutorily charged with promoting competition and protecting the public interest (id.).

b. Conversent

Conversent argues that the text of the Triennial Review Remand Order clearly states that the 10 DS1 cap applies only on routes where DS3 unbundling is not required (Conversent Motion at 2). Conversent argues that the Department was incorrect to rely only on the FCC's regulation and to ignore the explanation included within the FCC's order (id.). Rather, argues Conversent, courts, including the United States Supreme Court, Appeals Courts, and the FCC, read the FCC's regulations together with the interpretive text in FCC orders to determine the

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11 CTC and Lightship explain that the plain language of the FCC rule appears to support Verizon's position, while the text of the Triennial Review Remand Order supports the CLECs' position (CTC/Lightship Motion at 4).

meaning and effect of FCC rules (id.).[12] Conversent also argues that the case upon which the Department relied in its analysis, United States v. Lachman, 387 F.3d 42 (1st Cir. 2004), deals with informal, unpublished agency statements, and is inapposite to the instant issue, which concerns the interpretative text of a final FCC order (id. at 9-10).

c. Verizon

Verizon argues that the Department did not err when it applied the FCC's rule as written (Verizon Opposition at 2). Verizon argues that principles of statutory construction also apply to administrative regulations, including the FCC's regulations, and that, in the absence of ambiguity of the rule at issue, the Department was justified in not looking to the FCC's discussion of the rule in the text of the FCC's order (id. at 4). While Verizon agrees that the FCC may impose regulatory requirements either through rules or orders, the text in an FCC order may not be read to override an unambiguous rule (id. at 7).

In addition, Verizon argues that the rule at issue here is not inconsistent with the text of the FCC's order (id.). Verizon argues that the paragraph the CLECs point to in support of the argument that the DS1 cap applies only to those routes where DS3 unbundling is not required, is more properly read that the DS1 cap also applies to routes where DS3 unbundling is not required (id.). Finally, Verizon argues that the Department is required to implement the

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[12] In its Motion, Conversent provides citations to and discussion of Verizon v. FCC, 535 U.S. 457 (2002); SBC v. FCC, Case No. 03-4311 (3rd Cir. July 14, 2005); and several FCC cases which, Conversent asserts, support its argument that the text of FCC orders supplement FCC rules, and must be read in conjunction with them even in the absence of ambiguity in the rules (Conversent Motion at 3-9).

FCC's rules as the FCC drafted them and is precluded from requiring unbundling where the FCC has decided against it (id. at 9).

2. Analysis and Findings

The FCC's rule on the DS1 cap states, in its entirety:

> Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

47 C.F.R. § 51.319(e)(2)(ii)(B). The text in the Triennial Review Remand Order that the CLECs assert conflicts with this rule states, in its entirety:

> Limitation on DS1 Transport. On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits. This is consistent with the pricing efficiencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s. When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.

Triennial Review Remand Order at ¶ 128 (internal footnote omitted). The FCC rule, as indicated above, is not ambiguous. It is quite clear that up to ten unbundled DS1 circuits are available "on each route" where DS1 circuits are available on an unbundled basis. Likewise, there is no inconsistency between this statement and the text of the above-quoted paragraph from the Triennial Review Remand Order. According to the paragraph, a route upon which DS3 unbundling is not required, but upon which DS1 unbundling is required, is subject to the DS1 cap. The paragraph does not contain any language to indicate that "only" routes not subject to DS3 unbundling are subject to the DS1 cap. Moreover, applying the DS1 cap to routes on which DS3 unbundling is required (in addition to routes upon which it is not required) encourages CLECs to take advantage of the efficiencies inherent in purchasing unbundled DS3s rather than numerous, unlimited unbundled DS1s. The FCC promotes this efficiency elsewhere in the Triennial Review Order by imposing caps on DS1 loops, DS3 loops, and DS3 transport, each time for the stated purpose of encouraging efficient traffic aggregation. See Triennial Review Order at ¶¶ 131, 177, 181. Therefore, because there is no ambiguity in the rule and no inconsistency between the rule and the text of the order, the Department will not alter its conclusion in the Arbitration Order regarding the applicability of the DS1 cap.

G. Embedded Base (Issues 3, 4, 5)

1. Positions of the Parties

a. AT&T

AT&T argues that the rule relied upon by the Department in concluding that "additional lines, moves, or changes are not included in the 'embedded base' for which CLECs may obtain transition pricing" does not support the Department's conclusion (AT&T Motion at 6). AT&T contends that the rule provides in relevant part that ILECs are required to provide access to unbundled switching for a CLEC "to serve its embedded base of end-user customers," which means that the embedded base is defined according to the customers, not according to the switching arrangements (id. at 7).

In the alternative, AT&T argues that if the Department declines to reconsider its determination that CLECs may not obtain additional lines for customers who were part of the embedded base, it must still require Verizon to process feature changes for customers who are part of the embedded base (id.). AT&T contends that feature changes are not new UNEs, and that feature changes are a component of AT&T's right to use the existing switching UNE (id.). AT&T argues that the Department should either approve AT&T's proposed contract language, or clarify that AT&T is entitled to order feature changes for its embedded base customers without losing transition pricing (id. at 8).

AT&T also argues that the Department's exclusion of four-line carve-out customers from the embedded base is inconsistent with the plain language of the Triennial Review Remand Order (id. at 5). AT&T argues that the Triennial Review Remand Order is emphatic that the 12 month transition plan applies to all DS0 UNE-P arrangements, and does not contain an exception for four-line carve-out customers (id.). AT&T contends that the Triennial Review Remand Order laid to rest, once and for all, the contention that the FCC had determined in an earlier decision that customers with four or more lines were part of the enterprise market, by stating in a footnote that the "Triennial Review Order left unresolved the issue of the appropriate number of DS0 lines that distinguishes mass market customers from enterprise customers for unbundled local switching" (id.). AT&T contends that as of the date the embedded base was determined, all of AT&T's Massachusetts UNE-P customers, including four-line carve-out customers, were still receiving UNE-P under the terms of AT&T's existing interconnection agreement (id. at 6). AT&T argues that Verizon never sought to implement the four-line carve-out with respect to AT&T, and that accordingly, the Department should direct that the final Amendment should strike all references to the four-line carve-out, at least with respect to AT&T (id.).

b. Verizon

With respect to AT&T's argument concerning changes to the embedded base of UNE-P arrangements, Verizon contends that AT&T's discussion of the FCC rule omits the relevant sentence in the rule, which provides that "[r]equesting carriers may not obtain new local switching as an unbundled network element" (Verizon Opposition at 19-20). Verizon argues that the complete text of the rule, as well as the FCC's intent to transition CLECs away from UNEs, mandates the decision reached by the Department (id. at 20). Verizon argues that AT&T's argument is moot because more than 90 percent of Verizon's UNE-P lines have already been migrated to replacement services, and because Verizon is willing to process changes for embedded base UNE-P arrangements where a change is necessary to permit the end-user to add or remove vertical services (id.). Verizon notes that it is unwilling to process changes which do not affect the end-user's service, such as commingling (id.).

With respect to the four-line carve out, Verizon argues that although AT&T does not contest the Department's assertion that the FCC instituted the four-line carve-out in the UNE Remand Order[13] and reaffirmed its institution in the Triennial Review Order, AT&T nevertheless argues that the FCC eliminated the four-line carve out in a footnote in the

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13 In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) ("UNE Remand Order").

Triennial Review Remand Order (id. at 37). Verizon contends that it "strains credulity"for AT&T to suggest that the FCC would have overruled both the UNE Remand Order and the Triennial Review Order without any discussion (id.). Verizon argues that the purpose of the Triennial Review Remand Order was to address issues which had been vacated or remanded to the FCC, and that the Department cannot presume that the FCC intended, in a footnote, to reverse prior rulings that had not been reversed or remanded (id.).

Verizon contends that the four-line carve-out rule is applicable only in density zone one[14] in the top 50 Metropolitan Statistical Areas ("MSA")[15] (id. at 38). Verizon argues that the footnote upon which AT&T relies merely refers to that fact that the Triennial Review Order delegated to state commissions the task of determining the number of DS0 lines that would distinguish the enterprise market from the mass market for the rest of the country outside of density zone one in the top 50 MSAs, but that the D.C. Circuit vacated that delegation (id.).

Verizon argues that the FCC has always treated the four-line carve out as part of its enterprise market unbundling regime, and that the FCC emphasized in the Triennial Review

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14 The FCC's rules define the parameters for the establishment of density pricing zones that allow price-cap LECs to charge geographically deaveraged rates for switched transport services. Density zone one is the geographic area with the highest access line density and amount of traffic volume. 47 C.F.R. § 69.123; see also UNE Remand Order at ¶ 278 n.550.

15 An MSA is made up of a county or group of contiguous counties surrounding a city with a population of 50,000 or more. The Office of Management and Budget defines MSAs for use in federal statistical activities pursuant to 44 U.S.C. § 3504(d)(3) and 31 U.S.C. § 1104(d). See UNE Remand Order at ¶ 279 n.551.

Remand Order that “the D.C. Circuit upheld our enterprise switching rules, and consequently, there are not at issue here” (id. at 37-38).

Verizon argues that it was required to amend its interconnection agreement with AT&T before it could implement the four-line carve-out with respect to AT&T, and that the Department must not allow “the vagaries of case scheduling” to nullify the FCC’s longstanding four-line carve-out policy and rules (id. at 39-40).

2. Analysis and Findings

The Department rejects AT&T’s attempt to expand the embedded base to include four-line carve-out customers and moves, adds, and changes. With respect to moves, adds, and changes, although AT&T argues that the rule cited by the Department does not support our conclusion, AT&T cites selectively from the rule. AT&T omits the relevant provision of the rule, which states that “requesting carriers may not obtain new local switching as an unbundled network element.” 47 C.F.R. § 51.319(d)(2)(iii). Accordingly, we do not disturb our conclusion that the embedded base may not continue to grow through additional lines. See Arbitration Order at 76. Furthermore, as to feature changes, AT&T raises the same arguments already rejected by the Department in the Arbitration Order. Thus, reconsideration is not warranted.

With respect to four-line carve-out customers, again AT&T raises the same arguments already rejected in the Department’s Arbitration Order. We find no merit in AT&T’s argument that footnote 625 of the Triennial Review Remand Order somehow overturns the FCC’s prior determinations concerning the four-line carve-out rule in the UNE Remand Order and the Triennial Review Order. The footnote refers to the task formerly delegated to state commissions, a delegation which was vacated by the D.C. Circuit, that of determining the point at which mass market customers with multiple DS0 lines would be "carved out" of the mass market outside of density zone one in the top 50 MSAs. But, that determination is irrelevant because the FCC also eliminated unbundled access to local circuit switching for the mass market. See Triennial Review Remand Order at n.625. Four-line carve-out customers have been excluded from the mass market since the FCC instituted the four-line carve-out rule in 1999. Therefore, only mass market customers are part of the embedded base of customers which is eligible for transition pricing pursuant to the Triennial Review Remand Order. As we stated in the Arbitration Order at 79, the delay in implementing the four-line carve-out rule in Massachusetts "does not serve to negate the operation of the FCC's unbundling regime." Furthermore, permitting carriers to profit from the delay would only complicate Department efforts to implement future changes to FCC rules.

H. Definition of Dedicated Transport (Issue 9)

1. Positions of the Parties

a. Verizon

Verizon argues that the definition adopted by the Department for dedicated transport creates a possible ambiguity because it includes language to bring within the definition a transmission path between a Verizon wire center and Verizon switching equipment located at a CLEC's premises (Verizon Motion at 14, citing Arbitration Order at 103). Verizon argues that, in order to remove any ambiguity, the definition must be harmonized with the

Department's findings on "reverse collocation" where the Department found that "the FCC did not incorporate equipment other than line-side switching facilities into its definition of ILEC wire centers for the purpose of dedicated transport" (id. at 14-15, citing Arbitration Order at 222). No CLEC opposed Verizon's request for clarification of this issue.

2. Analysis and Findings

The Department grants Verizon's request for clarification. The Department determines that only transmission paths between an ILEC wire center and an ILEC switch with line-side functionality that is reverse collocated at a CLEC's premise need be included in the definition of dedicated transport. Granting the requested clarification is consistent with our holdings on reverse collocation and the Triennial Review Remand Order. Moreover, by making the limitation explicit, it clarifies the unbundling requirements for dedicated transport, and thus, removes ambiguity that could lead to disputes.

I. Definition for Commingling (Issue 9)

1. Positions of the Parties

a. XO

XO asks the Department to reconsider its decision not to define the term commingling, arguing that the parties interconnection agreements must be amended to incorporate the FCC's new definition in 47 C.F.R. § 51.5 (XO Motion at 2-5). XO contends that the Triennial Review Order established a new commingling obligation for ILECs and added to 47 C.F.R. § 51.5 the following definition for commingling: "Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services" (id. at 3-4).

XO claims that existing interconnection agreements do not reflect Verizon's new commingling obligations or the FCC's new definition for commingling (XO Motion at 4). Thus, XO contends that the Department's conclusion that the term commingling was not redefined or modified by the Triennial Review Order and as a result does not need to be defined in the parties interconnection agreements must be reconsidered (id. at 5). XO states that its proposed contract language accurately defines the term (id.).

b. Verizon

Verizon does not object to XO's request and considers it useful to include a definition of commingling in the parties' agreements (Verizon Opposition at 17). Verizon proposes adding the following definition: "Commingling. Shall have the meaning set forth in 47 C.F.R. 51.5. 'Commingle' means the act of Commingling" (id.).

2. Analysis and Findings

In the Order, the Department determined not to amend the parties' agreements to define certain terms "that were already defined and were not modified as a result of the Triennial Review Order and the Triennial Review Remand Order," including "commingling." Arbitration Order at 90 n.44. XO, however, is correct that the FCC included a new definition for commingling in the Triennial Review Order, reflecting an ILEC's new commingling obligations. Therefore, the Department modifies its determination that there was no need to include a definition for commingling. The parties shall include in the Amendment the definition contained in 47 C.F.R. § 51.5 for commingling.

J. Effective Date of Commingling, Conversion, Combinations, and Routine Network Modifications Requirements (Issues 12, 20 and 24)

1. Positions of the Parties

a. Verizon

In its Motion for Reconsideration, Verizon argues that not all of the ICAs of CLECs referenced in Section IV of the Arbitration Order are "self-executing" with respect to all changes in law (Verizon Motion at 7-8). According to Verizon, the ICAs of CLECs in Groups 1, 2, 3, 4, and 6 discussed in Section IV of the Arbitration Order are self-executing with regard to elimination of UNEs, but are not self-executing with regard to other requirements, such as the conversion, commingling, and combination requirements in the Triennial Review Order (id. at 8). Verizon argues that the Department correctly found in the Arbitration Order that negotiation and ICA amendment is required when a change of law affects an ongoing right or obligation, and not when a right or obligation is entirely eliminated, as with UNEs (id.). Therefore, Verizon argues that the Department should clarify that the FCC's rules regarding conversions, commingling, combinations, and routine network modifications will be effective for those carriers on the date those carriers execute amendments to existing ICAs, and not as of October 2, 2003, the effective date of the Triennial Review Order (id. at 9).

In response to XO's argument that Verizon's commingling and routine network modifications obligations are effective on the date of issuance of the Department's Arbitration Order (i.e., July 14, 2005), Verizon agrees that the effectiveness of the Department's Order is not delayed while the parties incorporate the Department's rulings into amendment language (Verizon Opposition at 17-18).

b. XO

XO argues that the Department effective date of Verizon's commingling and routine network modifications obligations under the Triennial Review Order is July 14, 2005, the date of issuance of the Department's Arbitration Order (XO Motion at 5). XO argues that the Department must order Verizon to: 1) process all CLEC orders submitted after July 14, 2005 to commingle § 251 UNEs and UNE combinations with other wholesale services; and (2) perform routine network modifications, regardless of whether an amendment has been executed (id. at 6). In the alternative, suggests XO, the Department should order that Verizon and CLECs immediately execute an amendment which implements Verizon's commingling and routine network modification obligations (id.).

c. CTC/Lightship

CTC and Lightship argue that the Department was correct to determine that Verizon was obligated to provide them with conversions, commingling, and combinations as of October 2, 2003 (CTC/Lightship Opposition at 1). CTC and Lightship argue that CLECs were entitled to commingling and conversions as of October 2, 2003, regardless of the terms of the change of law provisions in their ICAs because there was no change of law as to Verizon's basic obligation to convert services obtained under tariff to UNEs (id. at 1-2). Because there was no change of law, argues CTC and Lightship, there is no need for an ICA amendment for a CLEC to obtain conversions (id. at 2).

In addition, CTC and Lightship argue that, even if Verizon's obligations were considered "new obligations," the terms of CTC and Lightship's ICAs are self-executing with regard to combinations, and therefore, the new obligations automatically went into effect on October 2, 2003 (id. at 2-3). Moreover, CTC and Lightship argue that Verizon's implication that the ICAs need to be amended is nonsensical, because the FCC's pre-Triennial Review Order service eligibility criteria for combinations were not set forth in the ICAs either, but were applied nonetheless because that was the "Applicable Law" (id. at 3-4). CTC and Lightship conclude that, to the extent that the Triennial Review Order changed the applicable law upon which Verizon must provision combinations, and because CTC and Lightship's ICAs require Verizon to provide them in accordance with "Applicable Law," Verizon's obligations to provision combinations in accordance with the new criteria automatically changed when the Triennial Review Order went into effect on October 2, 2003 (id. at 4).

2. Analysis and Findings

The analysis in the Arbitration Order regarding the effective date of Verizon's obligations to provide commingling, conversions, combinations, and routine network modifications rested on the Department's determination whether a CLEC had an ICA with "self-executing" change of law provisions (wherein no amendment to the ICA was necessary to implement changes of law prior to Verizon discontinuing a UNE), or whether the CLEC was subject to the full arbitration process which would result in an ICA amendment incorporating the changes of law. The Department concluded that if a CLEC's ICA had a self-executing change of law provision (as discussed in Section IV of the Arbitration Order), then the effective date of Verizon's obligations regarding commingling, conversions, combinations, and routine network modifications was the effective date of the Triennial Review Order (i.e., October 2, 2003).[16] If, however, the CLEC was subject to the arbitration process, the effective date of Verizon's obligations regarding commingling, conversions, combinations, and routine network modifications was the issuance date of the Department's Arbitration Order (i.e.,

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16 The CLECs in this category are Acceris Communications Corp. f/k/a Worldxchange Corp., ACC National Telecom Corp., ACN Communications Services, Inc., BCN Telecom f/k/a NUI Telecom, Inc., BrahmaCom, Inc., Broadview Networks, Inc., Broadview NP Acquisition Corp., Budget Phone, Inc., Bullseye Telecom, Inc., Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp., Covista, Inc., CTC Communications Corp., DSCI Corp., DSLnet Communications, LLC, Equal Access Networks, Focal Communications Corp. of Massachusetts, ICG Telecom Group, KMC Telecom V, Inc., Level 3 Communications, LLC, Lightship Telecom LLC, LightWave Communications, Inc., MCI WorldCom Communications, Inc. as successor to Rhythm Links, Inc., McGraw Communications, Inc., New Horizons Communications Corp., PaeTec Communications, Inc., Sprint Communications Company, and Talk America, Inc.

July 14, 2005).[17] See Arbitration Order at 135 and n.61, 189. This conclusion was consistent with the Department's determinations regarding the effective date of all the rules promulgated by the Triennial Review Order, including the UNEs delisted by that order, with the exception of line sharing.[18]

The Department can quickly address XO's concern regarding the effective date of Verizon's commingling, conversions, combinations, and routine network modifications obligations as they pertain to XO. Because XO falls in the second category of CLECs (i.e., those subject to the arbitration process (see n.17, above)), the effective date of these

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17 The CLECs in this category are Allegiance Telecom of Massachusetts, Inc., AT&T Communications of New England, Inc., A.R.C. Networks, Inc., Brooks Fiber Communications of Massachusetts, Inc., C2C Fiber of Massachusetts LLC, Comcast Phone of Massachusetts, Inc., Conversent Communications of Massachusetts, LLC, CoreComm Massachusetts, Inc., DIECA d/b/a Covad Communications Corp., Eagle Communications, Inc., Freedom Ring Communications LLC d/b/a Bay Ring Communications, Global Crossing Local Services, Inc., IDT America Corp., Intermedia Communications, Inc., Looking Glass Networks, Inc., MCI WorldCom Communications, Inc., MCIMetroAccess Transmission Services LLC, Metropolitan Telecommunications of Massachusetts, Inc. d/b/a MetTel, Neutral Tandem–Massachusetts LLC, PNG Telecommunications, Inc., Qwest Communications Corp., RCN-BecoCom LLC, RCN Telecom Services of Massachusetts, Inc., RNK, Inc. d/b/a RNK Telecom, SpectroTel, Inc., Teleport Communications-Boston, Inc., US WEST Enterprise America, Inc. d/b/a !nterprise, Volo Communications of Massachusetts, Inc., Vylink Communications, Inc., WilTel Local Network LLC, XO Massachusetts, Inc., and Yipes Transmission, Inc.

18 As discussed in the Arbitration Order at 70-75, the effective date for the Triennial Review Remand Order UNE delistings (subject to the mandatory transition periods) was March 11, 2005. Similarly, line sharing was also subject to a mandatory transition period, established in the Triennial Review Order, and therefore, had an effective date of October 2, 2003, notwithstanding whether a CLEC's ICA had been deemed "self-executing" in Section IV of the Department's Order. Arbitration Order at 185.

obligations is July 14, 2005. Therefore, consistent with the Arbitration Order, the Department determines that Verizon must process all XO's orders submitted after July 14, 2005 to commingle § 251 UNEs and UNE combinations with other wholesale services, and perform routine network modifications, regardless of whether an amendment with XO has yet been executed.[19]

We now turn to the question raised by Verizon: whether the CLECs in the first category (see n.16, above) have ICAs with change of law provisions that are self-executing only as to elimination of Verizon's UNE obligations, but are not self-executing as to other changes of law, or, in other words, whether an ICA amendment is required to implement other changes of law arising from the Triennial Review Order, including the changes of law relating to conversions, commingling, combinations, and routine network modifications. We note that all of the CLECs that Verizon now asserts must amend their ICAs to implement certain changes of law, were among those CLECs that Verizon sought to withdraw from this arbitration proceeding in its Notice of Withdrawal of Petition on the grounds that amendments were not necessary to implement changes of law for those CLECs (see Verizon Notice of Withdrawal of Petition for Arbitration as to Certain Parties at 1-2 (filed August 20, 2004)

[19] In the Arbitration Order at 189, the Department stated that we "find no need to delay the effectiveness of our rulings while the parties incorporate these rulings into final amendment language."

("Notice of Withdrawal")).[20] Verizon did not indicate that it was requesting withdrawal of these CLECs only as to certain issues; rather, Verizon argued that there was no need for an amendment to implement changes of law as to these CLECs (Notice of Withdrawal at 2).

Moreover, in its response to the Department's briefing questions, in which the Department requested that parties identify provisions within their ICAs which governed changes of law and dispute resolution, Verizon never argued that amendment of these CLECs' ICAs was required for any issue. Rather, Verizon argued, "to arbitrate contract revisions for these CLECs would improperly alter the existing terms of the parties' agreements and deny Verizon MA specific contractual rights under its [ICAs]" (Verizon Response to Briefing Questions Issued on March 1, 2005, at 2 (filed April 1, 2005)). Verizon further argued that "[b]ecause there is no need to amend the agreements to give Verizon MA the contractual right to discontinue providing certain UNEs <u>or otherwise comply with binding federal law</u>, the dispute resolution provisions contained in the [ICAs] are not invoked under these circumstances" (<u>id.</u> at 26-27) (emphasis added). It is only now, on reconsideration, that Verizon suggests that these CLECs' ICAs are self-executing as to certain issues only, and that these CLECs must, in fact, amend their ICAs after all in order to implement some, but not all, changes of law arising from the <u>Triennial Review Order</u>.

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20 The Department denied Verizon's request to withdraw those CLECs who had filed Answers to Verizon's Petition for Arbitration or had otherwise indicated their intent to participate in the proceeding. <u>Procedural Order</u>, D.T.E. 04-33, at 20-26 (Dec. 15, 2004).

The Department has long denied reconsideration when the request rests on an issue presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987).[21] When, as here, the argument proposed on reconsideration is opposite to the position taken by the party throughout the proceeding to date, the Department has an even greater incentive to deny the reconsideration request.

In the Arbitration Order, at 16, the Department noted that when a change of law results in an "ongoing right or obligation under the interconnection agreement," the parties have a duty to negotiate an amendment to the interconnection agreement. The new rules on conversions, commingling, combinations, and routine network modifications did not result in a modification of ongoing rights or obligations under the interconnection agreement. These obligations are new obligations. While, as Verizon argues, the parties ordinarily must negotiate terms for new obligations not currently provided for under their interconnection agreements, we determine that in this case, commingling, conversions, combinations, and routine network modifications should have been made available from the effective date of the Triennial Review Order.

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21 Cf. Jorge Rivera Surillo & Co., Inc. v. Falconer Glass Industries, Inc., 37 F.3d 25, 29 (1st Cir. 1994), National Metal Finishing Co., Inc. v. BarclaysAmerican/Commercial, Inc., 899 F.2d 119, 123 (1st Cir. 1990) (holding that Fed. R. Civ. P. 59(e) does not allow parties to raise new arguments on reconsideration that should have been raised earlier); Federal Deposit Ins. Corp. v. World Univ., Inc., 978 F.2d 10, 16 (1st Cir. 1992) ("Rule 59(e) motions are aimed at reconsideration, not initial consideration. . . . They may not be used to argue a new legal theory").

It would be inconsistent to allow Verizon to withdraw CLECs' access to those UNEs delisted by the Triennial Review Order as of the effective date of that order (i.e., October 2, 2003), subject to applicable notice periods, but not to allow those CLECs to receive any benefits to them arising from the Triennial Review Order's rules on commingling, conversions, combinations, and routine network modifications until more than two years later. Moreover, Verizon's actions in requesting withdrawal of those CLECs on the basis that no amendment was needed supports our conclusion that all of the Triennial Review Order rules should be implemented as of the effective date of that order as to those CLECs. The Department concludes that an asymmetrical application of the FCC's rules was not the intent of the FCC in promulgating the changes of law in the Triennial Review Order. Likewise, an inconsistent application of the Triennial Review Order's rules was not the Department's intent when we issued the Arbitration Order. Therefore, the Department declines to alter its conclusions in the Arbitration Order concerning the effective dates of the FCC's rules on commingling, conversions, combinations, and routine network modifications.

K. Commingling of Delisted UNEs During Transition Period (Issues 12, 20 and 24)

1. Positions of the Parties

a. XO

XO requests that the Department reconsider its ruling that CLECs cannot commingle delisted § 251 UNEs with special access facilities during the transition period and obtain transition pricing for the delisted UNEs (XO Motion at 7). XO contends that commingling of delisted UNEs does not constitute a "change" to those facilities that would remove them from the CLECs' embedded base, because Verizon "need not make any physical change to existing DS1 and DS3 dedicated transport circuits" to comply with its commingling obligations, and that Verizon's discretionary action of assigning new circuit identification numbers to commingled arrangements is not a physical change (id.).

b. Verizon

Verizon argues that the Department's ruling "does not depend on whether a given change is a 'physical' one or not" and that XO's "proffered distinction between physical and non-physical changes to a UNE facility is thus illusory" (Verizon Opposition at 18). Verizon contends that XO provides no basis for its position that commingling does not constitute a change in the features or characteristics of a UNE loop or dedicated transport facility (id.). Thus, according to Verizon, the Department should not permit XO to retain "preferential transition pricing for de-listed UNEs" where the UNE has been removed from the embedded base through commingling with special access facilities (id.).

2. Analysis and Findings

In the Arbitration Order, the Department found that moves, adds, or changes are not included in the embedded base during the transition period. Arbitration Order at 76. The Department further found that commingling would constitute a change to the embedded base. Id. at 140-141. Accordingly, the Department concluded that CLECs could not commingle delisted UNES with other wholesale facilities (e.g., special access services). Id. XO requests that the Department reconsider its ruling that CLECs cannot commingle delisted § 251 UNEs with special access facilities during the transition period and obtain transition pricing for the delisted UNEs.

Upon further consideration of this issue, the Department finds that it was incorrect in determining that commingling of delisted UNEs with other wholesale services constitutes a change to the embedded base. We conclude that, unlike other changes (e.g., feature changes, which expand the scope of the UNE offering), commingling does not change the features or characteristics of the existing UNEs, but rather combines existing UNE arrangements in an unchanged form with other wholesale facilities. This is an administrative function (i.e., assigning new circuit identification numbers), but there is no change to the existing UNEs.[22]

Even if commingling of delisted UNEs with special access services during the transition period constituted a "change," it is not the type of "change" that the Department sought to prevent by our decision in the Arbitration Order that excluded moves, adds and changes from the embedded base. In the Arbitration Order, the Department found that "once the embedded base is defined it may not continue to grow through additional lines, moves, changes or new customers. Such a result would be contrary to the FCC's rules, which clearly state that

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[22] In defining the embedded base as of March 11, 2005, the Department took a "snapshot" of all delisted UNEs subject to transition pricing at that point in time. This picture of facilities or services eligible for transition pricing cannot be increased by changes to the service of existing customers in the embedded base (e.g., moves, additional lines, feature changes). Wholesale facilities combined with embedded base high-capacity loop and transport UNEs does not alter the snapshot of UNEs, however; it merely adds non-UNE features to the existing picture. To require a sacrifice of transition pricing for the existing UNEs merely as a consequence of adding special access to the preexisting base would itself be a change to the embedded base forbidden by FCC rules.

CLECs may not obtain new delisted UNE arrangements." Arbitration Order at 76. However, this type of commingling would not increase the CLECs' embedded base of high-capacity UNEs, because the wholesale services (i.e., special access services) that are combined with the UNEs would be priced at tariffed or commercial rates, not at the much lower TELRIC transition rates. As we stated in the Arbitration Order, the FCC in the Triennial Review Order greatly increased the availability of commingling to prevent just such a result, where CLECs are forced "to operate two functionally equivalent networks – one network dedicated to local services and one dedicated to long distance and other services – or to choose between using UNEs and using more expensive special access services to serve their customers." Arbitration Order at 139, citing Triennial Review Order at ¶ 581.

In conclusion, Verizon is obligated to provide CLECs, until March 11, 2006, UNEs at the transition rate, where such UNEs were provided by Verizon at TELRIC on the effective date of the Triennial Review Remand Order. This class of services is the embedded base, which may not be increased per FCC direction. However, as always, Verizon is not required to provide special access services at the transition rate, for to be so required would violate the FCC's proscription on moves, adds, or changes to the embedded base. Such supplementary arrangements, where they do not violate this proscription, would be mere tariffed or commercial arrangements between ILEC and CLEC. Permitting commingling of delisted UNEs, priced at the transition rate until March 11, 2006, with other wholesale services is consistent with this reading of the Triennial Review Remand Order. Accordingly, the

Department grants XO's motion for reconsideration and requires Verizon to commingle delisted UNEs with other wholesale facilities for CLECs during the transition period.

L. Recertification of Existing EELs (Issues 12, 20 and 24)

1. Positions of the Parties

a. CLECs

CTC and Lightship, jointly, and XO ask the Department to reconsider its decision that CLECs must recertify, on a circuit-by-circuit basis, existing EELs with the FCC's new service eligibility criteria. According to the CLECs, the Department's ruling is not supported by the Triennial Review Order or the FCC's rules at 47 C.F.R. § 51.318 (XO Motion at 8; CTC/Lightship Motion at 9-10). CTC and Lightship argue that the Triennial Review Order contemplates only three scenarios under which a CLEC must meet the service eligibility criteria: (1) to convert a special access circuit to a high-capacity EEL; (2) to obtain a new high-capacity EEL; or (3) to obtain at UNE pricing part of a high-capacity loop-transport combination (commingled EEL) (CTC/Lightship Motion at 9-10). But, CTC and Lightship argue, none of these scenarios apply to pre-existing EELs (id.). In addition, CTC and Lightship point to the FCC's statement in the Triennial Review Order that only "new orders for circuits are subject to the eligibility criteria" (id. at 10, citing Triennial Review Order at ¶ 623) (emphasis omitted). CTC and Lightship point to a Vermont arbitration decision to support their position (id.). Alternatively, CTC and Lightship argue that if the Department denies its motion, CLECs should be given 30 days from the date of the denial to re-certify their EELs (CTC/Lightship Motion at n.26).

Additionally, XO argues that the FCC's service eligibility criteria apply "only on a prospective basis, where a requesting telecommunications carrier seeks access to network elements to 'establish a new circuit or to convert an existing circuit from a service to unbundled network elements'" (XO Motion at 8, citing 47 C.F.R. § 51.318(a)) (emphasis omitted). XO further contends that the Department's re-certification requirement "effectively would eliminate arrangements complying with the predecessor regulatory framework" and would impose additional expenses and burdens on CLECs (id. at 8-9).

b. Verizon

Verizon contends that the Department's decision is well supported by the Triennial Review Order and the FCC's rules (Verizon Opposition at 21). It argues that while the Triennial Review Order did not expressly state that pre-existing EELs must meet the new criteria, it also did not expressly provide for grandfathering of pre-existing EELs (id. at 21-22). According to Verizon, the three scenarios cited by CTC and Lightship in which the criteria must be met are not "exhaustive" and that, in any event, many pre-existing EELs would fall within at least one of the scenarios (id. at 22-23). Further, Verizon claims that CTC, Lightship and XO have taken portions of the Triennial Review Order and the FCC's rules out of context to support their position (id. at 23-24). Finally, Verizon asserts that the Department should place no weight on the Vermont arbitration decision and that a Washington state arbitration decision is "more probative" (id.).

2. Analysis and Findings

The CLECs have not presented any new or undisclosed information that would bear on the Department's decision, and the cited sections of the Triennial Review Order and FCC rules were previously considered by the Department in rendering its decision on this issue. Thus, the CLECs are simply rearguing an issue decided previously. Therefore, the Department declines to modify its original finding. The Department, however, recognizes that some CLECs may have delayed complying with the recertification requirement, pending a ruling from the Department on reconsideration on this issue. Verizon did not indicate that it would be adversely affected by an extension of the deadline for recertification. Accordingly, we grant CTC and Lightship's alternative request to allow CLECs 30 days from the date of this Order to certify pre-existing EELs with the new service eligibility criteria.

M. "Materiality" Standard for EEL Audits (Issues 12, 20 and 24)

1. Positions of the Parties

a. AT&T

AT&T asks the Department to reconsider its decision to adopt Verizon's contract language on the standard for EELs audits (AT&T Motion at 14). AT&T argues that Verizon's language fails to incorporate the Triennial Review Order's "materiality" standard in connection with the assessment of auditing costs (id. at 15). AT&T also contends that the amendment language should make clear that it is the auditor that determines whether a CLEC has complied in all material respects with the service eligibility criteria, not Verizon, and that non-compliance of one circuit should not result in a CLEC having to pay the entire cost of the audit or the CLEC not being reimbursed for its audit costs (id. at 15-16). Further, AT&T claims that Verizon's language would require the CLEC to pay for Verizon's internal costs of the audit, not just the cost of the independent auditor (id. at 15). Instead of Verizon's language, AT&T states that the amendment should track the language from ¶¶ 627 and 628 of the Triennial Review Order (id. at 16). Finally, AT&T assert that "either both parties' bills should be subject to verification by the auditor, or neither should" (id. at 16, n.30).

b. Verizon

Verizon argues that its proposed contract language, which the Department approved, properly implements the Triennial Review Order (Verizon Opposition at 47). According to Verizon, failure of only one circuit to meet the service eligibility criteria cannot be "anything other than a failure to comply with the criteria in a material respect" (id.). Verizon also states that it did not intend to require CLECs to pay for its internal costs, and proposes to replace the phrase "the entire cost of the audit" in § 3.4.2.7 of its proposed Amendment 2 with the phrase "the cost of the independent auditor" (id.). Regarding the issue of reciprocal verification of parties' bills, Verizon states that the Department already addressed this issue in the Order (id. at 47-48).

2. Analysis and Findings

In the Order, the Department found with respect to auditing standards and costs:

> Contrary to the CLECs arguments, we find that Verizon's language on the auditors standard of "compliance in all material respects" tracks nearly verbatim the FCC's wording in the Triennial Review Order. The FCC stated that "the independent auditor's report will conclude whether the competitive LEC complied in all material respects with the applicable service eligibility criteria." The Department does not need to determine whether the standard is

> "perfection". Furthermore, as the FCC noted, "materiality" is an accounting concept, which the independent auditor will have the responsibility to apply.
>
> In addition, we find Verizon's reciprocal provisions concerning reimbursement of audit costs generally to be reasonable. The reimbursement deadlines should not be the same because the circumstances are not the same. Verizon's costs of the audit are quickly and easily verified by the CLEC, simply by obtaining that information from the auditor. On the other hand, a CLEC's costs must be compiled and then verified by the auditor to ensure their appropriateness. These tasks take time to complete and to expect Verizon to reimburse a CLEC within 30 days of the auditor's report is unrealistic. However, to ensure that a CLEC's reimbursement is not unduly delayed while the auditor verifies the CLEC's costs, we require Verizon to reimburse CLECs within 60 days from the date of the CLEC's submission of costs to the auditor.

Arbitration Order at 132-33 (internal citations omitted).

The Department's finding that Verizon's proposed amendment language "tracks nearly verbatim the FCC's wording in the Triennial Review Order" was an overstatement. Upon further consideration, we find that Verizon's proposed amendment language fails to properly implement the FCC's "materiality" standard. While the independent auditor may find non-compliance if a single circuit did not meet the service eligibility criteria, we do not want to prejudge the independent auditor's determinations by adopting language that tends to define "materiality," which, as we noted in the Arbitration Order, is an accounting concept. Therefore, the Department reconsiders its original decision and revises Verizon's language in § 3.4.2.7 of Amendment 2 as follows. The third sentence shall state: "To the extent the independent auditor's report concludes that [CLEC] failed to comply in all material respects with the service eligibility criteria, then . . ." The fourth sentence shall state: "Should the independent auditor confirm that [CLEC] complied in all material respects with the service eligibility criteria, then . . ." These changes conform the amendment's language more precisely to the Triennial Review Order. In addition, the Department adopts Verizon's proposed wording change to address AT&T's concern about paying for Verizon's internal costs. Finally, regarding the verification of auditing costs, the Department declines to reconsider this issue, because AT&T is simply rearguing an issue previously decided.

N. FTTC and FTTH Loops (Issue 13)

1. Introduction

The CLECs seek reconsideration of the Department's determination that unbundling relief for fiber-to-the-curb ("FTTC") and fiber-to-the-home ("FTTH") loops applies both to the enterprise market and the mass market, arguing that the FCC only granted unbundling relief for FTTC and FTTH loops used to serve the mass market. Conversent, and CTC and Lightship argue that the Department should have referred to the text of the FCC order accompanying a rule when interpreting a rule, even when the rule is unambiguous, and therefore object to the Department's adherence to the "plain meaning" of the FCC rules. AT&T argues that the FCC's rules are sufficiently ambiguous to require reference to the text of the order. Verizon, on the other hand, argues that the FCC's rules are unambiguous, and the Department correctly applied the rules as written.

2. Positions of the Parties

a. CTC/Lightship

CTC and Lightship argue that the Department erred by extending unbundling relief to the enterprise market based on the "plain meaning" of FCC rules (CTC/Lightship Motion at 3). CTC and Lightship argue that, although reliance on plain meaning may be appropriate for courts, it is not appropriate for a "public utility commission that is statutorily charged and entrusted with promoting competition and protecting the public interest" (id. at 4). Rather, CTC and Lightship maintain, § 252 of the Act requires state commissions to "independently consider" whether an interconnection agreement meets the requirements of § 251 (id. at 5) (emphasis in original). CTC and Lightship further contend that if Congress had wanted arbitrators to act as "robots that would regurgitate FCC rules exactly as they had been written by the FCC" Congress would not have needed to "conscript state commissions for this task" (id.). According to CTC and Lightship, the Department will fail its obligations under the Act if it does not look to the text of the FCC's orders and fails to consider the merits independently (id.).

CTC and Lightship argue that, if the Department reconsiders its position on regulatory interpretation, then the Department should also reconsider its finding that ¶ 210 of the Triennial Review Order precludes the Competitive Carrier Coalition's position that unbundling relief is limited to the mass market (CTC/Lightship Motion at 5). CTC and Lightship assert that, as the CCC explained in its Reply Brief, ¶ 210 means that a large business customer would not be treated as an enterprise customer when it purchased services typical of a mass market customer, and that a small business customer would not be treated as a mass market customer if it ordered services typical of a large business customer (id.). CTC and Lightship therefore argues that the Department's reliance on ¶ 210 is incorrect, and that the Department should withdraw that portion of its decision regardless of the ultimate decision concerning the scope of unbundling relief (id. at 6).

Alternatively, CTC and Lightship argue that the Department should at least clarify that its determination does not apply to DS1 and DS3 loops (CTC/Lightship Motion at 6). CTC and Lightship contend that the FCC held that DS1 and DS3 unbundling requirements were unaffected by Hybrid Loop rules, but that, after briefs were submitted in the Arbitration, "it became evident that some ILECs intend to try to use the Hybrid Loop rules as a backdoor to eliminate the unbundling of DS1 and DS3 loops that were preserved by the TRRO" (id.). CTC and Lightship argue that if CLECs' access to DS1 and DS3 loops is governed by the rules concerning Hybrid Loops, then the Triennial Review Remand Order's rules governing access to DS1 and DS3 are largely irrelevant (id. at 8).

b. AT&T

AT&T contends that the FCC's definitions of FTTH and FTTC loops, reproduced below, are ambiguous:

> FTTH:
>
> A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end-user's customer premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the multiunit premises' minimum point of entry (MPOE).
>
> FTTC:
>
> A fiber-to-the-curb loop is a local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE. The fiber optic cable in the fiber-to-the-curb loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises.

(AT&T Motion at 9) (emphasis in original).

AT&T argues that the inclusion of the words "residential" and "dwelling" in the FCC's definitions mean that residential multiunit buildings are the only multiunit buildings eligible for unbundling relief which, according to AT&T, makes no sense if unbundling relief has been granted to all buildings anyway (id. at 10). AT&T contends that, in order to resolve this ambiguity, the Department must look to the FCC's stated purpose in granting unbundling relief (id.).

AT&T argues that statutes must be construed "in accordance with the Legislature's intent and in order to effectuate the purpose of their framers" and that the FCC advises "that its rules must be read in conjunction with the text of the order adopting the rule" (id. at 12). AT&T maintains that the FCC has repeatedly stated that it was granting unbundling relief in order to encourage investment and deployment of broadband to the mass market, and that the FCC found that no incentives were necessary to encourage deployment of broadband to large business customers (id. at 11-12). Because of this, argues AT&T, the Department should reverse its determination and rule that FTTC and FTTH unbundling relief is only applicable to the mass market (id. at 12).

c. Conversent

Conversent argues that the Department's determination that it will not look to the text of FCC orders when interpreting an unambiguous regulation is "incorrect, inappropriate, and, as applied in this case, counterproductive to the pro-competitive policy goals of the Telecommunications Act of 1996" (Conversent Motion for Reconsideration at 1). Conversent argues that courts, including the United States Supreme Court, Appeals Courts, and the FCC, read the FCC's regulations together with the interpretive text in FCC orders to determine the meaning and effect of FCC rules (id.).

Conversent contends that the FCC's decision to grant unbundling relief was based in substantial part on the desire to encourage broadband deployment, and unbundling relief was used sparingly for that purpose (id. at 13-14). Conversent argues that the FCC did not find unbundling relief necessary to promote broadband deployment beyond the mass market, and that the Department will harm competition in the small to medium sized business market by extending unbundling relief beyond the mass market (id. at 15).

d. Verizon

Verizon argues that the Department correctly applied the FCC's FTTC and FTTH rules, which do not limit unbundling relief to residential units or the mass market (Verizon Opposition at 11). Verizon contends that the FCC deleted references to "residential" and "residential units" from its fiber unbundling rules and replaced them with the term "customer premises" (id. at 14). Verizon contends that the FCC's deletion of the terms "residential" and "residential unit" from its final rules proves that the FCC did not intend to limit unbundling relief to mass market customers (id. at 15). Verizon argues that the Department cannot read a limitation into the FCC's rules when the FCC has eliminated it (id.).

Verizon contends that the CLECs would have the Department determine the scope of unbundling relief in Massachusetts by defining the boundary between "mass market" and "enterprise" customers and applying unbundling relief solely to the mass market (id. at 15).

Verizon argues that such an exercise by the Department would be unlawful, as the FCC cannot delegate market definitions and impairment determinations to state commissions (id.).

Verizon contends that the Department must reject CLEC's arguments to disregard the clear language of the FCC rules and to rely on "alleged intent" in the text of FCC Orders (id. at 12). Verizon argues that principles of statutory construction apply to administrative regulations, including the FCC's regulations, and that, in the absence of any ambiguity in the rule, the Department was justified in not looking to the FCC's discussion of the rule in the text of the FCC's order (id. at 4). Verizon argues that while the FCC may impose regulatory requirements either through rules or orders, the text of an FCC order may not be read to override an unambiguous rule (id. at 7). Verizon argues that the plain language of the FCC rules does not exclude enterprise customers from unbundling relief, and therefore the Department cannot read any such exclusion into the rules (id. at 13).

Verizon contends that CTC and Lightship's argument concerning the inapplicability of unbundling relief to DS1 and DS3 loops is inconsistent with the FCC rules (id. at 13). Verizon argues that FCC rules require ILECs to provide access only to the functional equivalent of a DS0 loop in overbuild situations,[23] and that CTC and Lightship's position denying unbundling relief to DS1 and DS3 loops would eliminate all unbundling relief in overbuild situations, which is in conflict with FCC rules providing for such relief (id.). In addition, Verizon argues that no party raised the limitation of unbundling relief to DS0 loops during the arbitration

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[23] This is the situation only where Verizon elects to retire existing copper loops. Triennial Review Order at ¶ 273.

proceeding, and that the Department should reject CTC and Lightship arguments for that reason alone (id. at 12 n.10).

3. Analysis and Findings

The Department finds no merit in AT&T's allegations of ambiguity in the FCC rules. The terms "residential" and "dwelling" do not define the customer class eligible for unbundling relief, but merely indicate that the endpoints of FTTC/FTTH loops are different when the customer is part of a predominantly residential multiunit premises.

With respect to CLECs' arguments that the Department erred in relying only upon the plain meaning of FCC rules when seeking to implement those rules, the Department declines to reconsider its position.[24] The Department's consideration of the scope of FTTC/FTTH unbundling relief relied on several FCC orders. The Department considered an FCC errata in which the FCC struck the term "residential units" and replaced it with the current term "customer premises". Arbitration Order at 176, citing In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Errata, FCC 04-248 (Oct. 29, 2004), and In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Errata, FCC 03-227 (Sept. 17, 2003)). In addition, the Department relied on an FCC order when determining that the FCC had granted equivalent unbundling relief to both FTTC and FTTH loops. Arbitration Order at 177, citing In the Matter of Review of the Section 251

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24 CTC and Lightship implicitly acknowledge that the Department looked beyond the plain meaning of the rules when it argues that the Department erred in grounding its determinations on ¶ 210 of the Triennial Review Order.

Unbundling Obligations of Incumbent Local Exchange Carriers and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, FCC 04-248 (rel. Oct. 18, 2004)).

Moreover, as CTC and Lightship point out in their Motion, the Department also referred to ¶ 210 of the Triennial Review Order in its determination that FTTH/FTTC unbundling relief is not limited to loops serving residential customers. Arbitration Order at 177, citing Triennial Review Order at ¶ 210). However, as demonstrated in the preceding paragraph, the Department did not ground its analysis solely on ¶ 210. The Department rejects CTC and Lightship's Motion to strike the reference to ¶ 210, because the ultimate determination did not rise or fall based solely on ¶ 210.

Although AT&T argues that the FCC's stated goal in granting FTTC/FTTH unbundling relief was to encourage broadband deployment in the mass market, the Department rejects this as a basis for reconsideration. While it is true that the FCC stated that it was granting unbundling relief in order to encourage deployment of mass market broadband, it does not necessarily follow that unbundling relief was therefore limited to the mass market. To the contrary, the fact that the FCC deliberately removed the reference to residential units in its definitions is evidence of an intent not to limit unbundling relief to the mass market.

With respect to CTC and Lightship's request that the Department exclude DS1 and DS3 loops from its determination, it is not clear from CTC and Lightship's motion exactly what "backdoor" action the ILECs are engaged in, or if Verizon is one of the ILECs allegedly engaged in such action. CTC and Lightship did not explain their claim with sufficient specificity to permit consideration. Therefore, we deny reconsideration on this issue.

O. Conclusion

In this Order, the Department discusses and makes findings on all issues presented by the parties in their motions for reconsideration and/or clarification of the Arbitration Order. The parties are required to submit a single conforming Amendment applicable to all parties, consistent with the findings herein, for the Department's review and approval within 30 days of the date of issuance of this Order.

IV. COMPLIANCE AMENDMENT

The parties requested the opportunity to file briefs to assist the Department in resolving the remaining disputes over contract language contained in the October 27, 2005 compliance Amendment. The Department grants this request.

During the 30 day time span provided for the parties to negotiate conforming contract language to incorporate into the Amendment, based upon our findings in this Order, the parties should seek to resolve the disputes over contract language presented in the October 27, 2005 compliance Amendment. Should the parties fail to agree on conforming contract language, the parties may submit to the Department, within 30 days of the date of issuance of this Order, briefs to assist the Department in resolving any and all remaining disputes over contract language.

In addition, because further issues may need to be resolved, we direct Verizon to withdraw its compliance tariff, filed on August 29, 2005, which we have docketed as D.T.E. 05-63. We will direct Verizon to submit a new tariff filing after we have approved the final amendment.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the motions for reconsideration are denied in part and granted in part; and it is

FURTHER ORDERED: That the parties shall file a conforming Amendment consistent with the July 14, 2005 Arbitration Order and this Order within 30 days of the issuance of this Order; and it is

FURTHER ORDERED: That the parties may submit briefs on any and all remaining disputes over contract language within 30 days of the issuance of this Order; and it is

FURTHER ORDERED: That Verizon shall withdraw its compliance tariff in D.T.E. 05-63; and it is

<u>FURTHER ORDERED</u>: That the parties shall 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/
Judith F. Judson, Commissioner

/s/
Brian Paul Golden, Commissioner

Pursuant to § 252(e)(6) of the Telecommunications Act of 1996, appeal of this final Order may be taken to the federal district court or the Federal Communications Commission. Timing of the filing of such appeal is governed by the applicable rules of the appellate body to which the appeal is made or in the absence of such, within 20 days of the date of this Order.