COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment to 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*	)	**D.T.E. 04-33**

VERIZON MASSACHUSETTS' REPLY TO BRIEFING QUESTIONS

INTRODUCTION

On March 10, 2005, the Department issued a notice requesting that parties respond to two briefing questions relating to Verizon Massachusetts' ("Verizon MA") implementation of the *Triennial Review Remand Order*[1] as to competitive local exchange carriers ("CLECs") with interconnection agreements that do not contain self-executing change of law provisions. As explained below, the implementation of the federal mandate set forth in the *TRRO* is *not* conditioned on effectuating any changes to CLEC interconnection agreements with Verizon. The proposition that such agreements may override the FCC's explicit and binding directives that carriers take specific action on a specific date is wrong as a matter of law.

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[1] Order on Remand, *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, 2005 FCC LEXIS 912 (rel. Feb.4, 2005) ("*TRRO*").

As the U.S. Supreme Court has stated, "[c]ontractual arrangements remain subject to subsequent legislation by the presiding sovereign."[2] Congress gave the FCC sole responsibility to make Section 251 unbundling determinations.[3] The FCC has, in turn, exercised that jurisdiction by issuing the *TRRO*, which represents its *national* policy regarding the extent to which unbundled network elements ("UNEs") should be made available to CLECs.

In the *TRRO*, the FCC concluded that CLECs are *not* impaired without unbundled access to local circuit switching and dark fiber loops and, in some circumstances, high-capacity loops and dedicated transport.[4] The FCC established a transition plan that affirmatively *prohibits* new orders for these UNEs on or after March 11, 2005, and phases out the existing UNE arrangements over 12 months, or 18 months in the case of dark fiber.[5]

As discussed below, the FCC's clear intent is that the no-new-adds rule would become effective immediately. Nothing in the *TRRO* suggests that renegotiation of existing carriers interconnection agreements is a *precondition* of implementing that

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[2] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147-148 (1982), *citing Veix v. Sixth Ward Building & Loan Assn. of Newark*, 310 U.S. 32 (1940); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934).)

[3] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-67 (D.C. Cir. 2004) ("*USTA II*") (finding that the FCC's subdelegation of impairment determinations to state commissions is unlawful). Earlier this year, a federal district court confirmed that state commissions do not share unbundling authority with the FCC, holding that the decision in *USTA II* had definitively "rejected the argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations." *Michigan Bell Tel. Co., Inc. v. Lark, et al.*, No. 04-60128 (E.D. Mich. Jan. 6, 2005) ("*Michigan Bell*"), slip op. at 13. The Court observed that "state-imposed requirements are at odds with *USTA II*," and that it is "incongruous for the *USTA II* Court to find that Congress prohibited the FCC from passing unbundling decisions to the state[s]," but find that "the states could seize the authority themselves." *Id*. at 13-14.

[4] *TRRO* ¶¶ 5, 126, 129, 133, 174, 179, 182, 199, 204.

[5] *TRRO* ¶¶ 144-45, 195-99, 227.

mandate. Indeed, interpreting the *TRRO* as invoking the Section 252 contract amendment process is incongruous given the FCC's March 11, 2005 implementation date. Likewise, there is no basis for interpreting the particular terms of Verizon's interconnection agreements in a manner that would require a contract amendment to comply with that FCC directive.

BACKGROUND

After more than eight years of unlawful unbundling obligations imposed by FCC rules repeatedly vacated by the U.S. Supreme Court and the D.C. Circuit, the FCC - in response to the remand ordered by the D.C. Circuit in *USTA II* – issued the *TRRO*. In that order, the FCC affirmatively *prohibited new UNEs* for local circuit switching, dark fiber loops and, in certain instances, high-capacity loops and dedicated transport, as of March 11, 2005, and *phased out existing UNE* arrangements. In deciding to eliminate those UNEs, the FCC balanced the costs and benefits of unbundling to "provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition."[6] *TRRO* ¶ 2.

As demonstrated below, the FCC directives are clear and unambiguous as to the elimination of particular UNE arrangements.

- "Incumbent LECs have ***no obligation*** to provide competitive LECs with unbundled access to mass market local circuit switching." *TRRO ¶ 5.*
- The FCC's transition plan "***does not permit*** competitive

[6] For instance, the FCC determined that CLECs may not obtain new orders for UNE-P as of March 11, 2005, based on its finding that unbundling "would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition." *TRRO* at 218.

LECs to add new switching UNEs." *Id.*

- "[T]he disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify ***a nationwide bar*** on such unbundling." *Id.* at ¶ 204.

- "[W]e find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and we therefore determine ***not to unbundle*** that network element…" *Id*. at ¶ 210.

- "We conclude that requesting carriers are ***not impaired*** without access to unbundled DS3 transport on routes connecting wire centers where both if the wire centers are either Tier 1 or Tier 2 wire centers." *Id*. at ¶129.

- "These transition plans … ***do not permit*** competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists." *Id*. at ¶ 142.

- "These transition plans … ***do not permit*** competitive LECs to add new high-capacity loop UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists." *Id*. at ¶195.

- "Competitive LECs are ***not impaired*** without access to dark fiber loops in any instance." *Id.* at ¶ 5 and 146.

- "With respect to dark fiber loops, we ***eliminate unbundling*** on a nationwide basis." *Id.* at ¶ 166.

The FCC rules explicitly state that where an incumbent local exchange carrier ("ILEC") is *not* required to provide unbundled access to a given element because CLECs are *not* impaired without such access, the "requesting carriers *may not obtain*" that element as a UNE.[7]

[7] (Emphasis added); *see* 47 CFR §51.319(a)(4)(ii), (5)(iii) and (6)(ii) (regarding loops); 47 CFR §51.319(d)(2)(iii) (regarding switching) and 47 CFR §51.319(e)(2) (ii)(C), (iii)(C) and (iv)(B) (regarding transport).

In establishing the no-new-adds rule, the FCC carefully selected the date of March 11, 2005, to coincide with the expiration of the FCC's temporary directive in its *Interim Rules Order*[8] to continue providing UNEs despite the absence of a lawful impairment finding. Just as the obligations imposed on ILECs in the *Interim Rules Order* were immediately effective without a contract amendment, the FCC intended that the *TRRO* rules would be immediately binding to avoid a situation in which no effective FCC rules apply. *Interim Rules Order* ¶ 26. Thus, the FCC avoided a lapse during which no unbundling rules would be in place. *TRRO* ¶¶ 235-36, 250.

The *TRRO* also imposes specific transition periods to migrate the embedded customer base of delisted UNE elements to alternative arrangements. Specifically, the FCC granted CLECs 12 months to "submit orders to convert their UNE-P customers to alternative arrangements." *TRRO* ¶¶ 199. The FCC reasoned that the transition period "provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversion." *Id.* ¶ 227. The FCC likewise imposed a 12-month period to transition discontinued UNE loops and transport.[9] For purpose of negotiating those follow-on arrangements, the FCC gave the parties up to twelve months "to modify their interconnection agreements, including completing any change of law processes."[10]

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[8] Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783, ¶ 21 (Aug. 20, 2004) ("*Interim Rules Order*").

[9] *See e.g.* 47 C.F.R. §§ 51.319(a)(4)(iii), 51.319(d)(2)(iii) and 51.319(e)(2)(ii)(c). The rules also provide for an 18-month transition period for dark fiber. *TRRO* ¶¶ 144, 197.

[10] *TRRO* ¶¶ 143, 196, 227. To the extent existing contracts do not automatically give effect the FCC's prescribed transitional rates, the FCC also ruled that facilities no longer subject to

The distinction between the embedded base and new orders for delisted UNEs is clear. The FCC allowed carriers to negotiate arrangements to supersede the surcharges and mandatory migration of the *embedded* base provided for under the transition rules and preserved "commercial arrangements carriers have reached" for continued provision of wholesale facilities. *Id*. at ¶¶ 145, 198, 228. The FCC, however, did *not* contemplate that that its no-new-adds rule would be subject to a change-of-law renegotiation process. The FCC repeatedly emphasized in the *TRRO* that CLECs are *not* permitted to add new switching UNEs or delisted loops or transport facilities on or after March 11, 2005, "where the [FCC] determines that no section 251(c) unbundling requirement exists." *TRRO* ¶¶ 5, 142, 195, 227. The FCC created *no* exception to the rule that mandatory unbundling of new UNE-P arrangements and high capacity facilities not subject to unbundling under Section 251 (c)(3) must cease as of that date – and CLECs are *not* free to ignore or avoid that mandate.

The existence of an interconnection agreement cannot deprive the FCC of jurisdiction to issue binding directives, especially where, as here, the order is part of mandatory regulations required to conform the FCC's rules to binding federal court decisions.[11] For more than eight years, the FCC required ILECs to provide access to UNEs despite the repeated vacatur of its UNE rules by the U.S. Supreme Court and the D.C. Circuit because of its repeated failure to issue lawful impairment findings under

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unbundling would be subject to a true-up to the FCC's prescribed transitional rates, back to March 11, 2005, upon the amendment of the relevant interconnection agreements. *Id*. at ¶¶ 145, 198, 228.

[11] *See Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467, 482 (1911) (finding it "inconceivable" that the exercise of the commerce power by federal authorities could be hampered or restricted to any extent by contracts previously made between individuals or corporations).

Section 251(d)(2) of the Act.[12] Under the circumstances, the FCC has broad authority to issue immediately rules to remedy the situation created by its repeated promulgation of unlawful unbundling requirements.[13]

Finally, because the FCC has sole authority to make unbundling determinations, any action by a state commission that is inconsistent with or thwarts that federal policy would conflict with federal law[14] and, therefore, is preempted. Thus, where the FCC determines under Section 251(d)(2) of the Act that an element should *not* be unbundled – either because the FCC already made a national finding of no impairment or declined to require unbundling - Section 251(d)(3) and familiar principles of conflict preemption preclude states from enforcing inconsistent rules that would override that determination.[15]

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12 *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 388, 391 (1999); *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422-430 (D.C. Cir. 2002) ("*USTA I*"); *USTA II*, 359 F.3d at 568.

13 *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (reading *Callery* to embody the "general principle of agency authority to implement judicial reversals); *see also Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 686 (D.C. Cir. 2001).

14 The FCC found that the state authority preserved by the Act under the savings provision in Section 251(d)(3) is narrow and "is limited to state unbundling actions that are consistent with the requirements of section 251 and do not 'substantially prevent' the implementation of the federal regulatory regime." *TRO* ¶¶ 192-3. Section 251(d)(3)(C) also recognizes the FCC's power to prescribe and enforce "regulations to implement the requirements" of section 251 and establish the standards to which the states must adhere. *See also* 47 U.S.C. § 252(c)(1) & § 261(c).

15 Under the Supremacy Clause, "[t]he statutorily authorized regulations of [a federal] agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). That holding is supported by a long line of Supreme Court precedent. The federal government has the power to preempt any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

In assessing whether such a conflict exists, the Supreme Court has emphasized that "[f]ederal regulations have no less preemptive effect than federal statutes." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Moreover, the Court has held that a federal regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]." *Id*. at 155. Indeed, unless Congress expressly states otherwise, a statutory "saving clause" that preserves some state authority does not diminish the preemptive force of federal regulations, and states may not depart

This is true even if the state regulations share a "common goal" with federal law, but differ in the means chosen to further that goal.[16] *Id*. at ¶ 193.

In conclusion, in the *TRRO*, the FCC made an affirmative finding that ILECs need not provide - and CLECs cannot obtain - new arrangements for delisted UNEs, as of March 11, 2005. The *TRRO* leaves no doubt that the rule is *not* conditioned on any contract amendment. Under federal law and conflict preemption principles, a state commission lacks the authority to impose additional requirements or interfere in any way with the implementation of the *TRRO* rules. Only the FCC itself or the D.C. Circuit can stay or alter those directives.[17]

RESPONSES TO BRIEFING QUESTIONS

Briefing Question 1:

Notwithstanding the carrier's substantive arguments in this proceeding regarding proposed rates, terms, or conditions for any specific service, for each carrier's individual interconnection agreement, please identify each and every term that is relevant to

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from those "deliberately imposed" federal standards. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74, 881 (2000). Section 251(d)(3) of the Act embodies that *same* principle in that it permits preemption of any state law or regulatory requirement that undermines the FCC's implementing rules under Section 251.

16 The United States Supreme Court has held that "even in the case of a shared goal, the state law is preempted 'if it interferes with the methods by which the federal statute was designed to reach its goal.'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). *See also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379 (2000), in which the United States Supreme Court held that "[t]he fact of a common end hardly neutralizes the conflicting means." Similarly, the Seventh Circuit ruled that a tariff requirement imposed by the Wisconsin Public Service Commission was preempted by the Act, even though the tariff requirement "promotes the pro-competitive policy of the federal act." *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 445 (7th Cir. August 12, 2003). The Court found that "[a] conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's Supremacy Clause to resolve the conflict in favor of federal law." *Id*.; *see also Verizon North, Inc. v. Strand*, 309 F.3d 935, 940-41 (6th Cir. 2002).

17 28 U.S.C. § 2342 ("The court of appeals … has ***exclusive jurisdiction*** to enjoin, set aside, suspend (in whole or in part), or to determine the validity of -- (1) all final orders of the Federal Communications Commission….") (emphasis added); *see also* 47 U.S.C. § 405.

whether or not the interconnection agreement's change of law or dispute resolution provisions permit the parties to implement changes of "applicable law" without first executing an amendment to the interconnection agreement. In providing your response, please quote the relevant interconnection agreement provisions, citing them by section, and provide highlighted copies of the relevant language.

Response to Briefing Question 1:

The thrust of the Department's briefing questions is whether CLECs must agree to a contract amendment before Verizon can implement the FCC's no-new-adds rules for discontinued UNEs. This is based on the false premise that the interconnection agreements give CLECs the unilateral discretion to ignore the FCC's explicit and unconditional directives. Not only is that interpretation inconsistent with federal law and the letter and spirit of the *TRRO*, but it also contradicts the terms of Verizon's interconnection agreements and basic contract principles.

As described above, the FCC has exclusive authority to make unbundling determinations under Section 251(d)(2) of the Act. *USTA II*, 359 F.2d 504, 565-67. The Department affirmed that ruling, stating that "[t]he language of the Section 251(d)(3) savings clause does not ... suggest a congressional intent to save state commission actions that conflict with Section 251 or with the FCC's regulations."[18] The Department also

[18] *Proceeding by the Department on its Own Motion to Implement the Requirements of the FCC's Triennial Review Order Regarding Switching for Mass Market Customers*, MA D.T.E. 03-60, Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, at 21 (Dec. 15, 2004). Other state commissions have similarly found that the impairment determinations necessary to require unbundling are "reserved for the FCC, not the states." *Implementation of Requirements Arising from FCC's Triennial UNE Review: Local Circuit Switching for Mass Market Customers, etc.*, Order Closing Dockets, FL Order No. PSC-04-0989-FOF-TP, at 3 (Oct. 11, 2004); *see also Indiana Utility Regulatory Commission's Investigation of Matters Related to the Federal Communications Board's Report and Order*, Cause Nos. 42500, 42500-S1 & 42500-S2, Order, at 7 (January 12, 2005); *Petition of the Competitive Carrier Coalition for an Expedited Order that Verizon Virginia Inc. and Verizon South Inc. Remain Required to Provision Unbundled Network Elements on Existing Rates and Terms Pending the Effective Date of Amendments to the Parties' Interconnection Agreements, etc.*,

explicitly rejected a CLEC's "suggestion that Section 252(e)(3) preserves the ability of the States to require unbundling where the FCC finds that it is not required," because this reading of the Act "would discount improperly the preemptive effect of federal regulation under Section 251." D.T.E. 03-60, *Order*, at 22 (2004).

In the *TRRO*, the FCC definitively banned new orders for delisted UNEs on or after March 11, 2005. No provision of the *TRRO* purports to make the Section 252 contract amendment process a *precondition* to compliance with that mandate.

The FCC understood that existing interconnection agreements often contain "change of law" provisions. For example, the FCC specifically contemplated that carriers would negotiate arrangements to implement the FCC's *permanent* unbundling rules (*e.g.*, to change the list of UNEs available under interconnection agreements and to work out operational details of the transition of the embedded base). *TRRO* ¶ 233. The FCC also recognized that the embedded base transition would involve the change of law process – and allowed 12 or 18 months as a consequence.[19] Had the FCC intended that the *entire* transition be subject to the lengthy contract renegotiation process, it could have just made its new impairment findings and left it at that – much like it did in the *Triennial Review Order*. Instead, the FCC explicitly directed that CLECs "***may not obtain***" new switching, loop or transport UNEs eliminated by the new rules as of a ***date certain***, March 11, 2005 – with *no* exception. 47 C.F.R. § 51.319.

In considering this issue, the Indiana Commission recently held that

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Case Nos. PUC-2004-00073 & PUC-2004-00074, Order Dismissing Petitions, at 6 (July 19, 2004).

[19] However, at the end of the respective transition period, incumbent LECs have no further obligation to provide access to elements that are no longer subject to unbundling, even at the transitional rate. *TRRO* ¶¶ 145, 198, 228 (noting that the "limited duration of the transition" protects incumbents).

> [W]e cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements. To reach [such a] conclusion [] would confound the FCC's clear direction provided in the TRRO, with no obvious return to the transition timetable established in the TRRO.

Complaint of Indiana Bell Telephone Co., Inc. d/b/a SBC Indiana for Expedited Review of a Dispute with Certain CLECs Regarding Adoption of an Amendment to Commission Approved Interconnection Agreements, Cause No. 42749, at 7-8 (March 9, 2005) ("Indiana Order"). The Commission correctly observed that the FCC's bar on new orders would be meaningless if CLECs can delay indefinitely implementation subject to contract renegotiation – and would disrupt the phase-out of the embedded base. As the Indiana Commission explained,

> [c]learly, the intent of the one-year transition period, and its associated pricing, is to allow for a planned, orderly, and non-disruptive migration of existing UNE-P customers off of UNE-P to an alternative arrangement at an established price for the transition period.

Id. at 8. "If CLECs can continue adding new UNE-P customers after March 10, 2005, pending modification of their interconnection agreements pursuant to change of law provisions," asked the Indiana Commission, then "how is the composition of the embedded base to be determined" to carry out a "planned, orderly, and non-disruptive migration" to UNE replacement arrangements? *Id*. at 6.

A number of state regulatory commissions – including this Department - have similarly rejected any attempt by CLECs to compel Verizon to provide new UNE arrangements on or after March 11, 2005, in direct contravention of the *TRRO*.[20]

For example, on March 16, 2003, the New York Public Service Commission ("NYPSC") approved Verizon's tariff implementing the *TRRO* and rejected the notion that the change of law provisions of interconnection agreements could override the FCC's "express directive" prohibiting CLECs from continuing to order UNE-P.[21] On March 11, 2005, the New Jersey Commission unanimously denied the petition of various CLECS to require Verizon to continue accepting UNE-P orders.[22] Likewise, the Maine Public Commission unanimously concluded that CLECs are not entitled to order new UNEs discontinued under Section 251, and found that the FCC clearly intended no contract amendment would be required to give the March 11, 2005 deadline legal effect.[23]

On March 22, 2005, the Delaware Commission rejected CLECs' emergency attempts to ignore the *TRRO*,[24] and the Virginia Commission definitively dismissed and

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20 *See e.g.*, Open Meeting, *Verizon RI Tariff filing to implement the FCC's new unbundled (UNE) rules regarding as set forth in the TRO Remand Order issued February 4, 2005*, Docket 3662 (March 8, 2005) [www.ripuc.org/eventsaction/docket/3662page.html]; *In re Emergency Petition from MCI for a Commission Order Directing Verizon to Continue to Accept New Unbundled Network Element Platform Orders*, ML# 96341, Letter (Maryland PSC Mar. 10, 2005).

21 Order Implementing TRRO Changes, *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand*, Case 05-C-0203, at 13, 26 (NYPSC March 16, 2005).

22 Open Hearing, *In the Matter of the Implementation of the FCC's Triennial Review Order*, Docket No. TO03090705 (N.J. BPU March 11, 2005).

23 Open Hearing, *Request for Commission Investigation for Resold Services (PUC#21) and Unbundled Network Elements (PUC#20)*, Docket No. 2002-682, Consideration of Motions for Emergency Relief (Maine PUC March 11, 2005).

24 Open Meeting, *In the Matter of Complaint for Emergency Declaratory Relief*, Docket No. 334-05 (Delaware PSC March 22, 2005).

denied the CLECs' petition on March 24, 2005.[25] As expressed by the Kansas Commission, "the FCC is clear in that as of March 11, 2005, the mass market local circuit switching…[is] no longer available to CLECs on an unbundled basis for new customers" and therefore, "the sooner the FCC's new rules can be implemented, the sooner rules held to be illegal can be abrogated."[26]

In short, the specific terms of interconnection agreements *cannot* trump explicit FCC directives prohibiting CLECs from obtaining new delisted UNE arrangements as of that date or establishing a mandatory transition plan for those elements. The FCC has provided a specific implementation date and transition plan – with *no* exceptions - and the CLECs cannot use the purported "change of law" provisions or "dispute resolution" procedures to delay the implementation of FCC's regulations.

Briefing Question 2:

Indicate whether a change of law or dispute resolution provision has been triggered and state the date on which each condition precedent or party obligation (e.g., notice requirements) was met, if applicable, with regard to the implementation of the Triennial Review Remand Order, or any other statutory, judicial, or regulatory change, state or federal, that you claim did modify the parties' rights under the interconnection agreement.

Response to Briefing Question 2:

On February 10, 2005, Verizon issued a Notice of FCC Action regarding UNEs in the *TRRO*. Copies of the Notices are attached as Exhibits I and II hereto. In the

[25] Order Dismissing and Denying, *Petition of A.R.C. Networks Inc. and XO Communications, Inc. for a Declaratory Ruling*, Case No. PUC-2005-00042 (Virginia SC March 24, 2005).

[26] *In re General Investigation to Establish a Successor Standard Agreement to the Kansas 271 Interconnection Agreement*, Docket No. 04-SWBT-763-GIT, Order Granting in Part and Denying in Part Formal Complaint and Motion for an Expedited Order, at 4-5 (Kan. SSC March 10, 2005).

February 10th Notice, Verizon informed CLECs of the FCC's transition plan for new and embedded UNE arrangements. For the reasons stated above, this Notice did not trigger any change of law or dispute resolution provisions in Verizon's existing interconnection agreements. Verizon and CLECs are bound to implement the FCC's no-new-adds mandate as of March 11, 2005, without conditions.

CONCLUSION

For the foregoing reasons, there is no need to amend Verizon's interconnection agreements to give Verizon the contractual right to discontinue providing new delisted UNEs as directed by the FCC in its *TRRO*. The FCC made an affirmative and *unconditional* finding that ILECs need not provide - and CLECs cannot obtain - new arrangements for delisted UNEs, as of March 11, 2005. The FCC also established a 12-month transition period for migrating the embedded UNE base (18 months for dark fiber). Those *TRRO* directives are binding and enforceable on ILECs and CLECs alike. Accordingly, the FCC rules prevail over change of law and dispute resolution provisions of interconnection agreements.

Respectfully submitted,

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