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April 26, 2005

BY ELECTRONIC AND OVERNIGHT MAIL

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
Boston, MA 02110

Re: D.T.E. 04-33

Dear Ms. Cottrell:

On behalf of CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship Telecom, LLC; RCN-BecoCom LLC; and RCN Telecom Services of Massachusetts, Inc. (jointly, the "Competitive Carrier Coalition" or "CCC") and pursuant to the briefing schedule established by the Arbitrators in the above-referenced proceeding, we submit the Reply Brief of the Competitive Carrier Coalition.

Consistent with the Arbitration Ground Rules, seven (7) additional copies of this filing are attached for distribution to the Arbitrators and other Department staff. Also attached is an extra copy of this filing, please date-stamp it and return it in the attached, postage prepaid envelope provided. Please note that CCC will submit this filing in electronic format by E-mail attachment to dte.efiling@state.mass.us.

Should you have any questions concerning this filing, please do not hesitate to contact me.

Sincerely,

Philip J. Macres

Enclosure

cc: Tina Chin, Arbitrator
Jesse Reyes, Arbitrator
DTE 04-33 Service List

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**

REPLY BRIEF OF THE COMPETITIVE CARRIER COALITION

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Dated: April 26, 2005

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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**

REPLY BRIEF OF THE COMPETITIVE CARRIER COALITION

I. INTRODUCTION

CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship Telecom, LLC; RCN-BecoCom LLC; and RCN Telecom Services of Massachusetts, Inc. (collectively, the "Competitive Carrier Coalition" or "CCC"), submit this reply brief to Verizon's Initial Brief filed April 5, 2005.[1]

Verizon's Brief is so permeated by certain flaws that the CCC will first address them in this introduction, before responding to each issue.

A. The Act and Verizon's Long-Standing Interpretation of the Act Bar Any Suggestion that the *TRRO* is "Self-Effectuating" (This section serves as CCC's Reply to Issue 10)

In a remarkable about-face from its prior insistence on requiring an interconnection agreement before providing CLECs with any of the benefits of FCC unbundling rules, Verizon has now decided as a matter of self-interest to proclaim that the *TRRO* is "self-effectuating." As

[1] The CCC's proposed amendment that implements the *TRO*, which was previously filed with the Department on February 18, 2005, is referenced herein as the CCC *TRO* [Section Number]. The CCC's proposed amendment that implements the *TRRO* was attached to the CCC's Brief (attachment A) and is referenced herein as the CCC *TRRO* [Section Number].

such, Verizon contends that the new FCC rules, unlike old ones, (1) automatically superceded the terms of the parties' Agreements on March 11, 2005 and (2) do not even need to be incorporated into the Agreement, now or ever – regardless of the change-of-law terms of the parties' current agreements. For example, Verizon contends that "no contract amendments are necessary to implement" what Verizon calls "the FCC's mandatory transition plan"[2] or *any* terms to implement the process that carriers will use to determine the wire centers where UNE high-capacity loops and transport will be available.[3] This interpretation is contrary to the Act and the Agreements, and is stunningly inconsistent with Verizon's mantra over the years that CLECs cannot obtain UNEs pursuant to FCC rules until those rules are implemented in effective interconnection agreements.

In the past, Verizon has insisted that Congress intended interconnection agreements, and not FCC regulations, to be "the crucial implementation mechanism of the Act," explaining:

> First and foremost … Congress required carriers to rely initially on private negotiations to establish their interconnection agreements…. Congress provided an incentive for negotiations by freeing negotiated agreements from the standards defined in section 251.[4]

As Verizon explained, Congress explicitly permitted carriers to agree on terms that exceeded, fell short of, or differed from the requirements of the Act or FCC rules.[5] Even though Verizon

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[2] Verizon Brief at 35.

[3] Verizon Brief at 143 (asserting, incredibly, that "the criteria to govern whether high-capacity loops or dedicated transport facilities are subject to unbundling under section 251(c)(3) ... should not be reflected in the parties agreements.")

[4] *Verizon North, Inc. v. Strand*, No. 01-1013 (6th Cir. 2002), Brief of Verizon North, Inc. at 9, 25 (June 20, 2001) ("Verizon *Strand* Brief").

[5] 47 U.S.C. § 252(a)(1) ("an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251).

does not make a regular habit of doing so, this ability to deviate from statutory duties underpins what (prior to the *TRRO*) had been the ILECs' overriding interpretation of the Act – that because the Act "first and foremost" intended carriers "initially" to rely on private negotiations,[6] and because in such negotiations carriers could make tradeoffs that might differ from parts of the FCC's rules, CLECs could not directly assert any rights under the FCC rules themselves, but instead were required to execute an interconnection agreement before Verizon would provide them with *anything*. In other words, because a CLEC could agree to trade off its right to a UNE in exchange for some other benefit, it would undermine such negotiations for the CLEC later to claim that it could obtain the same UNE directly under "self-effectuating" rules.[7] Verizon's counsel in this proceeding, on behalf of SBC, put it this way:

> Under the language and structure of the 1996 Act, the obligations between ILECs and CLECs are governed in the first instance by their interconnection agreements. Indeed, absent such an agreement an ILEC has no obligation to make *any* facilities available to the CLEC, much less on the terms and conditions [required by the FCC's Section 251 regulations].[8]

Verizon routinely relied on this position to deny CLECs access to UNEs until interconnection agreements and/or amendments were executed and effective. When the FCC established its initial list of UNEs in 1996, and when it added to that list in 1999, Verizon contended that these UNE rules were not self-effectuating, but must instead be implemented in an agreement before they apply to a CLEC. Similarly, the *TRO* in 2003 clarified that CLECs are entitled to routine network modifications and commingling, but Verizon has asserted the right to

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[6] Verizon *Strand* Brief at 9.

[7] *See, e.g., Wisconsin Bell v. Bie*, 340 F. 3d 441, 444 (7th Cir. 2003).

[8] *SBC v. FCC*, D.C. Cir. Docket No. 03-1147, Brief of SBC Communications, Inc. at 15 (September 28, 2004) (emphasis original).

deny CLECs such access until they execute a *TRO* amendment. Only now, because the new rules in the *TRRO* largely benefit ILECs, Verizon conveniently has decided, in a complete about-face, that *those* rules should be deemed to apply automatically without any need or role for negotiation. Verizon's new position flies in the face of its past rationale: if Congress had intended the Act to be implemented in that manner, it never would have needed to create the interconnection agreement process in the first place. Moreover, if the FCC rules bound the parties without ever being incorporated into agreements, then the FCC would have had no reason to expressly provide that the new rules adopted in the *TRO* and *TRRO* would be implemented through the interconnection agreement change of law processes.[9]

Verizon's entanglement with its prior theories does not stop there. Verizon ignores the obvious corollary to its position that carriers may negotiate terms that are different from the Act or the FCC rules – that they are also free to negotiate any change-of-law terms they wish, and thus agree on how, or whether, the terms of a contract would change in the event that FCC rules changed during the term of an agreement. For example, carriers have been free to agree to make their contracts immune from changes of law during the course of their term – as many carriers did at one time in Texas, for example.[10] If FCC rules were deemed to become effective automatically, without regard to the terms of the existing agreement, these previously negotiated change-of-law terms would be rendered meaningless.

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[9] *See, e.g., TRO,* ¶ 701 and *TRRO* at nn. 408, 524, & 630

[10] SBC and numerous CLECs signed interconnection agreements starting in 2000 that agreed that the contracts would not be modified during their three-year term based upon changes to SBC's § 251 obligations. By contrast, the reason that the CCC members are now subject to the elimination of certain UNEs and the price increases under the FCC transition is not directly because the FCC changed its rules, but only because their contracts with Verizon call for prompt amendments to implement changes of law. Had the parties instead executed contracts that were immune from changes of law during the course of their term, Verizon would have no right to bring this proceeding and no right to impose the *TRRO* changes on the CLECs until the existing agreements could be terminated and replaced with new contracts.

Verizon has expressly argued in the past that regulators could not impose new rules that would override a contract without regard to the terms of the agreement. Verizon argued to the Ninth Circuit that "local carriers have the right to contract around [a federal] requirement, *and state commissions are bound to honor the terms of the parties' agreements*."[11] Verizon added that this principle applied to change-of-law provisions of interconnection agreements, such that some agreements may require automatic implementation of new FCC rules while others may prescribe some other result, and that a change in law "require[s] a case-by-case analysis of whether contracts at issue contained change-of-law provisions."[12] The Ninth Circuit agreed with Verizon, and found that across-the-board application of new state rules without regard to the change of law and other terms of an agreement "effectively changes the terms of [the agreements], and therefore contravenes the Act's mandate that interconnection agreements have the binding force of law."[13]

Since the primacy of interconnection agreements is based upon the directions of *Congress*, the FCC would similarly be precluded by Section 252 from imposing "self-effectuating" terms that would automatically override the parties' interconnection agreements without regard for the terms of such agreements. But even assuming the FCC had the authority to override interconnection agreements in a general rulemaking proceeding, which it does not, the FCC has said clearly that it did not intend to override contract terms or the Section 252 process. Instead, it specifically provided that the *TRRO* be implemented in accordance with the Section

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[11] *Pacific Bell v. Pac-West Telecomm, Inc*., Nos. 01-17161, 01-17166, 01-17181 (9th Cir.) Brief of Verizon California, Inc., 2002 WL 32096503 (March 15, 2002) (emphasis added).

[12] *Id.*

[13] *Pacific Bell v. Pac-West Telecomm, Inc*., 325 F.3d 1114, 1127 (9th Cir. 2002) (citing 47 U.S.C. § 252(a)(1)).

252 negotiations process. *See TRRO*, ¶ 233. The FCC gave only one reason for choosing a specific effective date (March 11, 2005): to avoid temporary and unnecessary disruption that could have resulted for a few days as a result of the different schemes adopted by the *TRRO* and the prior *Interim Order*.[14] Other than that, the March 11 effective date should be accorded the same significance as the effective date of prior FCC orders, and not be misconceived as a cryptic and unprecedented mandate for an automatic override of interconnection agreements.

Thus, for the same reasons that Verizon has argued repeatedly for years, the *TRO* and *TRRO* can only be implemented in accordance with the change of law terms of the parties' Agreements, which Verizon has explained "state commissions are bound to honor."[15] To be clear, that fact will not change the ultimate outcome that the § 251 UNEs eliminated by the *TRO* and *TRRO* will be removed from the CCC members' Agreements, whose terms do require the implementation of changes of law. But the Agreements and the Act preclude Verizon's interpretation that the *TRRO* is somehow "self-effectuating." Instead, the Amendment should become effective only upon execution, and it should provide the detailed terms that are necessary or warranted to implement *all* of the FCC's new rules,[16] not just the ones that Verizon has arbitrarily decided in its opinion are needed. In particular, the Amendment should establish terms

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[14] *TRRO*, ¶ 236. The *Interim Order* had established rules under which, if incorporated into the parties' interconnection agreements, would have resulted in the brief imposition of certain transition terms on March 15, 2005 that differed from those established by the *TRRO*. The FCC therefore explained that it chose to make the *TRRO* effective on March 11, 2005 to avoid that specific scenario.

[15] *Pacific Bell v. Pac-West Telecomm, Inc*., Nos. 01-17161, 01-17166, 01-17181 (9th Cir.), Brief of Verizon California, Inc., 2002 WL 32096503 (March 15, 2002). Accordingly, this proceeding is purely a creature of these change of law terms, and is subject to their limitations; Verizon could not even bring such a proceeding had the Agreements not allowed it.

[16] The CCC has stated its objection to the inclusion of *TRRO* issues in this proceeding, but has presented terms to implement the *TRRO* since the Department is considering these issues in this proceeding. *See* CCC Brief at 1, n. 2.

that will guide and govern the CLECs' eligibility to obtain high-capacity loops and transport under the FCC's new standards, and also the *TRRO*'s transition plan. *See* CCC Brief and Reply, Issue 27 and Supplemental Issue 4.

B. Verizon, Not the CCC, is Seeking to "Avoid" Federal Law

Verizon transparently – and wrongly – asserts that the CCC argument against self-effectuation of the *TRRO* is offered in an effort to delay or "avoid" implementation of the *TRRO* in their contracts.[17] Verizon's argument, in a nutshell, appears to be that the CCC members have their head in the sand and refuse to accept the reality that some § 251 UNEs have been eliminated. This is nonsense. The *TRO* and *TRRO* clearly do eliminate or modify certain § 251 obligations, and the CCC has proposed amendments that would do just that. One by one, the CCC amendments list each UNE obligation that has been altered, and in a clear and concise manner set forth new terms that would allow Verizon to limit or eliminate its provision of § 251 UNEs. It is Verizon that truly has its head in the sand, refusing to acknowledge that it could ever be subject to unbundling obligations other than those enumerated in the "Federal Unbundling Rules," despite the fact that, among other things, Section 271 unambiguously imposes such obligations. *See* CCC Brief and Reply, Issues 1 and 31.

In an attempt to paint the CCC as the side that is clinging desperately to unreasonable or unlawful positions, Verizon's Brief repeatedly overstates what the CCC has requested. For example, Verizon asserts that the CCC has requested a one-year transition for DS1 local switching;[18] actually, as Verizon knows from our negotiations, CCC's transition terms would not

[17] Verizon Brief at 1.

[18] Verizon Brief at 53.

apply to such switching.[19] Verizon also incorrectly alleges that CCC's proposal would continue to require Verizon to offer § 251 unbundled OCn loops and transport;[20] actually, CCC's *TRO* Amendment unambiguously states that "Verizon is not required to provide unbundled access to lit fiber-based OCn Loops or OCn Dedicated Transport."[21] Verizon erroneously claims that the CCC's proposal "views [DS1 and DS3 loop availability] as unconstrained by the FCC's unbundling limitations";[22] actually, CCC's proposal would explicitly list the wire centers from which CCC cannot order § 251 DS1 and DS3 UNE loops.[23] Counsel for CCC has repeatedly made clear to Verizon's negotiators that the CCC does not and has never demanded the terms Verizon now erroneously alleges. Verizon unfortunately appears to be trying to turn this arbitration into a game of political spin, hoping that if it can paint the CLECs' proposed amendments as overreaching that the Department will conclude that the CLECs proposals must be disregarded in their entirety. Therefore, for avoidance of doubt, the CCC members reaffirm to the Department their obligation and commitment under the change of law provisions to incorporate new terms that will result in Agreements that that fully implement the revised

[19] CCC's *TRO* Amendment eliminates the DS1 unbundled switching requirement and does not include any transition terms. The one-year switching transition term for switching in the CCC's *TRRO* Amendment would not apply to DS1 switching. See *TRRO* Amendment § 3. The CCC would not object, for avoidance of doubt, to an additional provision that makes this point explicitly in § 7 or elsewhere in its *TRRO* Attachment.

[20] Verizon Brief at 48.

[21] CCC *TRO* § 1.2. Verizon misleadingly refers to CCC's definition of dedicated transport (CCC *TRRO* § 6.2), which does include a reference to "OC-n capacity level services." The CCC's definition is a precise quotation of the FCC's definition of dedicated transport in 47 C.F.R. § 51.319(e)(1). OC-n transport is still dedicated transport; that does not mean that Verizon is required to unbundle it under § 251. *See* CCC Reply Brief, Issue 9.

[22] Verizon Brief at 51.

[23] CCC *TRRO* §§ 5.2.2, 5.3.2.

requirements of the law. Verizon should do the same, and should be more candid with the Department.

II. DISCUSSION

Many of Verizon's initial arguments were anticipated by CCC's Brief, and the CCC refers the Arbitrator to the CCC's Brief rather than repeating all of those arguments here. The CCC has not responded to all of the arguments made by Verizon in its Brief, but has confined this Reply Brief to those issues that warrant further discussion due to Verizon's incorrect interpretations of the law, misstatements, and misrepresentations.

Issue 1: Should the Amendment include rates, terms, and conditions that do not arise from federal unbundling regulations pursuant to 47 U.S.C. sections 251 and 252, including issues asserted to arise under state law?

Verizon aptly states in its Brief:

> This proceeding is intended to address parties' disputes about how to implement the changes in unbundling obligations adopted in the *TRO* and *TRRO*. … This arbitration is not a free-for-all for parties to propose changes to terms in their underlying agreements they may not like. [P]roposals to litigate non-*TRO* items fail to acknowledge that existing agreements already address these issues. … the scope of this proceeding is limited to modification of the ICAs in order to effectuate the changes in unbundling obligations brought about by the *TRO* and *TRRO*.[24]

The CCC agrees. Our Brief explained that parties "cannot seek arbitration of issues that do not arise from any change of law" in this proceeding.[25] But Verizon is attempting to do exactly what it says is prohibited – it is seeking in Issues 1 and 2 to inject new contract terms that

[24] Verizon Brief at 85.

[25] CCC Brief at 3-5. This limitation does not apply to issues on which both parties freely negotiated, but instead only applies to issues that one party has refused to negotiate. Of course, as a practical matter, there sometimes can be reasonable disputes as to whether a proposal arises from the change of law. The CCC, for example, believes that the inclusion of new copper retirement state requirements arises from the *TRO*, since the *TRO* gave ILECs new incentives to retire copper, revised its own copper retirement rules, and clarified that states could impose additional requirements.

would (1) eliminate all present and future non-§251 UNE obligations and (2) amend the existing change-of-law provisions of the Agreements, even though nothing in the *TRO* or *TRRO* rendered unlawful the portions of the existing Agreements that Verizon wants to change. Verizon is free to propose such terms when negotiating or arbitrating a new interconnection agreement, but, as Verizon's own explanation above makes clear, it cannot do so in this proceeding.

Further, Verizon's proposed amendments are inconsistent with the substance of the Act. In effect, Verizon seeks to eliminate the entire § 252 interconnection negotiation process (which it formerly treated as nearly sacred) and bind all carriers to the new regime of "self-effectuating" FCC rules. If the Act had required that interconnection agreements be strictly limited to the "Federal Unbundling Rules," parties would not need 100-to-200 page interconnection agreements, or even Verizon's proposed amendment; they would just need a one-sentence contract saying that they would do whatever the FCC unbundling rules require, and nothing else. Congress would have had no reason to take the extraordinary step of delegating the role of federal arbitrator to the state commissions if states were to play only such a ministerial role. Verizon's characterization of Section 252 arbitrations as "wasteful"[26] apparently reflects Verizon's wish (but not reality) that Congress had not vested the Department with a substantive role in the implementation of the Act. On the contrary, the Section 252 "interconnection agreement process is central to the Act," *Verizon North, Inc. v. Strand*, 309 F.3d 935, 941 (6th Cir. 2002). Verizon's proposal to incorporate FCC rules by reference would contravene the Act and jettison the Department's role entrusted by Congress to assure meaningful implementation of the Act.

[26] Verizon Brief at 4.

Verizon's citation to a scattering of state decisions that declined to impose a particular unbundling requirement that in some manner exceeded FCC rules could be countered with numerous examples of state commission decisions that have required additional unbundling, such as this Department's decision in 1996 to require unbundling of dark fiber.[27] The FCC's recent decision to preempt states from ordering the unbundling of the low-frequency portion of a loop (a UNE that the FCC had previously considered and rejected) merely highlights the fact that numerous other state unbundling decisions have not been preempted, as well as the FCC's and *USTA II*'s findings that state unbundling requirements have not universally been preempted.[28]

Verizon's proposal unreasonably and without legal foundation would foreclose implementation of every *future* unbundling requirement that might be imposed by the FCC or a state outside of Section 251.[29] For example, if Verizon's Amendment were adopted, and the FCC later imposed an unbundling requirement on Verizon as a condition of a future merger (i.e., with MCI) or if the Massachusetts Legislature adopted a law requiring Verizon to unbundle a certain network element (such as some new element that has never been addressed by the FCC), Verizon could argue that a CLEC had waived its right to initiate change of law proceedings to incorporate the new requirement because its contract limited Verizon's unbundling obligations to those

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[27] CCC Brief at 6, citing *Phase 3 Order*.

[28] *See* CCC Brief at 8-9 (citing *TRO*'s rejection of ILEC arguments that states are preempted), and CCC Brief at 10 (citing *USTA II*'s determination that the *TRO* did not operate to preempt state unbundling orders).

[29] Verizon has abandoned similar language in its Massachusetts UNE tariff. Verizon proposes language in this arbitration that limits its unbundling obligations "to the extent required by, 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51," Verizon had initially proposed this language to be included in its UNE tariff, but withdrew the language after the Department's Partial Suspension Order. *See* DTE 05-36, Partial Suspension Order (March 23, 2005); *see* letter from John Conroy, Vice President, Regulatory Massachusetts, Verizon to Mary Cottrell, Secretary, Massachusetts Department of Telecommunications and Energy, TT 05-38, at Proposed DTE 17, Part B, Section 1.1.1.A.1-2, page 1, and Section 13.2.1.A-B., p. 3 (dated April 19, 2005).

required by the FCC's Section 251 rules. There is no basis, under the *TRO* or otherwise, for the Department now to conclude that every possible non-§251 unbundling requirement that could ever be adopted in the future must be preempted – especially when the numerous savings clauses of the Act,[30] the *TRO*,[31] and the D.C. Circuit's interpretation of the *TRO* in *USTA II*[32] all explicitly contradict that conclusion. Instead, the Department should adopt the CCC's proposed terms, which merely reflect the fact that *under the existing Agreement*, Verizon is subject to all applicable law, and not just to the "Federal Unbundling Requirements."

Verizon tries to scare the Department into believing that the CCC's proposed terms would preserve the UNEs eliminated by the *TRO* and *TRRO* under state law even though the Department has concluded in D.T.E. 03-60 that it would not do so. If the CCC's Amendment became effective today, it would not require Verizon to provide these UNEs on the basis of state law, because the Department has concluded that state law does not presently require such unbundling. But while this aspect of the CCC's terms would have no consequence today, it should not be dismissed as unnecessary or moot, because it is necessary to make clear that to the extent that a legal obligation arises in the future, under state law or otherwise, Verizon has not secured a contractual waiver from CLECs of its obligation to comply or of their ability to initiate change of law proceedings.

Verizon's repeated contention that its unbundling obligations are determined

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[30] *See* CCC Brief at 7-8 (explaining the three savings clauses in the Act (§§ 251(d)(3), 252(e)(3) and 261(c)) that preserve state authority.

[31] *See* CCC Brief at 8-9 (quoting *TRO*, ¶ 192 "We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.)).

[32] *See* CCC Brief at 10 (quoting *USTA II*, 359 F.3d at 594 (deferring judicial review of preemption issues "until the FCC actually issues a ruling that a specific state unbundling requirement is preempted.")).

"exclusively" by the FCC's Section 251 rules[33] is so far-fetched and obviously contrary to the Act that even Verizon's own brief contradicts it. Verizon proudly quotes the FCC's recent statement in the *DSL Tying Order* that "the reach of the states' authority with regard to local competition is governed *principally* by federal law."[34] The CCC agrees that Verizon's unbundling obligations are governed principally by federal law, but that is not equivalent to being governed *exclusively* by the "Federal Unbundling Rules."

In addition, the nonsense of Verizon's "Federal Unbundling Rules" limitation is exposed by its contention, for example, that "CCC's definition of dark fiber transport appears to limit availability of unbundled access to offices that do not meet the FCC's non-impairment criteria, but CCC *renders this limitation meaningless* with its other language contemplating unbundling under 'state or federal merger conditions' and 'state law or Section 271.'"[35] Verizon's choice of words is revealing. If Verizon did not have any non-§251 unbundling obligations, the reference to these other laws would not render the § 251 rule meaningless; it would be those references that would be meaningless (and harmless). The only way that Verizon's statement would be correct is if Verizon *is* subject to non-§251 obligations and is seeking the Department's elimination of such requirements. As CCC demonstrated in its Brief, Verizon has no basis to claim that the *TRO* or *TRRO* changed the law in any way that affirmatively eliminated non-§251 obligations, so Verizon's vastly overbroad proposal must be rejected.

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[33] *See, e.g.,* Verizon Brief at 46 ("provision of dark fiber transport in accordance with FCC's Rule 51.319 necessarily excludes 'other Applicable Law'"); at 63 (asserting that the FCC has "exclusive authority" to impose unbundling obligations.

[34] Verizon Brief at 21 (citing *DSL Tying Order*, FCC-05-78, ¶ 22) (emphasis added).

[35] Verizon Brief at 47 (emphasis added) (parenthetical omitted).

Amusingly, Verizon's brief elsewhere claims that "any new rates prescribed by the FCC shall be in addition to, and not in limitation of," any rate increases imposed by this Department or that are otherwise lawfully applicable."[36] This suggestion is yet another example of Verizon wanting to have its cake and eat it too. In the same brief in which Verizon argues that its unbundling obligations are strictly limited to FCC rules and that the Department's orders and other applicable law are irrelevant, it contends that Department orders and other applicable law suddenly become relevant if they happen to permit Verizon to raise its rates.

For these and all the reasons set forth in CCC's Brief, the Department should reject Verizon's attempt to rewrite the Agreements and history with its proposal to strictly limit its obligations to the literal confines of the FCC's Section 251 regulations.

Issue 2: **What terms and conditions and/or rates regarding implementing changes in unbundling obligations or changes of law should be included in the Amendment to the parties' interconnection agreements?**

As demonstrated in CCC's reply on Issue 1 above, and its initial Brief on Issue 2, there is no basis in this proceeding for Verizon to propose to amend the change-of-law terms of the existing Agreements. The CCC has addressed the terms and conditions related to the implementation of the changes in law that have arisen from the *TRO* and *TRRO* in other sections of its Brief and Reply Brief.

Issue 3: **What obligations, if any, with respect to unbundled access to local circuit switching, including mass market and enterprise switching (including Four-Line Carve-Out switching), and tandem switching, should be included in the Amendment to the parties' interconnection agreements?**

Verizon complains that "[t]he CLECs consistently omit any provision clearly stating that

[36] Verizon Brief at 82.

the law does not, in fact, require Verizon to provide unbundled access to switching,"[37] and claims that as a result of this omission, only Verizon's proposed terms can be adopted. In the first place, Verizon ignores the undeniable fact that Section 271, which is part of "the law," requires Verizon to provide unbundled local switching at just and reasonable rates. Thus, Verizon is guilty of "consistently omit[ting] any provision clearly reflecting that the law *does*, in fact, require Verizon to provide unbundled local switching." See CCC Brief and Reply, Issue 31. Verizon's attempt to use the *TRRO* as an excuse to eliminate its § 271 obligations is procedurally improper and, more importantly, is contrary to law. Therefore, Verizon's proposal cannot be adopted.

Contrary to Verizon's accusation that CLECs have attempted to "evade" the FCC's non-impairment finding for switching, the CCC's proposal would unambiguously and completely eliminate Verizon's § 251 obligation to provide unbundled local switching, except for the FCC's one-year transition for switching associated with DS-0 loops.[38] The CCC's terms address the elimination of § 251 switching in a clear and concise manner, while Verizon's terms are bogged down by outdated references to moot terms such as "Four-Line Carve Out Switching" and "Mass Market Switching" that have no basis in the FCC's currently effective rules, which distinguish only between switching for customers above the DS1 level and below it. More importantly, Verizon's proposal contravenes the FCC's transition requirement that CLECs be permitted to continue to serve their embedded base of customers with UNE-P during the transition, which necessarily includes the ability to process moves, adds and changes. *See* CCC Brief and Reply, Supplemental Issue 4. Therefore, the CCC's terms should be adopted.

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[37] Verizon Brief at 33.

[38] See CCC *TRO* § 1.1, CCC *TRRO* § 4.1.

Verizon's Brief claims that its reference to "Four-Line Carve Out Switching" is intended to "avoid any doubt that might result from omitting such switching from" the list of UNEs being eliminated by the amendment.[39] But Verizon's inclusion of this outdated and unnecessary term appears designed not to eliminate doubt but to create it. The *TRRO* clearly rendered irrelevant the four-line carve out. Under the *TRRO*, the only relevant distinction is between switching provided for capacities below DS1 capacity, which is subject to the FCC's twelve-month transition terms, and switching for DS1 capacity and above, which is not.[40] Under FCC Rule 51.319(d)(2)(iii), adopted in the *TRRO*, Verizon is required to provide DS0 capacity UNE-P to CLEC's embedded base of customers until March 10, 2006 at the rate at which CLEC obtained the UNE-P arrangement on June 15, 2004 plus $1.[41] Under the plain terms of this regulation, the transition rate applies to *all* DS0 unbundled switching arrangements obtained by a CLEC as of March 11, 2005, which the FCC described as the CLEC's embedded base. Given Verizon's apparent attempt to exempt the four-line carve out lines from the FCC's transition terms, which Verizon has described as "mandatory," the arbitration award should make clear that the transition terms apply to all DS0 switching arrangements.

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[39] Verizon Brief at 55.

[40] *See* CCC Brief at 24, citing *TRRO*, at n.625. The *TRO's* reference to Four-Line Carve Out Rule in 47 C.F.R. § 51.319(d)(3)(ii), relied upon by Verizon, expired as a result of the *USTA II* and the *TRRO*. This rule applies "until the state commission completes the review described in paragraph (b)(2)(iii)(B)(4) [the determination of the demarcation between enterprise and mass market switching]." This review has effectively been completed, between *USTA II*'s vacature of *TRO*'s mass market switching rules and the TRRO's decision to terminate further inquiry into the demarcation between enterprise and mass market switching. *TRRO*, n. 625.

[41] The rule would replace this transition rate with any higher rate established by the Department between July 15, 2004 and March 11, 2005. However, no such rate was established by the Department. The "surcharge" currently being billed by Verizon for four-line carve out lines has not been established by the Department and cannot be a basis for the transition rate. Therefore, the transition rate for the four-line carve out lines is the rate at which CLEC was required to pay on July 15, 2004 plus $1.

Issue 4: **What obligations, if any, with respect to unbundled access to DS1 loops, DS3 loops and dark fiber loops should be included in the Amendment to the parties' interconnection agreements?**

CCC's Initial Brief has already refuted Verizon's arguments on this Issue.

Issue 5: **What obligations, if any, with respect to unbundled access to dedicated transport, including dark fiber transport, should be included in the Amendment to the parties' interconnection agreements?**

Verizon urges the Department to ignore the provisions of the *TRRO* that explain that the cap on DS1 transport UNEs applies only where there is a non-impairment determination for DS3s. Verizon concedes that "[a]lthough the text of ¶ 128 of the *TRRO* lends some support to [the CLEC's] position the rule itself contains no [such] limitation," but argues that "the FCC's rule must be applied as written."[42] However, FCC orders themselves have the force of law. The FCC has explained that its UNE rules must be "read in conjunction with the rest of the Order."[43] CCC and Conversent demonstrate in their briefs that the FCC designed the DS1 loop and transport caps to prevent CLECs from evading a non-impairment determination for DS3 UNEs. Neither the FCC nor Verizon has explained any reason to apply such caps where DS3s are also available as § 251 UNEs. Verizon cannot simply claim that it is its lucky day because the FCC neglected to spell out this detail in its formal rules. Read in conjunction with the *TRRO*, the CCC's proposal is more faithful to the FCC's intent than is Verizon's, and should be adopted.

Issue 6: **Under what conditions, if any, is Verizon permitted to re-price existing arrangements which are no longer subject to unbundling under federal law?**

Verizon's only argument in this Issue is that it should not be required to offer rates and terms for non-§ 251 UNEs in its Interconnection Agreement. The only apparent dispute between

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[42] Verizon Brief at 40. Verizon refers only to Conversent's proposal, but the CCC proposed similar terms. See CCC Brief at Issue 5.

[43] *TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCC Rcd 11166, 11177-78, ¶¶ 20-21 (2000) (referring to the *Local Competition Order*).

the parties on this issue at this time is whether the Agreement include rates and terms for the transitional network elements prescribed the *TRRO* (see CCC Brief and Reply, Issue 27) and for Section 271 network elements (see CCC Brief and Reply, Issues 1, 31). Once the Department resolves those issues, it appears that CCC and Verizon agree that no separate determination is needed on Issue 6.

Issue 7: **Should Verizon be permitted to provide notice of discontinuance in advance of the effective date of removal of unbundling requirements? Should the Amendment state that Verizon's obligations to provide notification of discontinuance have been satisfied?**

Verizon's brief makes clear that its proposal to this effect is an attempt to amend the change-of-law terms of the existing Agreements. Since nothing in the *TRO* or *TRRO* precipitates the need for such a change, it is beyond the scope of this proceeding. *See* CCC Brief on Issue 2, and Reply Brief above, Issue 1.

In any event, Verizon's argument is illogical. Verizon's Brief claims that it needs to be able to deliver notices of discontinuances prior to the effective date of a change of law to avoid "any further delay in implementing changes to the federal unbundling regulations, especially in light of the now 18-month delay in implementing the rulings of the *TRO*."[44] But Verizon has already provided its notices for UNEs eliminated by the *TRO* (whether appropriate under the terms of the parties' Agreements or not), so a change to the timing of notices would only affect future changes of law, and make no difference to whether there is "any further delay" in implementing the *TRO*. The fact that 18 months have passed since the *TRO* was adopted is an unusual circumstance caused by many factors, not the least of which was Verizon's successful appeal of major portions of the *TRO*. But the rules governing the timing of notices of

[44] Verizon Brief at 41-42.

discontinuation were not one of those factors, and there is no basis to reconsider the existing terms for such notices here. Verizon should instead offer its proposals on this issue when the parties negotiate new interconnection agreements.

Issue 8: Should Verizon be permitted to assess non-recurring charges when it changes a UNE arrangement to an alternative service? If so, what charges apply?

CCC's Initial Brief has already refuted Verizon's arguments on this Issue.

Issue 9: What terms should be included in the Amendments' Definitions section and how should those terms be defined?

Verizon's Brief on Issue 9 repeatedly strays, over the course of 36 pages, into substantive issues that go well beyond a list of the definitions that should be included and an explanation of how those terms should be defined. For example, Verizon frequently digresses into its argument against any references to its Section 271 obligations, even though (with the exception of Commingling and Conversions), the CCC definitions never refer to or even implicate Section 271. Rather than repetitively respond to Verizon's out-of-place arguments here, the CCC has addressed these issues in the relevant portions of its briefs. Issue 9 should be limited to the narrow question it poses, and leave non-definitional debates to the other portions of the issues list that raise them.

A. Response to Verizon's Section "CLEC Disagreements with Verizon's Proposed Definitions"

Dark Fiber Loop, Dark Fiber Transport, DS1 Loop, DS3 Loops, and Local Switching: Verizon's proposal to amend the existing definitions for these terms adds unnecessary and unwarranted complexity to a complex-enough proceeding. These terms are already defined in interconnection agreements, and nothing in the *TRO* or *TRRO* alters the *definition* of these terms

(as opposed to Verizon's § 251 obligation to unbundle them, which has changed).[45] See CCC Brief at 42. Verizon concedes this point elsewhere in its brief, when it states that the *TRO* "did not change the pre-existing definition of 'loop' …, so there is not need to modify ICAs to add or amend a definition for this term."[46] Verizon also correctly explains that "the interconnection agreements should not confuse the *definition* of [a particular UNE] with the *obligation* to provide" that UNE.[47] The CCC agrees. Accordingly, the Department should reject the inclusion of new definitions for these five terms.[48]

In any event, the Agreement should not include references to Verizon's internal technical documents, which would effectively permit Verizon unilaterally to amend the agreements without notice or Department review. The Connecticut Department of Utility Control rejected the inclusion of references to SBC's technical documents for that reason.[49] Although a Florida decision permitted such references, the Connecticut reasoning is more persuasive. The Department should avoid making a precedent-setting determination as to the inclusion of

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[45] Verizon mistakenly criticizes the CCC's "definitions" of dark fiber loops and dark fiber transport, when the CCC did not provide any definitions. Instead, Verizon has confused the debate over the definition of these terms with the debate over whether Verizon has or ever could have an obligation to unbundle these facilities under anything other than the "Federal Unbundling Rules." That debate is addressed in Issues 1 and 31, and Verizon's attempt to inject it here could only cloud the Department's analysis as to whether these terms need to be redefined at all.

[46] Verizon Brief at 74.

[47] Verizon Brief at 54 (emphasis original).

[48] The CCC proposal originally included a definition of Local Switching that Verizon has challenged in its Brief. The CCC now recognizes that neither its proposed definition nor Verizon's should be included in the Amendment because neither the TRO nor the TRRO have changed the definition of local switching. The CCC had originally proposed a definition because it had marked up Verizon's flawed definition.

[49] Application of the Southern New England Telephone Company for Approval of a Tariff for Collocation, Docket No. 99-08-05, Decision at 22-23 (Conn. D.P.U Mar. 9, 2000).

Verizon technical references in this proceeding when there is no reason for the Amendment even to define the terms in which these technical references appear.

Dedicated Transport: Unlike the above UNEs, the *TRRO* did change the definition of Dedicated Transport. But while the CCC's proposed definition is *word-for-word identical* to the FCC's definition of dedicated transport,[50] Verizon's definition is completely different from and would unduly narrow the FCC's definition. Verizon's Brief not only fails to explain why the FCC rule should be altered, but amazingly criticizes the CCC's reference – copied from the FCC definition – to "OCn capacity level services."[51] The CCC's definition, like the FCC's, does not mean that Verizon would be required to offer OCn dedicated transport as a § 251 UNE; the CCC's *TRO* Amendment unambiguously states that "Verizon is not required to provide unbundled access to lit fiber-based OCn Loops or OCn Dedicated Transport."[52] An OCn-level circuit between two Verizon wire centers *is* dedicated transport, although it is no longer required to be offered as a § 251 UNE. Verizon has not offered any reason why the definition in the Agreement should not reflect the FCC's definition adopted in the *TRRO*.

Discontinued Facility: The CCC's Brief (at 41-42) makes clear why the Department should prefer the CCC's use of specific contract terms to address each UNE, rather than Verizon's attempt to force the different rules that apply to each UNE into a one-size-fits-all classification of "Discontinued Facilities." The other CLECs have attempted to revise Verizon's definition, rather than replace it with CCC's straightforward approach, creating a complicated

[50] CCC Brief at 40, CCC *TRRO* § 6.2. The CCC definition is identical to 47 C.F.R. § 51.319(e)(1) except for the use of the term Verizon instead of incumbent LEC.

[51] Verizon Brief at 48.

[52] CCC *TRO* § 1.2.

and completely unnecessary debate over the definition of a term that is not once used by the FCC or its rules.

The CCC's omission of the term Discontinued Facility is not, as insinuated by Verizon, an attempt to preserve unbundling obligations eliminated by the FCC.[53] The CCC would oppose the confusing reference to Discontinued Facilities even if Verizon's unbundling obligations truly were limited to the "Federal Unbundling Rules," for the reasons explained in its brief.

Enterprise Switching, Mass Market Switching, Four Line Carve Out Switching, and Other DS0 Switching. These terms are outdated and inappropriate because they are all based on orders that have been vacated. See CCC Brief at 42. Footnote 625 of the *TRRO* makes clear that the only distinction now relevant for § 251 switching is between DS0 ports, which Verizon remains obligated to provide for a 12-month transition, and DS1 ports, which is not subject to the transition. The CCC proposed amendments implement these terms in a clear and concise manner, without the need for any new definitions. Verizon is simply crying wolf in claiming that the CCC's terms would result in subjecting DS1 switching to § 251 unbundling; the CCC's terms plainly eliminate that obligation immediately and entirely, and the CCC is willing to include a more explicit statement to that effect in the amendment if the Department believes it would address Verizon's supposed confusion.

[53] Verizon criticizes the CCC's inclusion of terms related to the *Bell Atlantic-GTE Merger Conditions* after the Arbitrator deemed the conditions inapplicable to the UNEs that were eliminated by the *TRO*. The primary purpose of the CCC's proposal is to ensure that Verizon cannot later argue, as SBC recently has done, that CLECs have waived their rights under the conditions in the event that the FCC grants their pending petition to enforce the conditions. *See* CCC Brief at 12. Verizon also criticizes the CCC's references to the *Line Sharing Order*. The CCC fully agrees that the merger condition with respect to line sharing has terminated (as have the merger obligations with respect to all other UNEs eliminated by the portions of the *TRO* that were affirmed in *USTA II*; the conditions remain operative only as to the UNEs eliminated by the *TRRO*). The CCC's proposed terms refer to line sharing because it has directly copied the FCC's language; had the CCC tried to rewrite the conditions to remove the expired portions, Verizon probably would have criticized it for altering the FCC's language.

Verizon's substantive requirements for unbundled switching should be addressed in Issue 3, but there is simply no legitimate purpose for Verizon's proposal to unnecessarily complicate this proceeding with the inclusion of these now-irrelevant definitions. The only apparent purposes of Verizon's proposed definitions are both improper:

- To convey a misimpression of a DS1 cut-off between the enterprise and mass markets. This cut-off no longer has anything to do with switching, and remains relevant only to Verizon's FTTH and Hybrid Loop unbundling obligations. The FCC has repeatedly recognized, most recently in the *TRRO*, that the enterprise market includes customers that purchase some number of multiple DS0s, but found that it was no longer necessary to draw this line with respect to switching since all § 251 switching is being eliminated.

- To suggest improperly that a CLEC's embedded base customers with four or more DS0s but less than a DS1 are excluded from the FCC's 12-month transition. The *TRRO* clearly rendered irrelevant the four-line carve out, and subjected all DS0 switching to the transition. See CCC's reply to Issue 3, above.

Entrance Facility: Verizon's Brief correctly states that "the interconnection agreements should not confuse the *definition* of entrance facilities with the *obligation* to provide" them. Verizon Brief at 54 (emphasis original). But then Verizon's brief on the definition of entrance facility does exactly that, and is filled with arguments about its substantive obligations. CCC does not object to Verizon's proposed definition of entrance facility. Verizon's substantive obligation to provide these facilities for interconnection is addressed in CCC's Brief on Issue 19.

FTTP Loop, Hybrid Loop: *See* CCC Brief and Reply, Issue 13.

Federal Unbundling Rules: See CCC Brief at 42-43; CCC Brief and Reply, Issue 1.

B. Response to Verizon's Section "New CLEC-Proposed Definitions"

Affiliate, Business Line, Fiber-Based Collocator and Wire Center: Contrary to Verizon's assertion, the *TRRO* is not self-effectuating, so these terms need to be defined in order to implement the *TRRO*. Even if the Department decides not to include lists of wire centers that meet the non-impairment thresholds in the Agreement, the Agreement must at least spell out the

standards by which CLECs can determine whether they may self-certify requests for UNEs, and so the Department will be able to apply standards to any disputes arising from self-certification. See CCC Reply Brief, Supplemental Issues 1-3, *infra*.

The CCC proposal would exclude from the non-impairment equation the fiber-based collocations of an entity with which Verizon has entered a binding agreement that would result in their affiliation. Verizon tries to write off this common sense proposal as "contrary to" the Act's definition of affiliate. Verizon misses the point, presumably to evade responding to the reasonableness of CCC's proposal. The CCC is not claiming that such companies are presently affiliated with Verizon; they are simply arguing that such companies should not be counted in the calculation of impairment, since any non-impairment determination would continue to apply after the companies became affiliated as a matter of law.[54] On the other hand, if the planned merger was abandoned, then the entity would once again count as a fiber-based collocator and Verizon would suffer no prejudice. See CCC Brief, Issue 4.

Commingling: Verizon contends that the CCC's proposed definition is inconsistent with the *TRO* because the FCC held in the *TRO* that commingling is not required pursuant to Section 271. Verizon obviously has overlooked the FCC's errata to the *TRO*, which struck the last sentence of footnote 1990 on which Verizon relies. As explained in the CCC's response to Issue 12 in its Brief, the CCC's definition is lawful.

Conversions: Verizon claims that CCC's definition of Conversion is improper because it references network elements obtained pursuant to § 271. Verizon misses the point. Regardless of how the Department rules as to Issue 31, CCC's proposed language is appropriate because it

[54] CCC would not object to a clarification that its definition of "affiliate" applies only to the definition of fiber-based collocator.

simply recognizes that CLECs should be able to request conversions of one type of Verizon wholesale offering to another. As explained in CCC's response to Issue 20 in its Brief, CCC's proposed universal definition is lawful and should be adopted.

Mobile Wireless Service; Route: The CCC's proposed definitions of these terms are taken from the text of the FCC rules, whereas Verizon proposes to exclude any definition and rely instead on the supposed self-effectuation of the FCC rules. Verizon argues that "by quoting language from the regulation, the CLECs would lock in the current regulation, though it may change over time."[55] But that is the point of a contract; to define the rights between the parties for a period of time. If the only role on an interconnection agreement was to require the parties to follow FCC rules as they change from time to time, there would be no reason to even have interconnection agreements. If the FCC rule does change, Verizon would have the right to invoke a change of law negotiation. But regardless, Verizon has no basis in this change-of-law proceeding to insist on imposing contract terms that would automatically change if the FCC changed its rules, since nothing in the *TRO* or *TRRO* required changes to the parties' existing change of law process in such a manner. *See* CCC Brief, Issue 2.

Mass Market Customer: Verizon's only response to the CCC's proposed definition of Mass Market Customer is to repeat its argument that the new limitations on its obligation to unbundle FTTH, FTTC and Hybrid Loops applies to all customers, and is not limited to the mass market. That debate is addressed in Issue 13, and is not raised by Issue 9. If the Department rules on Issue 13 that these broadband rules are indeed limited to the mass market, then some definition of Mass Market will clearly be necessary. In that event, the CCC's proposed definition

[55] Verizon Brief at 72.

of a 4 DS0 cutoff must be adopted because Verizon has neither provided its own definition nor undermined the particular cutoff proposed by the CCC.

Enterprise Customer. Upon further consideration, the CCC withdraws its request to define "Enterprise Customer," as such term is no longer needed to implement the terms of any party's proposal. This has no effect on CCC's insistence on its proposed definition of Mass Market Customer.

Issue 10: Should Verizon be required to follow the change of law and/or dispute resolution provisions in existing interconnection agreements if it seeks to discontinue the provisioning of UNEs under federal law? Should the establishment of UNE rates, terms and conditions for new UNEs, UNE combinations or commingling be subject to the change of law provisions of the parties' interconnection agreements?

See CCC's Introduction to this Reply Brief.

Issue 11: How should any rate increases and new charges established by the FCC in its final unbundling rules or elsewhere be implemented?

Verizon proposes that it be permitted to apply retroactively the new transition rates established under this Amendment back to an unspecified date that would appear on a "schedule issued by Verizon."[56] It would be entirely unreasonable to leave important contract rights to be determined unilaterally by Verizon through the issuance of a "schedule" at a time of Verizon's choosing after the Department has completed the arbitration and not subject to challenge by the CLECs or the Department. Verizon's proposed term should be rejected for this reason even before the Department considers whether it may be appropriate to amend the contracts with the inclusion of new true-up terms.

But even if Verizon had proposed a specific true-up rather than its unilateral plan to issue "schedules," such a proposal would also warrant rejection. The Department cannot in this

[56] Verizon Brief at 82 (citing Verizon Amendment 1 at § 3.5).

proceeding impose a generally-applicable provision for true-up either for the UNEs impacted by the *TRO* or *TRRO*. As the CCC Brief demonstrated in Issue 2, the *TRRO* can only be implemented in the Agreements in accordance with their existing change of law terms.[57] If those terms call for true-up upon a change of law, as some agreements do, then true-up will occur pursuant to such terms even without the inclusion of true-up language in the new Amendment. But where the existing Agreements instead provides for changes of law to be implemented in new Amendments, which would become effective upon execution, then Verizon cannot travel back in time to redraft the rules of the contract that apply to this round of the change in law, regardless of the FCC's reference to true-up in the *TRRO*. That is because the parties have already determined, as a matter of contract, how changes in law are to be implemented. If the Department were to impose true-up in such a situation, it would be upsetting the contractual relationship on which parties have relied and which the Department had previously approved – a contractual relationship that Verizon has elsewhere claimed that "state commissions are bound to honor."[58]

Verizon's Brief itself recognizes that these existing change-of-law terms control. Verizon's Brief notes that "particular contracts may not permit automatic implementation of rate increases" adopted by the *TRRO*, and that in such cases the rate increases could not be imposed until implemented in an amendment to the Agreement.[59] The CCC agrees that certain contracts do not permit automatic implementation of rate increases, but instead would have rate increases

[57] Thus, Verizon is incorrect in its assertion that "CLECs largely agree that where the FCC has specifically prescribed rate increases, those increases should go into effect on the FCC's terms." Verizon Brief at 83. It may be the case that a contract would provide for such implementation of FCC-prescribed rates, but not necessarily so.

[58] *See* CCC Reply Brief, Introduction § A (citing *Pac-West*, Verizon brief, 2002 WL 32096503).

[59] Verizon Brief at 83.

take effect if and when they are embodied in an amendment to the agreement. But Verizon would circumvent and make a mockery of that limitation if it could then upon execution impose true-up; a true-up would essentially be the same result as automatic implementation. If a contract bars automatic implementation and makes no reference to true-up, it clearly bars retroactive true-up as well.

Issue 12: **How should the interconnection agreements be amended to address changes arising from the *TRO* with respect to commingling of UNEs or Combinations with wholesale services, EELs, and other combinations? Should Verizon be obligated to allow CLECs to commingle and combine UNEs and Combinations with services that CLEC obtains wholesale from Verizon?**

CCC's Initial Brief has already refuted Verizon's arguments on this Issue.

Issue 13: **Should the ICAs Be Amended to Address Changes or Clarifications, If Any, Arising from the TRO With Respect to Line Splitting, Newly Built FTTP, FTTH, or FTTC Loops, Overbuilt FTTP, FTTH, or FTTC Loops, Access to Hybrid Loops for Provision of Broadband Services, Access to Hybrid Loops for Provision of Narrowband Services, Retirement of Copper Loops, Line Conditioning, Packet Switching, Network Interface Device, and Line Sharing?**

B. Newly Built FTTP, FTTH or FTTC Loops
C. Overbuilt FTTP, FTTH or FTTC Loops
D. Access to Hybrid Loops for the Provision of Broadband Services
E. Access to Hybrid Loops for the Provision of Narrowband Services

The CCC Brief demonstrated the numerous instances in which three FCC orders (the *TRO*, the *MDU* and the *FTTC* Orders) and the statements of Commissioners make clear that the fiber-to-the-home and hybrid loop unbundling relief adopted in the *TRO* applies only to "mass market" loops. If this relief instead applied to every fiber loop, the FCC's decision in the *TRO* to preserve dark fiber loops as a UNE would be nonsensical,[60] as would the FCC's subsequent

[60] The CCC acknowledges that the *TRRO* later eliminated its requirement for § 251 dark fiber loop UNEs for all customer premises. However, that has no bearing of what the FCC intended with respect to FTTH loops at the time that it wrote the *TRO*. Verizon has not claimed that the *TRRO* modified or clarified the FTTH requirements.

clarification that fiber loops to multi-unit premises that included both enterprise and mass market customers would be eligible for unbundling relief only if the MDU was "predominantly residential." (Had the FTTH rule applied to all loops, it would have already applied to all multi-unit premises; only because the FTTH rule applied only to mass market customers did the FCC need to clarify how the rules should apply to buildings that included both mass market and enterprise customers.)

Verizon chooses to ignore all this, and argues that ¶ 210 of the *TRO* extends the broadband rules to all enterprise customers, and supercedes the FCC's numerous statements to the contrary. The quote that Verizon takes out of context is the FCC's statement that "while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served." But Verizon ignores the meaning of FCC's explanation of this statement, located in the *same paragraph* of the *TRO*:

> For example, business customers typically associated with the enterprise market may require DS0 lines, particularly if they have remote business locations staffed by only a few employees where high-capacity loop facilities are not required. Because a competitive carrier faces the same economic characteristics to serve these customers at their remote locations with a DS0 loop that it faces to serve residential customers served by the same loop type, our customer class distinctions are not intended to preclude a competitive LEC from obtaining an unbundled loop to serve those DS0 customers.

In other words, the FCC's intent was to make clear that a large corporation would not be treated as an enterprise customer where it ordered services typical of a mass market customer, and a very small business that ordered services typical of a large enterprise customer would not be treated as a mass market customer. That is why the CCC's proposed definition of the mass market refers to the *capacity of telecommunications facilities* at the location in question, and *not the size of the customer's overall business*.

Verizon, meanwhile, would turn this explanation on its head, suggesting that simply because a very large corporation might order a mass market service to a remote location, it should be treated as a mass market customer even at its headquarters, where it orders services typical of the enterprise customer that it is. Verizon's interpretation of ¶ 210 is plainly wrong in context of the entire order and, in particular, of the FCC's subsequent reconsideration orders and the statements of Chairman Powell published with these orders. Verizon's attempt to apply the unbundling analysis performed for residences and very small businesses to the largest enterprise customers is clearly contrary to the *TRO* and the Act, and must be rejected.

Second, Verizon argues that the extension of the FTTH/FTTC/Hybrid Loop rules to the enterprise market is supported by the absence of a Mass Market limitation in the FTTH rules.[61] In the first place, it is ironic for Verizon to espouse blind faith to the very same FTTH rule that it elsewhere claims includes a "misnomer" that, if followed literally, would fail to accurately implement the FCC's intent.[62] Even compared to other instances in which it has taken self-serving, conflicting positions, but it is remarkable that Verizon is arguing for both a strict and a loose interpretation of the very same rule, in one instance seeking a strict, literal interpretation of the rule without regard to the order, yet asserting that the literal meaning of another part of the same rule should be ignored. The FCC itself has explained which of these arguments prevails -- the FCC has clearly held that its UNE rules must be "read in conjunction with the rest of the Order."[63] Therefore, it is clear that the omission of a reference to the mass market in the FTTH

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[61] Verizon Brief at 57, n.77.

[62] Verizon Brief at 56 (stating that the rule's use of the term "fiber-to-the-home" is a misnomer that perpetuates the inaccurate notion that a fiber loop is exempt from unbundling only if it serves a residence).

[63] *TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCC Rcd 11166, 11177-78, ¶¶ 20-21 (2000) (referring to the *Local Competition Order*).

rules does not override the numerous references to such a limitation in FCC orders, but instead reflects that the FCC has left this issue to be resolved in the Section 252 negotiation and arbitration process.

Verizon's Brief complains that the CCC has not proposed terms to limit Verizon's obligation to unbundle FTTC loops.[64] However, the CCC's *TRRO* Amendment does include FTTC terms (§ 5.4), and counsel for CCC specifically drew attention to this new inclusion to Verizon's negotiators prior to the filing of briefs in this proceeding.

Finally, with respect to Verizon's provision to CLECs of a voice-grade channel over Hybrid Loops, the CCC generally agrees with Verizon that Verizon would be required to provide TDM features, functions and capabilities but not the features, functions and capabilities used to provide packet-switched services. However, the CCC proposal makes clear that Verizon cannot deny access to features, functions and capabilities that are used to provide TDM services on the basis that they *sometimes* also could be used to provide packet services. The intent of the FCC rule is to enable CLECs to offer voice-grade TDM services; to do so, CLECs need access to all features, functions and capabilities used to provide TDM services.

F. Retirement of Copper Loops

Verizon's opposition to the CCC's proposed terms for copper loop retirement is based almost entirely on its favorite argument that anything not required by FCC Rules is prohibited by them. Verizon argues that "federal regulation bars" the CCC's proposals to the extent that they "depart from the FCC's rules."[65] But Verizon flatly ignores the fact that the *TRO* explicitly required ILECs to comply with any additional state rules, thus leaving the door open for states to

[64] Verizon Brief at 87 n.96.

[65] Verizon Brief at 92.

impose additional rules for copper retirement that may be needed to further state or federal policy.[66] Thus, it is ludicrous that Verizon claims that MCI's proposal "is also objectionable insofar as it requires not only compliance with the federal rules governing retirement, but also 'any applicable requirements of state law' without regard for whether that state law [if any] might be preempted by the federal rules."[67] When federal law specifically demands compliance with state requirements, it obviously has not preempted them.

The CCC does not in any way advocate terms that would require Verizon to broadly preserve outdated networks or that would deter Verizon from investing in new network technologies. Instead, the CCC's proposal imposes only minimal and reasonable obligations that are designed for the protection of end user consumers.

The principal new state requirement proposed by CCC is strictly limited to copper loops that a CLEC is already using to provide service to an existing end user customer. If Verizon seeks to retire such a loop, it would have several options. First, it could move the CLEC to an alternative UNE that supports the CLEC's existing services. Second, Verizon could terminate its provision of the loop to CLEC if it demonstrates that allowing the CLEC to continue using that loop to serve its customer would be unreasonable and contrary to the public interest. Therefore, there is only one scenario on which Verizon would be required to continue to provide a copper loop to CLEC: (1) If the CLEC is providing an existing service to a Massachusetts end user customer over a copper loop, (2) there is no alternative Verizon facility to which the CLEC could

[66] *TRO*, ¶ 284. The *TRO* discusses copper retirement in recognition of the fact that its new FTTH rules may make copper retirement more likely in the future. Consideration of reasonable copper retirement rules is thus warranted here as part of the Department's overall implementation of the new FTTH and Hybrid Loop rules.

[67] Verizon Brief at 92, n.99.

continue to offer its existing services at existing rates and terms to that customer without the copper loop; and (3) termination of the CLEC's access would serve no legitimate public interest. If Verizon can demonstrate, for example, that continued access to its copper loop would impede its deployment of broadband services, it would not be required to continue to provide the copper loop.[68] Therefore, CCC's proposal in no way conflicts with state and federal policy favoring the deployment of new broadband facilities and services.

The CCC proposal also requires Verizon to provide 6 months' notice of a planned copper retirement. Upon learning of a planned retirement, a CLEC may determine that its best option would be to move its service to an alternative loop arrangement. In order to have sufficient time to plan this transition, the CCC's notice provision is eminently reasonable, given that the *TRRO* determined that CLECs should be afforded 12-18 months to transition DS1, DS3 and dark fiber loops to alternative arrangements. CLECs also need advance notice even where they are not using a copper loop, since they need to advise their marketing and operations teams of the impending loss of copper loop availability before they rely on such availability in promising new services to or entering into new long-term contracts with prospective customers.

H. Packet Switching

Verizon incorrectly asserts that its obligation to provide unbundled local switching under the *TRRO* transition terms does not apply when it has deployed a packet switch to perform this function, citing what it believes to be FCC decisions in support. Contrary to this assertion, Verizon is obligated to provide unbundled switching pursuant to FCC rules that require ILECs to

[68] However, Verizon's Brief fails to provide any support for its vague suggestion that the CCC's modest copper retirement proposal would in any way impede Verizon's deployment of broadband services. In fact, where Verizon has already started to turn up its new fiber-to-the-home Fios service, it has typically not retired the parallel copper loop.

"provide a requesting telecommunications carrier with nondiscriminatory access to local circuit switching, including tandem switching, on an unbundled basis, in accordance with Section 251(c)(3) of the Act…."[69] This unbundling is to include "all line-side and trunk-side facilities, plus the features, functions, and capabilities of the switch."[70]

The FCC defines local circuit switching as "the function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks."[71] Given this definition, Verizon's packet switches, when they replace a traditional TDM-based switch, are in fact performing a local circuit switching function, notwithstanding that they can also perform packet switching. They are connecting one customer line to another and, although not necessary to meet the FCC's definition of circuit switching, they do so on a dedicated basis for the duration of the call.

This is in fact, the reason for applying the term "circuit" to this type of connection. "Traditionally, switching networks are made up of connective devices or circuits arranged in a structure that allows for simultaneous connection of many pairs of communication channels. This mode of switching is known as *circuit switching*, denoting the dedication of circuits to each connection for the duration of the call."[72] Contrast this with the "bursty" characteristics of packet switching, in which data packets from different sources are interspersed on the same line during a single time period.[73]

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[69] 47 C.F.R. § 51.319(d).

[70] 47 C.F.R. § 51.319(d)(1)(i).

[71] *Id.*

[72] *Engineering and Operations in the Bell System* 243-44 (R. F. Rey, Tech. Ed., AT&T Bell Laboratories 1983) (emphasis in original).

[73] *Id.* at 535.

In short, even a device designed as a "packet switch" can perform a "circuit switching" function. Even though a call may not have a dedicated path through the Verizon switch itself, the switch is still used to connect two end user lines together for the duration of the call. Verizon's new switches will continue to provide local voice switching by employing voice gateways in conjunction with one or more communications servers. The packet gateway duplicates traditional TDM voice switching functions in virtually all respects. It is touted as having a "standards-based architecture [that] promotes compatibility with standards compliant packet-switching equipment, TDM circuit-switched facilities, operations support systems (OSS), and billing operations … ."[74]

Verizon's arguments are mistaken because they rely upon the distinction between a packet switch and a circuit switch – two pieces of equipment that provide the same local *switching function*. "Switching" is the act of making, breaking or changing connections; a "switch" is the physical piece of equipment that performs these acts. Inattention to this distinction can lead to a tendency to conflate a piece of equipment with its function, as Verizon has done.

Verizon cites scraps of authority that fall well short of the consistent support that it depicts. First, Verizon relies on the *Local Competition Order*, but that Order plainly does not apply. The short paragraph cited in Verizon's Reply[75] comprises the sum total of the *Local Competition Order's* discussion of packet switches. It was response to a request to unbundle "*data* switching by packet switches,"[76] and the FCC was *not* declining the request *per se*; it was

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[74] *See* "Nortel Succession Communication Server 2000 Product Brief" (attached as Exhibit E to CCC's Brief).

[75] Verizon Brief at 95.

[76] *Local Competition Order*, ¶ 407 (emphasis supplied).

declining *to address the issue*, citing an insufficient record.[77] Second, Verizon cites the *UNE Remand Order*,[78] but the FCC statement there actually was addressing a function, not a device. "We decline at this time to unbundle the packet *switching functionality*, except in limited circumstances."[79] Finally, despite Verizon's attempts to find it, there is no support for its position in the *Triennial Review Order*, either. Throughout that *Order*, the FCC consistently uses the phrase "packet switching," *not* "packet switch," as Verizon implies. "Incumbent LECs are not required to unbundle packet *switching* …."[80] "[O]n a national basis, competitors are not impaired without access to packet *switching*…."[81] "[T]here do not appear to be any barriers to deployment of packet switches that would cause us to conclude that requesting carriers are impaired with respect to packet *switching*."[82]

Likewise, the footnote that Verizon characterizes as demonstrating that "the FCC flatly rejected MCI's request to make packet switches subject to unbundling"[83] is taken out of context. The footnote is actually used to expand on the FCC statement regarding *fiber* unbundling:

> [t]he rules we adopt herein do not require incumbent LECs to unbundle any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information. Moreover, the rules we adopt herein do not require

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[77] *Local Competition Order*, ¶ 427. "Because so few parties commented on the packet switches in connection with section 251(c)(3), the record is insufficient for us to decide whether packet switches should be defined as a separate network element."

[78] Verizon Brief at 95,

[79] *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, 15 FCC Rcd 3696 para. 307 ("*UNE Remand Order*") (emphasis supplied).

[80] *TRO*, ¶ 7.

[81] *TRO*,¶ 537, *cited by* Verizon Brief at 95.

[82] *TRO*, ¶ 539, *cited by* Verizon Brief at 95.

[83] Verizon Brief at 96.

> incumbent LECs to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, such as the xDSL-capable line cards installed in DLC systems or equipment used to provide passive optical networking (PON) capabilities to the mass market.[84]

Once again, Verizon has substituted the word "switch" for switching, and confused the *transmission equipment* used for creating packets with the *switch* that actually switches them.

Verizon has misinterpreted the FCC rules as obligating it to provide only access to a particular piece of equipment (*e.g.*, a TDM voice switch) rather than a specific *function* (*i.e.*, local switching), and has erroneously concluded that it is no longer obligated to unbundle any service supported by equipment with a packet switched architecture. The FCC's unbundling rules require unbundling of switching *functions*, not particular switching *equipment*. Indeed, the FCC has declined to establish technology-specific rules for unbundled switching.[85] For example, in the *Local Competition Order*, the FCC made no distinction between SDM switches (i.e. 1AESS) and TDM switches (i.e. 5ESS, DMS-100), except to recognize possible differences in functionality between the two technologies.[86] Moreover, the FCC did not restrict itself to

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[84] *TRO*, ¶ 288.

[85] The FCC stated that,

> Nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service. Indeed, Congress in the 1996 Act expanded the scope of the "telephone exchange service" definition to include, for the first time, "comparable service" provided by a telecommunications carrier. The plain language of the statute thus refutes any attempt to tie these statutory definitions to a particular technology. Consequently, we reject [the] contention that those terms refer only to local circuit-switched voice telephone service or close substitutes, and the provision of access to such services.

Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order, 13 FCC Rcd 24011 para. 41 (1998) ("*Advanced Services Order*").

[86] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 para. 418. (1996) ("*Local Competition Order*").

traditional loop-port-trunk termination schemes.[87] Likewise, in the *UNE Remand Order*, the FCC declined to single out specific equipment technologies when defining packet switching.[88]

Issue 14: What should be the effective date of the Amendment to the parties' agreements?

CCC's Initial Brief has already refuted Verizon's arguments on this Issue.

Issue 15: How Should CLEC Requests to Provide Narrowband Services Through Unbundled Access to a Loop Where the End User is Served Via Integrated Digital Loop Carrier (IDLC) Be Implemented? Should Verizon Be Permitted to Recover its Proposed Charges (*e.g.*, Engineering Query, Construction, Cancellation Charges)?

Verizon complains that the CCC's proposed *TRO* § 1.4.4.2 ("If none of the options described above are available, Verizon shall construct the necessary copper Loop or UDLC facilities and provide such facilities to CLEC on an unbundled basis") seeks "free loop construction."[89] The CCC has asked for no such thing. In the first place, Verizon's own proposal provides that "If neither a copper Loop nor a Loop served by UDLC is available, Verizon shall, upon request of CLEC, construct the necessary copper Loop or UDLC facilities."[90] Therefore, while normally Verizon is not obligated to construct facilities for a CLEC, here the only debate is over the appropriate rate for access to such loops.

The CCC proposal would require CLECs to pay the non-recurring and recurring charges applicable to unbundled loops, which the Department has previously determined are appropriate

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[87] "The line-side facilities include the connection between a loop termination at, *for example*, a main distribution frame (MDF), and a switch line card. Trunk-side facilities include the connection between, *for example*, trunk termination at a trunk-side cross-connect panel and a trunk card." *Id.* para. 412. (emphasis supplied).

[88] "We adopt a definition of packet switching that does not favor or disadvantage one packet switching technology over another. Our intention is to define packet switching in such a way as to capture the functionality of packet networks, without regard to a particular "packetizing" technology that an incumbent LEC has deployed in its network." *UNE Remand Order*, ¶ 304.

[89] Verizon Brief at 102.

[90] Verizon Amendment 2 § 3.2.4.2.

for other copper UNE loops that Verizon had previously constructed. Verizon could have proposed specific rates in this proceeding with supporting cost studies, but it has chosen not to do so. It would be unreasonable for the Department to allow Verizon to simply state that CLEC would be subject to other charges that Verizon would apparently determine and calculate later at its unilateral discretion. The purpose of an interconnection agreement is to establish the rates and terms at which CLECs can access UNEs and interconnection. Absent any evidentiary support for Verizon's proposed additional charges, the standard UNE Loop rate should continue to apply.

Issue 16: **Should Verizon be subject to standard provisioning intervals or performance measurements and potential remedy payments, if any, in the underlying Agreement or elsewhere, in connection with its provision of a) unbundled loops in response to CLEC requests for access to IDLC-served hybrid loops; b) commingled arrangements; c) conversion of access circuits to UNEs; d) loops or transport (including dark fiber transport and loops) for which routine network modifications are required; e) batch hot cuts, large job hot cut and individual hot cut process; and f) network elements made available under Section 271 of the Act or under state law?**

CCC's Initial Brief has already refuted Verizon's arguments on this Issue.[91]

Issue 17: **How should the Amendment address Verizon's obligation to provide sub-loop access be provided under the *TRO*? How should the Amendment address access to the feeder portion of a loop? How should the Amendment address the creation of a Single Point of Interconnection (SPOI)? How should the Amendment address unbundled access to Inside Wire Subloop in a multi-tenant environment?**

Verizon largely concedes CCC's argument that the language Verizon has proposed to implement a CLEC's rights to House and Riser Cable is superfluous. Verizon's proposed

[91] Although Verizon proposes language in this arbitration that would exclude its performance in connection with the provision of routine network modifications and commingling from standard provisioning intervals and from performance measures and remedies, Verizon recently proposed tariff pages that removed such exclusionary language after the Department issued its Partial Suspension Order. *See* DTE 05-36, Partial Suspension Order (March 23, 2005); *see* letter from John Conroy, Vice President, Regulatory Massachusetts, Verizon to Mary Cottrell, Secretary, Massachusetts Department of Telecommunications and Energy, TT 05-38, at Proposed DTE 17, Part B, Section 1.1.1.A.1-2, page 1 (dated April 19, 2005).

amendment has three key parts: (1) section 3.3.1 specifically eliminates reliance on all previous agreements, Verizon tariffs or SGATs, which may have been filed pursuant to this Department's orders, and replaces them with Verizon's new proposed language; (2) section 3.3.1.1 attempts to follow the FCC's general instructions regarding House and Riser Cable; and (3) sections 3.3.1.1.1 (and subparts), 3.3.1.1.2, 3.3.1.1.3, 3.3.1.1.4, 3.3.1.1.5, and 3.3.1.1.6 add minutiae related to access to House and Riser Cable that have no basis whatsoever in the *TRO*. In Verizon's view, the third part of its proposed revisions is "geared towards the practical and logistical implementation of CLEC orders for inside wire[.]"[92] Because these provisions are not derived from the *TRO*, CCC does not agree to these terms for "implementation" and Verizon has provided no legitimate reason for them.[93]

Instead, CCC proposes that the entire section of the Amendment related to Subloops for Multiunit Premises should require Verizon to provide access to them to the extent required by any applicable Verizon tariff of SGAT, and any applicable federal and state commission rules, regulations and orders. Under this approach, the Department would preserve the *status quo* related to House and Riser Cable, which is largely unchanged by the *TRO*, and avoid rendering prior Department decisions obsolete.

As for Verizon's argument that the Feeder portion of a Subloop is not limited to Subloops provided to Mass Market customers,[94] Verizon is mistaken.[95] As discussed above in connection with Issue 13, the omission of a reference to the mass market in the Feeder Subloop rules does

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92 Verizon Brief at 110.

93 *See* CCC Brief at 66-67.

94 Verizon Brief at 107-108.

95 *See* CCC Brief at 68.

not override the numerous references to such a limitation in FCC orders, but instead reflects that the FCC has left this issue to be resolved in the Section 252 negotiation and arbitration process.

Issue 18: **Where Verizon collocates local circuit switching equipment (as defined by the FCC's rules) in a CLEC facility/premises (*i.e.*, reverse collocation), should the transmission path between that equipment and the Verizon serving wire center be treated as unbundled transport? If so, what revisions to the parties' agreements are needed?**

CCC's Initial Brief has already refuted Verizon's arguments on this Issue.

Issue 19: **What obligations, if any, with respect to interconnection facilities should be included in the Amendment to the parties' interconnection agreements?**

CCC's Initial Brief has already refuted Verizon's arguments on this Issue.

Issue 20: **What obligations, if any, with respect to the conversions of wholesale services (e.g. special access circuits) to UNEs or UNE combinations (*e.g.* EELs), or vice versa "Conversions," should be included in the Amendment to the parties' interconnection agreements?**

A. What information should a CLEC be required to provide to Verizon (and in what form) as certification to satisfy the FCC's service eligibility criteria to (1) convert existing circuits/services to EELs or (2) order new EELs?[96]

Verizon professes "dismay" that "[s]ome CLECs complain that it would be unduly onerous" to fulfill Verizon's demands for extensive information as a prerequisite for ordering new enhanced Extended Loops ("EELs") or to convert existing circuits to EELs.[97] Verizon's proposed ordering process violates established principles set forth in the FCC's *Supplemental*

[96] As noted in the CCC Brief, CTC does not join sections 20A and 24 of this brief. Instead, CTC submits FCC Rule 51.318(b) was vacated by *USTA II* and not readopted by the *TRRO*. CTC is seeking clarification of this issue in a Petition for Reconsideration filed with the FCC on March 28, 2005 in WC Docket No. 04-313 and CC Docket No. 01-338. Other members of the CCC reserve their right to support this position in accordance with the reservation of rights language included in their proposed Amendments.

[97] Verizon Brief at 114.

Order Clarification as early as June 2000 and affirmed in the *TRO*.[98] Verizon demands such detailed information that it would effectively require a CLEC to submit to an unlawful pre-audit before Verizon will process or provision an order for new EELs or conversion of existing circuits to EELs, rather than the mere "self-certification" required by the FCC.[99]

Verizon's attempt to impose a pre-audit by requiring such detailed information is an unlawful "delay" or "gating" tactic foreseen, and prohibited, by the FCC.[100] The FCC determined that the ordering process for EELs and conversions should meet "the basic principles of entitling requesting carriers *unimpeded* UNE access upon self-certification, *subject to later verification*" in order to prevent "the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process."[101] The FCC underscored that "the ability of requesting carriers to begin ordering *without delay* is essential."[102] The FCC directed ILECs to "immediately process" such orders "upon receiving a request" from a CLEC which could take the form of a "letter" and "self-certification."[103]

In both the *Triennial Review Order* and *Supplemental Order Clarification*, the FCC "emphasized 'that incumbent LECs may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements.'"[104] The

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[98] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, Supplemental Order Clarification (rel. June 2, 2000) ("*Supplemental Order Clarification*").

[99] Verizon Amendment 2, § 3.4.2.3.

[100] *Supplemental Order Clarification*, ¶¶ 29, 31

[101] *TRO*, ¶¶ 622-623 (emphasis added).

[102] *TRO*, ¶ 623 (emphasis added). The FCC recognized that CLECs have "experienced delays" and numerous "other difficulties in converting special access to UNEs" in the past. *TRRO*, ¶ 64.

[103] *TRO*, ¶¶ 620.

[104] *TRO*, ¶ 621; *Supplemental Order Clarification*, ¶ 31.

FCC made clear that "audits will *not be routine practice*" and ILECs "have a limited right to audit every twelve months."[105] Contrary to this clear direction, Verizon seeks to impose a pre-audit, rather than a mere certification, as a gating mechanism designed to impede CLEC access to EELs and conversions. Specifically, Verizon seeks the following information before it will process or provision an order for such services:

> Each written certification provided by CLEC … must contain the following information for each DS1 circuit or DS1 equivalent: (a) the local number assigned to each DS1circuit or DS1 equivalent; (b) the local numbers assigned to each DS3 circuit (must have 28 local numbers assigned to it); (c) the date each circuit was established in the 911/E911 database; (c) the collocation termination connecting facility assignment for each circuit, showing that the collocation arrangement was established under a federal collocation tariff; (e) the interconnection trunk circuit identification number that services each DS1 circuit. There must be one identification number per every 24 DS1 circuits; and (f) the local switch that serves each DS1 circuit. When submitting an ASR for a circuit, this information must be contained in the Remarks section of the ASR, unless provisions are made to populate other fields on the ASR to capture this information.[106]

These detailed information requirements directly contradict the FCC's "provision now, audit later" framework and its intent to preclude ILEC manipulation and delay tactics.[107] Moreover, Verizon's proposed requirements act as a gating mechanism that enable it to engage in self-help to deny CLEC orders before the required audit is conducted. The FCC expressly prohibited such self-help measures. For example, the FCC stated:

> [i]f a requesting carrier certifies that it will provide qualifying services over high-capacity EELs in accordance with the Commission's rules, an incumbent LEC that wishes to challenge the certification *may not engage in self-help by withholding the facility in question*. The success of facilities-based competition

[105] *TRO*, ¶¶ 621, 626.

[106] Verizon Amendment 2, § 3.4.2.3.

[107] *TRO*, at ¶¶ 622-624, n. 1899.

> depends on the ability of competitors to obtain the unbundled facilities for which they are eligible in a timely fashion. Thus, an incumbent LEC that questions the competitor's certification may do so by initiating the audit procedures …. [108]

Similarly, the Illinois Commerce Commission recently decided that CLECs need not certify eligibility for a high-capacity EEL on a specific form required by SBC, and recognized that a simple letter would suffice.[109]

In sum, the Commission should hold that Verizon's information requirements constitute an unlawful gating requirement, a pre-audit and unlawful self-help measures; and, therefore, should reject Verizon's proposed language and adopt CCC's language.

B. Conversion of existing circuits/services:

1. Should Verizon be prohibited from physically disconnecting, separating, changing or altering the existing facilities when Verizon performs conversions unless the CLEC requests such facilities alteration?

Verizon objects to a "prohibition" that might preclude Verizon (except upon CLEC request) from physically disconnecting, separating, or physically altering existing facilities when converting tariffed services to an EEL.[110] CCC's proposal simply follows FCC rule 51.315, which provides in relevant part that:

> (b) Except upon request, an incumbent LEC *shall not separate* requested network elements that the incumbent currently combines. (c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner ….

47 C.F.R. § 51.315(b)-(c) (emphasis added). This rule is unambiguous, and Verizon's position is completely inconsistent with it.

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[108] *TRO*, at ¶ 623, n. 1899.

[109] *XO-IL Arb. Order*, at 35.

[110] Verizon Brief at 115.

Moreover, the FCC held that "[c]onverting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality."[111] CCC's proposed language comports with these FCC determinations and should be adopted.

2. What type of charges, if any, and under what conditions, if any, can Verizon impose for Conversions?

CCC's Initial Brief has already refuted Verizon's arguments on this Issue.

3. Should EELs ordered by a CLEC prior to October 2, 2003, be required to meet the FCC's service eligibility criteria?

Under Verizon's proposal, any EEL provided *prior to the effective date of the TRO*, October 2, 2003, must satisfy the eligibility criteria established as of October 2, 2003. The *TRO's* eligibility requirements do not, however, apply retroactively, only prospectively. Paragraph 589 of the *TRO* specifically provides:

> As a final matter, we decline to require retroactive billing to any time before the effective date of this Order. The eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past. To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order.

In addition, Paragraph 623 of the *TRO* states that "*new orders* for circuits are subject to the eligibility criteria." Taken together, the FCC has determined that (1) if a circuit qualifies under the new standards but did not qualify under the old standards, a CLEC cannot recover the excessive charges prior to the effective date; (2) if a circuit does not qualify under the new standards but did qualify under the old standards, the ILEC may not recover past losses; and (3) EELs may continue to be provided under the old standards up to the effective date. CCC's proposed language is therefore appropriate, and should be adopted.

[111] *TRO*, ¶ 586.

4. For Conversion requests submitted by a CLEC prior to the effective date of the amendment, should CLECs be entitled to EELs/UNE pricing effective as of the date the CLEC submitted the request (but not earlier than October 2, 2003)?

Verizon argues that the *TRO's* "new" commingling and conversion obligations should take effect upon execution of an Amendment of the CLEC's interconnection agreement, rather than retroactively.[112] Verizon incorrectly assumes that the *TRO* changed the law and imposed "new" obligations on Verizon to perform conversions to UNEs that did not exist before the effective date of the *TRO*. Verizon is mistaken.

The FCC has previously and expressly rejected Verizon's amendment requirement. In addressing a similar issue that arose when the pre-*TRO* eligibility criteria were established, the FCC held that "Verizon is required … to promptly implement the conversion of eligible special access circuits to EELs upon request.[113] The FCC emphasized that "*Verizon is not permitted to require CLECs to execute unneeded amendments or amendments with unfavorable terms as a condition to the conversion of their special access circuits to EELs*." [114] Here and in contravention of such FCC pronouncements, Verizon continues to require that CLECs execute such unnecessary amendments.

There has been no change in law as to conversions.[115] The Wireline Competition Bureau's recent Order denying Verizon's Petition for Stay of the *Triennial Review Remand*

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[112] Verizon Brief at 119.

[113] *Net2000 Communications, Inc. v. Verizon-Washington, D.C., Inc.*, File No. EB-00-018, Memorandum Opinion and Order, 17 FCC Rcd 1150, FCC 01-381, ¶ 37 (2002) (citing *UNE Remand Order*, 15 FCC Rcd 3696, 3909, ¶ 480; *Supplemental Order Clarification*, 15 FCC Rcd 9587, 9604, ¶ 33).

[114] *Net2000 Communications*, 17 FCC Rcd 1150, ¶ 37.

[115] Technically, therefore, CCC's proposed terms should not be necessary, but CCC has proposed them to resolve Verizon's refusal to perform conversions without an amendment. Because Verizon should be required to perform these conversions even under the existing terms of the Agreements, even before

Order, in which Verizon challenged the FCC's policy allowing CLECs to "convert" services to UNEs, directly refutes Verizon's theory.[116] In the relevant passage, the Bureau stated that the FCC:

> did not reverse a previous policy barring conversions where competitive LECs were otherwise eligible for the UNE at issue. In fact, the Commission *has never adopted such a bar*. The *Triennial Review Remand Order* instead merely reaffirmed the [FCC's] preexisting policy allowing conversions of services obtained under tariff to UNE arrangements. That policy was reviewed by the U.S. Court of Appeals for the District of Columbia Circuit, which left the Commission's conversion rules undisturbed. The 'stay' Verizon seeks thus would effect – not prevent – a change in *status quo.*[117]

Since Verizon cannot credibly claim that the current combinations requirement represents a change in prior law, the Commission should adopt CCC's position and proposed language on this issue.

5. When should a Conversion be deemed completed for purposes of billing?

CCC's Initial Brief has already refuted Verizon's arguments on this Issue.

C. How should the Amendment address audits of CLEC compliance with the FCC's service eligibility criteria?

Verizon objects to CCC's proposal that Verizon is only entitled only to one audit of a CLEC's books in a 12-month period.[118] As explained in CCC's Brief, Verizon is only entitled to

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(cont'd)

the *TRO* became effective, there is no conflict between its position here and its position that the *TRRO* is not "self-effectuating." On the other hand, if the Department agrees with Verizon that FCC rules are self-effectuating, then Verizon has no basis to oppose an October 2, 2003 effective date for pending conversion requests.

[116] *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, Order, DA 05-675 at ¶ 1 (rel. March 14, 2005) ("*Stay Denial Order*").

[117] *Stay Denial Order*, ¶ 3 (emphasis added).

[118] Verizon Brief at 122-123.

one audit in a 12 month period. The Illinois Commerce Commission recently came to the same conclusion and held that,

> the FCC gave ILECs the option of initiating an audit, with or without suspicion of noncompliance, no more than once every 12 months. By requiring ILECs to pay auditing costs (at least initially), TRO§626, the FCC created a disincentive against invoking that option, even on an annual basis. Thus, while the FCC imposed no "cause" requirement, it discouraged ILECs from acting without cause by allocating audit costs to the ILEC (unless an audit establishes material CLEC noncompliance, TRO§627).[119]

This rationale applies equally here and makes clear that the *TRO* does not condone audits more than once in a 12-month period. Accordingly, Verizon's proposed language should be rejected.

Verizon also argues that its requirement that CLECs keep records for a period of 18 months after an EEL arrangement is terminated is consistent with the nature and purpose of the audit requirement.[120] Verizon's proposal is not that at all. Verizon has shown no valid reason why CLECs should keep records 18 months *after an arrangement has been terminated*. CCC recognizes that they have a duty to maintain appropriate documentation to support their certifications while an EEL is in service; however, to the extent an arrangement has been terminated, there are no facilities that are being used that can be audited.[121]

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[119] *XO-IL Arb. Order*, at 38

[120] Verizon Brief at 123

[121] Verizon also objects to audit costs being allocated based on whether there is material non-compliance as required by the *TRO*. Although CCC fully addressed this issue in its Brief, CCC Brief at Issue 20(C), the Arbitrators should take notice that Verizon recently proposed tariff pages that allow just that. Verizon submitted such language after the Department issued its Partial Suspension Order. *See* DTE 05-36, Partial Suspension Order (March 23, 2005); letter from John Conroy, Vice President, Regulatory Massachusetts, Verizon to Mary Cottrell, Secretary, Massachusetts Department of Telecommunications and Energy, TT 05-38, at Proposed DTE 17, Part B, Section 13.4.1.E.3-4, page 5 (dated April 19, 2005).

Issue 21: **How should the Amendment reflect an obligation that Verizon perform routine network modifications necessary to permit access to loops, dedicated transport, or dark fiber transport facilities where Verizon is required to provide unbundled access to those facilities under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51? May Verizon impose separate changes for Routine Network Modifications?**

CCC's Initial Brief has already refuted Verizon's arguments on this Issue.

Issue 22: **Should the parties retain their pre-Amendment rights arising under the Agreement and tariffs?**

If Verizon believes that the new FCC rules support a change to its tariffs, it should propose tariff amendments through the normal and proper channels, rather than make a backdoor attempt to nullify its tariffs in a manner that has no basis in the FCC orders. *See* CCC's Brief on Issues 1 and 22, and Reply Brief on Issue 1.

Issue 23: **Should the Amendment set forth a process to address the potential effect on the CLECs' customers' services when a UNE is discontinued?**

See CCC Brief and Reply, Issues 6 (transition terms), 13(F) (copper retirement), 20 (conversions), and Supplemental Issue 4 (transition terms for embedded CLEC customers).

Issue 24: **How should the Amendment implement the FCC's service eligibility criteria for combinations and commingled facilities and services that may be required under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51?**[122]

See CCC's Brief and Reply, Issue 20(A).

Issue 25: **Should the Amendment reference or address commercial agreements that may be negotiated for services or facilities to which Verizon is not required to provide access as a Section 251 UNE?**

It is clear from the briefs that the dispute in Issue 25 is not whether the Amendments should mention "commercial agreements," but whether the default alternative arrangement for a

[122] CTC does not join sections 20A and 24 of this brief. Instead, CTC submits that FCC Rule 51.318(b) was vacated by *USTA II* and not readopted by the *TRRO*. CTC is seeking clarification of this issue in a Petition for Reconsideration filed with the FCC on March 28, 2005 in WC Docket No. 04-313 and CC Docket No. 01-338. Other members of the CCC reserve their right to support this position in accordance with the reservation of rights language included in their proposed Amendments.

former UNE should be a network element provided pursuant to (1) a commercial agreement or (2) Section 271. If the Department were to conclude in Issue 31 that Verizon has no obligation to provide network elements under Section 271, references to commercial agreements along the lines of those proposed by Verizon could be reasonable. If, however, Verizon continues to be subject to Section 271, according to the plain terms of the statute, then the CCC's proposal to make such elements the default transition option is more sensible and consistent with the Act.

It should be noted that "commercial agreement" is not a term defined by the Act, but the CCC understands Verizon to use the term to mean an agreement that Verizon offers voluntarily, without a legal obligation to do so. As such, § 271 network elements would not be provided under a "commercial agreement," because Verizon is legally obligated to offer such facilities at regulated rates and terms. Instead, as demonstrated in Issue 31, because Verizon is legally obligated to provide § 271 network elements, Congress required that Verizon's rates and terms for § 271 network elements be set forth in its § 252 interconnection agreements.

Issue 26: **Should Verizon provide an access point for CLECs to engage in testing, maintaining and repairing copper loops and subloops?**

CCC's Initial Brief has already refuted Verizon's arguments on this Issue.

Issue 27: **What transitional provisions should apply in the event that Verizon no longer has a legal obligation to provide a UNE? How should the Amendment address Verizon's obligations to provide UNEs in the absence of the FCC's permanent rules? Does Section 252 of the 1996 Act apply to replacement arrangements?**

Verizon's brief, in a single sentence response to this Issue, states that the transition rates and terms prescribed by the *TRRO* cannot be incorporated into a Section 252 interconnection agreement. This contention not only conflicts with the ILECs' long-standing argument that they do not have to provide anything to CLECs that is not included in a Section 252 agreement, see Introduction, *supra*, but it is also refuted by the FCC's orders. The *TRRO*'s transition terms are plainly a successor to the interim transition terms the FCC adopted in its August 2004 Interim

Order, which held that any § 252 interconnection agreement or amendment during that period should "reflect the transitional structure" the Order created.[123] Similarly, the *TRRO* indicated that the transitional scheme should be included in § 252 interconnection agreements, as it noted that carriers could adopt alternative transitional terms in interconnection agreements pursuant to § 252(a)(1).[124] Therefore, the FCC intended for the temporary transition terms to be included in the parties interconnection agreements. This inclusion is sensible and reasonable, since the core subject matter of the transition terms involve § 251 UNEs that CLECs have obtained, and, during the course of the transition, will continue to obtain, *pursuant to their Agreements*. If instead the Amended Agreements did not require Verizon to provide access to these facilities, Verizon could later return to its argument that CLECs are not entitled to any form of access that is not implemented in their agreements.

Issue 28: Should Verizon be required to negotiate terms for service substitutions for UNEs that Verizon no longer is required to make available under section 251 of the Act?

Congress required that Verizon's rates and terms for § 271 UNEs be established in § 252 Interconnection Agreements. *See* CCC's Brief and Reply, Issue 31.

Issue 29: Should the FCC's permanent unbundling rules apply and govern the parties' relationship when issued, or should the parties not become bound by the FCC order issuing the rules until such time as the parties negotiate an amendment to the ICA to implement them, or Verizon issues a tariff in accordance with them?

Contrary to Verizon's assertion, FCC rules are not "self-effectuating." Instead, the determination of the effective date of the changes that result from the *TRO* and *TRRO* are

[123] *Interim Order*, ¶ 22.

[124] *TRRO*, ¶¶ 145, 198, 228.

controlled solely by the existing change of law terms, which Verizon has itself previously explained are binding on state commissions. *See* Introduction, *supra*, and CCC Brief, Issue 2.

Issue 30: Do Verizon's obligations to provide UNEs at TELRIC rates under applicable law differ depending upon whether such UNEs are used to serve the existing customer base or new customers? If so, how should the Amendment reflect that difference?

This distinction is relevant only to UNEs subject to the transition rules established by the *TRRO,* which is addressed in CCC's response to Issues 6, 27 and Supplemental Issue 4.

Issue 31: Should the Amendment Address Verizon's Section 271 Obligations to Provide Network Elements that Verizon No Longer is Required to Make Available Under Section 251 of the Act? If So, How?

Contrary to Verizon's assertions, the Department has just as much authority to establish "just, reasonable and not unreasonably discriminatory"[125] rates, terms and conditions in this § 252 arbitration proceeding for network elements that must be offered pursuant to § 271[126] as it does to establish TELRIC rates for § 251 UNEs.. Verizon's argument is based on narrow, strained, and distorted interpretations of the Act and various FCC and court decisions that imbues them with meaning that are simply absent from the text. These fast and loose legal arguments do not hold up to scrutiny.

As explained in CCC's Brief, the Department has this authority because Verizon's § 271 obligations are unequivocal, directly applicable, *and arbitrable under § 252*. Indeed, the Department, by serving as the arbitrator in this § 252 arbitration, is performing its role as a federal steward that has been specifically delegated authority by Congress to implement the federal Act consistent with the FCC's established standards. In this context, the facts and the law

[125] *See TRO*, ¶¶ 656, 663.

[126] 47 U.S.C. §§ 271(c)(2)(B)(iv) (local loop transmission), (v) (local transport), (vi) (local switching), & (x) (signaling/call related databases) (collectively "§ 271 network elements").

are clear – (1) Verizon is obligated to offer 271 network elements;[127] (2) § 271 requires that interconnection agreements be approved by the Department pursuant to the § 252 process and contain both § 251(c)(3) and § 271 network elements;[128] (3) the *TRO* and *TRRO*, among other things, established new standards pertaining to Verizon's obligation to offer 251(c)(3) and 271 network elements that must be negotiated and implemented pursuant to the § 252 process;[129] and (4) the Department is legally obligated to address related open issues and establish the appropriate terms for offering such facilities in this § 252 arbitration.[130] As explained in CCC's Brief and herein, a logical and coherent interpretation and evaluation of the Act and the *TRO* demonstrates this. Verizon's arguments not only reflect its disdain for state regulatory oversight of its § 271 offerings, but also make a mockery of the provisions of the Act that require Verizon

[127] 47 U.S.C. §§ 271(c)(2)(B)(iv),(v), (vi), & (x) (specifying that BOCs are obligated to offer access to local loop transmission, local transport, local switching, and call related databases); *see also TRO*, ¶¶ 652-53 (emphasizing that "BOCS have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251").

[128] 47 U.S.C. § 271(c)(2)(A) (requiring interconnection agreements include § 271 checklist items); 47 U.S.C. § 271(c)(1)(A) (requiring that agreements be "approved under Section 252").

[129] The *TRO* prescribed the standard that needs to be applied when establishing rates, terms and conditions for § 271 network elements and recognized that although the FCC may have relieved BOCs from offering certain UNEs (and later in the *TRRO*) pursuant to § 251, BOCs still have an independent obligation pursuant to § 271 to provide access to them at just, reasonable, and not unreasonably discriminatory rates, terms and conditions consistent with § 201 and § 202 of the Act. *TRO*, ¶¶ 656-664. The FCC also held that in implementing the *TRO*, the § 252 process should be followed and emphasized that "Parties may not refuse to negotiate any subset of the rules we adopt herein [which includes the FCC's 271 determinations]." *TRO*, ¶¶ 703-704, 706. In this connection, the *TRO* and the regulations established therein are both considered the "rules" that parties are required to negotiate. *see generally* 5 U.S.C. § 551 (a "'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency…").

[130] 47 U.S.C. § 252(b)(4)(C) (requiring a state commission to resolve all open issues); *see also TRO*, ¶¶ 701-705 (holding that the § 252 process be used to conform interconnection agreements to reflect the *TRO*).

to offer § 271 checklist items in an interconnection agreement approved by a state commission under § 252.

A. The Department's Decisions Not to Enforce § 271 Obligations in *Non*-§ 252 Proceedings Are Irrelevant.

Verizon initially contends that there is "no lawful basis to include section 271 obligations in the section 252 Amendment under arbitration."[131] It cites various Department decisions as having already rejected such arguments. Verizon's argument is wrong, because these earlier cases *were not § 252 arbitration proceedings*, like this one, where the Department has express authority, under § 252, § 271, and the *TRO*, to establish rates, terms, and conditions for § 271 network elements. D.T.E. 98-57 Phase III-D was a tariff investigation under Commonwealth law, and the *Consolidated Order* was both a tariff investigation and a general proceeding initiated to implement aspects of the FCC's *TRO* that were subsequently vacated by *USTA II*. Although the Department declined in these proceedings to enforce Verizon's § 271 unbundling obligations, the Department was not in those cases exercising its federal law authority as a § 252 arbitrator.[132] As discussed above, the FCC ordered that the § 252 process be used to implement its *TRO* rulings[133] and state commissions have the explicit authority and duty in a § 252

[131] Verizon Brief at 136.

[132] It bears noting that the Department did hold in D.T.E. 03-59-B that § 271 and the FCC's implementing rules do not preempt its jurisdiction over Verizon's obligation to offer local switching pursuant to § 271 when it is offered on a common carriage basis. D.T.E. 03-59-B, Order Denying Motion of Verizon Massachusetts for Partial Reconsideration, at 7. Likewise, under § 271 and the FCC's implementing rules, the Department is not preempted from establishing rates, terms and conditions associated with § 271 network elements in a § 252 arbitration proceeding.

[133] *See TRO*, ¶¶ 703-04 & 706.

arbitration to decide all "open issues" unresolved by the parties' negotiations, including issues related to § 271 network elements.[134]

B. State Commissions Have a Role in Implementing § 271 Obligations in a § 252 Arbitration.

Verizon submits that the Act and various FCC and court decisions indicate that the FCC has sole authority to implement § 271.[135] It contends that the only role state commissions have under § 271 is an advisory one which only occurs when a § 271 application is being considered by the FCC. Verizon argues that a state commission's role under § 271 ceases after the FCC approves a § 271 application for that state. As discussed below, Verizon once again is wrong.

1. The FCC Never Held in *InterLATA Boundary Order* that It Has Sole Authority Over the § 271 process.

Verizon claims that in the *InterLATA Boundary Order,* the FCC held that it has exclusive authority over the § 271 process.[136] This is a grossly erroneous interpretation of this order. The FCC actually held that it had sole authority over LATA boundaries. Nowhere in this order did the FCC suggest that it had exclusive authority over all of § 271. In fact, by ordering parties to negotiate and implement its *TRO* determinations (which includes its 271 holdings) using the § 252 process, the FCC has held otherwise.[137]

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[134] *See also* CCC's Brief at 112 (citing 47 U.S.C. § 252(b)(4)(C) (requiring a state commission to resolve all open issues) and 271(c)(1) (requiring that agreements be "approved under Section 252")).

[135] Verizon Brief at 137.

[136] Verizon Brief at 137 (citing *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona*, NSD-L-97-6, Memorandum Opinion and Order, 14 FCC Rcd 14392 (1999) ("*InterLATA Boundary Order*")).

[137] *See TRO*, ¶¶ 703-04, 706. Verizon seems to suggest that because states had no jurisdiction over the implementation of the Modification of the Final Judgment ("MFJ"), states are prohibited from regulating under § 271. However, the 1996 Act abolished the MFJ and replaced it with the requirements of § 271. Far from abolishing state authority, the Act specifically preserves state authority in a number of

2. *Indiana Bell* Does Not Preempt The Department from Acting Pursuant to § 271.

Verizon goes on to argue that *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004) preempts the Department from acting pursuant to § 271.[138] Again Verizon distorts the holding of the case, which was not a § 252 arbitration. *Indiana Bell* found that the Indiana Utility Regulatory Commission ("IURC") could not order that a specific § 271 performance plan be implemented when reviewing a § 271 application.[139] The court's ruling had nothing to do with the performance plan. Rather, the court explained that IURC's establishment of a plan during the evaluation of a § 271 application "bumps up" against the process for interconnection agreements for local service under Sections 251 and 252.[140] The Court emphasized that,

> What the IURC has done is to make an end run around the Act. By issuing a freestanding order, the IURC set up baselines for interconnection agreements. The order interferes with the procedures set out in the Act, which require that agreements be negotiated between private parties and only when that fails are they subject to mediation by state agencies.[141]

In contrast, by establishing rates, terms, and conditions for § 271 network elements in this § 252 arbitration, the Department would not be "interfer[ing] with the procedures" associated with

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(cont'd)

important respects. Therefore, the fact that states may or may not have exercised any authority in implementing the MFJ is irrelevant.

[138] Verizon Brief at 137.

[139] *Indiana Bell*, 359 F.3d at 496-98.

[140] *Indiana Bell*, 359 F.3d at 497.

[141] *Indiana Bell*, 359 F.3d at 498.

establishing "interconnection agreements for local service under section[]… 252,"[142] but instead would be implementing those procedures as Congress intended.

3. The FCC Does Not Have Exclusive Authority to Establish Rates for § 271 Network Elements

Verizon also argues that state commissions have no authority to set the rates for § 271 network elements and that such authority exclusively rests with the FCC.[143] Its position is entirely incorrect. Section 271 network elements are not interstate services but are local exchange intrastate offerings for which state commissions have the authority to regulate. Sections 271(c)(2)(B)(iv)-(vi) specifically characterize the 271 loop, transport, and switching as "local" facilities. Because these are not interstate services, they are not within the FCC's exclusive control pursuant to section 201.[144]

But even if § 271 rates were deemed to be an exclusively federal issue, the FCC did not (and could not) strip state commissions of their arbitration authority under Section 252(e) to establish just and reasonable rates for 271 network elements. *Iowa II* fully supports the CCC's formulation. In *Iowa II*, the Supreme Court upheld the scheme in which the FCC established TELRIC methodology and left implementation of that methodology to the state commissions in § 252 proceedings.[145] Similarly, the FCC has established the "just and reasonable" standard for § 271 rates and has left implementation of that standards to the § 252 process. Therefore, Verizon's § 271 rates are ripe for consideration as an open issue in this arbitration. .

State commissions therefore have the requisite authority to establish rates for § 271

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[142] *Id*. at 498.

[143] Verizon Brief at 138.

[144] The FCC's exclusive § 201 jurisdiction only applies to interstate services.

[145] *Iowa II*, 525 U.S. at 378 (emphasis added).

network elements that comport with the applicable federal requirements. As explained in CCC's Brief, the FCC would expect states to establish such rates. Indeed, hypothetically speaking, if the FCC were to review a § 271 application when the BOC was not compelled by Section 251(c)(3) to offer loops, transport, switching, and/or signaling, the FCC would expect a state commission to establish just and reasonable rates, terms, and conditions for network elements that § 271 exclusively and independently requires BOCs to provide. Thus, state commissions would not be acting without authority in doing so. Rather, state commissions would be complying with the FCC's explicit directives that it be done.[146]

4. States Have The Authority Under § 252 to Establish Rates, Terms and Conditions for § 271 Network Elements.

Verizon further contends that *USTA II* specifically rejected the argument that § 271 obligations cannot be established in § 252 arbitrations.[147] The *USTA II* court never rendered such a ruling. Rather, it merely affirmed the FCC's decisions that the TELRIC pricing standard applies only to § 251(c)(3) UNEs and not to § 271 elements; and that § 271 unbundling obligations do not include the § 251(c)(3) duty to combine network elements. In upholding this latter FCC decision, the court noted that a BOC may nonetheless have a duty under other law to

[146] The FCC expects that state commissions will make written factual findings and reach reasoned legal conclusions concerning the BOC's compliance with the requirements of Section 271. *See* Public Notice, Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, 16 FCC Rcd 6923, at 6930 (Mar. 23, 2001) (emphasizing that given "our 90-day statutory deadline, this Commission looks to state commissions to resolve factual disputes wherever possible. As indicated in prior section 271 orders, this Commission will accord more weight to state commission evaluations where the state has conducted a rigorous investigation of the BOC's compliance with the statutory requirements through an open, collaborative state process that allows full participation by all interested parties, and has supported its evaluation with a detailed record.") These findings and legal conclusions guide the FCC's review of a BOC's section 271 application and assist the FCC in determining whether to grant the application. Although the FCC makes the ultimate finding of compliance, it relies heavily upon the work of state commissions.

[147] Verizon Brief at 139 & 140.

provision combinations (in that case, the § 202 nondiscrimination requirement).[148] The decision simply says nothing at all about the use of the arbitration process for § 271 elements, and Verizon is entirely wrong in trying to bootstrap such a conclusion from it.

Verizon's arguments ignore the structure and plain language of the relevant sections of the Act. Section 271 itself provides for the applicability of Section 252 procedures, including State arbitration, in implementing the competitive checklist. It requires each Bell Operating Company to provide certain services and functions, including "[unbundled] local loop transmission," 47 U.S.C. § 271(c)(2)(B)(iv), and "[unbundled] local transport," 47 U.S.C. § 271(c)(2)(B)(v), at rates that must not be unjust, unreasonable and unreasonably discriminatory. *USTA II*, 359 F.3d at 589, citing 47 U.S.C. §§ 201-202. Section 271 also requires that the BOC offer these elements either under "binding agreements that have been approved under section 252" or under a "statement of terms and conditions … [that] has been approved or permitted to take effect by the State commission under section 252(f) …." 47 U.S.C. § 271(c)(1)(A), (B). If a BOC fails or refuses to obtain approval of such agreements or statements "under section 252," it would plainly have "cease[d] to meet" one of the essential conditions of § 271, § 271(d)(6); *see* § 271(c)(2)(A) (entitled "Agreement *required*").

The FCC, as well, has confirmed the role that States play in this process. In the *TRO*, it emphasized that "BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates."[149] The FCC recognized that its order will not be self-

[148] *USTA II*, at 590 (explaining that "CLECs have presented to the FCC's § 271 combination rules is grounded in an erroneous claim of a cross-application of § 251" and that it does "not pass on whether the § 271 combination rules satisfy the § 202 nondiscrimination requirement.").

[149] *TRO*, ¶ 652; *see also TRO*, ¶¶ 653 & 656.

effectuating and will need to be implemented, in large part, through interconnection agreements between carriers.[150] The FCC held that where a negotiated agreement cannot be reached, parties should submit their requests to state arbitration and that state commissions would implement the *TRO* under the § 252 process.[151] At the same time, the FCC stated that "parties may not refuse to negotiate any subset of the rules we adopt herein [which includes the FCC's 271 rules]."[152]

If the Department eliminated critical § 251 UNEs but did not concomitantly establish provisions for their § 271 counterparts in this arbitration, it would be contravening its duties as required by the Act and the *TRO*.[153] Moreover, since § 271 and FCC precedent specifically provide that checklist items must be included in § 252 agreements, there can be no serious argument that if a BOC and a requesting carrier disagree on the rates, terms and conditions of access to § 271 network elements, that disagreement constitutes an "open issue" that a state commission has the authority to resolve in a § 252 arbitration.

Federal courts have uniformly found that state commissions must arbitrate such issues. For example, the Eleventh Circuit decision in *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*,[154] confirms the Department's authority to arbitrate interconnection agreement disputes over specific checklist items. In that case, BellSouth disputed the Florida Public Service Commission's ability to arbitrate a dispute between MCI and BellSouth on the terms and

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150 *TRO*, ¶ 701.

151 *TRO*, ¶¶ 703-704.

152 *TRO*, ¶ 706; *see supra* note 129 (explaining that the *TRO* and the regulations established therein are both considered the "rules" that parties are required to negotiate and citing 5 U.S.C. § 551).

153 *See XO-IL Arb. Order*, at 66 (recognizing this and ordering that provisions for § 271 network elements be included in a § 252 interconnection agreement).

154 *MCI Telecom. Corp.* v. *BellSouth Telecom. Inc.*, 298 F.3d 1269 (11th Cir. 2002).

conditions of a performance monitoring and liquidated damages plan. The Eleventh Circuit disagreed with BellSouth and held that the FPSC could arbitrate that dispute because that performance and damages plan "clearly falls within the FPSC's authority."[155] The Eleventh Circuit held that the state commission has the authority to arbitrate disputes over items specifically referenced in "the text of the statute" that incumbents are "required to negotiate."[156] As discussed above, the § 271 checklist items are specific, express statutory obligations that apply to BOCs and that they are required to offer under § 252 agreements. As a result, *MCI* makes clear that the Department has the authority in this arbitration to resolve this dispute over § 271 network elements.

Similarly, in *Coserv Ltd Liability Corp.* v. *Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003) ("*Coserv*"), the Fifth Circuit reversed a state commission's refusal to arbitrate an issue in similar circumstances. It concluded that a state commission "err[s]" whenever it "narrowly" interprets § 252 to permit the state commission to decide only issues related to § 251(b) and (c).[157] Rather, in seeking to reach an interconnection agreement, the "parties are free to include interconnection issues that are not listed in § 251(b) and (c) in their negotiations. … [N]othing in § 252(b)(1) limit[s] open issues only to those listed in § 251(b) and (c)."[158] The court found that Congress expected that negotiations initiated pursuant to section 252 might expand to include "other issues" that would be "link[ed] … together under the § 252 framework," and Congress "still provided that *any issue* left open after unsuccessful negotiation would be subject to

[155] 298 F.3d at 1274.

[156] *Id.* at 1294.

[157] *Coserv*, at 486, 488.

[158] *Id.* at 487.

arbitration."[159] Accordingly, the court held that, where the "parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration."[160]

As indicated above and in the CCC's Brief, Verizon, by requesting and obtaining its section 271 authority in which it agreed and is now required by law to offer 271 network elements, must now negotiate and arbitrate, if necessary, the rates, terms and conditions for 271 network elements pursuant to § 252. Moreover, because the FCC has held that parties could not refuse to negotiate any subset of the *TRO*, there is no question that the 271 issues are part of this arbitration.[161]

C. Department Oversight of § 271 Network Elements is Necessary and Would Not Impede Commercial Agreements.

Verizon also contends that state law regulation of § 271 network elements would impede commercial agreements for such facilities.[162] Verizon submits that the "possibility of state

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[159] *Id.*

[160] *Id.*; *accord MCI* v. *BellSouth*, 298 F.3d at 1274 (recognizing that state commissions can decide issues that the parties agree to negotiate). Elsewhere, Verizon has portrayed the *MCI* and *Coserv* decisions as the governing law that limits section 252 arbitrations only to "section 251" issues. The CCC recognizes that these cases may support an argument that an ILEC can refuse to negotiate terms wholly unrelated to its obligations under the Act. However, these cases make clear that Verizon cannot refuse to negotiate terms related to § 251, and CCC submits that this rule is equally applicable to § 271, which the Act specifically connected to the §§ 251-252 process. Neither *MCI* nor *CoServ* considered this issue. Thus, it is irrelevant here whether Verizon agreed to negotiate § 271 issues.

[161] *TRO*, ¶ 470. Although *Coserv* stands for the proposition that § 251 controls what is must be addressed in a § 252 arbitration, the court never addressed the fact that § 271 issues must also be addressed in a § 252 arbitration because interconnection agreements required under § 271 must be approved by state commissions pursuant to § 252. Contrary to Verizon's claims (Verizon Brief at 141), *Sprint Communications Co. v. FCC*, 274 F.3d 549, 552 (D.C. Cir 2001) did just that. It recognized that § 271 incorporates by reference the § 252 process which includes state commission involvement. Relatedly, Verizon's references to the *Qwest Declaratory Ruling*, 17 FCC Rcd at 19341, ¶ 8 & n.26 (Verizon Brief at 138 & 139) are inapposite because that FCC decision did not address this express statutory obligation nor did the FCC explicitly forebear from enforcing these obligations on Verizon or other BOCs.

[162] Verizon Brief at 139.

commission review and potential modification of voluntary commercial agreements will encourage parties to attempt to use the regulatory process to improve further on terms of a negotiated deal, thus diminishing their ability to resolve issues with certainty at the bargaining table."[163] In the first place, this argument is specious as a legal matter, just as it would be irrelevant if Verizon argued that the interconnection agreement process interfered with its ability to enter "commercial agreements" related to rates for its § 251 UNE obligations. In addition, Verizon's argument is farcical as a factual matter, because there are unlikely to be *any* real negotiations in the absence of regulatory oversight.[164] BOCs have *limited incentives, if any, to negotiate* just, reasonable, and nondiscriminatory rates, terms and conditions for 271 UNEs since all of the BOCs have been granted 271 authority. If anything, the threat of state commission involvement encourages rather than discourages BOCs to incorporate such provisions in commercial agreements.

Tellingly, Verizon's counsel implicitly recognizes that commercial agreements cannot upstage interconnection agreements, because interconnection agreements need to reflect the entire rights and obligations of the parties under the Act and applicable law, or else such rights may be forfeited. Verizon's counsel, on behalf of SBC, recently argued to the D.C. Circuit that:

> Under the language and structure of the 1996 Act, the obligations between ILECs and CLECs and governed in the first instance by their interconnection agreements. Indeed, absent such an agreement an ILEC has no obligation to make *any* facilities available to the CLEC, much less on the terms and conditions [required by the FCC's Section 251 regulations].[165]

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[163] Verizon Brief at 139.

[164] *See also Bell Atlantic/GTE Merger Order*, ¶ 202 (finding that "because interconnection prices are subject to regulatory oversight," an incumbent is less able to engage in price discrimination).

[165] *SBC v. FCC*, D.C. Cir. Docket No. 03-1147, Brief of SBC Communications, Inc. at 15 (September 28, 2004) (emphasis original).

SBC concluded that a CLEC that executed an interconnection agreement after the merger conditions were adopted that did not include the substantive obligations imposed by the merger conditions "disavowed" its right to such access. Under this theory, *any* unbundling or interconnection obligation could only be implemented through an § 252 agreement "regardless of the source of the Commission's authority to impose the merger conditions," *i.e.*, even if the merger conditions were not derived from § 251.[166] And in particular, SBC argued that a CLEC could only enforce its rights arising under the 1996 Act – which would include § 271 – in an interconnection agreement, and that any CLEC that did not secure its rights arising under the 1996 Act – which again would include § 271 – had "expressly" waived them.[167]

For the foregoing reasons, Department should reject Verizon's arguments and should adopt the 271 contract language proposed by the CCC.

Issue 32: Should the Commission adopt the new rates specified in Verizon's Pricing Attachment?

Verizon points out that its Amendment 2 includes a pricing attachment addressing the rate elements and services that it is required to provide under the *TRO*, and states that it will submit a cost study to support proposed prices for such rate elements.[168] However, as the CCC noted in its Brief, Verizon's March 1, 2005 letter to the Department specified that Verizon did not intend to litigate charges in this proceeding for non-recurring rate elements for which the

[166] *Id*. at 17. SBC made this argument knowing that the D.C. Circuit had previously concluded that its merger obligations were in fact independent of Section 251. *SBC v. FCC*, 373 F.3d 140 (D.C. Cir. July 6, 2004).

[167] *Id*. at 22.

[168] Verizon Brief at 142.

Department has not already set approved rates.[169] Verizon further stated that until rates for those elements are approved by the Department, it would not charge for such activities when provisioning new loops pursuant to the terms of the amended interconnection agreements.[170] Based on Verizon's representations to the Department, the CCC stated in its Brief that this pricing issue is moot and not appropriate for resolution in the instant proceeding.[171] Therefore, Verizon's entire Pricing Attachment, including the general provisions 1.1-1.4 associated with it, is unnecessary and should be rejected by the Department.

If the Department, however, does not entirely reject Verizon's Pricing Attachment (which it should do for the reasons stated herein), the Department should strike Sections 1.2 and 1.3 of the general provisions associated with it. Section 1.2 is inappropriate because it permits Verizon to assess "TBD" charges on a retroactive basis without Department approval. Although Verizon stated in its March 1 letter that it would not charge for the activities until the Department approves new rates, Section 1.2 provides otherwise and seemingly allows Verizon to assess charges retroactively. Section 1.3 is equally unacceptable because the language permits Verizon unilaterally to impose new rates without adhering to the terms of its underlying interconnection agreement regarding rate changes. As detailed in the CCC's response to Issue 11, Verizon may not collect any rates that have not been so approved, and implementation of any new rates must take place in compliance with the existing change of law provisions contained in the parties' interconnection agreements. Verizon's inconsistent positions on this issue underscore the need

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[169] CCC Brief at 122 (citing D.T.E. 04-33, Letter from Bruce P. Beausejour, Vice President and General Counsel of Verizon New England to Mary Cottrell, Secretary, Massachusetts Department of Telecommunications & Energy, at 2 (Mar. 1, 2005)).

[170] *Id.*

[171] *Id.*

for the Department to clarify that Verizon has no unfettered authority to impose new rates when the mood strikes it. For these reasons, Verizon's proposed language is unnecessary and improper.

Supplemental Issue 1: Should the Agreement identify the central offices that satisfy the FCC's criteria for purposes of application of the FCC's loop unbundling rules?

Verizon's position on Supplemental Issues 1-3 is simple, and wrong. Whether or not the Department agrees with the particular way that CCC has proposed to implement the *TRRO*'s loop and transport terms into the agreements, it cannot lawfully agree with Verizon's position that these rules should not be included the agreements *at all*. Verizon claims that "not everything in the *TRRO* is subject to negotiation," asserting instead that parts of the *TRRO* are to be implemented through the self-certification process outlined in ¶ 234 of the *TRRO* rather than the agreements.[172] *But the parties must first establish terms that will implement the self-certification process itself.* Such terms are needed in the Amendment for at least two reasons.

First, in the absence of contract terms, the self-certification process would not apply. Verizon is incorrect in its assertion that the parties are already subject to the FCC's self-certification process "*without changing their existing interconnection agreements*."[173] The *TRRO* is not self-effectuating, so the self-certification process will only be binding when it is implemented into the Agreement. *See* CCC Reply Brief Introduction, *supra* (noting that Verizon's prior and long-standing position has been that CLECs are only entitled to the terms set forth in their Agreements).[174] It is particularly important in this instance to incorporate the new terms into the agreements in order to explicitly amend terms in the existing agreements that

[172] Verizon Brief at 146.

[173] Verizon Brief at 145.

[174] Verizon Brief at 145.

conflict. For example, existing agreements may allow Verizon to reject a UNE order on the grounds that Verizon believed that the requested facility was not eligible to be ordered as a UNE. The CCC is entitled to have these contract terms replaced in this proceeding.

Second, supplemental terms are needed in the contract because ¶ 234 of the *TRRO* does not flush out every necessary detail that is needed for an effective process. The FCC specifically recognized that additional or alternative terms may be appropriate, and held that such terms are subject to § 252 negotiations.[175] Verizon is required by the Act to negotiate (and, in this case, arbitrate) terms that are directly related to its § 251 obligations. *See TRO,* ¶ 706 (explaining that under their § 251(c) obligation to negotiate in good faith, "parties may not refuse to negotiate any subset of the rules.")

While Verizon suggests that ¶ 234 offers "a complete system"[176] to implement the loop and transport terms of the *TRRO*, it would be ridiculous to pretend that a single paragraph of the FCC's order (which was not even discussed by carriers in their comments to the FCC) addresses every issue that will arise in the implementation of its rules for high-capacity loops and transport. Supplemental terms are needed to implement the FCC's design in real-world terms, and in a manner that considers the interests of consumers. For example, the CCC's Brief demonstrates that additional terms are needed to:

- enable CLECs to determine in advance where they can obtain UNEs, so that they can develop viable business and marketing plans and determine what promises they can and cannot make to consumers (CCC Brief at 122, 125).
- enable CLECs to make quick determinations regarding their ability to self-certify a UNE order so that the order can be placed quickly, in line with consumer expectations for a prompt delivery of service (CCC Brief at 125);

[175] *TRRO*, ¶ 234, n.660.

[176] Verizon Brief at 144.

- clarify the form in which a CLEC can submit self-certification, so that there is no dispute over whether the certification was properly submitted (CCC Brief at 127-128);
- establish a process and transition terms to address what happens to existing UNEs already at a wire center when reclassified, a subject on which the FCC specifically left to the § 252 process (CCC Brief at 105-108, 125-126);
- establish a reasonable limitation on the time period in which Verizon can indicate its objection to a self-certification, as has been required by the Michigan PSC (CCC Brief at 128); and
- establish definitions of fiber based collocator and business line that would be used by the CLEC in determining self-certification, and by the Department in the event of a dispute (CCC Brief at 29, 40).

Whether or not the Department agrees with the CCC's proposed solutions for these legitimate concerns, it cannot reasonably give in to Verizon's demand to ignore the existence of these issues. Verizon is content to leave the self-certification process incomplete and outside the contract, because if the system does not function effectively, it is CLECs and their customers that will suffer the consequences. Verizon's failure to present *any* terms to implement these new rules is contrary both to the letter and to the effective implementation of the Act, and must be rejected.

Verizon's short critique of the merits of the CCC's proposed terms is easily dispelled. First, the CCC has proposed to apply the same type of transition to § 251 UNEs that may be eliminated in the future by operation of the *TRRO* terms. *See* CCC Brief at 107-108. Verizon perplexingly claims that the "proposed transition periods clearly have nothing to do with the FCC's purposes in creating its transition periods in the *TRRO* – avoiding CLEC rate shock and allowing the parties to make operational changes and set up replacement services."[177] But the CCC's transition proposal has everything to do with those concerns – they are the very same reasons that CLECs need transition terms for UNEs eliminated in the future: to have time to move the end-user customers' services to alternative arrangements, and phase-in possible rate

[177] Verizon Brief at 148.

increases that CLECs will be unable to immediately pass on to their customers, especially those with term contracts. Verizon's position that there should be *no* transition terms for these facilities not only ignores the factual commonality between present and future UNE eliminations, but also blatantly ignores the fact that the FCC explicitly stated that it expected ILECs "to negotiate appropriate transition" terms for these UNEs affected later by the *TRRO*.[178]

Second, Verizon argues that "there is no need to litigate in advance whether particular" central offices will be eligible for unbundling, and that it would be more "efficient" to leave this issue for later dispute resolution cases.[179] In the first place, the CCC believes that it would in fact be more efficient for the Department to make a single, advance determination with respect to all central offices than subsequent one-on-one dispute resolution proceedings. But more importantly, efficiency is not the primary, and certainly not the only, consideration. Congress' decision to implement the Act through individualized interconnection agreements reflects this fact clearly. The CCC Brief demonstrates the importance of assuring to the extent possible that CLECs are able to determine where they can obtain UNEs *before* they make investments or commitments to their customers. CCC Brief at 122-128. Verizon is therefore wrong in its assertion that CLECs would suffer "no harm" from the delay that would occur by deferring these determinations to after-the-fact disputes.[180] Verizon's only other response to this critical issue is to claim that CLECs have already been "adequately informed" of their rights by Verizon's provision of the list of wire centers that it believes meet the FCC's criteria, according to

[178] *See* CCC Brief at 107 (citing *TRO*, n.399 & n.519).

[179] Verizon Brief at 144.

[180] Verizon Brief at 145.

Verizon's interpretation of those criteria.[181] If Verizon's own interpretation of the rules were the standard with which the Act were to be applied, interconnection agreements would never be necessary. Instead, the Department should implement some method, such as CCC's proposed terms, to assure that there is an impartial determination by the Department as to which wire centers will be deemed non-impaired. The New Hampshire Public Utilities Commission recently opened a proceeding "to determine which wire centers in New Hampshire are affected and what procedure the Commission should adopt for future determinations with respect to affected wire centers."[182] The CCC is merely asking the Department to do the same.

Third, Verizon argues that CLECs should be required to self-certify that their UNE requests are not inconsistent with the *TRRO*, rather than CCC's proposed language that would require certification that requests are not "inconsistent with the Amended Agreement."[183] The difference between the parties on this point is small, but the CCC's proposal is more consistent with the design of the Act. See CCC Brief Issue 1, Reply Brief Introduction (explaining that the obligations of the parties are established by interconnection agreements, not FCC rules). The CCC's proposed terms would incorporate all of the *TRRO* into the terms of the Agreement, so a certification of consistency with the Agreement would be at least as good to Verizon as a certification of consistency to the *TRRO*.

Fourth, Verizon correctly notes that the CCC's proposal that would apply the self-certification process to all UNEs is not provided for in any FCC rule. We believe that it is a reasonable and sensible approach to apply the same process to all UNEs, for the reasons

[181] Verizon Brief at 143.

[182] *See* State of New Hampshire Public Utilities Commission, DT 05-083, Order of Notice (dated April 22, 2005) (attached hereto as Exhibit A).

[183] Verizon Brief at 148-149.

explained in CCC's brief. Simply because the FCC did not require something does not mean, as Verizon argues, that it "must be rejected."[184] *See generally* Issue 1 and the CCC's Introduction to this Reply Brief. However, if the arbitrators disagree, such disagreement should not be a basis to reject the entirety of the CCC's proposed self-certification process. Instead, the CCC emphasizes that its proposal can easily be modified to be limited to high-capacity loops and transport, and that approach would be far more warranted than acceptance of Verizon's proposal to not have contract terms that would apply self-certification to *any* UNE.

Finally, Verizon raises a fair point that the self-certification process should not override contract terms that may allow Verizon to reject a UNE order for reasons unrelated to unbundling eligibility, such as overdue accounts or unavailability of facilities.[185] Verizon had not raised this concern in negotiations, and the CCC would agree to modify its language in order to address it.

The CCC has provided a compelling case in its brief to justify each of the terms it has proposed to implement the TRRO's high-capacity loop and transport rules. Verizon, by contrast, would deprive CLECs (and their customers) any of the benefits of these rules by forcing the CLECs to remain in limbo, without any contract rights, until some later after-the-fact litigation to resolve disputes. CLECs are entitled to contract terms that reflect their rights under the Act. Therefore, CCC's proposed terms should be adopted.

<u>Supplemental Issue 2</u>: Should the Agreement identify the central offices that satisfy the Tier 1, Tier 2 and Tier 3 criteria, respectively, for purposes of application of the FCC's dedicated transport unbundling rules?

See CCC's Reply to Supplemental Issue 1.

[184] Verizon Brief at 148.

[185] Verizon Brief at 149.

Supplemental Issue 3: Should the DTE determine which central offices satisfy the various unbundling criteria for loops and transport? If so, which central offices satisfy those criteria?

See CCC's Reply to Supplemental Issue 1.

Supplemental Issue 4: What are the parties' obligations under the TRRO with respect to additional lines, moves and changes associated with a CLEC's embedded base of customers?

Verizon contends that "CLECs are not allowed to add new lines for existing customers or obtain de-listed UNEs when existing customers move to different locations."[186] Its position, however, is entirely inconsistent with the plain meaning of the *TRRO*. As discussed above, implementation of the *TRRO* requires that interconnection agreements be amended; *i.e.*, the *TRRO* is not self-effectuating as Verizon contends. However, even if it were, Verizon is still obligated to provision adds, moves, and changes[187] – which includes new lines – to embedded customers pursuant to the transition provisions of that order.

With respect to embedded UNE-P customers, the *TRRO* is unequivocal. In paragraph 199 of the order, the FCC explains that,

> Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis, competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers

[186] Verizon Brief at 150.

[187] A move order is submitted by a CLEC to an ILEC when an existing CLEC customer moves to a new address. An add order is submitted when an existing customer seeks to add an additional line to his service. A change order is submitted when an existing customer seeks to add or delete a feature, such a three-way calling.

> to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers.[188]

In addition, FCC Rules 51.319(d)(2)(i) and (iii), read together, provide that during the transition period, an ILEC must unbundle local switching so that CLECs may serve their embedded base of end-user customers. These rules specify that:

> (i) An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops.
>
> * * * * *
>
> (iii) Notwithstanding paragraph (d)(2)(i) of this section, for a 12-month period from the effective date of the Triennial Review Remand Order, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers.[189]

Although some other provisions of the *TRRO* did reference UNE-P arrangements rather than UNE-P customers, the provisions cited above are the ones most directly addressing the transition terms, and make clear that the FCC *never limited the embedded base transition period* to include only existing lines and UNE-P arrangements.

Grasping for straws, Verizon argues that the "embedded base of end user customers" in Rule 51.319(d)(2)(iii) really means the embedded base of *lines*. Verizon's interpretation not only ignores the plain words used by the FCC, but also its stated intent. The FCC wanted to ensure that the transition period will not serve as a means for an ILEC to frustrate a CLEC's ability to serve its embedded customers.[190]

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[188] *TRO*, ¶ 199.

[189] 47 C.F.R. § 51.319(d)(2)(i) & (iii)

[190] *See TRRO*, ¶ 226 n.626 (noting that the transition plan be implemented in a manner that avoids harmful disruption in the telecommunications markets).

As to high capacity loops and dedicated transport, the *TRRO* requires that, at a minimum, an ILEC provision moves, adds and changes associated with a CLEC's embedded customers until the interconnection agreement between ILEC and the CLEC is amended. Paragraph 233 of the *TRRO* demonstrates this and explains that the FCC expected that changes of substantive law would be administered pursuant to the § 252 process, under state supervision. Tellingly, if the FCC did not mean this, it never would have stated that high-capacity loops and dedicated transport facilities "no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable law changes."[191]

A number of state commissions have interpreted the *TRRO* in this manner.[192] For these reasons and as explained in CCC's Brief, the Department should adopt the CCC's proposed transition terms in § 7.2.4 of its *TRRO* amendment.

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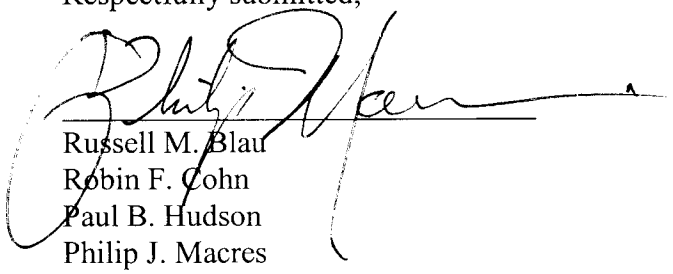
[191] *TRRO*, nn.408 & 524.

[192] *See In the matter, on the Commission's own motion to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issues by SBC Michigan and Verizon*, Case No. U-1447, Order (Mich. P.U.C. Mar. 9, 2005) (attached to CCC Brief as Exhibit S); *see also XO Illinois, Inc. and Allegiance Telecom of Illinois, Inc. v Illinois Bell Telephone Company Complaint Pursuant to 220 ILCS 5/13-515*, Case No. 05-0156, Amendatory Order by the Commission, at 11 (Ill. C.C. Mar. 23, 2005), *available at* http://eweb.icc.state.il.us/e-docket/; *In the matter of a General Investigation to Establish a Successor Standard Agreement to the Kansas 271 Interconnection Agreement, also known as the K2A*, Docket No. 04-SWBT-763-GIT Order Granting in Part and Denying in Part Formal Complaint and Motion for an Expedited Order, at 5-6 (Kan. C.C. Mar. 10, 2005), *available at* http://www.kcc.state.ks.us/docket/cal.cgi.

III. CONCLUSION

For the foregoing reasons and as set forth in the CCC's Initial Brief, the CCC's proposed *TRO* and *TRRO* amendments are consistent with the requirements of the Act and with the change-of-law terms of the parties' Agreements whereas Verizon's proposed amendments are not. Therefore, the Department should adopt the CCC's proposed amendments.

Respectfully submitted,



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Dated: April 26, 2005

EXHIBIT A

THE STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

DT 05-083

ORDER OF NOTICE

The New Hampshire Public Utilities Commission (Commission) hereby gives notice that it is opening a formal investigation pursuant to RSA 365:5 in connection with certain provisions of Tariff No. NHPUC 84 of Incumbent Local Exchange Carrier (ILEC) and Regional Bell Operating Company (RBOC) Verizon NH. The provisions at issue are contained in certain tariff revisions filed by Verizon on February 22, 2005 in Docket No. DT 05-034.

Specifically, the Commission will investigate issues related to Verizon's obligation as an ILEC to provision certain unbundled network elements (UNEs) -- DS1 loops, DS3 loops and dedicated high-capacity transport facilities (including dark fiber transport) -- to Competitive Local Exchange Carriers (CLECs) pursuant to Section 251 of the Telecommunications Act of 1996, 47 U.S.C. § 251, and the Federal Communications Commission's *Triennial Review Remand Order* (TRO Remand Order), 2005 WL 289015 (F.C.C., Feb. 4, 2005). The Commission intends to conduct its investigation as an adjudicative proceeding pursuant to RSA 541-A:31 and N.H. Code Admin. Rules Part Puc 203.

The TRO Remand Order makes clear that Verizon remains obliged to provision these UNEs under section 251 at some of its wire centers but not others and requires CLECs to determine which wire centers meet specific criteria set forth in the TRO Remand Order. The TRO Remand Order provides a formula and method for how to determine which wire centers qualify with regard to newly requested services but does not provide a method of how to deal with already

provisioned services other than to direct the parties to negotiate changes in their interconnections agreements. Additionally in New Hampshire, the Commission must deal with changes to the Verizon tariff as a result of the TRO Remand Order rather than just interconnection agreements. For that reason, we find a formal investigation is warranted. The purpose of the investigation is to determine which wire centers in New Hampshire are affected and what procedure the Commission should adopt for future determinations with respect to affected wire centers.

The Commission additionally reserves the right, if necessary, to determine in this proceeding whether, notwithstanding the requirements of section 251 and the TRO Remand Order, Verizon remains obliged to provision the affected UNEs at any New Hampshire wire centers by virtue of Verizon's status as an RBOC that has obtained authority under section 271 of the Telecommunications Act, 47 U.S.C. § 271, to provide interLATA long-distance service in New Hampshire. *See* Order No. 24,442 (March 11, 2005) entered in Docket Nos. DT 03-201 and DT 04-176.

Based upon the foregoing, it is hereby

ORDERED, that a Prehearing Conference, pursuant to N.H. Admin. Rules Puc 203.05, be held before the Commission located at 21 S. Fruit St., Suite 10, Concord, New Hampshire on May 25, 2005 at 10:00 a.m., at which interested parties and the Commission Staff will provide a preliminary statement of its position with regard to the investigation and any of the issues set forth in N.H. Admin Rule Puc 203.05(c) shall be considered; and it is

FURTHER ORDERED, that Verizon NH is a mandatory party to this proceeding; and it is

FURTHER ORDERED, that, immediately following the Prehearing Conference, Verizon, the Staff of the Commission and any Intervenors hold a Technical Session to review the issues in the investigation; and it is

FURTHER ORDERED, that pursuant to N.H. Admin. Rules Puc 203.01, Verizon shall notify all persons desiring to be heard at this hearing by publishing a copy of this Order of Notice no later than May 4, 2005, in a newspaper with statewide circulation or of general circulation in those portions of the state in which operations are conducted, publication to be documented by affidavit filed with the Commission on or before May 25, 2005; and it is

FURTHER ORDERED, that pursuant to N.H. Admin Rules Puc 203.02, any party seeking to intervene in the proceeding shall submit to the Commission an original and eight copies of a Petition to Intervene with copies sent to Verizon and the Office of the Consumer Advocate on or before May 20, 2005, such Petition stating the facts demonstrating how its rights, duties, privileges, immunities or other substantial interest may be affected by the proceeding, as required by N.H. Admin Rule Puc 203.02 and RSA 541-A:32,I(b); and it is

FURTHER ORDERED, that any party objecting to a Petition to Intervene make said Objection on or before May 25, 2005.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of April, 2005.

Debra A. Howland
Executive Director & Secretary

Individuals needing assistance or auxiliary communication aids due to sensory impairment or other disability, should contact the Americans with Disabilities Act Coordinator, NHPUC, 21 S. Fruit St., Suite 10, Concord, New Hampshire 03301-2429; 603-271-2431; TDD Access: Relay N.H. 1-800-735-2964. Notification of the need for assistance should be made one week prior to the scheduled event.