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April 5, 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 Initial 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 us.

Sincerely,

Russell M. Blau
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**

INITIAL BRIEF OF THE COMPETITIVE CARRIER COALITION

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Dated: April 5, 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**

INITIAL 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"), by their undersigned counsel, submit this opening brief in support of their proposed amendments to their interconnection agreements with Verizon ("Agreements") that were approved by the Department in accordance with Section 252 of the federal Telecommunications Act of 1996 (the "Act"). In accordance with the change-of-law provisions of these Agreements, the CCC's two proposed amendments would implement, respectively, the changes in law that result from the FCC's *Triennial Review Order* ("*TRO*"), effective October 2, 2003, and *Triennial Review Remand Order* ("*TRRO*"), effective March 11, 2005.[2] The CCC's proposed amendment that implements the TRO, which was previously filed with the Department on February 18,

[2] The CCC restates its objection to the inclusion of issues related to the *TRRO* in this arbitration proceeding. This proceeding is limited *by statute* to consideration of issues raised in Verizon's arbitration petition and responses thereto. *See* 47 U.S.C. § 252(b)(4)(A). Without waiving this objection, the CCC has proposed terms relating to the *TRRO* that were not raised in Verizon's petition or the CCC's response to that petition, because Verizon has done so and because the Department plans to consider such issues in this proceeding.

2005, is referenced herein as the CCC *TRO* [Section Number]. The CCC's proposed amendment that implements the *TRRO* is attached and is referenced herein as the CCC *TRRO* [Section Number].[3]

The scope and conduct of this proceeding are governed by the change of law provisions of the Agreements, which have allowed parties to request arbitration of an amendment, and by the requirements of Section 252. As demonstrated below, the CCC's proposals are consistent with the requirements of each, while the amendments proposed by Verizon are not. Therefore, the Department should reject Verizon's proposals and order Verizon to execute the CCC's proposed amendments.

II. DISCUSSION

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?

The principal question posed by this Issue 1 is the propriety of Verizon's proposed language that it must provide UNEs "*only* to the extent required by the Federal Unbundling Rules," and "*only* to the extent required by 47 U.S.C § 251(c)(3) and 47 C.F.R. § Part 51."[4] Verizon's sweeping proposal should be rejected for at least two reasons:

- First, under the change-of-law terms of the existing Agreements, a party may only seek arbitration of terms necessary to implement the laws that have changed. Verizon's

[3] The CCC's proposed *TRRO* Amendment that was filed with the Department on March 18, 2003 has been somewhat revised. A copy of the revised CCC *TRRO* Amendment is attached hereto as Exhibit A. This revised Amendment has already been presented to Verizon for negotiations and replaces the one that was filed with the Department on March 18.

[4] *See, e.g.,* Verizon Amendment 1 §§ 2.1 & 4.7.6 (emphasis added); *see also, e.g.,* Verizon Amendment 2 §§ 2.1, 2.2, 2.3, 2.4, 3.1, 3.2.2, 3.2.3, 3.2.4, 3.3.1, 3.3.1.1, 3.3.1.2, 3.3.1.2.2, 3.3.2, 3.4.1.1, 3.4.1.2.1, 3.4.1.2.2, 3.4.2.1, 3.4.2.2, 3.5.1, 3.5.3 (stating in numerous places throughout its proposed amendment that it, *i.e.*, will only provide UNEs "to the extent required by 47 U.S.C § 251(c)(3) and 47 C.F.R. Part 51").

proposal to eliminate all non-§ 251 unbundling obligations has no basis in the *TRO* (or any other change in applicable law) and therefore is beyond the proper scope of this proceeding.

- Second, even if Verizon were permitted to propose terms that have no basis in the *TRO*, its particular proposal to eliminate all non-§ 251 unbundling obligations is contrary to the Act.

Accordingly, the CCC's *TRO* and *TRRO* proposals properly reflect Verizon's unbundling obligations under applicable law, such as Section 271 and the FCC's *Bell Atlantic/GTE Merger Conditions*, as described below.

A. Verizon Cannot in this Proceeding Seek Arbitration of Issues that Do Not Arise from Any Change of Law.

Verizon cannot in this *change-of-law* proceeding seek to amend the portions of the Agreements on which the law has not changed. This is not an arbitration of a *new* interconnection agreement, in which a party may seek arbitration of any disputed term in a contemplated agreement. Rather, this proceeding arises from Verizon's proposal to *amend* existing Agreements to conform them to changes of law that occurred as a result of the *TRO*, which became effective on October 2, 2003. To the extent Verizon was required before October 2003 to provide access to unbundled network elements under any provision of law other than 47 U.S.C. § 251, nothing in the *TRO* changes those requirements.

The scope of this proceeding is limited to determining the terms of an amendment that are necessary to implement the change of law. For example, DSLnet's Agreement provides that upon one party's request to implement a change in law, "the Parties shall promptly renegotiate in good faith and amend in writing this Agreement in order to make such mutually acceptable revisions to this Agreement *as may be required* in order to conform the Agreement to Applicable

Law."[5] The RCN and CTC Agreements similarly provide only for the replacement of contract terms *that have been rendered unlawful by a change in law* with "substitute contract provisions which conform to [the new] rules."[6] These change-of-law provisions clearly limit the range of issues on which a party can seek arbitration of an amendment based upon a change in law.

A change in law event does not open the door for a party to attempt to re-litigate any and every issue in the Agreement with which it is dissatisfied. If parties were free to compel arbitration of any issue every time there was a change of law on any other issue, no matter how unrelated, that party could subject the other to endless litigation and complete insecurity.

Only contract terms that a change in law "make[s] unlawful" are eligible to be replaced through negotiation of a change of law amendment.[7] The Agreements previously adopted by the Department did not limit Verizon's unbundling obligations to the "Federal Unbundling Rules" (*i.e.*, 47 U.S.C § 251(c)(3) and 47 C.F.R. § Part 51), and Verizon has failed to identify *any* provision of the *TRO* that would "make unlawful" the existing Agreements' contemplation that other sources of law could exist. Indeed, the D.C. Circuit in *USTA II* rejected arguments that the *TRO* preempted states from seeking to impose additional unbundling requirements.[8] Verizon

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[5] *See* DSLnet-Verizon Agreement, Gen. Terms and Conditions, § 4.6 (emphasis added).

[6] *See* RCN-Verizon MA Interconnection Agreement, Gen. Terms and Conditions, § 8.2; *see also* CTC-Verizon MA Interconnection Agreement, Gen. Terms and Conditions, § 8.2; Focal-Verizon MA Interconnection Agreement, Gen. Terms and Conditions, § 8.3, Unbundled Network Elements and Combinations, § 1.7.1(b); Lightship-Verizon MA Interconnection Agreement, Gen. Terms and Conditions, § 27.3.

[7] *See* RCN-Verizon MA Interconnection Agreement, Gen. Terms and Conditions, § 8.2; CTC-Verizon MA Interconnection Agreement, Gen. Terms and Conditions, § 8.2.

[8] *See USTA II*, 359 F.3d 554, 594 (D.C. Cir. 2004) (deferring judicial review of the preemption issues until the FCC actually issues a ruling that a specific state unbundling requirement is preempted).

therefore cannot claim that the *TRO* compels new contract terms that effectively preempt all state unbundling authority.

Nor can Verizon plausibly claim that the *TRO* changed the law in a manner that precludes other *federal* sources of unbundling requirements, such as Section 271 or a merger condition imposed by the FCC. For example, the *TRO* determined that "the [unbundling] requirements of section 271(c)(2)(B) establish an independent obligation for the BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251."[9] In addition, the D.C. Circuit has determined that the *TRO* did not supersede the ILECs' unbundling obligations under their FCC merger conditions, and that these conditions applied in addition to, and regardless of, an ILEC's obligations under Section 251.[10] Thus, the *TRO* did not eliminate all federal sources of unbundling requirements outside of the "Federal Unbundling Rules" adopted under Section 251, and so Verizon has no basis to claim that the *TRO* necessitates the inclusion of such terms in this proceeding.

B. Verizon's Attempt to Eliminate All Non-§ 251 Requirements Is Unreasonable and Contrary to Law.

Even if Verizon were permitted to propose terms that do not arise from a change of law implemented in the *TRO*, its particular proposal to eliminate all state and federal non-§ 251

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[9] *TRO*, ¶ 653.

[10] *SBC v. FCC*, 373 F.3d 140, 150 (D.C. Cir. July 6, 2004). Rejecting SBC's argument that a merger condition requiring unbundling of shared transport had been superceded by subsequent Section 251 unbundling orders, the court stated: "But those orders had nothing to do with SBC's … obligations under the Merger Order. They concerned instead SBC's unbundling obligations under the Act. They were silent on SBC's independent obligations under the Merger Order." *Id.* The FCC's *Bell Atlantic/GTE Merger Order* similarly explained that its conditions were a "floor not a ceiling" that would apply as separate and independent legal obligations above and beyond the requirements applicable to other incumbent LECs, such as those established in "other more general proceedings." *See Bell Atlantic/GTE Merger Order*, ¶¶ 252-253.

unbundling obligations is unreasonable and contrary to the Act. The Act explicitly preserved the ability of state commissions under certain circumstances to impose additional unbundling requirements that go beyond those required by FCC regulations. These state-imposed obligations can arise in at least two ways – first, from a state commission's interpretation of the requirements of the federal Act, and second, from an invocation of its own state law authority. Likewise, Section 271 of the Act explicitly imposes unbundling obligations on Verizon, and additional unbundling obligations can arise in other federal contexts, such as through conditions imposed by the FCC in conjunction with its approval of a merger. Verizon's attempt to eliminate all existing and future state and federal unbundling requirements outside of Section 251 is therefore contrary to the Act.

1. The Act Empowers States to Impose Conditions Pursuant to Federal Law.

Section 252(e)(2)(B) of the Act not only permits but *requires* state commissions conducting a Section 252 arbitration to consider imposing unbundling requirements above and beyond the FCC's unbundling rules. This section provides that state commissions can only approve arbitrated amendments to interconnection agreements that meet the requirements of Section 251 of the Act, "including" FCC regulations. Had Congress intended that states consider *only* whether an agreement meets the requirements of FCC regulations, it would have had no reason to ask states separately to consider Section 251 itself. The Department has previously exercised this authority to order unbundling of dark fiber in 1996, three years before the FCC imposed that requirement in the *UNE Remand Order*.[11] Verizon's proposal to exempt itself from any unbundling obligations except "to the extent required by 47 U.S.C § 251(c)(3) and 47 C.F.R.

[11] *See* D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3 (December 4, 1996) ("*Phase 3 Order*").

Part 51" would unduly strip the Department's obligation and authority to implement the responsibility delegated to it by Congress to interpret Section 251. In fact, Verizon's proposal would render the Department's role in arbitrating interconnection agreements under Section 252 a mindless rubber-stamping of FCC rules. Congress clearly did not intend to so limit the states, especially from acting in a manner that promotes the goals of and is consistent with the federal Act. Therefore, Verizon's proposed terms should be rejected.

2. The Act Preserves State Commission Authority Pursuant to State Law.

The savings clauses in the Act unambiguously provide that states may impose additional unbundling obligations based upon *state law*, so long as their requirements are consistent with and do not substantially prevent implementation of Section 251. Sections 251(d)(3),[12] 252(e)(3),[13] and 261[14] of the Act, and Section 601(c) of the 1996 Act[15] all expressly preserve the

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[12] "Preservation of State Access Regulations—In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State Commission that -- (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3).

[13] Section 252(e)(3) provides that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement." 47 U.S.C. § 252(e)(3). Section 252(e)(3) thus represents "an explicit acknowledgment that there is room in the statutory scheme for autonomous state commission action." *Puerto Rico Tel. Co. v. Telecom. Reg. Bd. of Puerto Rico*, 189 F.3d 1, 14 (1st Cir. 1999); see also Southwestern Bell Tel., 208 F.3d at 481 (§ 252(e)(3) "obviously allows a state commission to consider requirements of state law when approving or rejecting interconnection agreements"); *AT&T Comms. of NJ v. Bell Atlantic-NJ, Inc.*, No. Civ. 97-CV-5762(KSH), 2000 WL 33951473, at *14 (D.N.J. June 6, 2000) ("§ 252(e)(3) gives states the authority to impose unbundling requirements beyond those mandated by FCC regulations.").

[14] 47 U.S.C. § 261(c) provides that "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the

authority of state commissions to enforce their own requirements with respect to access to, and interconnection with, incumbent local exchange company facilities. In sum, the 1996 Act authorizes this Commission to impose unbundling requirements under state law that go beyond what FCC regulations require. Federal regulation does not preempt the field unless it is so pervasive as to leave "no room" for parallel state requirements.[16] Verizon can make no case for preemption here, where Congress explicitly reserved a role for states in regulating local telecommunications competition within the 1996 Act and states have adopted parallel regulatory requirements pursuant to that authority.[17]

The FCC even recognizes this state authority and has not attempted to preempt it. In the *TRO*, the FCC specifically stated that,

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.[18]

(cont'd)

State's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part."

[15] Section 601(c) of the Telecommunications Act of 1996 establishes a special rule of construction for interpreting the Act. Congress specified that the Act "shall not be construed to modify, impair, or supersede … State[] or local law unless expressly so provided." P.L. 104-104 § 601(c)(1), 110 Stat. 56, 143 (1996), 47 U.S.C. § 152 (note)..

[16] *Hillsborough County, Florida v. Automated Medical Laboratories, Inc*., 471 U.S. 707, 713 (1985).

[17] *See id.*

[18] *TRO*, ¶ 191.

The FCC further acknowledges in the *TRO* that Congress expressly declined to preempt states in the field of telecommunications regulation:

> 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.[19]

Accordingly, the FCC has explicitly acknowledged that state Commissions retain independent unbundling authority, including authority to require unbundled access to network elements.

Verizon's proposed terms, however, would leave the states able only to impose the same unbundling requirements that had already been established by the FCC's unbundling rules. The Connecticut Department of Public Utility Control ("DPUC") found that SBC's similar interpretation of Section 251 "would render [the savings clause in] § 251(d)(3) meaningless," explaining that:[20]

> when employing [SBC's] reasoning, the state would be left solely to regulate network elements that the FCC has previously determined meet an impairment standard. … In that environment, state regulations could only exist if they mirrored federal regulations. If such a regulatory framework were the intent of Congress, it would have provided for that requirement in § 251(d)(3). The Department further believes that if this were Congress' intention, it would not have created the state authority "carve-out" exception in that section.

The DPUC then determined that its state law authorized it to require SBC to continue to offer the vacated UNEs at existing rates until the new permanent FCC rules are implemented.[21]

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[19] *TRO*, ¶ 192.

[20] *Application of The Southern New England Telephone Company For a Tariff to Introduce Unbundled Network Elements – TRO*, Docket No. 00-05-06RE03, Decision at 11 (Conn. D.P.U.C. Aug. 25, 2004) (attached hereto as Exhibit B).

[21] *Id.* at 10-11.

If there were still any doubt that the Department's independent authority survived the *TRO* and *USTA II*, *USTA II* itself said so. As previously noted, *USTA II* rejected Verizon's claim that states had been preempted from seeking to impose additional unbundling requirements.[22] Verizon therefore has no basis to contend that only the FCC has the authority to order unbundling. While *USTA II*'s subdelegation holding precludes the FCC from delegating <u>its</u> obligations to the states, the decision in no way limits authority that Congress delegated *directly* to states, or the inherent authority that states retained.[23] *USTA II* speaks only to the FCC's obligations under the Act; this Commission's independent state law authority – which is explicitly preserved by the savings clauses – remains unaffected by *USTA II*.

Moreover, the Sixth Circuit in *Michigan Bell v. MCImetro*, 323 F.3d 348 (6th Cir. 2003) ("*Michigan Bell*") explained that,

> When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. In fact, it expressly preserved existing state laws furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition, stating that the Act does not prohibit state commission regulations 'if such regulations are not inconsistent with the provisions of [the FTA].'[24]

The Court held that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted," and upheld the

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[22] *See USTA II*, 359 F.3d 554, 594 (D.C. Cir. 2004) ("deferring judicial review of the preemption issues until the FCC actually issues a ruling that a specific state unbundling requirement is preempted").

[23] *See, e.g., DPUC Standstill Decision* at 8 ("The actions of the DC Circuit Court to vacate the federal rules does not diminish the authority of the Legislature or the requirements it has imposed on telecommunications service providers by state statute.")

[24] *Michigan Bell v. MCImetro*, 323 F.3d at 358.

Michigan Public Service Commission's order.[25] Certainly, an order requiring unbundled access to network elements under state law would not prevent a carrier from taking advantage of the network opening provisions of the Act, but would instead "foster local interconnection and competition" and would therefore clearly be within the scope of regulation Congress sought to protect.

Significantly, *Michigan Bell* went on to explain that a state commission can enforce state regulations "even where those regulations differ from the terms of the Act or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services.[26] Thus, the language in the Act is intended to preempt regulations that inhibit competition – not those that foster it. Accordingly, the Department has the authority to require access to network elements under state law, which would in no way interfere with — but rather would enhance — the ability of new entrants to obtain access and provide service.

Regardless of whether Massachusetts law today authorizes the Department to impose additional unbundling obligations – and the CCC believes that it does – there is no basis for the Interconnection Agreement to determine in advance that any such law or Department decision will be ignored under the terms of the Agreement. Therefore, Verizon's proposed terms to bar application of state law in the Agreement should be rejected.

3. Verizon's Proposed Terms Would Unreasonably Impede Even Federal Unbundling Requirements.

Verizon's proposed Amendments would steamroll not only the authority of the Department but also that of Congress and the FCC. Federal law and the FCC can and do impose

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[25] *Id.* at 359.

[26] *Id*. at 361.

unbundling obligations on Verizon outside of the ambit of the Section 251 unbundling rules, such as through operation of Section 271 or in connection with conditions imposed upon approval of a merger. Since Verizon has narrowly defined its unbundling obligations to exclude even these other federal requirements, its proposal to exempt itself from any unbundling obligations except "to the extent required by 47 U.S.C § 251(c)(3) and 47 C.F.R. § Part 51" would unduly and unlawfully impede the implementation of these federal requirements.

What is most striking about Verizon's attempt in this arbitration to exclude federal non-§ 251 unbundling obligations from the scope of the Amended Agreement is the fact that ILECs are simultaneously arguing elsewhere that CLECs can and in fact must effectuate their non-§ 251 rights to network elements through Interconnection Agreements. The legal counsel that represents both Verizon and SBC in the federal unbundling litigation recently argued to the D.C. Circuit on behalf of SBC that any CLEC that fails to secure terms reflecting an ILEC's merger condition obligations *in their Section 252 interconnection agreements* waives the right to obtain network elements pursuant to such merger conditions.[27] Thus, it appears that Verizon is trying to create a trap that would, under this theory, entirely eliminate all non-§ 251 unbundling requirements: it would prohibit a CLEC from obtaining terms for non-§ 251 UNEs in their interconnection agreements, and then deny the CLEC the right to seek access to non-§ 251 UNEs through another agreement by asserting that it waived its rights to such UNEs when it executed an interconnection agreement that did not include such terms.[28] This absurd gamesmanship would clearly contravene the Act and the public interest and must be rejected.

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

[28] For example, Verizon's proposed terms could force CLECs to waive, even prospectively, their rights to obtain network elements under other sources of law. For example, the FCC or

Finally, Verizon's proposed term to limit its unbundling obligations to those "to the extent required by 47 U.S.C § 251(c)(3) and 47 C.F.R. § Part 51" could even undermine the implementation of the Federal Unbundling Rules themselves. Verizon's vague proposal fails to explain how its limiting language is to be interpreted. Hypothetically, Verizon could argue that this contract provision would allow it, in its unilateral judgment, to later deny access to a UNE that is included in the terms of the Amended Agreement on the grounds that Verizon believes the UNE is not "required by 47 U.S.C § 251(c)(3) and 47 C.F.R. § Part 51" even though the Department found otherwise when it approved the arbitrated amendment to the Agreement. In rejecting a similar proposal by SBC, the Illinois Commerce Commission determined that the "proposed language would empower SBC to implement the [Agreement] by second-guessing – outside the regular appellate processes – the viability of regulatory and judicial rulings," and that nothing in SBC's proposed language would preclude it from deciding that something is not required by the Act or FCC regulations even when regulators had reached the opposite conclusion. The ICC concluded that "by arrogating such power, SBC will elicit disputes with [CLEC] and delay [CLEC's] access to competitive services."[29]

Since it is the Department's task in this arbitration to determine which UNEs are "required by the Federal Unbundling Rules," Verizon's proposed term to this effect is wholly unnecessary – except to provide Verizon with a back-door means to subvert the decisions of the

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(cont'd)

another regulatory authority could impose conditions on approval of Verizon's plan to acquire MCI. But if a CLEC were contractually limited to order UNEs "only to the extent required by the Federal Unbundling Rules" or "only to the extent required by 47 U.S.C § 251(c)(3) and 47 C.F.R. § Part 51" as Verizon now proposes, Verizon could argue that the CLEC could not seek to take advantage of such new merger conditions because it had previously become bound by a contract foreclosing all access except as required by FCC rules.

[29] *XO-IL Arb. Order*, at 47 (attached hereto as Exhibit C) .

Department and deny access to UNEs whose availability may have been affirmed by the Department. The Department should seal this door shut and reject Verizon's proposed language.

C. The CCC's Specific Proposed Terms for Each UNE Affected by the *TRO* and *TRRO* Are Consistent with the Act, the Change-of-Law Process, and the Purpose of Interconnection Agreements.

As demonstrated above, the most important determination for the Department to make in arbitrating Issue 1 is the rejection of Verizon's proposal to limit itself from unbundling obligations with language "only to the extent required by the Federal Unbundling Rules" or "only to the extent required by 47 U.S.C § 251(c)(3) and 47 C.F.R. Part 51."

Rather than counter Verizon's proposal with the opposite contention throughout the CCC's proposed Amendments – that other applicable federal and state unbundling requirements may apply – the CCC's proposals[30] for the most part set forth the specific changes to each of Verizon's unbundling requirements that were altered by *TRO and TRRO*. This degree of specificity, after all, is one of the primary purposes of having an interconnection agreement arbitration – to make clear to both parties going forward which UNEs are and are not required to be provided under the contract. Such clarity is needed to provide reasonable assurance to the CLEC in making its business investments and commitments to its customers, and also to reduce the likelihood of future disputes as to the meaning of the contract.

The CCC's amendments[31] also properly and reasonably establish necessary terms for the implementation of Verizon's unbundling obligations under Section 271, and for the transition of former Section 251 UNEs to Section 271 UNEs.[32]

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[30] *See* CCC *TRO* § 1; CCC *TRRO* §§ 4, 5, 6 & 7.

[31] *See* CCC *TRO* §§ 2.1.1, 4, 5.2, & 5.3; CCC *TRRO* §§ 7.1 & 7.2.5.5.

[32] *See* CCC's response to Issue 31.

Finally, Section 1.2 of the CCC's *TRRO* Amendment provides that Verizon would remain obligated to comply with any applicable unbundling requirements imposed by the FCC as a condition for approval of the Bell Atlantic/GTE merger or any future mergers. Notwithstanding the Arbitrator's prior determination on the Bell Atlantic/GTE merger conditions, the CCC believes that these conditions remain applicable to the UNEs that would be eliminated by the *TRRO* (the CCC agrees that the conditions have expired with respect to the UNEs eliminated by the *TRO*). The CCC and many other CLECs have specifically requested the FCC to issue a declaratory ruling associated with Verizon's continuing obligations and are raising this issue with the FCC's Enforcement Bureau.[33] Because this issue is now pending before the FCC, the CCC has simply proposed terms that repeat the precise language of the merger conditions, and will await the FCC's determination as to the applicability of those conditions. By contrast, Verizon's proposed terms would arguably force the CCC to waive its rights under the merger conditions before the FCC is able to resolve the issue. As explained above, Verizon's appellate litigation counsel has argued to the D.C. Circuit that CLECs that do not secure terms that apply the merger condition requirements in their interconnection agreements waive their rights under the conditions. In the face of this argument, there is no reasonable basis for the Department to refuse to include the CCC's proposed *TRRO* § 1.2, which merely obligates Verizon to comply with any current or future FCC unbundling requirements to the extent that the FCC determines they are applicable. In addition, the Department should adopt the CCC's proposed *TRO* § 1 and *TRRO* § 1.1, which clarifies that any omission of terms related to CLEC's rights pursuant to any

[33] *See Petition for Declaratory Ruling*, CC Docket Nos. 98-141, 98-184 (filed Sep. 9, 2004).

law or requirement other than Section 251 does not constitute a waiver of CLEC's rights accruing under such obligations.

Therefore, the Arbitrator should reject Verizon's vague, overbroad and unlawful proposal and adopt the CCC's proposed terms that have been specifically tailored to implement the changes of law effectuated by the *TRO*.

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?

A. The *Triennial Review Order* Does Not Require Amendments to the Existing Change of Law Terms of the Agreements.

The ambiguous wording of Issue 2 hides the real question posed: whether the *TRO* has rendered unlawful the change of law provisions of the existing Agreements, such that Verizon has a contractual right created by the *TRO* to demand the modification of the existing change of law terms in this arbitration proceeding.[34] The answer to this question – one of the easiest yet most important issues of this arbitration – is, emphatically, no.

Verizon's proposed Amendment would significantly alter the change of law terms of the existing Agreements. Essentially, Verizon's proposal would throw the parties' existing change of law terms out of the Agreement and replace them with new, unreasonable terms that, if adopted in this arbitration, would govern future changes of law. Sections 3.1 and 3.2 of Verizon's proposed Amendment would give Verizon unilateral authority to interpret the FCC's unbundling rules and decide when it no longer must provide a network element on an unbundled basis.

[34] It is unclear whether other parties intend this broadly phrased issue also to encompass all of the terms and conditions that should be adopted to implement the specific changes to Verizon's unbundling obligations that would be altered by the Amendment – a question that very nearly encompasses this entire arbitration. The CCC has addressed in other sections of this brief the terms that the Department should adopt for specific changes unbundling obligations with respect to each of the affected UNEs.

Verizon would not have to negotiate new terms and conditions with CLECs under its Amendments; it would simply give notice of an intent to discontinue providing the service, and then end service at the end of the notice period.

This approach would completely upset the arrangement that already exists in the Agreements. As demonstrated in Issue 1, *supra*, Verizon cannot seek to compel arbitration in this change of law proceeding to replace terms of the existing Agreements for which the law has not changed.[35] Verizon is clearly prohibited from using a change of law involving one issue as an excuse to demand renegotiation of other parts of the Agreement not affected by the change of law.[36] But that is exactly what Verizon is seeking to do here by proposing significant one-sided and unreasonable changes to the change of law terms previously approved by the Department. The *TRO* did not in any way "make unlawful" the terms that the parties had previously established to implement such changes in law. In fact, it did the opposite, because the FCC explicitly said that carriers must follow their *existing* change of law provisions to implement the *TRO*.[37] It would be more than peculiar—it would be inexplicable—for the FCC to order the parties to comply with the change of law provisions of the existing agreements if it had just concluded that those existing change of law terms were unlawful.

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[35] *See* CCC's response to Issue 1.

[36] This limitation is based upon the parties' existing change of law terms, which unquestionably govern how the parties must implement the changes of law at hand. *See* CCC's response to Issue 1. Even if Verizon were successful in seeking to amend the change of law terms of the Agreements in this arbitration proceeding, that result would of course only become a part of the Agreement upon the conclusion of this proceeding and would thus apply only to future changes of law.

[37] *See TRO*, ¶¶ 700-701 (finding that where parties had previously adopted change of law terms in an existing interconnection agreement, such terms must apply to the implementation of the *TRO*.)

The Agreements do not need new change of law terms based upon the *TRO* because their existing change of law terms *already* prescribe what must happen to implement the changes of law that have arisen from the *TRO*. For example, CTC and RCN's Agreements provide that, in such event, "the parties shall negotiate promptly and in good faith in order to amend the Agreement to substitute contract provisions which conform to [the new] rules,"[38] and that if negotiations fail, the parties will use the Dispute Resolution Procedures in the Agreement to resolve the matter. Indeed, it is exactly these terms that Verizon has relied upon to initiate this proceeding with respect to RCN. The very purpose of these terms is to agree in advance how to address situations exactly like the one that has arisen, *i.e.,* a change of law based upon new FCC unbundling regulations. Verizon's wish that it had different change of law terms in its Agreements provides no basis for invoking this Department's jurisdiction to arbitrate this issue.

In one of the first arbitrations to consider the *TRO*, the Illinois Commerce Commission decisively rejected SBC's proposal to amend the change of law terms of its Interconnection Agreement with XO (similar to Verizon's proposal here) for precisely these reasons. First, the Commission noted the conclusion of its Staff that:

> the TRO is itself a change of law, but not one that has any effect upon change of law provisions. If that assertion is correct, the parties cannot establish a new "transition and notification process" in the arbitration.[39]

The Commission agreed, explaining:

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[38] *See, e.g.,* RCN - Verizon MA Interconnection Agreement, Gen. Terms and Conditions, § 8.2; *see also, e.g.,* CTC – Verizon MA Interconnection Agreement, Gen. Terms and Conditions, § 8.2; DSLnet - Verizon MA Interconnection Agreement, Gen. Terms and Conditions, § 4.6; Focal - Verizon MA Interconnection Agreement, Gen. Terms and Conditions, § 8.3; Lightship - Verizon MA Interconnection Agreement, Gen. Terms and Conditions, § 27.3.

[39] *XO-IL Arb. Order,* at 54.

> If modification of the parties' present change-of-law provision were necessary to proper incorporation of the TRO into the existing ICA, then such modification would be within the scope of this proceeding.
>
> However, that is not the case here. To the extent that the [TRO] has determined that specific network elements no longer need to unbundled (or offered at TELRIC) – and to the extent that such unbundling is not required under presently applicable state law – there is no need to establish a process for identifying those elements and incorporating them into the ICA. The FCC has already identified them. They can be incorporated by simply listing them in the parties' amendment as elements that will not be unbundled….[40]

That is exactly what the CCC has proposed to Verizon to implement the *TRO* – an amendment that "simply list[s]" the changes to Verizon's unbundling obligations that have arisen from the *TRO*. Verizon's proposal, by contrast, is beyond the scope of this arbitration since it is not necessary to implement the *TRO*. Indeed, it is also patently unreasonable because it vests the authority to interpret applicable law with Verizon, rather than with state commissions as Congress intended. Under Verizon's proposed terms, it could argue that it would be authorized to stop providing a UNE simply on the basis that its attorneys had determined that the UNE was no longer required by applicable law. Given the long history of disagreements over the proper interpretation of the Act and FCC regulations, Verizon's plan is clearly a recipe for abuse and conflict. As the CCC explained to Verizon during negotiations:

> CLECs cannot reasonably be expected to rely on a contract amendment that purports to give Verizon the unilateral ability to terminate UNEs based upon its own untested interpretation of changes in law, given the likelihood that the parties may disagree on the applicability of alleged changes in the future just as they do today. Accordingly, in negotiations, we explained that an amendment should address Verizon's obligations with specificity with respect to each network element so that there can be no

[40] *XO-IL Arb. Order*, at 54.

> ambiguity later as to what is required, and so the state commissions know exactly what they are being asked to approve. However, Verizon refused to consider such an amendment in the negotiation sessions.[41]

The *XO-IL Arb. Order* agreed:

> It is entirely unreasonable to … empower [] SBC to unilaterally adjudge the content, validity and viability of non-stayed judicial and administrative authorities. Moreover, by arrogating such power, SBC will either elicit disputes with XO and delay XO's access to competitive services.[42]

In contrast, the current change of law provisions are appropriate because they allow parties to resolve any disputes over the interpretation of new regulations, either by negotiation or by submitting their disputes to the Department. By keeping the existing change of law terms, the CCC's proposed Amendment would preserve this lawful process that was previously approved by the Department and that was reaffirmed by the *TRO*.

Finally, Verizon cannot claim that the *TRO* creates a need to amend the change of law process that would apply to future changes of law. Nothing in the *TRO* rendered the existing change-of-law terms unlawful for such future proceedings. As the Illinois *XO Arbitration* Order found:

> Regarding future identification of elements that must be "declassified" … SBC has not demonstrated that the parties' existing change-of-law provisions are inadequate. … It follows that future disputes regarding the identification of network elements that must be unbundled per the [FCC's rules] should be subject to existing ICA change-of-law and dispute resolution provisions.[43]

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[41] *See* E-mail from Paul Hudson, Counsel for CCC, to Anthony Black, Counsel for Verizon, November 15, 2004.

[42] *XO-IL Arb. Order,* at 47.

[43] *XO-IL Arb. Order,* at 55.

Verizon's unreasonable insistence in *improperly* seeking to amend the change-of-law terms of its Agreements is the principal reason that the CCC's negotiations with Verizon on a *TRO* Amendment have repeatedly reached an impasse. It is also the primary reason that negotiations have accomplished so little, leaving this proceeding with poorly and vaguely defined issues that will undoubtedly frustrate the Department and its Staff. The fact that negotiations have accomplished so little to date is not evidence that Verizon's proposal to amend the change of law terms is necessary – on the contrary, Verizon's proposal to amend the change of law terms is the primary *cause* of that failure. By rejecting Verizon's proposal to rewrite the change of law provisions in its favor, as the Illinois Commerce Commission did in the *XO-IL Arb. Order*, the Department will facilitate the implementation of future changes of law by making clear from the start that such changes can only be implemented in accordance with the terms of the Agreements. Therefore, the Department should reject Verizon's proposed §§ 3.1 and 3.2 and other provisions where Verizon seeks the sole right to implement changes of law according to its will, and should instead adopt the CCC's straightforward implementation of the *TRO*.

B. The *TRRO* Does Require Certain Modifications to Change of Law Terms that Would Apply to Future Changes to Verizon's Unbundling Obligations.

By contrast, the *TRRO* does necessitate certain changes to the terms that would apply to future changes in Verizon's unbundling obligations under applicable law. Paragraph 234 of the *TRRO* provides that CLECs, when submitting a request for a high-capacity UNE loop or transport circuit, should self-certify their eligibility to obtain such a facility as a Section 251 UNE. The order further requires that the ILEC provision such orders immediately, even if it disagrees that the CLEC has the right to order such a UNE. The FCC explained:

> To the extent that an incumbent LEC seeks to challenge any such UNEs, it can subsequently raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision

> the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.[44]

This requirement from the *TRRO* requires the establishment of an orderly and fair process in which Verizon must first process UNE orders that the CLEC certifies as valid, and only then dispute the CLEC's right to order such UNEs. While the terms to implement this new requirement are generally addressed in CCC's response to Supplemental Issue 1 (subsection B) below, they must also be addressed in this Issue 2 because they require modest changes to the existing change of law terms of many agreements.

Verizon's interpretation of many of its existing change of law terms – that it can upon notice terminate existing UNEs and stop provisioning new UNEs when it believes the law no longer requires a particular UNE – is irreconcilably inconsistent with the new *TRRO* requirement to provision first and dispute later. Verizon can no longer simply "notify" CLECs of the unavailability of a UNE based on a supposed change in law when the CLEC believes it is entitled to order such a UNE. Therefore, the CCC's proposed *TRRO* § 8.4 would apply the same dispute resolution process described above to disputes as to a CLEC's right to order a certain UNE after an alleged future change in law. In that event, the CCC's proposed *TRRO* § 8.4 would require both the CLEC and Verizon to comply with the same certification and provisioning process pending the execution of an amendment to the agreement to reflect the changes in law. Verizon's proposed amendments, by contrast, cannot be adopted because they would purport to allow Verizon to act unilaterally to withdraw UNEs in a manner inconsistent with the new FCC requirements.

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[44] *TRRO*, ¶ 234.

Finally, to the extent that the change of law provisions are being revised as a result of the *TRRO*, the CCC has proposed that at a minimum Verizon be required to provide 90 days notice before withdrawing any UNE offering. *See* CCC *TRO* § 1; CCC *TRRO* § 1.3. The reasonableness of this requirement is evidenced by, among other things, the fact that even Verizon agreed to provide this amount of notice in its attempt to implement the *TRO* even if an agreement arguably permitted less time for notice. While the CCC believes, as demonstrated above, that Verizon should never be able to unilaterally eliminate a UNE by notice, the primary purpose of this proposal is to assure that under any interpretation of the Agreement there would be adequate time for a party to bring any objections to such a notice to the Department for resolution. Any purported elimination of a UNE on a shorter schedule would place unreasonable and unnecessary pressure on the Department to resolve such disputes within a matter of weeks or even days of receiving them.[45]

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?**

The CCC *TRO* § 1.1.1 proposal would eliminate Verizon's obligation under Section 251 to provide unbundled local switching in combination with loops of DS1 or greater capacity, consistent with the requirements of the *TRO*, and would also eliminate Verizon's obligation under Section 251 to provide unbundled access to Call-Related Databases, SS7 Signaling and

[45] To the extent that the Department concludes that CCC's proposed *TRO* § 1 and *TRRO* § 1.3 are incompatible with the CCC's position that the arbitration may only consider terms that implement the changes in law that have occurred, the CCC would withdraw this portion of its proposed amendment. However, the CCC believes that this proposal is a reasonable implementation of the new change-in-law terms that are necessary as a result of ¶ 234 of the *TRRO*.

Shared Transport other than in connection with CLEC's use of unbundled Local Switching purchased from Verizon.[46]

The CCC *TRRO* § 4.1 would eliminate Verizon's remaining Section 251 unbundled switching obligations, except as required by the FCC's transition plan.[47] Therefore, it is no longer necessary for the Department to define "enterprise" and "mass market" customers with respect to switching. As footnote 625 of the *TRRO* explained:

> The *Triennial Review Order* left unresolved the issue of the appropriate number of DS0 lines that distinguishes mass market customers from enterprise market customers for unbundled local switching. We need not resolve that issue here because, in this Order, we eliminate unbundled access to local switching for the mass market, as well. The transition period we adopt here this applies to all unbundled local circuit switching arrangements used to serve customers at less than the DS1 capacity level as of the effective date of this Order.[48]

Thus, the only relevant demarcation with respect to switching today is to divide DS1 and higher capacity customers from customers who subscribe to services with a capacity of less than a DS1. The Arbitrator should decline to adopt the now-unnecessary and irrelevant references to "enterprise switching," "mass market switching," "four line carve out switching" and "other DS0 switching" proposed by Verizon. *See also* CCC's response to Issue 9.

The rates applicable to transitional § 251 switching are addressed in CCC's response to Issue 6. The requirement that Verizon provide moves, adds and changes for transitional UNEs is addressed in CCC's response to Supplemental Issue 4. Other transition provisions that CCC has proposed are address in CCC's response to Issue 27.

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[46] *See* CCC *TRO* § 1.1.3.

[47] *See* CCC *TRRO* § 4.1.

[48] *TRRO*, n.625

Because switching will continue to be provided under the § 251 transition and also under § 271, the Agreement should continue to reflect the terms necessary to assure that Verizon provisions local switching in a nondiscriminatory manner that fulfills the requirements of the Act. Thus, the CCC's *TRO* proposal clarifies that Verizon's obligation to provide local switching should be technology neutral.[49] Although the FCC's Section 251 local switching rules refer to circuit switching, its definition of "local circuit switching" does not preclude the inclusion of switching functionality performed by a packet switch. Instead, the FCC defines local circuit switching as "the function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks."[50] Given this definition, any equipment that performs this function, regardless of the technology or switching architecture, is in fact performing a local circuit switching function, since it is connecting one customer line to another and is doing so on a dedicated basis for the duration of the call.[51] And in any event, the Section 271 checklist requires Verizon to unbundle "local switching," without any reference to "circuit."[52]

This issue is ripe for consideration because Verizon has begun to upgrade its network by replacing its existing TDM-based switches with packet-based soft-switches.[53] Verizon's new switches will continue to provide local voice switching by employing voice gateways, which

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[49] *See* CCC *TRO* § 1.1.2.

[50] 47 C.F.R. § 51.319(d)(1)(i).

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

[52] 47 U.S.C § 271 (c)(2)(B)(vi).

[53] *See, e.g.,* Verizon Industry Letter, December 27, 2004 (attached hereto as Exhibit D).

perform a voice-packet-voice conversion that is transparent to the end user, in conjunction with one or more communications servers. The packet gateway duplicates traditional TDM voice switching functions in virtually all respects, so that even though a call may be "packetized" as it passes through the new Verizon switch itself, the switch is still used to connect two end user lines together for the duration of the call. In fact, Verizon's new switches are touted as having a "standards-based architecture [that] promotes compatibility with standards compliant packet-switching equipment, *TDM circuit-switched facilities*, operations support systems (OSSs), and billing operations …."[54] The new soft-switches support all significant local switching functions,[55] a conclusion that is reinforced by Verizon's offer to continue to offer local switching on the soft-switch platform – but at resale rates.[56] It is precisely this surrogate functionality that obligates Verizon to provide unbundled access to the new soft-switches.

Verizon should not be permitted to misinterpret the FCC rules as merely obligating it to provide only access to a particular piece of *equipment* (e.g. TDM voice switch) rather than a specific *function* (e.g. local switching). 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.[57] For example, in the *Local*

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[54] *See* Nortel Succession Communication Server 2000 Product Brief (attached hereto as Exhibit E) (emphasis supplied).

[55] *Id*.

[56] Verizon Industry Letter, *supra*, n. 53.

[57] "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

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.[58] Moreover, the FCC recently rejected internal protocol conversion as a basis for recategorizing a service.[59] The FCC determined that AT&T could not recategorize its interstate packet-switched voice-over-IP service as an information service simply because it utilized the IP packet switching protocol internally within its network:

> End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T. To the extent that protocol conversions associated with AT&T's specific service take place within its network, they appear to be "internetworking" conversions, which the Commission has found to be telecommunications services.[60]

Moreover, the FCC was unimpressed with AT&T's arguments that the mere capability of offering advanced services somehow re-categorizes all services that can be provided by a certain piece of equipment.[61] The same reasoning applies to Verizon's new soft-switches, which perform the traditional local switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks. They also support all traditional Class 5 switch vertical features just

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(cont'd)

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, ¶ 41 (1998).

[58] *Local Competition Order*, ¶ 418.

[59] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (rel. Apr. 21, 2004).

[60] *Id.*, ¶ 12.

[61] *Id.*, ¶ 13.

as does any other local switching equipment that must be unbundled.[62] To the extent they are performing these functions, *this is local switching* as defined by FCC rules, and these functions must continue to be unbundled, *see* CCC *TRO* § 1.1.2. Therefore, to the extent that Verizon remains obligated to unbundle local switching under Section 251 or Section 271, such obligations are not relieved by the use of a packet switch to perform such functions.

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?

The CCC's *TRO* proposal would eliminate Verizon's obligation under Section 251 to provide unbundled OCn loops.[63] In addition, the CCC's *TRRO* Amendment would eliminate Verizon's obligation under Section 251 to offer new dark fiber loops and certain DS1 and DS3 loops in accordance with the wire center thresholds established by the *TRRO*.[64] Consistent with the *TRRO*, this proposal would eliminate Verizon's § 251 obligation to offer access to DS1 UNE loops to any building served by a wire center that serves at least 60,000 business lines and have four (4) or more unaffiliated fiber-based collocators,[65] and DS3 loops from wire centers that serve at least 38,000 business lines and have four (4) or more unaffiliated fiber-based collocators.[66]

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[62] "In addition, the local switching element includes all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex, as well as any technically feasible customized routing functions." *Local Competition Order*, ¶ 412.

[63] CCC *TRO* § 1.2.

[64] CCC *TRRO* § 5.

[65] CCC *TRRO* § 9.1.1. & 9.1.1.2.

[66] CCC *TRRO* § 9.1.2.

In determining which wire centers are above these thresholds, the first major issue the Department should resolve is whether MCI should be deemed affiliated with Verizon in calculating the number of unaffiliated fiber-based collocators as the CCC has proposed.[67] The *TRRO's* definition of fiber-based collocator makes clear that affiliates of Verizon do not count toward as collocators to meet the thresholds under the new impairment test.[68] Subsequent to the release of the *TRRO,* Verizon announced that it has entered into an agreement to acquire MCI, which the CCC believes may have a substantial number of fiber-based collocation arrangements at Verizon central offices. It would be unreasonable for the Department to include these MCI collocations as evidence of non-impairment when MCI itself has apparently determined that its business models should not continue independent of an affiliation with Verizon, and when its facilities might soon become unavailable to competitors on any terms other than those available from the ILEC. If this deal is consummated, MCI would become an affiliate of Verizon. Therefore, as a matter of common sense, practicality and reasonableness, the Department should adopt the CCC's proposal for the term "Affiliate" in the fiber-based collocator test to include "any entities that have entered into a binding agreement that, if consummated, will result in their becoming affiliates" as defined by Section 153 of the Act.[69]

The second critical issue that the Department should address is whether the central offices that meet the thresholds described above should be specifically listed in the Agreement. *See* CCC's responses to Supplemental Issues 1 and 2.

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[67] CCC *TRRO* § 2.1.

[68] *TRRO,* Appendix B, at 145; 47 C.F.R. § 51.5.

[69] CCC *TRRO* § 2.1.

As for the transition terms applicable to DS1 and DS3 loops that are no longer required under the tests set forth above, the CCC *TRRO* proposal would appropriately implement the transition period for its embedded base of customers through March 10, 2006, as required by the *TRRO*.[70] The requirement that Verizon provide moves, adds and changes for transitional UNE loops is addressed in Supplemental Issue 4. The rates applicable to transitional § 251 dark fiber, DS1 and DS3 loops are addressed in Issue 6. Other transition provisions that CCC has proposed are address in CCC's response to Issue 27. Verizon's obligations to unbundle loops pursuant to Section 271 are addressed in Issue 31.

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?**

The CCC *TRO* proposal would eliminate Verizon's obligation under Section 251 to provide unbundled OCn dedicated transport,[71] and its *TRRO* proposal would eliminate certain DS1, DS3 and dark fiber transport routes that meet the thresholds established by the *TRRO*.[72] For the same reasons as set forth in Issue 4 above, the Department should (1) adopt CCC's proposed definition of "Affiliate" to be used in determining the number of fiber-based collocators and (2) require that the Agreement list the wire centers that meet the non-impairment thresholds. *See* CCC's response to Issue 4.

The CCC *TRRO* proposal reflects the new FCC requirement that a CLEC is limited to 10 DS1 transport circuits on a route where DS3 transport is not available as a § 251 UNE, and 12

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[70] CCC *TRRO* §§ 7.2.1 & 7.2.4.

[71] CCC *TRO* § 1.2.

[72] CCC *TRRO* §§ 6, 9.1.3, 9.1.4.

DS3 transport circuits on any route.[73] Two clarifications are needed for a reasonable implementation of this new standard. First, Verizon's proposed terms fail to include the language from the *TRRO* that applies this limitation only to wire centers where CLECs are deemed to be non-impaired without access to DS3 transport.[74] The purpose of the DS1 transport limit is to prevent CLECs from evading the elimination of DS3 transport UNEs by ordering large number of DS1 circuits instead. Where a DS3 transport UNE is available, there would be no rule to evade, and any CLEC request for DS1 circuits instead of DS3s would be presumed legitimate. Although Verizon contends that the FCC's enacted regulations have a strict 10 DS1 cap that applies across the board regardless of whether D3 transport is available as a UNE or not, the *TRRO* clarifies that this cap only applies when DS3 transport is not available as a UNE.[75] Significantly, in construing the *TRRO* and the regulations it promulgated, the NYPSC recently held that the *TRRO* should be read as "a whole" as intending to apply the 10 DS1 cap only where the FCC found non-impairment for DS3 transport and stated that is the "most logical and reasonable interpretation of the FCC's actions."[76] The Department should interpret the *TRRO* in the same manner and adopt CCC's proposed *TRRO* § 6.5.2.

Second, the amendment should make clear that the DS1 transport limit does not apply to the transport portion of DS1 loop-transport EEL combinations.[77] The FCC had intended that CLECs be able to obtain up to 10 DS1 loops per building, but if the transport cap applied to

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[73] CCC *TRRO* § 6.5.2.

[74] *See TRRO*, ¶ 128.

[75] *TRRO*, ¶ 128.

[76] *NYPSC Order Implementing TRRO Changes*, at 13 (attached hereto as Exhibit F).

[77] See *TRRO* § 6.5.2.

EELs, CLECs would only be able to order 10 DSL loop combinations to all of the buildings served by a wire center, combined. Therefore, DS1 EELs should be subject only to the 10-per-building restriction that applies to DS1 loops.[78]

The rates applicable to transitional § 251 dark fiber, DS1 and DS3 transport are addressed in Issue 6. The requirement that Verizon provide moves, adds and changes for transitional UNE transport circuits (such as for EELs) is addressed in Supplemental Issue 4. Other transition provisions that CCC has proposed are address in CCC's response to Issue 27. Verizon's obligations to unbundle dedicated transport pursuant to Section 271 are addressed in Issue 31.

Finally, the *TRO* clarified that ILECs must continue to provide § 251(c)(2) interconnection facilities, which includes dedicated transport facilities used for interconnection, at TELRIC rates. Consistent with this clarification, the CCC proposes language that preserves its rights in this regard which the Department should adopt.[79]

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?

To the extent this Issue asks for an interpretation of what Verizon "is" permitted to do, it can relate only to the interpretation of the existing Agreement -- which cannot be part of this arbitration proceeding. Verizon's existing rights and obligations are already defined by the existing change of law provisions of its Agreements. Those obligations under the Agreement remain in effect until modified in accordance with the change of law provisions of the Agreement or until the Agreement is terminated. Verizon has itself has explained elsewhere that

[78] *See TRRO*, ¶ 181.

[79] *See* CCC *TRO* § 1.8; CCC *TRRO* § 6.7.

these *TRO* arbitration proceedings cannot address the interpretation of existing change of law terms:

> Verizon strongly disagrees with [the] suggestion that this arbitration is the proper place to resolve disputes about interpretation of *existing* interconnection agreements. This consolidated arbitration is intended to address amendments to existing agreements, not to interpret those agreements.[80]

To the extent that this Issue asks what conditions should be established in the Amendment to govern what Verizon would be permitted to do *in the future* (once the Amended Agreement is adopted), the CCC has demonstrated above that there is no basis in this proceeding to amend the existing change of law terms in the manner proposed by Verizon. *See* response to Issue 2. Therefore, Verizon's ability to re-price existing arrangements which are no longer subject to unbundling under federal law should continue to be governed by the change of law terms of the parties' existing Agreements.

As to the UNEs that the *TRO* determined were no longer required under § 251, CCC's proposed Amendment would allow Verizon immediately to re-price § 251 UNEs to the rates applicable to § 271 Network Elements (except for certain provisions established by the FCC related to grandfathered line sharing). *See* CCC's response to Issue 31. While a CLEC could reasonably propose a transition term any time a UNE is eliminated, in the case of the UNEs affected by the *TRO,* the CCC has determined at least for their purposes that transition terms are not needed. This determination should be without prejudice to the need for transition terms for UNEs affected by the *TRRO* or any future changes of law, or to the request by any other CLEC for terms to transition from these UNEs.

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[80] Letter from Elaine M. Duncan, Vice President and General Counsel – CA-NV-HI, Verizon, to Asst. Chief Administrative Law Judge Phillip Weismehl, California Public Utilities Commission, at 3 (dated March 22, 2005) (emphasis Verizon's) (attached hereto as Exhibit G).

Unlike the UNEs affected by the *TRO*, a transition is necessary for the UNEs that would be eliminated on the basis of the *TRRO*. The FCC established reasonable, clear transition rules, which the CCC would implement through *TRRO* § 7, *see also* CCC's response to Issue 27. The Department should first make clear that these transition terms apply only to UNEs that Verizon is no longer required to unbundle at cost-based rates under Section 271, state law, or any FCC merger conditions, and that have been designated for elimination in accordance with the contract terms to implement the *TRRO*. The CCC's proposed *TRRO* § 7 clearly delineates these criteria, whereas Verizon's proposed terms could, at least on paper, improperly impose the higher transition rates on UNEs that Verizon would otherwise remain required to provide at existing rates. As to wire centers that that later surpass the FCC's loop and transport unbundling thresholds, CCC *TRRO* § 9.2 addresses such circumstances. *See* CCC's response to Issue 27, Part B.

Where the transition rates established by the *TRRO* should apply, the CCC proposes that the amendment adopted in this arbitration establish and state the specific rates as calculated using the FCC's formulas, rather than just parroting the FCC formulas in the agreement and leaving the parties open to future disputes as to the proper implementation of those formulas.[81]

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?**

To the extent this Issue asks for an interpretation of Verizon's rights to implement the *TRO* or *TRRO*, Verizon's existing rights and obligations are already defined by the existing change of law provisions that are in interconnection agreements. As for future changes of law,

[81] CCC *TRRO* §§ 7.2, & 9.1.5.

as explained in CCC's response to Issue 2 above, under paragraph 234 of the *TRRO* Verizon can no longer be permitted to discontinue a UNE simply by notice. Therefore, the Department should not adopt any contract terms arising from this Issue 7.

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?

No. As explained in CCC's response to Issue 20(B)(2), such conversion charges are unlawful in any circumstance. The impropriety of such charges is particularly obvious where Verizon compels a CLEC to change a UNE arrangement to an alternate service and is therefore the cost causer. The disconnection of a UNE arrangement caused by Verizon's withdrawal of its UNE offering is an activity that Verizon has unilaterally initiated. It is certainly not the CLEC's desire to disconnect the UNE. To the contrary, the CLEC would still utilize the UNE arrangement if Verizon agreed to make it available. Consequently, in the unlikely event that Verizon incurs any costs for conversions that have not already been recovered through the non-recurring charges that Verizon assessed when the CLEC first ordered the UNE, such costs should be borne by the cost causer, Verizon.

In any event, Verizon should not incur any costs associated with converting a UNE to an alternative service. For example, in the case in which Verizon is converting the CLEC's UNE loop or transport facilities to an "alternative" special access arrangement, there is no technical work involved because *the same loop and transport facilities will be used to provide the alternative arrangement.* At most, the only "work" would simply involve a billing change. The FCC has already found that "Converting between wholesale services and UNEs (or UNE combinations) is largely a billing function."[82] Moreover, because upfront non-recurring charges

[82] *TRO*, ¶ 588.

that Verizon assessed when it first provisioned UNEs recovered the costs Verizon incurs when connecting *and disconnecting the UNE arrangement*,[83] any costs Verizon does incur when it transitions a UNE arrangement to an alternative service (if any) have most likely already been recovered. The Department should therefore reject Verizon's proposal for the right to impose nonrecurring charges on UNE migrations or conversions, and adopt the CCC's proposed *TRO* § 2.3 and *TRRO* § 7.2.5.4, which would prohibit the imposition of conversion charges for former UNEs that are migrated or converted to alternative arrangements as a result of the *TRRO*.[84]

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

A. CCC's Proposed Terms and Definitions

Quite simply, an amendment should include definitions of terms needed to implement it. The CCC's *TRO* amendment requires the following definitions, with references to the relevant sections of CCC's proposal, followed by a justification of the proposed definition:

Call-Related Databases are the calling name database, line information database, toll free calling database, advanced intelligent network databases, and downstream number portability databases. (CCC *TRO* § 5.1)

> Justification: CCC's proposed definition is more specific than Verizon's. Verizon suggests a general, imprecise definition that could invite litigation, whereas CCC's definition clearly states what databases are included.

Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, or Section 271 Network Elements purchased from Verizon to any one or more facilities or services (other than unbundled network

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[83] *Investigation by the Department of Telecommunications and Energy on its Own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided-Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*, D.T.E. 01-20, Order, at 486 (Mass. D.T.E. July 11, 2002).

[84] *See also* CCC's response to Issue 27.

elements) that CLEC has obtained from Verizon, or the combining of an unbundled network element, or a combination of unbundled network elements, or Section 271 Network Elements with one or more such facilities or services. Commingle means the act of Commingling. (CCC *TRO* § 5.2)

Justification: This definition is taken from FCC Rule 51.5, with the additional inclusion of commingling of Section 271 Network Elements, which is explained in CCC's response to Issue 12.

Conversion means all procedures, processes and functions that Verizon and CLEC must follow to Convert any Verizon facility or service other than an unbundled network element (*e.g.*, special access services) or group of Verizon facilities or services to the equivalent UNEs or UNE Combinations or Section 271 Network Elements, or the reverse. Convert means the act of Conversion. (CCC *TRO* § 5.3)

Justification: *See* CCC's response to Issue 20.

Enterprise Customer is any business customer that is not a Mass Market Customer. (CCC *TRO* § 5.4)

Justification: *See* CCC's response to Issue 13(B)-(E).

Fiber-to-the-Home (FTTH) Loop is a Loop serving a Mass Market Customer and consisting entirely of fiber optic cable, whether dark or lit, between the main distribution frame (or its equivalent) in an end user's serving wire center and the demarcation point at the end user's customer premises. (CCC *TRO* § 5.6)

Justification: CCC's proposed definition of FTTH Loop is appropriately limited to Mass Market Customers, which is consistent with the *TRO*. Verizon's proposal would improperly appear to expand the restrictions on FTTH Loops to all customers, which was clearly neither contemplated nor required by the *TRO*. *See* CCC's response to Issue 13 (B)-(C).

House and Riser Cable is a distribution facility in Verizon's network, other than a fiber optic facility in a FTTH Loop, between the minimum point of entry ("MPOE") at a multiunit premises where an end user customer is located and the Demarcation Point for such facility, that is owned and controlled by Verizon. Also known as the "Inside Wire Subloop." (CCC *TRO* § 5.7)

Justification: CCC's proposal is consistent with the language in the *TRO* regarding FTTH loops. Under Verizon's proposal, any subloop in a FTTH loop would not be subject to unbundling, but the *TRO* limited this exception only to the fiber optic facility in the FTTH loop. Rule 51.319(a)(3) explains that a FTTH loop "consists entirely of fiber optic cable," in which case there should be no subloops. To the extent subloops are attached to FTTH facilities, they are not FTTH loops and would be subject to subloop unbundling requirements. Verizon's proposal would not be consistent with the FCC regulations implementing Section 251. *See also* CCC's response to Issue 17.

Hybrid Loop is a local Loop that serves a Mass Market Customer and is composed of both fiber optic cable and copper wire or cable between the main distribution frame (or its equivalent) in an end user's serving wire center and the demarcation point at the end user's customer premises. (CCC *TRO* § 5.8)

Justification: CCC's proposed definition of Hybrid Loop is appropriately limited to Mass Market Customers, which is consistent with the *TRO*. Verizon's proposal would improperly appear to expand the restrictions on Hybrid Loops to all customers, which was clearly neither contemplated nor required by the *TRO*. *See* CCC's response to Issue 13 (B)-(E).

Line Splitting is the process in which one competitive local carrier provides narrowband voice service over the low frequency portion of a copper Loop and a second competitive carrier provides digital subscriber line service over the high frequency portion of the same Loop. (CCC *TRO* § 5.10)

Justification: This definition is taken from FCC Rule 51.319(a)(1)(ii).

Local Switching is the line-side, and trunk-side facilities associated with the line-side port, on a circuit switch in Verizon's network (as identified in the LERG), plus the features, functions, and capabilities of that switch, unbundled from loops and transmission facilities, including: (a) the line-side Port (including the capability to connect a Loop termination and a switch line card, telephone number assignment, dial tone, one primary directory listing, pre-subscription, and access to 911); (b) line and line group features (including all vertical features and line blocking options the switch and its associated deployed switch software are capable of providing that are provided to Verizon's local exchange service Customers served by that switch); (c) usage (including the connection of lines to lines, lines to trunks, trunks to lines, and trunks to trunks); and (d) trunk features (including the connection between the trunk termination and a trunk card). The term Local Switching does not include Tandem Switching. (CCC *TRO* § 5.11)

Justification: The only difference between Verizon's and CCC's proposal is that CCC makes clear that the definition of Local Switching does not include Tandem Switching, unlike Verizon's proposed definition. The inclusion of Tandem Switching in the definition is inappropriate because Tandem Switching does not provide basic functions that Local Switching does. *See* CCC's response to Issue 19.

Mass Market Customer is an end user customer who is either (a) a residential customer; or (b) a business customer whose premises are served by telecommunications facilities with an aggregate transmission capacity (regardless of the technology used) of less than four DS-0s. (CCC *TRO* § 5.12)

Justification: *See* CCC response to Issue 13(B)-(E).

Section 271 Network Elements are network elements provided by Verizon pursuant to Section 271 of the Act or Section 4 of this Amendment. (CCC *TRO* § 5.13)

Justification: *See* CCC response to Issue 31.

Shared Transport is unbundled transport shared by more than one carrier (including Verizon) between end office switches, between end office switches and tandem switches, and between tandem switches, in Verizon's network. (CCC *TRO* § 5.14)

Justification: This definition is consistent with FCC Rule 51.319(d)(4)(i)(C).

Subloop for Multiunit Premises Access is any portion of a Loop, regardless of the type or capacity, that is technically feasible to access at a terminal in Verizon's outside plant at or near a multiunit premises. It is not technically feasible to access a portion of a Loop at a terminal in Verizon's outside plant at or near a multiunit premises if a technician must access the facility by removing a splice case to reach the wiring within the cable. (CCC *TRO* § 5.15)

Justification: The only difference between the CCC and Verizon proposals is that the Verizon proposal would exempt FTTP loops from the definition. A reference to FTTP (or FTTH) loops makes no sense with respect to subloops. FCC Rule 51.319(a)(3) explains that a FTTH loop "consists entirely of fiber optic cable," in which case there should be no subloops. To the extent subloops are attached to FTTH facilities, they are not FTTH loops and they would be subject to subloop unbundling requirements. Verizon's proposal would not be consistent with the FCC regulations implementing Section 251. Even if the Department agreed with Verizon's premise, at a minimum, Verizon's reference to FTTP loops should be changed to FTTH and FTTC loop, since the term FTTP should not be included in the Amendment, as demonstrated in subsection (B) below.

Subloop Distribution Facility is the copper portion of a Loop in Verizon's network that is between the minimum point of entry ("MPOE") at an end user customer premises and Verizon's feeder/distribution interface. (CCC *TRO* § 5.16)

Justification: This definition is necessary to implement CCC's proposed TRO § 1.7.2, which is justified in CCC's response to Issue 17. This definition comports with FCC Rule 51.319(b)(1), and was taken from the amendment that Verizon proposed in its initial arbitration petition in this proceeding.

In addition, the Amendment should include definitions of Feeder (CCC *TRO* § 5.5), Line Sharing (CCC *TRO* § 5.9), and Tandem Switching (CCC *TRO* § 5.17). CCC and Verizon have proposed the same definitions for these terms, which should be adopted. Finally, although CCC

does not here object to Verizon's definition of Packet Switching, CCC suggests that the definition be placed in the only section where it is used (CCC *TRO* § 1.4.1).[85]

The CCC's *TRRO* Amendment requires the following definitions:

Affiliate includes all entities that are affiliates as defined by 47 U.S.C. § 153(1) and also includes any entities that have entered into a binding agreement that, if consummated, will result in their becoming affiliates as so defined. The term "Verizon" includes all Affiliates of Verizon. (CCC *TRRO* § 2.1)

Justification: This definition is based on Section 153(1) of the federal Act, with the additional inclusion of companies with which Verizon has entered a binding agreement to become affiliated, which is explained in CCC's response to Issue 4.

Business Line is a Verizon owned switched access line used to serve a business customer, whether by Verizon or by a competitive LEC that leases the line from Verizon. The number of business lines in a wire center shall equal the sum of all Verizon business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with Verizon end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines." (CCC *TRRO* § 2.2)

Justification: This definition is taken from FCC Rule 51.5.

Dedicated Transport includes Verizon transmission facilities between wire centers or switches owned by Verizon, or between wire centers or switches owned by Verizon and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level transmission facilities, as well as dark fiber, dedicated to a particular customer or carrier. (CCC *TRRO* § 6.2)

Justification: This definition is taken from FCC Rule 51.319(e)(1).

Dedicated Transport Route is a transmission path between one of Verizon's wire centers or switches and another of Verizon's wire centers or switches. A route between two points (e.g., Verizon wire center or Verizon switch "A" and Verizon wire center or Verizon switch "Z") may pass through one or more intermediate Verizon wire centers or switches (e.g., wire center or switch "X"). Transmission paths between identical end points (e.g., Verizon wire center or switch "A" and Verizon wire center or switch "Z") are the same "route," irrespective of whether

[85] *See* CCC's response to Issue 13.

they pass through the same intermediate Verizon wire centers or switches, if any. (CCC *TRRO* § 6.2.1)

Justification: This definition is taken from FCC Rule 51.319(e).

Fiber-Based Collocator is any carrier, unaffiliated with Verizon, that maintains a collocation arrangement in a Verizon wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at its collocation arrangement within the wire center; (2) leaves the Verizon wire center premises; and (3) is owned by a party other than Verizon or any Affiliate of Verizon, except as set forth in this paragraph. Dark fiber obtained from Verizon on an indefeasible right of use basis shall be treated as non-Verizon fiber-optic cable to the extent it satisfies parts (1) and (2) of this definition and uses that dark fiber to provide lit capacity. Two or more Affiliated fiber-based collocators in a single wire center shall collectively be counted as a single Fiber-Based Collocator. (CCC *TRRO* § 2.3)

Justification: This definition is taken from FCC Rule 51.5.

Wire Center is the location of a Verizon local switching facility containing one or more central offices. The wire center boundaries define the area in which all customers served by a given wire center are located. "Central office" is a switching unit, in a telephone system which provides service to the general public, having the necessary equipment and operations arrangements for terminating and interconnecting subscriber lines and trunks or trunks only. There may be more than one central office in a building. (CCC *TRRO* § 2.6)

Justification: The definition for Wire Center is taken from FCC Rule 51.5 and the definition for Central Office is taken from the Appendix to part 36 of the FCC's rules.

B. Terms and Definitions Proposed by Verizon That Should Not be Included

The following terms proposed by Verizon should not be included in the Amendment:[86]

Discontinued Facility: This broad term should be rejected in favor of CCC's more specific language defining each of the specific UNEs that are no longer required under Section 251. A one-size-fits-all definition of Discontinued Facility is particularly inappropriate after the effective date of the *TRRO*, because there are different transition requirements for the UNEs "discontinued" by that order than for UNEs discontinued by the *TRO*. Therefore, Verizon's one-size-fits all definition of this term could lead to confusion and disputes. Moreover, the CCC's

[86] The CCC reserves the right to propose definitions for these terms should the Department determine that they should be included in the Amendments' Definitions section.

delineation of the treatment of each UNE, rather than a broad reference to "discontinued facility," is consistent with the FCC rules, which set forth the new requirements for each UNE and do not establish a broad definition of "discontinued facilities" to apply to all UNEs that the rules have eliminated. Therefore, the Department should adopt the CCC's approach and exclude this term from the Agreement.

DS1 and DS3 Loop: It is not necessary to define these Loops because they are already defined in the Agreements and there has been no change of law with respect to their definition. Verizon cannot use this change-of-law process to attempt to change the contract terms where the law has not changed. *See* CCC response to Issue 2. In particular, it is inappropriate for Verizon to propose a new definition of loop that includes references to Verizon's internal technical documents, which it could later change unilaterally in a manner that might be inconsistent with the act. Since these definitions do not serve any necessary purpose, they should be excluded from the Amendment.

Enterprise Switching, Mass Market Switching, Four Line Carve Out Switching, and Other DS0 Switching. None of these definitions are relevant after the adoption of the *Triennial Review Remand Order*, which explicitly decided that it was no longer necessary to draw the line between the enterprise and mass markets with respect to unbundled switching. The only relevant distinction under the new rules is switching provided for DS1+ customers, which was eliminated as a § 251 UNE by the TRO, and switching for customers served by DS0s. *See* CCC's response to Issue 3, *citing TRRO* at n.625.

Federal Unbundling Rules: This term would be needed only to implement Verizon's proposal to limit its obligations under the Agreement strictly to the FCC's regulations under

Section 251. For the reasons set forth in the CCC's response to Issue 1, that proposal should be rejected. Therefore, this definition is unnecessary.

FTTP Loop: As demonstrated in the CCC's response to Issue 13(B)-(E), the Amendment should follow the format of the FCC's rules, and define FTTH and FTTC loops separately. The FCC rules do not define FTTP loop, and there is no basis to do so here. In particular, in consolidating the definitions of FTTH and FTTC loops into a single FTTP definition, Verizon omitted key and necessary phrases from the FCC rules. Therefore, the Department should adopt the CCC's proposed definitions of FTTH and FTTC loops and reject the inclusion of a separate definition of FTTP loop.

Interim Rule Facilities: The FCC's August 2004 *Interim UNE Order* no longer has any relevance to this proceeding, as it has been superseded by the *TRRO*. Therefore, this definition serves no purpose and should not be included.

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?

Yes. *See* CCC's responses to Issue 2, 6, and 29.

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

As explained in CCC's responses to Issues 2 and 6, the changes in law that result from the *TRO* and *TRRO* can only be implemented in accordance with the existing change-of-law terms of the Agreements. Therefore, these change of law provisions should govern the implementation of rate increases or imposition of new charges that arise from the *TRO* and the *TRRO*. Accordingly, the CCC's *TRRO* amendment provides that the effective date of any new rates established by the amendment shall be in accordance with the existing change of law

provisions. *See* CCC *TRRO* § 7.2.3. Any proposal that contravenes these existing change of law provisions must be rejected.

The *TRO* does not establish any rate increases or new charges. For charges related to routine network modifications, *see* Issue 21. For rates related to conversions, *see* CCC's responses to Issues 8 and 20(B)(2). For rates related to Section 271 Network Elements, *see* CCC's response to Issue 31.

The *TRRO* established transition rates for the switching, loop, and transport elements that will no longer be subject to unbundling under the FCC's Section 251 rules, including a $1 monthly increase for switching and in most cases a 15% increase for loops and transport. While the CCC's *TRO* Amendment §§ 7.2.1 and 7.2.2 set forth the FCC's formula for establishing the new transition rates, the CCC instead proposes that the Arbitrator require the parties to apply the FCC's formula to calculate precise rates to be included in a rates attachment to the Amendment, so that the rates will be clearly established and not vulnerable to dispute after the conclusion of the arbitration.[87]

As to rate increases or new charges arising from "elsewhere," the CCC is not clear what this issue is referring to and in any event objects to their inclusion in this proceeding.

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?**

Yes. Under the *TRO*, Verizon is obligated to offer commingling. As discussed below, the CCC's commingling language should be included in the Amendment because it tracks the *TRO*

[87] *See* CCC's response to Issue 6; *see also* CCC *TRRO* §§ 7.2, 9.1.5.

and is otherwise appropriate.[88] *First*, consistent with the *TRO*, the CCC's definition of "Commingling" recognizes that this involves the "connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services."[89]

The CCC's definition of Commingling also goes one step further and requires Verizon to permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including facilities leased under section 271.[90] While the CCC recognizes that the FCC failed to address this issue in the *TRO* (in fact, it made two diametrically opposed statements in the original order, and then deleted both of them by errata, leaving the matter unresolved[91]), imposing this obligation is both appropriate and necessary. As the Illinois Commerce Commission found in arbitrating this very issue, "It would be inconsistent with the FCC's

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[88] *See* CCC *TRO* §§ 2.1, 5.2; *see* 47 C.F.R. § 51.318(b); *TRO*, ¶¶ 579-84.

[89] *TRO*, ¶ 579.

[90] *See* CCC *TRO* § 5.2.

[91] The first errata removed a passage that would have clearly required RBOCs to permit commingling of Section 271 items with Section 251 UNEs and the second one removed a contradictory passage that would have clearly relieved RBOCs of the obligation to permit commingling of Section 271 items with Section 251 UNEs. The relevant passage, in strikeout form, states "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including ~~any network elements unbundled pursuant to section 271 and~~ any services offered for resale pursuant to section 251(c)(4) of the Act. *TRO Errata*, ¶ 31. The relevant passage of the second errata provides, "We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). ~~We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items."~~ *Id*.

rationale to require [CLECs] to provision services over separate and distinct facilities if it elected to commingle Section 251 UNEs and Section 271 UNEs to provide services to a customer."[92] Significantly, the FCC explained that:

> the commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them either to operate two functionally equivalent networks – one network dedicated to local services and one dedicated to long distance and other services – or to choose between using UNEs and using more expensive special access services to serve their customers. Thus, we find that a restriction on commingling would constitute an "unjust and unreasonable practice" under 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act. Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c)(3). Incumbent LECs place no such restrictions on themselves for providing service to any customers by requiring, for example, two circuits to accommodate telecommunications traffic from a single customer or intermediate connections to network equipment in a collocation space. For these reasons, we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations.[93]

The ICC also found that "it would be possible for SBC to leverage control over the voice-grade loop, which meets the 'necessary and impair' standards of Section 251(d)(2), by allowing the SBC to deny carriers seeking access to 271 UNEs the corresponding access to Section 251 loops."[94] It concluded that this "creates conflict with Section 271 requirements of SBC to both provide certain specific network elements and to comply with Section 251(c)(3)."[95] The ICC therefore ordered SBC to permit commingling of Section 251 UNEs and Section 271 items.

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92 *MCI-IL Arb. Order*, at 262 (attached hereto as Exhibit H).

93 *TRO*, ¶ 581 (footnotes and citations omitted).

94 *MCI-IL Arb. Order*, at 262.

95 *MCI-IL Arb. Order*, at 263.

Because the same concerns and issues apply equally here, the Department should order Verizon do the same, as CCC's proposed definition requires.

Second, consistent with the FCC's finding that a restriction on commingling would be patently unlawful,[96] CCC's proposal ensures that commingling will be provisioned in a just, reasonable and lawful manner.[97]

Third, CCC's proposed language prohibits commingling charges for many of the same reasons conversion charges are unlawful.[98] Indeed, ILECs have an incentive to impose "wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges" that could deter legitimate commingling of wholesale services and UNEs or UNE combinations, and could unjustly enrich Verizon as a result of refusing to commingle a UNE or UNE combination with a wholesale service.[99] Furthermore, because ILECs are not required to perform commingling in order to continue serving their own customers, commingling "charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions."[100] Moreover, "such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (*e.g.*, competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or

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96 *See TRO*, ¶ 581.

97 *See* CCC *TRO* § 2.1.

98 *See* CCC's response to Issue 20(b)(2) and CCC *TRO* § 2.1.1.

99 *See TRO*, ¶ 581.

100 *See TRO*, ¶ 587.

disadvantage."[101] Given this, the Department should reject Verizon's attempt to assess commingling charges, and should adopt CCC's proposed TRO § 2.1.1 which provides that the rate applicable to each portion of a commingled facility or service (including nonrecurring charges) cannot exceed the rate for that portion if it were purchased separately.

Fourth, CCC's language recognizes that Verizon had the duty to provision commingled circuits upon the effective date of the *TRO*.[102] As explained in CCC's response to Issue 20(b)(4), Verizon was obligated to perform conversions at that time. For similar reasons, Verizon was likewise obligated to permit commingling upon that date as well.

By contrast, the Department can quickly reject Verizon's proposed commingling language, which is confusing and clearly outdated.[103] Verizon's terms are replete with references to "Qualifying UNEs," a term from the *TRO* that was vacated by *USTA II* and not restored by the *TRRO*. Verizon's proposed terms are also tied to the FCC *Interim Order*, which is now irrelevant because it was superceded by the *TRRO*.[104] Verizon's proposal could be rejected for this reason alone, but even were these outdated terms somehow expunged, its terms would still be contrary to law. First, Verizon's proposal would limit commingling to UNE or combinations obtained under 47 U.S.C. § 251(c)(3) or under a Verizon UNE tariff with wholesale services obtained from Verizon under a Verizon access tariff or separate non-§ 251 agreement that it characterizes as "Qualifying Wholesale Services."[105] As discussed above, the

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[101] *See TRO*, ¶ 587.

[102] *See* CCC *TRO* § 2.1.

[103] *See* Verizon Amendment 2 §§ 3.4.1 *et seq*.

[104] *See* Verizon Amendment 2 §§ 3.4.1.1. & 3.4.1.2.

[105] *See* Verizon Amendment 2 §§ 3.4.1.1. & 3.4.1.2.

amendment must permit commingling of unbundled network elements made available pursuant to other applicable law such as § 271, *BA/GTE Merger Conditions* or state law. By contrast, for example, the CCC proposal would permit commingling of § 271 network elements. Second, Verizon's proposal to impose nonrecurring charges for commingling is without foundation, as explained above. Third, Verizon's request for an exemption from performance standards from its provisioning of commingling is inappropriate; *see* CCC response to Issue 16. Finally, Verizon's proposed reservation of rights language (Amendment 2 § 3.4.1.2.2) would unlawfully limit Verizon's obligation to offer UNEs pursuant to 251(c)(3); *see* CCC's response to Issues 1 and 2.

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?

A. Line Splitting

The CCC takes no position on this issue, but reserves the right to do so in the future.

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

Before considering the terms to implement the details of the FCC's FTTH, FTTC and Hybrid Loops rules, the Department should first resolve the threshold dispute as to which markets these rules apply. In their recent FCC filings, both the CCC and Verizon effectively agreed that these broadband loop rules apply only to mass market customers, although they disagreed as to the appropriate line between the enterprise and mass markets. In this proceeding, however, Verizon appears to have reversed course and is now attempting improperly to extend these rules to most of the enterprise market. Verizon's proposed amendment is contrary to the

numerous indications in the *TRO*, the subsequent MDU and FTTC Orders, and the supporting statements of Chairman Powell that the broadband unbundling relief was designed for and applies to only to the mass market.

In order to implement the broadband loop rules in accordance with Section 251 and the *TRO*, the Department must delineate the point between the enterprise and mass markets and apply these rules only to the latter. This is necessary because although the FCC only relieved Verizon from offering FTTH, FTTC and Hybrid loops to mass market customers, it did not make the demarcation between the enterprise and mass markets.

Although the FCC's FTTH rules do not expressly exclude enterprise customers, they clearly were not intended to apply to most business customers. The FCC's entire discussion of FTTH and "hybrid" copper-fiber loops appears in the section of the *TRO* entitled "Mass Market Loops."[106] The purpose of these rules was to incent the ILECs to construct new fiber loops to end users in markets where it was feared that unbundling obligations would otherwise dissuade such deployments. The FCC found that "removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services *to the mass market*."[107] As the FCC later explained, its new FTTH rules were designed "to ensure that regulatory disincentives for broadband deployment are removed for carriers seeking to serve those customers – residential customers – that pose the greatest

[106] The FTTH section is at *TRO*, ¶¶ 273-284. The hybrid loop section is at *TRO*, ¶¶ 285-297. Both of these sections are part of the larger section on mass market loops (*TRO*, ¶¶ 211-297), and neither FTTH nor hybrid loops are mentioned in the separate section on enterprise loops (*TRO*, ¶¶ 298-342).

[107] *TRO*, ¶ 278 (emphasis added).

investment risk."[108] In contrast, that the FCC found that "the record shows additional investment incentives are not needed" to incent ILECs to deploy broadband-capable loops to larger business customers, so the broadband unbundling limitations were not applied to the enterprise market.[109] Thus, when explaining the application of the Hybrid Loop rules, the FCC explained in the *TRO* that "we stress that the line drawing in which we engage does not eliminate the existing rights of competitive LECs have to obtain unbundled access to hybrid loops capable of providing [high-capacity services] which are generally provided to enterprise customers rather than mass market customers."[110]

Subsequent FCC orders reaffirm that the FTTH rules apply only to mass market loops. First, in response to a BellSouth petition to clarify that the FTTH rules apply to mixed-use multiple dwelling units ("MDUs"), the FCC held that the FTTH rules would apply only to MDUs that are "predominantly residential."[111] Indeed, Verizon's proposed *TRO* Amendment clearly recognizes that FTTH and FTTC loops to MDUs are only eligible for broadband relief if the MDU is "predominantly residential."[112] This limitation, while correct, would make no sense if, as Verizon now seems to contend, *all* enterprise fiber-to-the-premises loops were included in the FTTH and FTTC rules. Clearly, the purpose of the "predominantly residential" designation was intended to address the status of buildings that included both enterprise and mass market

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[108] *Review of the Section 251 Obligations of Local Exchange Carriers*, CC Docket 01-338, Order on Reconsideration, FCC 04-191, ¶ 5 (rel. Aug. 9, 2004) ("*MDU Order*").

[109] *MDU Order*, ¶ 8.

[110] *TRO*, ¶ 294.

[111] *MDU Order*, ¶ 4. The MDU Order restated in its introductory paragraph that the FTTH rules applied "[f]or loops serving mass market customers." *MDU Order*, ¶ 2.

[112] *See* Verizon Amendment 1 at § 4.7.9.

customers; if loops to all customers were already governed in the same way, the FCC's MDU Order would have been entirely unnecessary.

The FCC again reaffirmed that the broadband limitations apply only to mass market loops on October 18, 2004, when it adopted additional rules that applied similar limitations on the unbundling of FTTC mass market loops. The *FTTC Order* explained that "[i]n the *Triennial Review Order*, the Commission limited the unbundling obligations imposed on *mass market* FTTH deployments to remove disincentives to the deployment of advanced telecommunications facilities *in the mass market*,"[113] and that the new order was intended to apply the same scheme to FTTC loops. The *FTTC Order* and Chairman Powell's separate statement repeatedly make clear that the FTTC rules, like the FTTH rules, apply only to mass market loops.[114]

Accordingly, the FCC's limitations on FTTH, FTTC and Hybrid Loop unbundling apply only to "mass market" loops. However, the FCC has not to date precisely defined the cutoff between the mass market and "enterprise" customers. Instead, it has left that determination to be made during the negotiation and arbitration process under Section 252. Therefore, the Department will need to draw an appropriate line between the enterprise and mass markets to be able to adopt an arbitrated agreement in accordance with the standards mandated in Sections 251 and 252. In the absence of such a clear line, the meaning and scope of the limitation on Verizon's unbundling obligations would be unclear and subject to Verizon's claims of virtually unfettered

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[113] *Review of the Section 251 Obligations of Local Exchange Carriers*, CC Docket 01-338, Order on Reconsideration, FCC 04-248, ¶ 2 (rel. October 18, 2004) ("*FTTC Order*") (emphasis added).

[114] *FTTC Order*, ¶¶ 5, 6, 9, 13, 14, 16, 17. *See also FTTC Order*, Separate Statement of Chairman Powell at 1 ("This item follows on from the Triennial Review Order, where the Commission limited the unbundling obligations imposed on mass market fiber-to-the-home (FTTH) deployments to remove disincentives to the deployment of advanced telecommunications facilities in the mass market.")

discretion. Verizon would no doubt attempt to take advantage of this ambiguity by attempting to void the FCC's distinction and apply the limitation to all such loops.

Verizon apparently recognizes that the FTTH, FTTC and Hybrid Loop rules only apply in the mass market, and it in its comments in the *TRRO* proceeding it urged the FCC to draw the line between the enterprise and mass markets for the implementation of the broadband rules.[115] However, the FCC did not provide an answer in the *TRRO*, and there is no guarantee that the FCC will provide definitive guidance regarding this issue in the near future, if at all. Until such time, adoption of Verizon's proposal would arguably, and unreasonably, permit Verizon to draw the line wherever it sees fit.

While the precise definition of "mass market" was not established by the *TRO*, the FCC did provide extensive guidance to the parties and the state commissions as to the boundaries of this definition. The FCC explained that "[m]ass market customers consist of residential customers and *very small* business customers."[116] The *TRO* further explained that "very small" business customers are distinct from small business customers generally and "typically purchase the same kinds of services as do residential customers, and are marketed to, and provided service and customer care, in a similar manner."[117] This description of the mass market was consistent with the finding in the *UNE Remand Order* that the mass market consists "largely [of] residential customers"[118]

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[115] Verizon's FCC *TRRO* Comments, WC Docket No. 04-313, CC Dockets 01-338 at 147 (filed October 4, 2004).

[116] *TRO*, ¶ 127 (emphasis added).

[117] *TRO* at n.432.

[118] *UNE Remand Order*, ¶¶ 291, 293.

Since no hearing is scheduled for this phase of the proceeding, the Department is limited to consideration of previously established law and facts in setting the demarcation point between the enterprise and mass markets. In light of this situation, the CCC has proposed a cutoff based upon the FCC's "four line carve out" rule, which in the past has served a as a reasonable proxy of the demarcation between the enterprise and mass markets.[119] Accordingly, the CCC has proposed to define Mass Market Customer as "an end user customer who is either (a) a residential customer; or (b) a business customer whose premises are served by telecommunications facilities with an aggregate transmission capacity (regardless of the technology used) of less than four DS-0s."[120] If Verizon wishes to have the line drawn at any other point, it should request a hearing on this issue. In the event that the Department conducts a hearing, the CCC reserves the right to present evidence and amend its proposed definition.

Finally, the Department will need to establish a definition for a "primarily residential" MDU. While Verizon's proposed amendment recognizes this standard, it does not provide any basis for the parties to determine whether or not an MDU is "primarily residential." To attempt to avoid later disputes as to whether a building is subject to these rules, the CCC's proposed *TRRO* amendment in § 5.4.1 defines "predominantly residential MDU" as an apartment building, condominium building, cooperative or planned unit development that allocates more than ninety percent of its total square footage to residences.[121] The types of buildings included in this

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[119] CCC *TRO* § 5.12.

[120] *See* CCC *TRO* § 5.12; *see also* CCC's response to Issue 9.

[121] CCC *TRRO* § 5.4.1.

definition are taken from the FCC's MDU Order,[122] while the proposed proportion is a CCC proposal. The CCC has not yet received Verizon's response to this proposal.

1. "FTTP" Loops

Verizon's proposal refers to fiber-to-the-premises loops, which is not a term addressed by the FCC or FCC rules, apparently to refer to FTTH and FTTC loops together. While the CCC's proposal, CCC *TRO* §§ 1.3.1 & 1.3.2, recognizes that the unbundling rules for these two types of loops are similar, it is more reasonable and preferable to define the terms separately. As demonstrated below, Verizon's proposed definition of FTTP blurs important portions of the FCC's definition of FTTC loops.

In addition, Verizon's two references to "serving" wire centers in its proposed FTTP definition are not supported by the FCC definitions and should be deleted. If Verizon constructs a loop between a wire center and a premises, by definition that wire center "serves" the premises. In many cases, an end-user premises may be served by multiple wire centers in order to offer route diversity to customers. The ambiguous references to the "serving" wire center are therefore unnecessary and should be removed to reduce the likelihood of a dispute.

The CCC's proposed *TRO* §§ 1.3.1 & 1.3.2 more accurately reflects FCC rules (which do not even mention "FTTP loops") and should be adopted.

2. Newly-Built FTTH Loops

The only issue on which the CCC and Verizon disagree with respect to newly built Fiber-to-the Home ("FTTH") loops is whether this term applies to loops other than mass market loops, as discussed above. Because Verizon's attempt to extent these provision to enterprise loops is contrary to the Act and the *TRO*, the Department should adopt CCC *TRO* § 1.3.1.

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[122] *MDU Order*, ¶ 2.

3. Overbuilt FTTH Loops

The CCC and Verizon proposals generally agree that Verizon may decline requests to provision of an overbuild FTTH loop where it offers the alternative of nondiscriminatory access on an unbundled basis to a transmission path capable of providing DS0 voice grade service to the customer's premises. *See* CCC *TRO* § 1.3.2; Verizon Amendment 2 § 3.1. However, there are subtle differences in the two proposals, and the CCC *TRO* § 1.3.2 should be adopted for the reasons discussed below.

First, the CCC's proposal includes the additional specification that this path support at transmission of at least 64 kilobits per second, which is explicitly specified as a requirement in FCC Rule § 51.319 (a)(3)(ii)(C). Unlike Verizon's proposal, the CCC proposal also establishes the rate for such access, in particular by capping the rate at the rate applicable to a DS0 UNE loop to the same premises.

The CCC proposal also gives Verizon the option, instead of offering the voice grade channel, to continue to offer the unbundled copper loop to CLECs. Verizon would not be required to do so under the CCC's proposal; it simply and reasonably offers Verizon an additional option that was explicitly stated as an alternative option in ¶ 296 of the *TRO*.

Finally, the Department should reject two parts of Verizon's proposed terms. First, it should reject Verizon's statement that it would provide the voice grade channel "only to the extent required by 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51." *See* CCC's response to Issue 1. Also, the Department should reject Verizon's proposed language in the FTTH Overbuild section of the agreement that "in no event shall CLEC be entitled to obtain access to an [FTTH Loop] on an unbundled basis where Verizon has deployed such a Loop to the customer premises of an end user that previously was not served by any Verizon Loop other than an FTTP Loop." By

definition, such a loop would not be an overbuild. The terms for new build loops should be and are addressed in CCC's response to subsection 2 of this FTTH section above.

For all of these reasons, the Department should adopt the CCC's proposal on this issue,[123] which is derived from ¶ 277 of the *TRO* and from FCC Rule 51.319(a)(3). *See also* CCC's response to Issue 13(F) for terms related to copper retirement.

4. FTTC Loops

The CCC's proposed *TRRO* § 5.4.2 recognizes that FTTC loops should be subject to the same requirements as FTTH Loops.[124]

Verizon's definition of FTTC loops (as part of its consolidated FTTP loop definition) conveniently eliminates an important limiting element of the FCC's definition. The FCC's definition of FTTC loops is as follows:

> Fiber-to-the-curb loops. A fiber-to-the-curb loop is a local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE. *The fiber optic cable in a fiber-to-the-curb loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution*

[123] CCC *TRO* § 1.3.2.

[124] Note, however, that Verizon's obligation with respect to providing unbundled FTTC loops has not changed at this time because Verizon remains obligated to provide unbundled access to these facilities pursuant to the *Bell Atlantic/GTE Merger Conditions*. The CCC respectfully submits that the Arbitrator's prior determination with respect to the merger conditions relates only to the UNEs eliminated by effective portions of the *TRO*, for which the CCC agrees that the merger conditions have now terminated. The conditions remain applicable to FTTC loops and all UNEs that would be eliminated by the *TRRO* because those determinations by the FCC remain subject to appeal. Verizon's proposed terms for FTTC loops should therefore be rejected for the reasons set forth in the CLEC Petition for Declaratory Relief on this issue now pending before the FCC in WC Docket 98-184.

> *subloop also is not more than 500 feet from the respective customer's premises.* (emphasis added).[125]

Verizon's proposed FTTP definition leaves out the latter, italicized part of the FCC's definition. The FCC itself explained twice in the *FTTC Order* why this term is an essential part of its definition:

> We further specify that the fiber transmission facility in a FTTC loop must connect to copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premise. We do this to ensure that our unbundling relief is targeted to FTTC deployments that are designed to bring increased advanced services capability to users, rather than extended to other hybrid loop deployments that coincidentally happen to have individual loops with less than 500 feet or less of copper.

and:

> the fiber transmission facility in a FTTC loop must connect to copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premise. In this manner, we provide those incumbents seeking to avail themselves of this unbundling relief an incentive to reconfigure their network to bring advanced services to the entire geographic area rather than permitting them to obtain unbundling relief where, by happenstance, there may be an existing loop with 500 feet or less copper distribution.[126]

Verizon's proposed FTTP definition therefore overextends the limitation on unbundling to loops that the FCC believes should remain subject to unbundling. This overextension (by omission) is yet another basis that compels rejection of Verizon's proposed definition of FTTP loops. The Department should instead adopt the CCC's proposed definition, CCC *TRRO* § 5.4.1, which properly implements the FCC's definitions.

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[125] 47 C.F.R. § 51.319(a)(3)(i)(B) (Oct. 18, 2004).

[126] *FTTC Order*, ¶ 17.

5. Access to Hybrid Loops for Provision of Broadband Services

Other than the requirement that the Hybrid Loop terms should be limited to the mass market, as described above, the only significant differences between the CCC's *TRO* § 1.4.2 and Verizon's Amendment 2 § 3.2.2 are as follows:

The parties agree that Verizon is required to provide access to time division multiplexing features, functions, and capabilities of Hybrid Loops. However, Verizon's language fails to include a requirement that such access is provided in a nondiscriminatory manner. Paragraph 294 of the *TRO* explicitly required Verizon to provision such access in a nondiscriminatory manner, so the CCC's reference to nondiscrimination should be included.

Second, Verizon's proposed amendment includes extensive language, drafted prior to the adoption of the *TRRO,* suggesting that it would not be obligated to provision DS1 or DS3 capacity hybrid loops unless the FCC readopted DS1 and DS3 loop rules after September 13, 2004. Since the FCC has done so, there is no need for Verizon's language.

Third, Verizon's proposal would insert unnecessary language that would limit its obligation to provide TDM access to the extent required by federal regulations. These provisions are unnecessary and potentially contrary to law. *See* CCC's response to Issue 1.

Finally, the CCC notes that its proposed § 1.4.1 includes the definition of Packet Switching because this is the only section in the Amendment where the term "Packet Switching" is used. The CCC suggests its inclusion here so that it may note that it has agreed to this definition only because it was adopted by the FCC in 47 C.F.R. § 51.319(a)(2)(1).[127]

[127] The CCC believes that it is inappropriate to classify DSLAM functionality as "Packet Switching" and reserves the right to so argue in future proceedings and/or in this proceeding, as circumstances warrant.

Therefore, the CCC's *TRO* §§ 1.4.1 and 1.4.2 are consistent with FCC Rule 51.319(a)(2)(iii) and should be adopted rather than Verizon's proposed terms.

6. Access to Hybrid Loops for Provision of Narrowband Services

Other than the requirement that the Hybrid Loop terms should be limited to the mass market, as described above, the only significant differences between the CCC's *TRO* § 1.4.3 and Verizon's Amendment 2 § 3.2.3 are the first and third points raised above with respect to the parties' differences on access to hybrid loops for the provision of broadband services. For the same reasons described above, the Department should adopt the CCC's proposed *TRO* § 1.4.3 rather than Verizon's proposed terms, which would purport to permit unlawful discrimination.

F. Retirement of Copper Loops

Although Verizon takes the position that the Amendments need not address this issue,[128] the *TRO* explicitly recognized that state commissions may impose additional requirements with respect to copper retirement.[129] Additional terms are in fact warranted in the wake of the *TRO* because the new broadband rules give Verizon additional incentive to retire copper loops.[130] CCC *TRO* § 1.5.4.1 requires that reasonable and adequate notice of any proposed retirement of copper loops or subloops be given before such facilities are retired. CCC's proposal also provides safeguards that apply when Verizon seeks to retire a copper loop that a CLEC is presently using to serve an end-user customer, and a heightened standard is appropriate in such situations.[131]

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[128] *See* Feb. 18, 2005 Joint Issues Matrix, at Issue 15(f).

[129] *TRO*, ¶ 284.

[130] CCC *TRO* § 1.5.4.

[131] CCC *TRO* § 1.5.4.1.2.

The importance of this issue is apparent not only because the *TRO* specifically invited states to adopt additional regulations, but also because the new rules exempting certain fiber facilities from unbundling gives ILECs an incentive to replace copper facilities with fiber facilities in order to deny UNE access to CLECs. While the CCC recognizes that Verizon has other reasons for its fiber deployment and there may be compelling reasons for Verizon to seek to retire copper facilities, the CCC's proposed terms are modest and narrowly tailored only to prevent Verizon from retiring a copper loop currently in use by the CLEC in instances where Verizon is unable to demonstrate the existence of basic safeguards.[132] The CCC proposal should therefore be adopted.

G. Line Conditioning

Verizon argues that line conditioning need not be addressed in this proceeding, since its obligation to perform line conditioning predates the *TRO*. However, Verizon does not dispute that its obligation to perform routine network modifications is within the scope of this proceeding. *See* Issue 21. Since line conditioning is a type of routine network modification, reference to conditioning is appropriate in that section of the TRO amendment. Section 3 of the CCC's *TRO* § 3 addresses line conditioning in a manner consistent with 47 C.F.R. 51.319(a)(1)(ii) as adopted in the *TRO*, and should be approved by the Department.

H. Packet Switching

As indicated in CCC's response to Issue 3, the amended ICAs should reflect the fact that the FCC's rules with respect to the unbundling of packet switching do not permit Verizon to evade its obligation to provide access to local switching where it replaces its circuit switch with a packet switch and uses the packet switch to perform local switching functionality. Instead,

[132] CCC *TRO* § 1.5.4.1.2.

Verizon's obligation to provide local switching should be technology neutral, as advocated by CCC.[133]

I. Network Interface Device (NID)

The CCC takes no position on this issue, but reserves the right to do so in the future.

J. Line Sharing

The ICAs should be modified in accordance with CCC's proposed *TRO* §§ 1.5.1 and 5.9, which reflects Verizon's ongoing obligation to provide certain grandfathered line sharing arrangements. Specifically, Verizon continue must to provide existing line sharing arrangements (1) that were initially ordered between October 2, 2003, and October 1, 2004 in accordance with the terms of 47 C.F.R. §51.319(a)(1)(i)(B); and (2) that were initially ordered prior to October 2, 2003 at existing rates, for so long as a CLEC has not ceased providing xDSL service to that end user customer at the same location over that loop or subloop.[134] The CCC's proposal is consistent with Rule 51.319(a)(1)(i)(B), and CCC §§ 1.5.1 and 5.9 should be adopted.

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

As is typical in Section 252 proceedings, the Amendment should become effective as of the date it is approved by the Department. However, as discussed in response to Issues 12 and 20(b)(4), Verizon must permit commingling and conversions *upon the TRO's effective date* so long as the requesting carrier certifies that it has met any required eligibility criteria.[135] Given the FCC's pronouncements in the *TRO*, CCC's proposed amendment (CCC *TRO* §§ 2.1, 2.3, 2.3.4.4) makes clear that as of October 2, 2003, Verizon is required to provide commingling and

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[133] *See* CCC's response to Issue 3; *see also* CCC TRO § 1.1.2.

[134] *TRO*, ¶¶ 255-270. *See* CCC *TRO* §§ 1.5.1 and 5.9.

[135] *See TRO*, ¶¶ 587-89; 47 C.F.R § 51.318.

conversions unencumbered by additional processes or requirements (*e.g.*, requests for unessential information) not specified in *TRO*.[136] CCC proposes that CLECs should receive pricing for new EELs and converted UNEs as of the date they made such requests to Verizon. *See* CCC's responses to Issues 12 and 20(b)(4).

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)?

CCC's proposed *TRO* § 1.4.4 properly reflects the *TRO*'s requirement that when a CLEC orders an unbundled loop to serve a retail customer currently being served by Verizon over IDLC, Verizon must provide this service "either through a spare copper facility or through the availability of Universal DLC systems" or, if neither is available, Verizon must provide the requesting CLEC a "technically feasible method of unbundled access."[137] By contrast, Verizon's proposed terms for IDLC hybrid loops should not be adopted because, among other reasons, it fails to provide that Verizon must offer unbundled access to hybrid loops served by IDLC systems by using, among other things, a "hairpin" option; *i.e.*, configuring a semi-permanent path and disabling certain switching functions. This option, among others, is specifically required by footnote 855 of the *TRO*,[138] and its omission from Verizon's proposed language is improper. The Illinois Commerce Commission ordered SBC to make such options available to CLECs.[139]

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[136] *See TRO*, ¶¶ 586, 588, 623-624.

[137] *TRO*, ¶ 297; *see* CCC *TRO* § 1.4.4.

[138] CCC *TRO* § 1.4.4.2.

[139] *MCI-IL Arb. Order*, at 304-305.

Verizon's attempt to assess additional nonrecurring charges in connection with IDLC hybrid loops should be rejected because Verizon has not demonstrated a proper basis for such additional charges above and beyond the standard recurring and nonrecurring loop charges that Verizon already proposes to apply.[140] Nothing in the *TRO* supports the imposition of such additional charges, and Verizon bears the burden of proof in supporting its proposal. The CCC will review Verizon's support for these terms in its brief and respond in their reply brief, if necessary.

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?**

As proposed in CCC *TRO* §§ 3.1.1 (Routine Network Modifications and Performance), 1.9 and in Exhibits A, § 8 (Hot Cut Processes/Validation, Testing and Quality Assurance Requirements) and B (Framework for Hot Cuts Metrics/Remedies Negotiations), the amended interconnection agreements should reflect Verizon's obligation to comply with any applicable performance assurance plan, including metrics and penalties, for its provisioning of unbundled network elements and wholesale services, including unbundled loops in response to CLEC requests for access to IDLC-served hybrid loops; commingled arrangements; conversion of access circuits to UNEs; loops or transport (including dark fiber transport and loops) for which

[140] *See* Verizon Amendment 2, § 3.2.4.

routine network modifications are required; [141] batch hot cuts, large job hot cut and individual hot cut process; and network elements made available under Section 271 of the Act or under state law.[142]

Verizon has already agreed to comply with applicable performance assurance plans in Massachusetts, including metrics and penalties, as a condition of approval of its Section 271 application.[143] To name a few, Verizon Amendment 2 §§ 3.2.4.3 and 3.5.2, which attempt to insulate Verizon from compliance with applicable performance measures, are contrary to what it has already agreed to do and what Section 271 dictates it should do. There is no reason for the Department to allow Verizon to disavow existing performance assurance plans at this juncture. Performance assurance safeguards remain necessary to ensure that Verizon continues to satisfy its Section 271 obligations, which were not changed by the *TRO*. Therefore, the CCC's proposed language should be adopted.

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[141] *See also* CCC's response to Issue 21 (further explaining why Verizon's performance of routine network modifications should be subject to performance measures and potential remedy payments).

[142] The performance standards and remedies that Verizon is subject to pursuant to Massachusetts state law are set forth in the Carrier-to-Carrier ("C2C") Guidelines (effective January 2000) and the Performance Assurance Plan ("PAP"). The Department adopted New York's C2C Guidelines and the PAP as part of the Department's investigation into Verizon's application to provide long distance service. *Verizon Application for Entry into the In-Region InterLATA Telephone Market*, D.T.E. 99-271, Order Adopting Performance Assurance Plan (Sept. 5, 2000); Order on Motions for Clarification and Reconsideration re: Performance Assurance Plan (Nov. 21, 2000). Upon closure of D.T.E. 99-271, in order to receive ongoing PAP-related filings, the Department opened docket D.T.E. 03-50 on April 24, 2003. Verizon is also obligated to meet performance standards established in the Consolidated Arbitrations. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94.

[143] *Massachusetts 271 Order*, ¶ 236.

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?**

In the "Inside Wire Subloop" section of its proposed amendment, Verizon tries to undo a significant amount of work done by this Department and the industry to establish reasonable terms and conditions for the provision of House and Riser Cable ("HARC"). Even though the *TRO* did not significantly alter Verizon's obligation to provide unbundled access to HARC in Massachusetts, Verizon has taken the opportunity to try to undo the effects of the Department's efforts in previous dockets.[144] CCC asserts that the Department should reject Verizon's proposed inside-wire subloop language because it has no basis in the *TRO*. The language proposed by Verizon bears no relation to the rule issued by the FCC, but instead imposes arbitrary operational provisions and restrictions for the provisioning of inside wire that contradict previous orders of the Department. Verizon has been unable in negotiations to explain why it must insist on these requirements, such as a requirement that a CLEC "shall install its facilities no closer than fourteen (14) inches of the point of interconnection for such cable." Such a requirement cannot be found in the FCC rules, and Verizon has suggested no legitimate purpose for the restriction.

[144] *See, e.g., Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies*, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-L, October 15, 1999; *Verizon New England, Inc. dba Verizon Massachusetts' Resale Services*, D.T.E. 01-20 at 203-209 (Mass. D.T.E. July 11, 2002).

This is only one example of the type of language Verizon has attempted to foist on CLECs that require HARC to serve residential customers in multiunit premises.

Instead, the Coalition proposes in *TRO* §§ 1.7 and 5.7 more general language that requires Verizon to provide Subloops for Multiunit Premises to the extent required by any applicable Verizon tariff or SGAT, and any applicable federal and state commission rules, regulations, and orders. Some state commissions, including this Department, have completed thorough proceedings regarding Subloops, especially regarding House and Riser facilities in multi-tenant buildings. Verizon's proposal would have the effect of unilaterally overruling those decisions and rendering all of those proceedings irrelevant. Instead, Verizon should be required to return to this Department, in a specific proceeding directed toward the need to revise the provisioning rules applicable to HARC, and seek whatever changes to this Department's requirements that may be necessary, if any, to make them consistent with state and federal law. Verizon has yet to explain how the existing HARC requirements are not already consistent with state and federal law, or how the *TRO* requires alteration of the existing rules applicable to HARC. As discussed above, Verizon is obligated to comply with any additional state law requirements or conditions imposed by state commissions in the course of an arbitration. Verizon's proposal would have the effect of avoiding these obligations.

CCC *TRO* § 1.7.2 includes provisions associated with Verizon's obligation to provide access to Subloop Distribution Facilities. Under these terms, Verizon is required to provide unbundled access to the Subloop Distribution Facilities at a technically feasible access point located near a Verizon remote terminal equipment enclosure at the rates and charges provided for Unbundled Subloop Arrangements (or the Distribution Subloop) in the Agreement. CCC's proposal also recognizes that it is not technically feasible to access the Subloop Distribution

Facility if a technician must access the facility by removing a splice case to reach the wiring within the cable. These provisions track FCC Rule 51.319(b)(1)(i) and should be adopted.

In addition, CCC *TRO* § 1.6 (Feeder), properly reflects that only fiber feeder subloops to Mass Market Customers were affected by the *TRO*. The FCC's discussion of fiber feeder subloops[145] was limited to their provision to Mass Market Customers. Accordingly, the Coalition proposal is consistent with the FCC regulations implementing Section 251. Verizon, on the other hand, seeks to extend the limitation on provisioning of feeder to all feeder, including feeder to end users other than Mass Market Customers. Because Verizon's proposal is clearly beyond the scope of the applicable FCC rule, it should be rejected and the Department should adopt the CCC proposal instead.

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?

Yes. In § 6.3.1 of the CCC's *TRRO* Amendment, Verizon is required to provision dedicated transport between Verizon switches or other equipment that is reverse collocated at a non Verizon premises, including but not limited to collocation hotels. Although § 6.3 of CCC's *TRRO* proposal relieves Verizon of provisioning entrance facilities on an unbundled basis pursuant to § 251, CCC's proposal clarifies that Verizon transmission facilities that terminate at reverse collocations at *any* CLEC premises remain dedicated interoffice transport eligible for UNE status and should not be considered entrance facilities. The FCC specifically recognized this distinction in the *TRO* and stated that ILECs "may 'reverse collocate' in some instances by collocating equipment at a competing carrier's premises, or may place equipment in a common

[145] *TRO*, ¶ 253.

location, for purposes of interconnection."[146] The FCC expressly incorporated into the definition of "reverse collocation" all of the specific examples raised by SNiP LiNK in its comments[147] and found that these examples, among others, fell within the definition of dedicated transport that was eligible for unbundling. SNiP LiNK's examples included situations where "Verizon installed its own fiber to reach SNiP LiNK and activated OC-48 transmission electronics in SNiP LiNK's headquarters" on "a rack located in SNiP LiNK's switch room," and other interconnection methodologies, including methodologies not involving the collocation of an ILEC switch.[148] The FCC held that to the extent an ILEC has equipment "'reverse collocated' in a non-incumbent LEC premises, *the transmission path from this point back to the incumbent LEC wire center shall be unbundled as transport* between incumbent LEC switches or wire centers to the extent specified."[149]

In readopting its prior definition of dedicated transport in the *TRRO*,[150] the FCC noted that "wire center" includes any ILEC "switches with line-side functionality that terminate loops that are 'reverse collocated' in non-incumbent LEC collocation hotels."[151] Verizon now construes this FCC statement as specifically *limiting* the definition of transport, in reverse collocation situations, to include only those instances where the ILEC collocates local switching

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[146] *TRO* at n.1126 (emphasis added).

[147] *TRO*, ¶ 605, n.1842 ("We recognize that the collocation must be within the incumbent LEC network … a requesting carrier can satisfy this prong through reverse collocation. For the purposes of this test, we adopt SNiP LiNK's definition of all mutually-agreeable interconnection methodologies.").

[148] SNiP LiNK *ex parte*, CC Docket Nos. 01-338, 96-98, 98-147, at 1-2 (Feb. 5, 2003); *TRO*, ¶¶ 369, n. 1126, 605, n. 1842.

[149] *TRO*, ¶ 369, n. 1126 (emphasis supplied).

[150] *TRRO*, ¶ 137.

[151] *TRRO*, ¶ 87, n. 251.

equipment in a collocation hotel. Contrary to Verizon's claims, the FCC did not narrow the definition of transport established in the *TRO* as it relates to reverse collocation. In fact, the FCC's eligibility criteria, which were established in the *TRO* and affirmed by the D.C. Circuit in *USTA II*, still recognize that reverse collocation includes "the installation of incumbent LEC equipment at the premises of a competitive LEC or any other entity not affiliated with that incumbent LEC, regardless of whether the incumbent LEC has a cage."[152] The definition is not restricted to the reverse collocation of ILEC switching equipment but rather encompasses multiplexing equipment and other equipment contemplated by SNiP LiNK's definition that the FCC adopted.[153] CCC's proposed *TRRO* § 6.3.1 appropriately reflects this FCC decision and it should therefore be adopted.

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

CCC's proposed *TRO* § 1.8.1 that addresses interconnection facilities is consistent with the Act and the FCC's implementing orders, including the *Local Competition Order*, the *TRO* and the *TRRO*.[154] It clarifies that Verizon must provide interconnection facilities at TELRIC, pursuant to 251(c)(2) and 252(d)(1) (which includes tandem switching, as well as transport facilities and equipment between a CLEC switch and a Verizon tandem switch or other point of Interconnection designated by the CLEC), that are used for the exchange of traffic between the CLEC and Verizon (including traffic exchanged with third-party carriers by way of Verizon

[152] *TRO*, at n.1843.

[153] *TRO*, ¶ 605 & n.1843.

[154] *See also* CCC *TRRO* § 6.7.

tandem switches).[155] 47 U.S.C. §§ 251(c)(2) & 252(d)(1) and FCC orders and rules mandate this.[156]

The *TRO* unequivocally states that "all telecommunications carriers … will have the ability to *access transport facilities*…to interconnect for the transmission and routing of telephone exchange service and exchange access, pursuant to section 251(c)(2)."[157] The FCC explained that "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent LEC's] network,' section 251(c)(2) of the Act explicitly provides for this and we do not alter the Commission's interpretation of this obligation."[158] It added that Section 251(c)(2) requires access to the "facilities and equipment" used by competing carriers for "interconnection with the local exchange carrier's *network* … for the transmission and routing of telephone exchange service and exchange access."[159] Although the FCC narrowed the definition of dedicated transport in the *TRO* that ILECs must offer pursuant to § 251(c)(3), it explicitly preserved the right of CLECs to use ILEC dedicated transport for § 251(c)(2)

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[155] *See* CCC's response to Issue 5.

[156] *See Local Competition Order*, ¶¶ 628 & 682 (concluding that the FCC's TELRIC pricing rules apply to both interconnection and unbundled network elements); 47 C.F.R § 51.501 *et seq.* With respect to pricing of facilities, the term "'element' includes network elements, interconnection, and methods of obtaining interconnection and access to unbundled elements." *See* 47 C.F.R § 51.501(b); *see also Investigation by the Department of Telecommunications and Energy on its Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*, D.T.E 01-20 – Part A-B, RCN-BecoCom, LLC Comments on Verizon Massachusetts Compliance Filing (March 18, 2003). In addition, Verizon's 271 obligations impose a separate obligation on Verizon to provide interconnection at TELRIC based rates. *See* 47 U.S.C. § 271(c)(2)(B)(i).

[157] *TRO*, ¶ 368 (emphasis supplied).

[158] *TRO*, ¶ 366.

[159] *TRO*, at n.1117 (emphasis in original).

interconnection. The FCC stated, "*[u]nlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection,* we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic."[160]

Moreover, in the *TRRO*, the FCC reaffirmed its finding that ILECs must offer dedicated transport that is needed for § 251(c)(2) interconnection at TELRIC. Although the FCC "reinstated the *Local Competition Order* definition of dedicated transport to the extent that included entrance facilities" and found "that requesting carriers are not impaired without unbundled access to entrance facilities,"[161] the FCC explained that this latter finding

> does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network. [162]

Given this, Verizon's obligation to offer 251(c)(2) interconnection facilities, which includes dedicated transport used for interconnection as well as tandem switching facilities to connect CLECs with third-party carriers continues even though Verizon may have been relieved of offering dedicated transport on an unbundled basis pursuant to 251(c)(3) out of certain wire centers.[163]

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[160] *TRO*, ¶ 366 (emphasis added).

[161] *TRRO*, ¶ 137.

[162] *TRRO*, ¶ 140 (citing *TRO*, ¶ 366).

[163] No credible argument can be made that interconnection facilities do not include dedicated transport because the Department and Verizon's own interconnection tariff recognize that the facilities needed for interconnection include dedicated transport (which also includes entrance facilities). D.T.E. 01-20-Part A-B, Order on Verizon Massachusetts' Compliance Filing, at 33

Verizon claims that it will comply with the FCC's regulations, which do not require an incumbent LEC to provide "unbundled access to dedicated transport that does not connect a pair of wire centers."[164] However, it maintains that the *TRO* did not purport to establish new rules regarding the terms upon which CLECs may obtain interconnection facilities under section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Verizon avers that Parties' existing interconnection agreements contain negotiated (or arbitrated) terms regarding such interconnection architecture issues, and it would be inappropriate and extremely complex for the parties to attempt to renegotiate (or arbitrate) such issues here.

Verizon's positions have no merit. Because the Department has held that this arbitration will implement the *TRO* and *TRRO*, there is absolutely no reason that the clarifications made by the FCC in the *TRO* (and subsequently upheld in the *TRRO*) cannot be memorialized in the amendment to the Parties' interconnection agreements. Contrary to Verizon's submissions, it is not "inappropriate or extremely complex" to include this basic clarification language in the amendment. If anything, doing so is academic and the clarification is needed now more than ever. This language simply confirms that this amendment does not "trump" those negotiated or arbitrated terms in the Parties' existing agreements that relate to interconnection facilities. Indeed, because the *TRRO* relieved ILECs of their obligation to offer entrance facilities and

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(May 29, 2003) (noting that "an entrance facility provides for the interconnection of two networks"); DTE MA No. 17, Miscellaneous Network Services, Part C Section 1, Page 2, First Revision Canceling Original, § 1.5.1.A.2 ("Transport will be provided by the Telephone Company from the CLEC's premises to the Telephone Company end offices (Meet Points A and C) or access tandem (Meet Point B)").

[164] *See* Feb. 18, 2005 Joint Issues Matrix, at Issue 19.

dedicated interoffice transport (in certain instances) at TELRIC rates, it is critical that the amendment makes clear that CLECs have the right to obtain such facilities at TELRIC–based rates for interconnection purposes. If the amendment does not reflect this clarification, Verizon will inevitably force CLECs to pay special access prices for interconnection facilities. Thus, it is reasonable that the amendment clarify that the FCC's unbundling rules do not alter the obligation of Verizon to provide facilities at TELRIC rates for purposes of 251(c)(2) interconnection. CCC's language is consistent with the FCC's orders and therefore should be adopted.

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?

As discussed herein, CCC's *TRO* proposal for conversions is consistent with the *TRO* and recognizes that as of October 2, 2003, Verizon was required to perform the functions necessary for CLECs to Convert any facility or service, provided that the CLEC would be entitled to place a new order for the UNE, UNE Combination or other facility or service resulting from a Conversion.[165] The CCC has defined the term "Conversion" in *TRO* § 5.3 to include "all procedures, processes and functions that Verizon and CLEC must follow to Convert any Verizon facility or service other than an unbundled network element (*e.g.*, special access services) or group of Verizon facilities or services to the equivalent UNEs or UNE Combinations or Section 271 Network Elements, or the reverse. Convert means the act of Conversion." The definition is consistent with FCC Rule 51.316, which provides,

> Upon request, an incumbent LEC shall convert a wholesale service, or group of wholesale services, to the equivalent unbundled network element, or combination of unbundled network

[165] *See* CCC *TRO* §§ 2.3, 5.3; *TRO*, ¶¶ 585-589.

> elements, that is available to the requesting telecommunications carrier under section 251(c)(3) of the Act and this part.

The FCC's finding that conversions can go the opposite direction is contemplated in the CCC's proposed language as well. Tellingly, the FCC, in promulgating FCC Rule 51.316, recognized that it was technically feasible "to convert UNEs and UNE combinations to wholesale services and vice versa."[166] Perhaps more tellingly, the FCC, in evaluating both types of conversions, declined to "establish procedures and processes that ILECs and CLECs must follow to convert wholesale services (*e.g.*, special access services offered pursuant to interstate tariff) to UNEs or UNE combinations and the reverse, *i.e.*, converting UNEs or UNE combinations to wholesale services."[167] In making this statement, the FCC was obviously cognizant that ILECs may want to convert UNEs to special access or some other alternative service as they are relieved of offering such facilities on an unbundled basis pursuant to 251(c)(3). Accordingly, CCC's definition recognizes that the term Conversions should be bidirectional and is therefore proper.

CCC's proposal that a CLEC be able to initiate conversion requests in writing or by electronic notification is entirely reasonable.[168] Verizon's proposal that conversion procedures be governed solely by its conversion guidelines, however, is highly inappropriate because Verizon controls those terms and can unilaterally change them at any time.[169] Further, nothing in the *TRO* requires that CLECs follow these guidelines and thus there is no need to reference them in the amendment. Given Verizon's past practices and conduct associated with routine network

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[166] *TRO*, n.1809.

[167] *TRO*, ¶ 585.

[168] CCC *TRO* § 2.3.1.

[169] Verizon Amendment 2 § 3.4.2.6.

modifications,[170] CLECs have legitimate fears that by referencing these guidelines, Verizon is providing itself a mechanism to undercut its legal obligations and have a back door means to (1) avoid any decisions made in this arbitration about conversions that are adverse to it and (2) "impose an undue gating mechanism that could delay the initiation of the ordering or conversion process."[171] Accordingly, Verizon's attempt to do this through its proposed language (regardless of whether it is intentional) should be rejected.

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?[172]

As explained in CCC's response to Issue 24, a CLEC is only required to certify that it satisfies the eligibility criteria of Rule 51.318(b).[173] Nothing in the *TRO* requires a CLEC to provide the type of information that Verizon demands.[174] If Verizon seeks to contest the CLEC certification, it may exercise its audit rights.[175] Moreover, the FCC has explicitly stated that "carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, so long as the competitive LEC meets the

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[170] *See* CCC's response to Issue 21.

[171] *TRO*, ¶ 623.

[172] 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.

[173] *TRO*, ¶¶ 623-624

[174] Verizon Amendment 2 § 3.4.2.3.

[175] *TRO*, at n.1900.

eligibility criteria that may be applicable."[176] As discussed in CCC's response to Issue 24, the FCC's eligibility criteria apply in a *limited set* of circumstances. The FCC has explained, "to the extent a competitive LEC meets the eligibility requirements and a particular network element is available as a UNE pursuant to our impairment analysis, it may convert the wholesale service used to serve a customer to UNEs or UNE combinations…."[177] CCC's language properly reflects the FCC's holdings and provides that Verizon shall permit and shall perform the functions necessary for CLEC to convert any facility or service, provided that the CLEC would be entitled under the terms of the amended Agreement or applicable law or any tariff or contract to place a new order for the UNE, UNE Combination or other facility or service resulting from a conversion.[178]

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?

Yes. The FCC held that "Converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality."[179] The FCC also recognized that "conversions may increase the risk of service disruptions to competitive LEC customers" and that requesting carriers should establish … any necessary operational procedures to ensure customer service quality is not affected by

[176] *TRO*, ¶ 586.

[177] *TRO*, ¶ 586; 47 C.F.R. § 51.316(b).

[178] CCC *TRO* § 2.3.

[179] *TRO*, ¶ 586.

conversions."[180] With this FCC mandate, it is absolutely critical that Verizon not physically disconnect, separate, change or alter the existing facilities when it performs conversions unless the CLEC requests alterations to its facilities. Otherwise, there exists a far greater potential for customer service quality to be degraded, suspended or cut off. The CCC's language[181] serves to limit the risk of service disruptions as envisioned by the *TRO* and therefore should be adopted.

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

The Department should strictly prohibit Verizon from imposing any Conversion charges.[182] The FCC has already concluded that such charges are patently unlawful under the Act. In particular, the FCC found that,

> Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions.[183] Moreover, we conclude that such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (*e.g.*, competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or disadvantage.[184]

In rendering this decision, the FCC recognized that once a CLEC "starts serving a customer, there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first

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[180] *TRO*, ¶ 586.

[181] CCC *TRO* §§ 2.3.2. & 2.3.3.

[182] Verizon proposes that certain charges, including retag fees, for conversions apply for each circuit converted. *See* Verizon Amendment 2 §§ 3.4.2.4 & 3.4.2.5.

[183] 47 U.S.C. § 251(c)(3).

[184] *TRO*, ¶ 587 (*citing* 47 U.S.C. § 202(a)).

time."[185] The FCC further found that "such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service."[186] For these reasons, CCC's proposed language should be adopted because it prohibits Verizon from imposing such charges.[187]

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

No. 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 and only apply prospectively. First the FCC unequivocally stated in the *TRO* that "*new orders for circuits are subject to the eligibility criteria*."[188] Contrary to Verizon's claims, the FCC never stated that old orders are as well or even hinted at that. If that was the case, the FCC would not have limited this statement to "new" orders but would have discussed old orders as well which it didn't. Second, if this FCC clarification is not enough, the FCC stated in paragraph 589 of the *TRO* that,

> 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.

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[185] *TRO*, ¶ 587; *see* 47 C.F.R. § 51.316(c).

[186] *TRO*, ¶ 587.

[187] CCC *TRO* § 2.3.

[188] *TRO*, ¶ 623 (emphasis added).

This language establishes 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.

The *TRO* expressly envisions a dual-track EEL qualification system. To illustrate, a request pending prior to the effective date of the *TRO* would have been submitted under the old "safe harbors" eligibility criteria. Those circuits would be entitled to be priced at "the appropriate pricing" applicable to those circuits at the time; *i.e.*, the pricing applicable to circuits that satisfied the former eligibility criteria. This statement further contemplates that a CLEC may "lock in" the appropriate pricing for the circuit. By locking in the appropriate price, some circuits would continue to qualify as EELs under the old standards, while newly ordered circuits would have to satisfy the new standards before being priced at UNE rates.

The FCC clearly did not intend to have *TRO*'s new EEL eligibility criteria run afoul of the *ex post facto* prohibition [*i.e.*, the prohibition against enacting laws that apply retroactively and negatively affect a person's rights]. Verizon's proposed language does just that and for these reasons, should be rejected. Accordingly, the Department should adopt CCC's terms.[189]

[189] *See* CCC *TRO* §§ 2.3, 2.3.4.4. The Department must also reject Verizon's language (Verizon Amendment 2 §§ 3.4.2.1, 3.4.2.2) that permits Verizon to convert existing circuits to alternative arrangements if CLECs do not re-certify in writing for each DS1 circuit or DS1 equivalent within 30 days of the Amendment Effective date. Even if the *TRO* required CLECs to recertify existing EELs (which it does not), the *TRO* specifically forbids Verizon from engaging in self-help. *See TRO*, ¶ 623 n.1900.

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)?

Yes. Under the *TRO*, Verizon must process conversion requests upon the effective date of the *TRO* so long as the requesting carrier certifies that it has met the *TRO*'s "eligibility criteria that may be applicable."[190] The FCC emphasized that the "ability of requesting carriers to begin ordering without delay is essential"[191] and that "conversions should be performed in an expeditious manner," unencumbered by additional processes or requirements.[192] It specifically noted that CLECs "may convert existing special access services to combinations of loop and transport network elements, but only to the extent such conversions meet the service eligibility criteria for EELs adopted herein."[193] Although the Commission established rules for conversions in the *TRO* (i.e., 47 C.F.R. 51.316), the Commission did not bar conversions prior to that time and thus CLECs had every right to convert circuits prior to October 3, 2003 unless their respective interconnection agreements with ILECs specifically provided otherwise. Indeed, when the FCC recently denied Verizon's request to stay the FCC's *TRO* conversion decision, the FCC stated that "The *Triennial Review Remand Order* 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."*[194]

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[190] *TRO*, ¶ 586.

[191] *TRO*, ¶ 623.

[192] *TRO*, ¶¶ 587-88.

[193] *TRO*, at n.1808.

[194] *Unbundled access to Network Elements Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order, DA 05-675, ¶ 3 (rel. Mar. 14, 2005).

Verizon's position that an amendment is generally required before conversions are performed defies these FCC holdings and is a blatant attempt to preserve unjust riches. As explained above and, the FCC never prohibited conversions and recognized once a competitive LEC starts serving a customer using special access, ILECs have an obvious incentive to thwart or frustrate a CLEC's attempt to convert circuits. The FCC emphasized that ILECs may accomplish this by assessing "wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a UNE service for the first time."[195] The FCC also agreed that "such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could *unjustly enrich* an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service."[196] Although the FCC was speaking in terms of charges, the same holds true with respect to delaying tactics, such as Verizon's position that agreements must be amended before conversions are performed, especially if interconnection agreements do not explicitly bar conversion requests.

Moreover, what is good for the goose is good for the gander. "Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers,"[197] Verizon's amendment requirement is tantamount to imposing conversion charges, which the FCC found to be "inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions."[198] Indeed, such requirements or charges "are inconsistent with section 202 of

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[195] *TRO*, ¶ 587.

[196] *TRO*, ¶ 587 (emphasis added).

[197] *See TRO*, ¶ 587

[198] *TRO*, ¶ 587 (citing 47 U.S.C. § 251(c)(3)).

the Act, which prohibits carriers from subjecting any person or class of persons (*e.g.*, competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or disadvantage."[199] As the FCC found, a "critical component of nondiscriminatory access is preventing the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process."[200] Verizon's Amendment requirement for conversions does just that and is therefore unlawful. Moreover, Verizon's requirement is simply baffling since the FCC never barred conversions. Accordingly, CCC's proposed language comports with FCC rulings on this subject and should therefore be adopted.[201]

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

When a CLEC requests a conversion that involves no physical alterations to the facilities, CCC propose that conversion orders be deemed to have been completed effective upon receipt by Verizon of the written or electronic request from CLEC, and recurring charges for the replacement facility or service should apply as of that date.[202] As previously explained, the FCC, in order to minimize the risk of incorrect payments, held that "conversions should be performed in an expeditious manner" and that "converting between wholesale services and UNEs (or UNE combinations) is largely a billing function." [203] Because of this and, as previously explained, because ILECs are unjustly enriched by not assessing the appropriate charges when the conversion request is made (and otherwise have absolutely no financial incentive to promptly

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[199] *TRO*, ¶ 587 (citing § 202(a)).

[200] *TRO*, ¶ 623.

[201] *See* CCC's *TRO* §§ 2.3 & 2.3.4.4.

[202] *See* CCC *TRO* § 2.3.4.1.

[203] *TRO*, ¶ 588.

process a conversion request), it is reasonable and fair that the conversion order be deemed completed upon Verizon receipt of the CLEC's written or electronic conversion request and that recurring charges for the replacement facility or service apply as of that date.

However, when a CLEC specifically requests that Verizon perform physical alterations to the facilities being converted, CCC proposes that the conversion order be deemed completed upon the earlier of (a) the date on which Verizon completes the requested work or (b) the standard interval for completing such work (in no event to exceed 30 days), regardless of whether Verizon has in fact completed such work.[204] CCC's proposal is reasonable because if facility rearrangements or changes are requested, thirty (30) calendar days provides a sufficient amount of time for Verizon to accomplish such work and recognizes that Verizon otherwise has no incentive to perform the conversion in any reasonable time period.

Along with the date upon which conversions are deemed complete, CCC also proposes that Verizon bill a CLEC pro rata for the facility or service being replaced through the day prior to the date on which billing at rates applicable to the replacement facility or service commences, and the applicable rate for the replacement facility or service thereafter.[205] CCC's proposed language further recognizes that these billing adjustments should appear on the bill for the first complete month after the date on which the Conversion is deemed effective and that if any bill does not reflect the appropriate charge adjustment, a CLEC may withhold payment in an amount that reflects the amount of the adjustment that should have been made on the bill for the applicable Conversions.[206]

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[204] *See* CCC *TRO* § 2.3.4.2.

[205] CCC *TRO* § 2.3.4.3.

[206] CCC *TRO* § 2.3.4.3.

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

CCC's proposed audit terms are consistent with the *TRO* and should be adopted.[207] They permit Verizon to "obtain and pay for an independent auditor to audit, on an annual basis [(*i.e.*, one time in any 12-month period)], compliance with the qualifying service eligibility criteria" and recognize that "an annual audit right strikes the appropriate balance between the incumbent LECs' need for usage information and risk of illegitimate audits that impose costs on qualifying carriers."[208] In contrast, Verizon proposes that it be entitled to an audit once per calendar year rather than once per 12-month period.[209] However, the *TRO* specifically refers to an "annual audit" and contemplates that a full year would have to elapse between audits. Under Verizon's proposal, Verizon could audit a CLEC's books in December, and then audit again in January of the following year. In that case, the two audits would be separated by a month, not by a year as required by the *TRO*.

The CCC's proposal also requires that Verizon give a CLEC thirty (30) days' written notice of a scheduled audit.[210] This was a requirement the FCC previously established in the *Supplemental Order Clarification* that the *TRO* did not alter.[211] In addition, consistent with the *TRO*,[212] CCC proposes that audits be performed in accordance with the standards established by

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[207] *See* CCC *TRO* § 2.2.3.

[208] *TRO*, ¶ 626.

[209] Verizon Amendment 2 § 3.4.2.7.

[210] CCC *TRO* § 2.2.3.

[211] *TRO*, ¶ 622 n.1898 (noting that the Commission found that and ILEC must provide at least 30 days written notice to a carrier that has purchased an EEL that it will conduct an audit).

[212] *TRO*, ¶ 626.

the American Institute for Certified Public Accountants. Out of fairness, it also requires that the auditor's report be provided to the CLEC at the time it is provided to Verizon.

Furthermore, CCC's *TRO* proposal incorporates the *TRO*'s concept of materiality that governs this type of audit and recognizes that "to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor."[213] Verizon's proposed language is entirely deficient in this regard. Indeed, Verizon seeks the entire cost of the audit regardless of the materiality.[214] Verizon's language entirely fails to recognize that under the *TRO*, a CLEC is only obligated to reimburse Verizon for the "cost of the independent auditor" if the audit reveals the CLEC "failed to comply in all material respects." [215] The *TRO* found that reimbursement for the cost of the auditor (not "the entire cost of the audit" as Verizon requests) in these circumstances strikes the appropriate balance that (1) provides an incentive for competitive LECs to request EELs only to the extent permitted by the *TRO*, and (2) "eliminates the potential for abusive or unfounded audits, so that incumbent LEC will only rely on the audit mechanism in appropriate circumstances."[216] Unlike Verizon's language, CCC's language fairly and properly addresses these competing concerns.

CCC's *TRO* proposal also reflects the FCC's holding that "to the extent the independent auditor's report concludes that the requesting carrier complied in all material respects with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated

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[213] *TRO*, ¶ 628.

[214] *See* Verizon Amendment 2 § 3.4.2.7.

[215] *TRO*, ¶ 628.

[216] *TRO*, ¶ 627-28.

with the audit."[217] The FCC explained that such costs would "account for the staff time and other appropriate costs for responding to the audit (*e.g.*, collecting data in response to the auditor's inquiries, meeting for interviews, etc)."[218]

Moreover, payment of reimbursements is symmetrical under CCC's *TRO* proposal, whereas it is not under Verizon's. In particular, CCC proposes that Verizon pay the CLEC, or vice versa (depending upon the result of the audit), within thirty (30) days of receiving the costs of the audit.[219] However, under Verizon's proposal, a CLEC is required to reimburse Verizon within thirty (30) days but Verizon does not have the same obligation.[220] Rather, Verizon requires that the CLEC provide to the independent auditor for its verification a statement of the CLEC's out-of-pocket costs of complying with an requests of the independent auditor and that Verizon will reimburse the CLEC within thirty (30) of the auditor's verification. This added process is unnecessary and undercuts the need for immediate payment. Should Verizon challenge the CLECs costs, Verizon always has the right to dispute the charges; however, payment must be made 30 days after Verizon receives the CLECs costs so that the "potential for abusive or unfounded audits" by Verizon are eliminated or at least minimized.[221]

Furthermore, Verizon's proposal that a CLEC keep books and records for a period of eighteen (18) months after an EEL arrangement is terminated is highly inappropriate and should

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[217] *TRO*, ¶ 628

[218] *TRO*, at n.1908.

[219] *See TRO* § 2.2.3.

[220] *See* Verizon Amendment 2 § 3.4.2.7.

[221] *See TRO*, ¶ 628.

be rejected.[222] The *TRO* does not require that CLECs keep such information for this period of time for terminated arrangements. Apart from having no basis in the *TRO*, this interval is unreasonably long and unduly burdensome.

Finally, Verizon's request to convert a noncompliant circuit at its own volition without CLEC consent (Verizon Amendment 2 § 3.4.2.2) has no legal basis. The *TRO* specifically states that "To the extent the independent auditor's report concludes that the competitive LEC failed to comply with the service eligibility criteria, that carrier must … convert all noncompliant circuits to the appropriate service."[223] Verizon's attempt to convert circuits is also a form of self-help that contravenes the *TRO*.[224]

Accordingly, the Department should adopt the audit provisions proposed by the CCC and find that Verizon's competing language is inconsistent with the *TRO* and unreasonable.

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?

Verizon's Amendment 2 § 3.5 fails to comply with the FCC's clarification of its rules in the *TRO* that reaffirmed Verizon's obligation to perform routine network modifications on behalf of CLECs on a nondiscriminatory basis pursuant to Section 251. In contrast, CCC's *TRO* § 3.1 consists of more detailed terms to better assure the effectuation of the requirements of the Act as

[222] Verizon Amendment 2 § 3.4.2.7.

[223] *TRO*, ¶ 627.

[224] *TRO*, ¶ 623 n.1900 (explaining that ILECs should not "engage in self-help").

reemphasized by the *TRO*.[225] The *TRO* specified that ILECs, "must make the same routine modifications to their existing loop facilities that they make for their own customers."[226] Such modifications generally include (but are not limited to) rearranging or splicing of in-place cable at existing splice points; adding an equipment case; adding a doubler or repeater; installing a repeater shelf; deploying a new multiplexer or reconfiguring an existing multiplexer; accessing manholes; and deploying bucket trucks to reach aerial cable.[227] Thus, consistent with the *TRO*, CCC's proposed *TRO* Amendment ensures that the interconnection agreements specify that the routine network modifications that Verizon makes to its own customers are made to the CCC.

CCC's more detailed terms appropriately reflect the fact that Verizon has a pre-existing duty to provide routine network modifications needed to provision all network elements.[228] Therefore, the CCC urges the Department to do two things: (1) adopt its proposed language for the reasons discussed herein; and (2) hold that Verizon has always had a duty to provide routine network modifications regardless of the final terms the Department adopts.

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[225] *See* CCC *TRO* § 3.1.

[226] *TRO*, ¶ 633.

[227] *TRO*, ¶ 637.

[228] *See, e.g., Proceeding on Motion of the Commission to Examine the Provision of High-Capacity Facilities by Verizon New York, Inc., Petition of Verizon New York Inc. for Consolidated Arbitration to Implement Changes in Unbundled Network Element Provisions in Light of the Triennial Review Order, Petition of AT&T Communications of New York, Inc. for Arbitration of Interconnection Agreement Amendments,* Case Nos. 02-C-1233, 04-C-0314, 04-C-0318, Order Directing Routine Network Modifications, at 17 (N.Y. P.S.C., Feb. 9, 2005) ("*NY Routine Network Modifications Order*") (attached hereto as Exhibit I); *Petition of Verizon-Rhode Island For Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Rhode Island to Implement the Triennial Review Order*, Docket No. 3588, Procedural Arbitration Decision at 11 (April 9, 2004) ("*RI Routine Modifications Decision*") (attached hereto as Exhibit J).

Contrary to Verizon's contentions, the Act and FCC implementing rules have always required Verizon to offer UNEs on a nondiscriminatory basis, which includes performing routine upgrades needed to provision UNEs. The *TRO* did not establish new obligations in this regard but rather made certain that ILECs do not subvert existing duties. Section 251(c)(3) of the Act imposes a duty upon ILECs to provide CLECs "nondiscriminatory access to network elements on an unbundled basis … on rates, terms and conditions that are just, reasonable, and nondiscriminatory."[229] Sections 51.307, 51.311 and 51.313 of the FCC's rules similarly require ILECs to offer all requesting carriers nondiscriminatory access to UNEs. None of these rules has ever been vacated by a reviewing court. These nondiscrimination rules specifically apply to all inherent features of the network element, the quality of the element, and the terms for access to the element, respectively. Under these broad and unqualified nondiscrimination requirements, Verizon has always been required to make routine network modifications or enhancements for CLECs whenever it does so for its retail customers.

In addition, Section 51.311(b) of the FCC's rules directs that "the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself."[230] Furthermore, Section 51.313(b) of the FCC's rules requires that "the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall,

[229] 47 U.S.C. § 251(c)(3).

[230] 47 C.F.R. § 51.311(b); *see also Local Competition Order*, ¶¶ 312-13.

at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself."[231]

The parity requirement of the FCC's rules has always included the tasks involved in performing routine network expansions and modifications to electronics and other facilities that ILECs normally perform for their retail customers.[232] Courts have agreed that ILECs had this duty prior to release of the *TRO* and have stated that if an ILEC "upgrades its own network (or would do so upon receiving a request from a [retail] customer), it may be required to make comparable improvements to the facilities that it provides to its competitors to ensure that they continue to receive at least the same quality of service that the [ILEC] provides to its own customers."[233] The parity requirements of § 251(c)(3) of the Act and FCC Rules 51.311(b) and 51.313(b) already mandated that Verizon perform routine network modifications so that CLECs can access underlying network elements or interconnect at the same level of quality or pursuant to the same terms and conditions, respectively, that Verizon provides to itself. Despite Verizon's proposal, no amendment is required to effectuate this preexisting duty. Nonetheless, CCC has proposed language to clarify this duty, just as the FCC clarified and confirmed it in the *TRO*.

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[231] 47 C.F.R. § 51.313(b); *see also Local Competition Order*, ¶¶ 315-16.

[232] *US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc*., 31 F.Supp.2d 839, 856 (D. Or. 1998) rev'd and vacated in part on other grounds sub nom. US West Communications, Inc. v. Hamilton, 224 F.3d 1049 (9th Cir. 2000); *see also US West Communications, Inc. v. Jennings*, 46 F.Supp.2d 1004, 1025 (D. Ariz. 1999) (citing *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 n.33 (8th Cir.1997)).

[233] *US West Communications Inc. v. AT&T Communications of the Pacific Northwest, Inc*., 31 F.Supp.2d at 856; *see also US West Communications Inc. v. Jennings*, 46 F.Supp.2d at 1025.

Additionally, the FCC has found that Verizon performed far less extensive routine modifications in connection with UNE loop orders than other major ILECs.[234] The FCC's finding "that attaching routine electronics, such as multiplexers, apparatus cases, and doublers to high-capacity loops is already standard practice in most areas of the country"[235] shows that Verizon's policy did not reflect the view of pre-*TRO* law that prevailed throughout the rest of the country. Thus, in the *TRO*, the FCC merely affirmed Verizon's obligations to provision DS-1 UNE loops where certain routine network modifications are required.[236] In other words, the FCC did not change the law, but clarified Verizon's obligations under existing law. This being the case, the "change in law" provisions in Verizon's interconnection agreements are not invoked and no further negotiation or amendment is necessary for Verizon to comply with its legal obligation to provide routine network modifications.

The New York Public Service Commission ("NY PSC") recently confirmed this interpretation. It ruled that Verizon has a duty to perform routine network modifications necessary to make high capacity loops available as UNEs and amendments are not necessary to for Verizon to do so.[237] The NY PSC found that the *TRO* did:

> [N]ot change existing law in requiring routine network modifications. Rather, it settled existing law where there had been uncertainty due to conflicting interpretations. This clarification of what the Telecommunications Act and prior FCC rules mean did not therefore trigger the "change of law" procedures in Verizon's interconnection agreements.[238]

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[234] *TRO*, ¶ 639 n. 1936.

[235] *TRO*, ¶ 635.

[236] *TRO*, ¶¶ 632-641.

[237] *See NY Routine Network Modifications Order*, at 1-2.

[238] *NY Routine Network Modifications Order*, at 17.

The Maine Public Utilities Commission came to the same conclusion, ruling:

> We find, on balance, that the TRO did not establish new law but instead clarified existing obligations. Section 251(c)(3) has always required that Verizon provide access to its UNEs on a non-discriminatory basis. The FCC's new rules merely clarify what is required under that existing obligation. Thus, Verizon must perform routine network modifications on behalf of CLECs in conformance with the FCC's rules. Verizon may not condition its performance of routine network modifications on amendment of a CLEC's interconnection agreement.[239]

A Rhode Island arbitrator, dismissing any "routine network modification" language from Verizon's proposed *TRO* amendment, agreed that the FCC did not establish rules that departed in any way from prior rules, but merely "resolved the controversy as to whether [Verizon] had to perform routine network modifications."[240] Similarly, the Virginia State Corporation Commission found that the *TRO* established Verizon's obligations regarding routine network modifications in connection with the provisioning of DS-1 UNE loops, and required that Verizon perform such modifications under existing interconnection agreements without modification.[241]

Verizon's well-established record of evasion of its obligations to provide routine network modifications, which the FCC explicitly condemned in the *TRO*, necessitates the more detailed rules proposed by CCC to facilitate verification and enforcement of Verizon's obligations.[242] Accordingly, the CCC *TRO* § 3.1 more clearly reflects Verizon's legal obligations to provide

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[239] *Verizon Maine: Petition for Consolidated Arbitration*, Docket No. 2004-135, Order at 8 (Maine PUC June 11, 2004) (attached hereto as Exhibit K).

[240] *RI Routine Network Modifications Decision*, at 11.

[241] *Petition of Cavalier Telephone for Injunction against Verizon Virginia for Violations of Interconnection Agreement and for Expedited Relief to Order Verizon Virginia to Provision Unbundled Network Elements in Accordance with the Telecommunications Act of 1996*, Case No. PUC-2002-00088, Final Order at 8-9 (Va. SCC, Jan. 28, 2004) ("*VA Routine Network Modifications Order*") (attached hereto as Exhibit L).

[242] *See TRO* at n.1940 (finding Verizon's policy "discriminatory on its face").

routine network modifications than Verizon's proposal. The Department should reject Verizon's attempt to continue to discriminate in provisioning of Dark Fiber Loop and Transport UNEs, and adopt the Coalition's terms that apply the nondiscrimination terms to all elements.[243]

In addition, the Department should adopt the CCC's proposed language that prohibits Verizon from assessing additional charges for routine network modifications and recognizes that the cost for these modifications are already included in the existing rates for the UNE set forth in the Agreement. Verizon has, to some degree, conceded this. In a letter dated March 1, 2005, Verizon stated that it,

> will not seek through this Arbitration to litigate charges for the non-recurring rate elements identified in Exhibit A for which the Department has not already set approved rates. Until rates for those elements are approved by the Department, Verizon MA will not charge for the activities when provisioning new loops once interconnection agreements are appropriately amended.[244]

The Department should therefore reject any attempt by Verizon now or in the future to double-recover its supposed costs for performing routine network modifications. While the *TRO* permits Verizon to recover its legitimate costs, it recognizes that these costs are often already recovered by an ILEC's recurring UNE rates. The FCC found that "costs associated with modifications may be reflected in the carrier's investment in the network element, and labor costs associated with modification may be recovered as part of the expense associated with that investment (e.g., through application of annual charge factors (ACFs))." Continuing, the FCC held that its "rules

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[243] *See TRO*, ¶ 638 (finding that the network modification rules apply to all transmission facilities, including dark fiber). *See also* CCC's response to Issue 1 for discussion of Verizon's proposed § 3.5.3.

[244] *See* D.T.E. 04-33, Letter from Bruce P. Beausejour, Vice President and General Counsel of Verizon New England to Mary Cottrell, Secretary, Department of Telecommunications & Energy, at 2 (dated Mar. 1, 2005).

make clear that there may not be any double recovery of these costs ….”[245] The Virginia State Corporation Commission recently rejected Verizon’s attempt to impose additional charges for network modifications, finding that Verizon’s costs for these routine modifications are already built into its existing UNE rates and therefore must be provided at no additional charge, and the Department should do likewise.[246]

As initially discussed in CCC’s response to Issue 16, the Department should also reject Verizon’s baseless proposal in Section 3.5.2 to exempt UNEs requiring routine modifications from the performance plan adopted by the Commission. It would be nonsensical to abandon the performance plan, one of the Department’s principal mechanisms for curbing discrimination and other anticompetitive acts, for a category of UNEs for which Verizon has been singled out by the FCC for its record of intentional discrimination. Verizon’s proposal is tantamount to a suggestion that corporations found guilty of securities fraud should receive a special exemption from further SEC investigations. Thus, the Department should deny Verizon’s thinly veiled attempt to continue its practice of discrimination with respect to network modifications, and should instead adopt the CCC’s proposed § 3.1.1.

In view of Verizon’s record of discrimination and evasion of its obligations, the Department should adopt additional measures to reduce the likelihood that a CLEC UNE request will continue to be improperly denied on the basis of no facilities. In light of the FCC’s clarification of Verizon’s obligation to perform routine network modifications, rejected orders should be at most a rare occurrence. Pursuant to the Coalition’s proposed § 3.1.2, if Verizon

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[245] *TRO*, ¶ 640.

[246] *VA Routine Network Modifications Order*, at 8; *see also NY Routine Network Modifications Order*, at 19.

rejects a UNE request on the basis of no facilities, it would be required to provide detailed information, including the location of all facilities that were reviewed in making the determination; a description and estimated cost of non-routine modifications that would be necessary to fulfill the UNE request; and a proposed timetable and charge to the CLEC for the non-routine modifications that would be sufficient to provision the requested facility. These safeguards will reduce the probability of error, assist all parties in the identification of alternative solutions, and facilitate enforcement by greatly increasing the transparency of the process.

Furthermore, the CCC's *TRO* § 3.1.3 would serve as an additional protective measure to ensure that Verizon does not continue to unlawfully discriminate against CLECs. Where a CLEC UNE request is denied on the basis of no facilities available, Verizon would have a 24-month continuing obligation to advise the CLEC within 60 days if and when Verizon later provides any retail or wholesale services to any customer at the same premises that were the subject of a "no facilities" determination by Verizon. Such notification shall include, at a minimum, a description of all work that was performed in the interim period that enabled service to be offered over the facility. In the absence of such a provision, it would be extremely difficult for CLEC and the Department to identify and prosecute circumstances where Verizon unlawfully discriminates in its provisioning. If Verizon fails to so notify the affected CLEC, or if it is subsequently determined by Verizon, the CLEC or the Department that the facility should have been made available to the CLEC at the time of its request, Verizon shall pay to CLEC a performance remedy of $1,000 per incident, in addition to and not exclusive of all other available remedies.[247]

[247] The Department can order such damages be paid as it has held that "liquidated damages are necessary and consistent with the Act." Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 3 Order (Mass. D.T.E. Dec. 4, 1996).

Given Verizon's record of noncompliance, meaningful and enforceable penalties are necessary to incent Verizon to comply with its obligations.

Additionally, Verizon's proposed Amendment 2 § 3.5.3[248] should be rejected. Verizon seeks to limit its obligations to offer routine network modifications to the extent required by 47 U.S.C § 251(c)(3) and 47 C.F.R. Part 51, which is inappropriate as explained in CCC's response to Issue 1. Verizon also asserts that offering routine network modifications does not obligate Verizon to provide access to a Discontinued Facility or limit Verizon's rights to cease providing a Discontinued Facility. For the same reasons discussed in CCC's responses to Issues 1 and 2, Verizon's proposed language should be rejected.

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

It is the CCC's understanding that this Issue refers to Verizon's oft-repeated provisions that it will not provide a particular network element "Notwithstanding any other provision of the Amended Agreement … or any Verizon Tariff or SGAT" and other similar language.[249] This phrase is overbroad and contrary to law. As demonstrated in CCC's response to Issue 1, it is both unlawful and procedurally improper for Verizon to attempt to so broadly limit its obligations in this manner. In particular, there is no basis for Verizon to use a change to its § 251 obligations as an excuse to eliminate obligations arising from other applicable law or requirements. If Verizon believes that the new FCC regulations also support a change to its tariffs or SGATs, it should propose amendments to those documents through the normal and proper channels. The Department should not countenance Verizon's backdoor attempt to nullify

[248] Verizon Amendment 2 § 3.5.3.

[249] *See, e.g.*, Verizon Amendment 1 §§ 2.1, 2.3, 3.1, 3.4, 4.5, 4.7; Verizon Amendment 2 §§ 1, 2.1, 2.3, 2.4, 3.1, 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.3.1, 3.4.1, 3.4.1.2.2, 3.4.2, 3.5.3, 4.5, 4.7.

its tariffs and other obligations. In any event, as demonstrated in Issue 1 above, Verizon's attempt to limit its obligations to those that it believes are required by the "Federal Unbundling Rules," which appears to be the sole supposed basis for the nullification of tariffs and SGATs, is unlawful and is not supported by the *TRO* or *TRRO*.

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

The CCC's concerns that fall within the scope of this issue are addressed in: (1) the CCC's proposed terms for transition rules that apply to Section 251 UNEs eliminated by the *TRRO*, *see* CCC's responses to Issue 6 and 29; and (2) the CCC's contract provisions relating to Conversions,[250] *see* CCC's response to Issue 20. If a UNE is discontinued, CLECs must be able to convert it without disruption or impairment of service to a tariffed service where one exists. Any other approach that allows for uncertainty would create an opportunity for mischief on Verizon's part, generally to the detriment of end users subscribing to service from CLECs.

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?[251]

CCC's *TRO* language is appropriate and properly recognizes the limited instances when a CLEC must certify to Verizon that it satisfies the FCC's service eligibility requirements for

[250] CCC *TRO* § 2.3.

[251] 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.

combinations and commingled facilities.[252] Significantly, FCC Rules 51.318(a) and (b) specifically provide,

> (a) Except as provided in paragraph (b) of this section, an incumbent LEC shall provide access to unbundled network elements and combinations of unbundled network elements without regard to whether the requesting telecommunications carrier seeks access to the elements to establish a new circuit or to convert an existing circuit from a service to unbundled network elements.
>
> (b) An incumbent LEC need not provide access to (1) an unbundled DS1 loop in combination, or commingled, with a dedicated DS1 transport or dedicated DS3 transport facility or service, or to an unbundled DS3 loop in combination, or commingled, with a dedicated DS3 transport facility or service, or (2) an unbundled dedicated DS1 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled dedicated DS3 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled DS3 loop or a DS3 channel termination service, unless the requesting telecommunications carrier certifies that all of the following conditions are met:[253]

The CCC's proposal specifically incorporates the language of FCC Rule 51.318(b), which sets forth the *precise* instances when a CLEC must certify that it complies with the FCC's service eligibility criteria. Incredibly, Verizon's proposed certification requirements are not limited to these instances and it proposes that they generally apply to each DS1 circuit or DS1 equivalent circuit.[254] However, the FCC Rule is far more specific than Verizon's sweeping proposal, and requires that the eligibility criteria be satisfied "for each combined circuit, including each DS1

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[252] *See* CCC *TRO* § 2.2. The FCC has noted that "No certification is necessary for requesting carriers to obtain access to loops, transport, subloops, and other stand-alone UNEs, as well as EELs combining lower capacity loops." *TRO*, n.1899.

[253] 47 C.F.R. §§ 51.318(a) & (b).

[254] Verizon Amendment 2 § 3.4.2.1.

circuit, each DS1 enhanced extended link, and each DS1-equivalent circuit on a DS3 enhanced extended link."[255] In addition, Verizon's language contemplates applying the eligibility criteria to non-UNEs despite the fact that the rules do not apply to them.

Moreover, unlike CCC's proposed *TRO* Amendment, Verizon's proposed Section 3.4.2.3 of Amendment 2 is inconsistent with the *TRO* because it seeks to impose onerous eligibility requirements that a CLEC must satisfy before it may obtain combinations. Specifically, Verizon demands that,

> Each written certification to be provided by ***CLEC Acronym TXT*** pursuant to Section 3.4.2.1 above must contain the following information for each DS1 circuit or DS1 equivalent: (a) the local number assigned to each DS1 circuit 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; (d) the collocation termination connecting facility assignment for each circuit, showing that the collocation arrangement was established pursuant to 47 U.S.C. § 251(c)(6), and not under a federal collocation tariff; (e) the interconnection trunk circuit identification number that serves each DS1 circuit. There must be one such 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.[256]

Nothing in the *TRO* requires a CLEC to provide the sort of information demanded by Verizon. A CLEC is only required to certify that it satisfies the eligibility criteria of Rule 51.318(b).[257] If Verizon seeks to contest the CLEC certification, it may exercise its audit rights.[258]

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[255] 47 C.F.R. § 51.318(b)(2).

[256] Verizon Amendment 2 § 3.4.2.3.

[257] *TRO*, ¶¶ 623-624

[258] *TRO*, n.1900.

With respect to means upon which certification is made, CCC proposes that a CLEC can self-certify in writing or by electronic notification. CCC's proposal is perfectly reasonable, whereas the FCC has found that specific certification procedures demanded by ILECs "would impose an undue gating mechanism that could delay the initiation of the ordering or conversion process."[259] Accordingly, CCC's proposed language, CCC *TRO* § 2.2, should be adopted.

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?

Verizon claims that its proposed language is necessary because it has not agreed to negotiate terms and conditions of commercial agreements for replacement services for any of the Discontinued Facilities under the auspices of Section 251 and 252 or as part of the negotiations over a *TRO* or *TRRO* Amendment.[260] Verizon's proposed language should be rejected as superfluous and unnecessary, and it should be rejected by the Department.

As explained in CCC's response to Issues 1 and Issue 31, Verizon has an obligation to offer rates, terms and conditions for network elements in interconnection agreements under Section 271 and other applicable law (*i.e.*, Bell Atlantic/GTE Merger Conditions) even if Verizon has been relieved of offering such network elements pursuant to Section 251(c)(3). And, as explained in CCC's response to Issue 31, *infra*, such issues can be arbitrated under Section 252(b). Therefore, Verizon's proposed language is unnecessary and would be a source of possible conflict and confusion. Furthermore, Verizon's language has no basis in the *TRO*. Accordingly, it should not be included in the Amendment. However, CCC notes that services

[259] *TRO*, ¶ 623.

[260] *See* Feb. 18, 2005 Joint Issues Matrix, at Issue 25.

provided under a commercial agreement should be subject to Commingling and Conversion to the same extent as tariffed services, which is consistent with the *TRO*.

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

Verizon should be required to provide physical loop test access points for CLECs to engage in testing, maintaining and repairing copper loops and subloops, on a nondiscriminatory basis, as proposed in CCC *TRO* § 1.5.3. Verizon claims that this issue is not properly within the scope of the instant case, and has not suggested any relevant language. However, CCC's proposal for the inclusion of such language comes directly from the *TRO*, where the FCC required ILECs to provide access points for copper loop maintenance. In pertinent part, the *TRO* directs that ILECs:

> shall provide, on a nondiscriminatory basis, physical loop test access points to a requesting telecommunications carrier at the splitter, through a cross-connection to the requesting telecommunications carrier's collocation space, or through a standardized interface, such as an intermediate distribution frame or a test access server, for the purpose of testing, maintaining, and repairing copper loops and copper subloops.[261]

The language proposed by CCC is consistent with the *TRO* and appropriately seeks to solidify Verizon's obligations regarding this important issue. The Department should therefore reject Verizon's position that the disputed language is not necessary and adopt CCC's proposal.

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?

A one-size-fits-all solution would be inconsistent with FCC regulations and unsound policy, because different transition provisions will be appropriate in different circumstances. For

[261] *TRO*, Appendix B, at 11; 47 C.F.R. § 51.139(a)(1)(iv)(A).

example, the *TRRO* established different transition terms for dark fiber than for other affected § 251 UNEs, and also different terms for UNEs being requested to serve the CLECs' existing customer base as opposed to new customers. Meanwhile, the CCC is not seeking transition terms for most § 251 UNEs eliminated by the *TRO*. Thus, the Department should consider specifically-tailored transition terms, as needed, depending on the particular circumstances of the UNE at issue.

A. Transition Provisions for § 251 UNEs Subject to Elimination Under the *TRRO* as of the Effective Date of the Amendment.

The CCC addresses the rates that should be applicable to the transitional *TRRO* UNEs in its response to Issue 6, and in Issue 8 explains that Verizon should not be permitted to impose charges for moving these UNEs to alternative arrangements. The requirement that Verizon provide moves, adds and changes for transitional UNEs is addressed in CCC's response to Supplemental Issue 4.

In addition, the Agreements should include reasonable terms to govern the migration and conversion of transitional UNEs to alternative arrangements. Section 7.2.5 of the CCC *TRRO* Amendment would require CLECs to submit orders to convert or migrate UNEs that are no longer available to alternative arrangements by the end of the applicable transition period.[262] To the extent Verizon does not complete the requested conversion or migration by the last day of the applicable transition period, Verizon must continue to provide the UNE until such time as Verizon completes the migration of the UNE to the alternate arrangement.[263] The proposal also

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[262] CCC *TRRO* § 7.2.5.1. The CCC uses the term "migrate" to refer to requests to transition the UNE to a non-Verizon arrangement, and the term "convert" to refer to requests to transition to alternative Verizon service arrangements.

[263] CCC *TRRO* § 7.2.5.2.

specifies that the effective date for Conversions is the last day of the applicable transition period and for migrations is the earlier of the date upon which the migration is performed or the first day of the next billing cycle after the migration order is submitted by the CLEC. [264] The purpose of these terms is to provide certainty and fairness to all parties. If the CLEC is remaining on the Verizon network, it would be assessed the transitional rate for exactly the period that the FCC provided, no more and no less. CLECs could gain no advantage by delaying their requests to move, and Verizon could gain no advantage in delaying its performance of the request. Meanwhile, the migration terms should assure that Verizon cannot continue to charge the CLEC for services that the CLEC no longer wants for an unreasonable amount of time after the CLEC has requested to be moved off the Verizon network.

CCC's proposal requires Verizon to perform all conversions and migrations of § 251 UNEs eliminated by the *TRRO* in a seamless manner without customer disruption or adverse effects to service quality.[265] In addition to the reasons that justify such treatment of conversions generally, explained in CCC's response to Issue 20(B)(1)-(2), these terms are especially appropriate for the conversion of migration of UNEs affected by the *TRRO*, which are being reclassified (1) as a result of Verizon's request, rather than the CLEC's,[266] and (2) will in many instances be requested in significantly higher volumes than are otherwise typical. Because of the extraordinary circumstances, the proposed language requires that parties work together to develop a mutually agreeable plan to implement the conversion process.

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[264] CCC *TRRO* § 7.2.5.2.

[265] CCC *TRRO* § 7.2.5.3.

[266] While Verizon is entitled to discontinue its provision of these facilities as § 251 UNEs, it is not legally required to do so. Therefore, these UNEs are being moved to alternate arrangements only because Verizon has so requested.

Finally, while the CCC would intend to comply with the terms set forth above, in fairness to Verizon, the CCC proposal would grant Verizon the right unilaterally to convert and if applicable reprice the CCC's discontinued § 251 arrangements to § 271 network elements on 30 days notice if the CLEC fails to submit its requested alternative by the end of the transition period.[267] Since Verizon remains obligated to continue to provide unbundled access to these facilities under Section 271, it should not be permitted unilaterally to disconnect these facilities at the end of the transition period. More than likely, any such situation would only arise as a result of an oversight or error by the CLEC and/or Verizon, and the end user customer should not be subjected to unnecessary disruption resulting from a disconnection.

B. Provisions Governing § 251 UNEs Subject to Elimination Under the *TRRO* After the Effective Date of the Amendment.

Although the classification of most of the wire centers that will be affected by the *TRRO* will be established in the initial implementation of the Order and are unlikely to change, the *TRRO* permits Verizon to seek reclassification if facts change that cause a wire center to cross one of the FCC non-impairment thresholds. Accordingly, the CCC has proposed a process that would enable Verizon to discontinue its provision of such UNEs where appropriate, and in such instance provide an appropriate transition for CLECs.[268]

As a preliminary matter, it should be noted that while the *TRRO* established a self-certification process for *new* UNE orders in which, ultimately, a state commission could be asked to determine whether a wire center meets the *TRRO* thresholds for non-impairment, as a practical matter, the question of whether a particular wire center meets the thresholds is more likely to

[267] CCC *TRRO* § 7.2.5.5.

[268] CCC *TRRO* §§ 9.2, 9.2.1, 9.2.2.

arise first with respect to *existing* UNEs rather than new orders. It is virtually certain that there already exist CLEC UNE arrangements ay any wire center that Verizon would attempt to designate for non-impairment. Since the self-certification process would not apply to existing arrangements, separate terms are needed to address the process applicable to existing UNEs. Thus, the CCC's proposed terms for the self-certification process is set forth its *TRRO* § 8, which are addressed in Supplemental Issue 1 (subsection B) of this brief. The process governing the treatment of existing UNEs at such wire centers is addressed in § 9.2 of CCC's *TRRO* proposal and is addressed here.

Under CCC's *TRRO* Amendment, Verizon would be permitted at any time to request that CLEC agree to the addition of a wire center to one of the non-impairment lists.[269] So that the CLEC can make an informed decision as to whether or not to agree, without having to bring every matter to the Department, the CCC proposal would require Verizon to provide CLEC access to the underlying data and methodology.[270] If the Parties are unable to agree, Verizon would be permitted to invoke the change-of-law dispute resolution process to force a determination.[271] The New York Public Service Commission recently required Verizon to follow a similar practice for wire center reclassifications under the *TRRO*, finding that Commission resolution of such disputes would avoid disputes over the effective date of a reclassification.[272]

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[269] CCC *TRRO* § 9.2.

[270] CCC *TRRO* § 9.2.1.

[271] CCC *TRRO* § 9.2.

[272] *NYPSC Order Implementing TRRO Changes*, at 9 (attached hereto as Exhibit F).

When § 251 UNEs are eliminated by this process in the future, the *TRRO* recognizes that CLECs are entitled to "appropriate" transition terms.[273] The CCC has as a comprise proposal offered to use essentially the same transition terms that the FCC found were appropriate for the UNEs eliminated by the initial implementation of the *TRRO*, rather than advocating the longer transition terms previously advanced by CLECs.[274] The FCC explained in the *TRRO* that CLECs need sufficient time "to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase or lease facilities."[275] Deployment of loop facilities is a time-consuming process, and the FCC has repeatedly emphasized that sufficient transition periods are appropriate to avoid "flash cuts" that are disruptive to carriers and their customers.[276] The same 12 and 18 month transition periods are appropriate because CLECs will need to make the same types of adjustments when loop and transport UNEs eliminated in the future as they are

[273] *See TRRO* at n. 399 ("We recognize that some dedicated transport facilities not currently subject to the nonimpairment thresholds established in this Order may meet the thresholds in the future. We expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."); n. 519 (same for loops).

[274] CCC *TRRO* § 9.2.2, providing that the *TRRO* transition period shall apply to any network element that ceases to be available to CLEC as a result of an amendment to a schedule, except that (a) the Transition Period for such network elements shall be 12 months from the effective date of such amendment to the relevant schedule for network elements other than Dark Fiber, and 18 months for Dark Fiber network elements from the effective date of such amendment to the relevant schedule; and (b) the transitional rate for such elements shall be 115 percent of the rate that was in effect on the day before the effective date of such amendment to the relevant Schedule.

[275] *TRRO*, ¶ 196.

[276] *See, e.g., TRRO*, ¶ 226; see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9186-87, ¶¶ 77-78 (2001) (finding that it would be "prudent to avoid a 'flash cut' to a new compensation regime that would upset the legitimate business expectations of carriers and their customers.").

today. Therefore, the CCC's proposed *TRRO* § 9.2 governing future wire center reclassifications and UNE transitions is consistent with FCC rules and public policy, and should be adopted.

C. Other Questions Raised by Issue 27

Any future changes to Verizon's unbundling obligations that arise from a change in *law* (as opposed to a change in facts, as described above) can only be implemented in accordance with the change in law provisions of the Agreement in effect at that time. *See* CCC response to Issue 2. If appropriate and permitted under those terms, a party could propose transition terms for such an instance during that future change of law process.

As for the application of the Section 252 negotiation process to "replacement arrangements," *see* CCC's responses to Issues 1 and 31.

The Amendment need not specifically address Verizon's obligations to provide UNEs in the absence of permanent FCC rules because permanent rules do exist and are in effect. Moreover, to the extent certain rules were vacated, the change in law provisions of the agreement that were in effect at that time of the vacatur would govern. *See* CCC response to Issue 2 (explaining that the Agreements already set forth terms to address changes in law). Therefore, as to Issue 27, no further litigation of this question should be necessary.

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?

Yes. The Agreements should reflect all of Verizon's unbundling obligations, including its Section 271 obligations, and should not be artificially limited to its obligations arising under Section 251. *See* CCC's response to Issues 1 and 31.

As for service substitutions for UNEs that Verizon may at some future date obtain relief from its existing § 251 obligations, CCC asserts that terms for such service substitutions are not necessary under CCC's proposal. Because CCC does not seek to amend the parties' existing

change-of-law terms, the existing change-of-law language is sufficient to handle future contingencies as they may arise.[277]

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?

Both the *TRO* and the *TRRO* expressly provide that the new rules must be implemented through the interconnection agreement change of law processes, and are not self-executing.[278] The *TRRO* recognizes that while the order became effective on March 11, 2005, the changes to the parties' relationships should take effect "upon the amendment of the relevant interconnection agreements, including any applicable change of law processes."[279] Significantly, a Federal District Court in Illinois recently held that the *TRRO* does not go into effect automatically and that negotiations are "a predicate to implementation of the TRO Remand Order."[280] In any event, the determination of the effective date of the changes that result from the *TRO* and *TRRO* are controlled solely by the existing change of law terms. *See* CCC response to 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 Issues 6, 27 and Supplemental Issue 4. For the

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[277] *See* CCC's response to Issues 2, 3, 6, & 27.

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

[279] *TRRO* at nn.408, 524, & 630.

[280] See *Illinois Bell Telephone Company v. Illinois Commerce Commission et al*., Case No. 05 C 1149, slip op. at 12 (Mar. 29, 2005) (attached hereto as Exhibit M).

reasons set forth CCC's response to those Issues, the Department should adopt § 7 of the CCC's *TRRO* Amendment.

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?

Yes. Pursuant to 47 U.S.C. §§ 271(c)(2)(B)(iv),(v),(vi), & (vii), Verizon is required to provide requesting carriers with access to specifically-enumerated network elements including loop transmission, transport, switching and call-related databases ("Section 271 network elements"). This obligation is wholly independent of Verizon's duty to offer UNEs pursuant to Section 251(c)(3). In its proposed Amendment, CCC proposes rates, terms and conditions associated with Section 271 network elements.[281] Verizon refuses, however, to incorporate any language that recognizes its obligation to offer such facilities on the grounds both that the Amendment should be narrowly limited to what Section 251(c)(3) requires, and that the Department has no authority either to implement Section 271 or to arbitrate this issue in a Section 252 arbitration proceeding.

Verizon's § 271 obligations are unequivocal, directly applicable, and arbitrable. The relevant provisions of Sections 271 and 252 and their interrelationship require that (1) the rates, terms and conditions associated with Section 271 network elements must be contained in an interconnection agreement or SGAT approved by a state commission pursuant to § 252; and (2) a dispute over the rates, terms and conditions for Section 271 network elements is an "open issue" that may be presented to a state commission within the context of a § 252 arbitration. In addition, the Department has independent and explicit authority to order that such provisions be included in an interconnection agreement. The Department should find that the CCC's proposed contract

[281] CCC *TRO* §§ 4 & 5.13.

language associated with Verizon's obligation to offer Section 271 network elements is "just and reasonable,"[282] and require its incorporation in the agreements.

A. The Department Has Authority to Establish Rates, Terms and Conditions Associated with Verizon's Obligation to Offer Section 271 Network Elements in this Arbitration.

1. Section 271 Requires that Rates, Terms and Conditions Associated with Section 271 Network Elements be Included In State-Approved Section 252 Interconnection Agreements.

A state commission has the authority to establish rates, terms and conditions associated with Section 271 network elements. The interrelationship between Sections 252 and 271 makes clear that disputes regarding such elements are subject to a § 252 arbitration; and the Act vests primary jurisdiction with the states – not the FCC – to arbitrate disputes involving interconnection agreements.[283] The § 271 competitive checklist requirements, including the network element items, *must* be implemented through interconnection agreements or SGATs approved under § 252.[284] FCC precedent on this point has been clear – in approving Verizon's Massachusetts 271 application, the FCC stated that a BOC "must" satisfy its checklist obligations "*pursuant to state-approved interconnection agreements* that set forth prices … for each checklist item."[285]

Verizon nonetheless claims that the Department has no authority to decide this unresolved issue. According to Verizon, § 252 limits a state commission's authority in conducting an arbitration proceeding to the implementation of § 251 obligations. Verizon

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[282] *TRO*, ¶¶ 656, 662-64.

[283] *See* 47 U.S.C. §§ 252(d)(4), 252(e), 252 (e)(5).

[284] 47 U.S.C. § 271(c)(1), (2).

[285] *Massachusetts 271 Order*, ¶ 11

erroneously contends that because it no longer is required to offer certain network elements on an unbundled basis under § 251, the Department has no authority under § 252 to arbitrate the rates, terms and conditions associated with its obligation to offer them pursuant to § 271. To the contrary, state commissions are authorized – indeed, required – to decide all "open issues" unresolved by the parties negotiations, including issues of state law (*See* CCC response to Issue 1) and § 271 checklist items.[286]

Verizon's argument relies on reading portions of § 252 out of context, instead of considering how that provision relates to the rest of the statute. BOCs are mandated by Section 271 to offer the competitive checklist items, which include, among other things, those network elements delineated in § 271(c)(2)(B). In addition, § 271(c)(2)(A) provides:

> (A) AGREEMENT REQUIRED – A Bell operating company meets the requirements of this paragraph if, within the State for which authorization is sought –
>
> (i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [interconnection Agreement], or
>
> (II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [an SGAT], and
>
> (ii) such access and interconnection meets the requirements of subparagraph (B) [the competitive checklist items].

Section 271(c)(1) specifically requires that these agreements be approved under § 252 of the Act, so the arbitration provisions of § 252 necessarily must apply. In particular, § 271(c)(1) provides:

> (c)(1) AGREEMENT OR STATEMENT- A Bell operating company meets the requirements of this paragraph if it meets the

[286] 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").

> requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.
>
> (A) PRESENCE OF A FACILITIES-BASED COMPETITOR- A Bell operating company meets the requirements of this subparagraph if it has entered into one or more **binding agreements that have been approved under Section 252**, specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in Section 3(47)(A), but excluding exchange access) to residential and business subscribers.[287]

Significantly, the Senate committee that drafted the 271 competitive checklist said the checklist "set[s] forth what must, at a minimum, be provided [upon request] by a Bell operating company in *any interconnection agreement approved under section 251* to which that company is a party."[288] A BOC can thus comply with its § 271 obligations *only* by entering into interconnection agreements "under section 252" (§ 271(c)(1)(A)) that include specific terms and conditions for the § 271 checklist items. In arbitrating such agreements, state commissions have the authority, in the first instance, to set the rates, terms, and conditions for them.[289]

In evaluating § 271 applications, the FCC required BOCs to demonstrate compliance with § 271 by showing they had binding § 252 interconnection agreements that contained rates, terms and conditions for competitive checklist items. In fact, the FCC dismissed § 271 applications and determined that a BOC failed to comply with the checklist if it relied on an

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[287] 47 U.S.C. § 271(c)(1)(A) (emphasis added).

[288] S. Rep. 104-23, 104th Cong, 1st Sess., p. 43 (March 30, 1995) (emphasis added).

[289] *See Sprint Communications Co. L.P. v. F.C.C.*, 274 F.3d 549, 552 (D.C. Cir. 2001)(noting that the competitive checklist requirements are "enforced by state regulatory commissions pursuant to §252").

agreement that was not binding or had not been approved by the state commission.[290] The FCC also made clear that when a BOC "is providing" a checklist item in satisfaction of § 271(c)(2)(A) only if it has a "concrete and specific legal obligation to furnish the item upon request *pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions*."[291] Accordingly, for BOCs to remain compliant with the § 271 checklist, they must negotiate and, if necessary, arbitrate rates, terms and conditions for each of the § 271 checklist items that will be included in state approved § 252 interconnection agreements. Conversely, if a BOC declines or refuses to do so, 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*").

Verizon, by requesting and obtaining its § 271 authority, has voluntarily and implicitly agreed to negotiate – and thus to arbitrate where negotiations fail – interconnection agreements that contain the § 271 checklist items which will need to be approved pursuant to section 252. 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 Section 271 network elements, that disagreement constitutes an "open issue" that a state commission has the authority to resolve in a § 252 arbitration.

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[290] *See, e.g., Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan,* CC Docket No. 97-1, Order, 12 FCC Rcd 3309, ¶ 22 (1997); *see also Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan,* CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20700, ¶¶ 25 & 71 (1997) (subsequent history omitted).

[291] *Massachusetts 271 Order*, ¶ 11 (emphasis added).

Further, Verizon has submitted these issues to the Department's resolution by petitioning to arbitrate issues associated with the implementation of the *TRO*. The *TRO* specifically addresses § 271 Issues. In fact, the FCC devotes eighteen paragraphs to the subject matter.[292] In that section, the FCC both affirmed prior conclusions and articulated new ones regarding § 271. In response to Verizon's request to implement changes in law associated with the *TRO*, CCC sought to address § 271 related issues in their ICAs. Accordingly, any claim by Verizon that the *TRO* "made no changes of law in connection with Section 271" and were not the subject of negotiations needed to implement the *TRO* is simply incorrect.[293]

2. The Department Can Establish Just and Reasonable Rates, Terms and Conditions for Section 271 Network Elements Pursuant to its Intrastate Authority.

Along with the authority state commissions have to determine "unresolved" Section 271 issues in an 252 arbitration, § 252(e)(3) explicitly states that "*nothing* in" § 252 – including, for example, the provisions in § 252(b)(4)(A) providing that state commissions must limit its arbitration proceeding to the issues raised by the arbitration petition and the response to it – "shall prohibit a State commission from establishing or enforcing other requirements of state law *in its review of an agreement*." 47 U.S.C. § 252(e)(3) (emphasis added). Section 261(c) likewise permits state commissions to exercise their intrastate authority in a manner that is consistent with the federal regulatory scheme. Section 261(c) specifically provides:

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[292] *See TRO*, ¶¶ 647-667.

[293] "While subsection 251(c)(1) establishes an ILEC duty to negotiate the items enumerated in subsection 251(c), subsection 252(a)(1) empowers the parties 'to negotiate and enter into binding contract…without regard to the standards set forth in subsections (b) and (c) of section 251." *XO-IL Arb. Order*, at 65 (finding that the ICC has authority to address 271 issues in a 252 arbitration). Thus, although Verizon had to negotiate subsection 251(c) items if CCC's so requested, the parties could negotiate anything pertaining to interconnection or access to network elements, including the impact of the *TRO* on obligations arising under Section 271. *Id.* at 45-46.

> (c) Additional State Requirements. - Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.[294]

With this authority, state commissions can further local telecommunications competition as § 271 contemplates and establish intrastate rules that track a BOC's obligations under § 271. State commissions may thereby establish just and reasonable rates, terms, and conditions for Section 271 network elements and order that they be included in interconnection agreements.

Contrary to Verizon's arguments, the Department is not preempted from doing so. It is well known that the Act recognizes dual state and federal regulation over telephone service in which the FCC primarily regulates interstate communications and states primarily regulate intrastate communications. Section 271 does not strip state commissions of their authority to regulate intrastate services that include Section 271 network elements; to the contrary, other provisions of the Act expressly preserve that authority.

Nor does the FCC's adoption of the just and reasonable standard associated with Sections 201 and 202 (which normally only applies to interstate services) for Section 271 network elements permit the FCC to exert exclusive interstate jurisdictional control over them. The FCC's exclusive § 201 jurisdiction only applies to interstate services. Section 271 network elements, however, are not interstate services but are local exchange offerings. In fact, Sections 271(c)(2)(B)(iv)-(vi) specifically characterizes the § 271 loop, transport, and switching elements as "local" facilities. Because they are not interstate services, these elements are not within the FCC's exclusive control pursuant to § 201.

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[294] 47 U.S.C. § 261(c).

Thus, regardless of the open issues presented by the parties to an arbitration or the scope of an incumbent LEC's duty to negotiate, Congress unmistakably provided that, during the course of serving as an arbitrator under § 252, a state commission is always entitled to establish or enforce pro-competitive state law requirements in an interconnection agreement, in addition to implementing federal requirements, that are consistent with the standards prescribed by the FCC. With respect to checklist items that the BOCs make available pursuant to § 271 but not 251, the states clearly retain authority under state law to establish just and reasonable rates, terms and conditions for them in a § 252 arbitration.

B. CCC's Proposed Rates, Terms and Conditions for 271 Network Elements Are Just and Reasonable and Should be Adopted.

Given the Department's authority and obligation to resolve issues related to Section 271 network elements in this arbitration, the Department should adopt the CCC's proposed § 271 terms because they are just and reasonable.[295]

First, in CCC *TRO* § 4.1, the CCC has proposed terms to secure its rights under § 271(c)(2)(B) with respect to facilities that Verizon may no longer be required to offer under § 251. Inclusion of these terms in the interconnection agreement is necessary to enable reasonable transition terms for affected UNEs. Verizon's exclusion of these terms from the proposed Amendment is merely the latest incantation of its position that § 271 does not impose any independent obligation to provide access to certain network elements. Verizon's position has been repeatedly rejected by the FCC, most recently in the *TRO*.[296]

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[295] CCC *TRO* § 4

[296] *See TRO*, ¶ 653 ("we continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for the BOCs to provide access to loops, switching, transport and signaling regardless of any unbundling analysis under Section 251."); *see also TRO*, ¶¶ 652, 654-655 (rejecting Verizon's arguments).

Second, the CCC proposes in *TRO* § 4.2 the continued utilization of the TELRIC-based rates, at least on a temporary basis. The CCC is mindful of the FCC's determination in the *TRO* that state commissions are not required to apply the pricing standards of Section 252 to these facilities. However, Verizon has not proposed alternative rates in its Amendment, nor has it provided any evidence to establish that different rates would be just and reasonable as required by the *TRO*. Therefore, the rates established by the Department in its prior UNE cost proceedings, which are already a part of the parties' Agreements, remain the only suitable, presumptively lawful pricing scheme available for the Department to adopt in this proceeding. Facing the same situation, the Maine Public Utilities Commission rendered a decision that is consistent with the CCC's proposal and stated,

> Until such time as we approve new rates for Section 271 UNEs, adopt FCC-approved rates, or CLECs agree to Section 271 UNE rates, Verizon must continue to provide all Section 271 UNEs at existing TELRIC rates. We find this requirement necessary to ensure a timely transition to the new unbundling scheme. We have no record basis to conclude that TELRIC rates do not qualify as "just and reasonable" rates; while we might ultimately approve higher rates, we cannot do so without the benefit of a record or the agreement of the parties.[297]

The New Hampshire Public Utilities Commission recently issued a similar decision.[298] The Department should follow suit and adopt the CCC's proposed *TRO* § 4.2.

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[297] *Verizon Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order Part II, at 19-20 (Me. PUC Sept. 3, 2004) (attached hereto as Exhibit N).

[298] *Proposed Revisions to Tariff NHPUC No. 84 (statement of Generally Available Terms and Conditions); Petition for Declaratory Order re Line Sharing*, DT 03-201, 04-176, Order Following Briefing, Order No. 24,442, at 50 (N.H. P.U.C. Mar. 11, 2005) (attached hereto as Exhibit O).

It is important to note that although the FCC did state that it would review rates for § 271 UNEs in the context of § 271 applications and enforcement proceedings,[299] the FCC *did not specifically preclude or preempt state commissions from establishing such rates for 271 network elements in arbitration proceedings conducted pursuant to § 252*. As it did with the TELRIC standard for § 251(c)(3) unbundled network elements, the FCC articulated a pricing standard in the *TRO* that state commissions may apply in resolving disputes over the rates for this class of network elements:

> The pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.[300]

In paragraph 664, the FCC again referred to the pricing methodology for Section 271 network elements as a "pricing standard," noting that the "appropriate inquiry for network elements required under § 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in Sections 201 and 202."[301] In no place did the FCC state that state commissions were forbidden from utilizing their § 252 authority to apply this methodology and "establish" a particular rate. Simply by use of the passive voice, the FCC did not – and could not – divest state commissions of the pricing responsibility the Act gives them.

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[299] *TRO*, ¶ 664.

[300] *TRO*, ¶ 663.

[301] *TRO*, ¶ 664.

Moreover, it is procedurally and substantively appropriate to allow state commissions, who are much more familiar with the individual parties, the wholesale offerings, and the issues of dispute between the parties, to apply the FCC's just and reasonable standard for Section 271 network elements. Significantly, a number of other considerations support a state commission's authority in this regard. First, it makes perfect sense if the state commission is applying the FCC's "just and reasonable" standard. Significantly, most state commissions have considerable experience in applying this standard to the rates of BOCs and many other public utilities. Further, state commissions, and not the FCC, are most familiar with the detailed company-specific data that will be used to support a BOC's claim that its Section 271 network elements are just and reasonable. In addition, the Supreme Court's decision in *Iowa II* and the Eighth Circuit's decision in *Iowa III*[302] clearly establish that states, not the FCC, set rates for network elements arbitrated pursuant to 252. Indeed, the Supreme Court stated that:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions …. The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in § 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[303]

State commissions therefore have the requisite authority to establish rates for Section 271 UNEs that track the applicable federal requirements.[304] Indeed, just as states apply federal pricing standard for network elements unbundled pursuant to Sections 251 and 252, they can do

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[302] *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000).

[303] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 384 (1999) ("*Iowa II*").

[304] *Iowa II*, 525 U.S. at 385 n.10.

the same with respect to Section 271 network elements.[305] Finally, 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 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 such facilities under Section 271. 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.

Finally, in CCC *TRO* § 4.3, the Coalition proposes that Verizon continue to be required to provide combinations of network elements provided pursuant to § 271 and permit commingling. Even if these elements are not subject to nondiscrimination standards of § 251, they remain subject to the requirements of state law and of Sections 201 and 202. Any refusal to provide such combinations and commingling to CLECs, even as it performs them for its own affiliates and operations, would be unreasonable and discriminatory in violation of these applicable standards. In particular, a restriction on commingling and combining Section 271 network elements would (1) be an "unjust and unreasonable practice" under § 201, (2) be an "undue and unreasonable prejudice or advantage" under § 202, and (3) violate nondiscrimination requirements.[306] The CCC *TRO* § 3.8.3 is necessary to ensure that Verizon's provisioning of Section 271 network elements is reasonable and nondiscriminatory.

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[305] *Iowa II*, 525 U.S. at 384 & 385 n.10.

[306] *See TRO*, ¶ 581.

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

Based on Verizon's letter to the Department dated March 1, 2005, this issue is now moot and no longer appropriate for resolution in this proceeding. [307]Verizon wrote that it,

> will not seek through this Arbitration to litigate charges for the non-recurring rate elements identified in Exhibit A for which the Department has not already set approved rates. Until rates for those elements are approved by the Department, Verizon MA will not charge for the activities when provisioning new loops once interconnection agreements are appropriately amended.[308]

Verizon is thus no longer seeking to arbitrate non-recurring charges in this proceeding, and, therefore, this issue is now moot. However, as explained in CCC's responses to Issues 12, 20, and 21, any such charges should be explicitly prohibited.

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?

A. The Wire Centers Should be Identified in the Agreement.

Yes; *see* CCC *TRRO* §§ 9.1-9.4; *see also* CCC *TRRO* §§ 5.2.2, 5.3.2, 6.5.2, & 6.6.1. The primary and most fundamental purpose of an interconnection agreement is to clearly spell out the terms under which a CLEC may obtain unbundled network elements and interconnection. CLECs need clear and specific terms so that they know in advance what they can -- and cannot -- promise to their own customers, and so that they can develop viable business and marketing plans. In addition, since FCC rules rarely provide all of the details necessary for practical implementation, the inclusion of clear and specific terms reduces the likelihood of subsequent

[307] *See* 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).

[308] *Id.* at 2.

disputes that would have to be brought back to the Department for resolution. The proper identification of these wire centers is central and critical to a *TRRO* amendment because it will determine the fundamental rights and obligations of the parties related to the affected UNEs.

Verizon's theory is that the agreements need not specify the central offices from which certain UNEs will or will not be available because Verizon will determine the list itself and provide it to the CLECs. This suggestion is no more reasonable than if Verizon had proposed to the FCC in February 1996 that a list of UNEs to be available under the Act need not be codified in the FCC rules because Verizon would make that determination on its own and post the list of UNEs on its website. The Department surely recognizes the high likelihood that if the CLECs' rights are left to be determined by Verizon, the CLECs and consumers will be deprived of the full benefits promised under the 1996 Act.

Even aside from their motivation, the ILECs' purported lists clearly are suspect. When the *TRRO* was adopted, the FCC said that by its count only 0.5% of wire centers in the country would meet the threshold for non-impairment for DS1 loops. However, the lists now propounded by the ILECs would eliminate DS1 loops to far more consumers in far more wire centers. In response, regulators have started to insist upon review of the underlying data and assumptions in the ILEC lists, and almost immediately thereafter ILECs have started to "discover" errors in their lists. For example, after providing its underlying data to a hearing examiner at the Maine Public Service Commission, Verizon determined that its inclusion of a central office in Augusta, Maine should be removed from its Tier 2 transport list.[309] SBC and BellSouth also have removed certain wire centers from their lists after further scrutiny.

[309] *See* Letter from Dee May, Vice President Federal Regulatory Affairs, Verizon Communications to Marlene Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (dated March 4, 2005).

Especially under these circumstances, it would be unreasonable and contrary to the *TRRO* for the Department to allow Verizon to impose its wire center lists for Massachusetts without any objective third-party scrutiny. The CCC has legitimate concerns regarding the validity, accuracy, and reliability of Verizon's lists and underlying methodology, and the Department should too. For these reasons, the Department, and not Verizon, should make the initial determinations of which wire centers in Massachusetts meet the non-impairment thresholds established by the *TRRO*.

While it is true that the self-certification process established by the *TRRO* affords CLECs some ability to challenge Verizon's designations after the fact through the dispute resolution process, that process cannot be reasonably be relied upon by the Department *exclusively*. First, to even get to dispute resolution, the *TRRO* requires that the CLEC must first undertake a "reasonably diligent inquiry" and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements of the *TRRO*'s loop and transport unbundling criteria and that it is therefore "entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3)."[310] But despite the fact that Verizon's lists have already proven to be fallible, Verizon has threatened reprisal against any CLEC that dares to self-certify an order for a wire center on Verizon's lists. Verizon wrote to one member of the CCC that should a CLEC attempt to submit an order for loop or transport UNEs out of the wire centers it has identified on its list, it would treat each such order as an act of bad faith in violation of federal regulations and in breach of the CLEC's interconnection agreements.[311] Regardless of

[310] *TRRO*, ¶ 234.

[311] Letter from Jeffery A. Masoner, Vice President – Interconnection Services Policy and Planning, Verizon to Russell Blau, Partner, Swidler Berlin, LLP at 2 (dated March 1, 2005) (attached hereto as Exhibit P).

the propriety of Verizon's statements, it is clear that the FCC did not intend for CLECs to place orders for UNEs as a fishing-expedition means of determining, through ad hoc dispute resolution, which wire centers meet the various FCC thresholds for non-impairment. Instead, there needs to be some *reliable and timely* process that assures that CLECs are able to make accurate determinations as to the eligibility of a wire center for unbundling.

Wherever possible, that process needs to occur ***before*** the CLEC would place an order for the UNE. The CCC members are not in business to obtain UNEs; their business in Massachusetts is to provide services to consumers. CLECs need to be able to tell potential customers immediately whether they will be able to provide service to them, and at what price. Verizon's proposed terms would make that impossible. In the absence of a list of wire centers already approved by the Department, CLECs could often be faced with the choice of foregoing a customer or risking losing the UNE used to serve that customer after the dispute resolution process. The resulting disruption to the CLEC and to the affected consumers could and should be avoided simply by requiring that the list of central offices where UNEs will be unavailable be vetted by the Department and included in the Agreement.

Moreover, because wire centers may need to be added to the list or upgraded to a different classification (e.g., Tier 2 to Tier 1), effective dates of such changes could be called into question without having official lists that are attached to the Amendment. If the affected wire centers are listed in such attachments, then the specific effective dates of the Amendment can be used in order to resolve true-up disputes that are allowed under the *TRRO*.[312] The self-

[312] *See TRRO,* at n.408 & n.524 (noting that dedicated transport and high capacity loop 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 and applicable change of law processes").

certification process might be able to resolve that issue for new orders, but the *TRRO* did not on its own terms address how *existing* UNEs from these wire centers would be addressed. Certainly, the Department cannot reasonably approve terms that would allow Verizon to terminate its provision of existing UNEs at a central office simply on the basis of some future update to a Verizon website that Verizon believes that the wire center has moved into a different classification.

For these reasons, and "to ensure adequate notice and process," the New York Public Service Commission required the list of wire centers to be included in Verizon's UNE tariff, on which most New York interconnection agreements are based.[313] The Department should likewise require that the lists of exempt wire centers be included in the Agreements.

B. Terms to Implement the Self-Certification Process

Although the inclusion of wire center lists in the Agreements should greatly reduce the potential for future disputes, the Amendment should still include terms to govern the self-certification process and any disputes arising therefrom.

The *TRRO* requires CLECs to "undertake a reasonably diligent inquiry" before submitting high-capacity loop and transport UNE orders, and, based on that inquiry to confirm that to the best of its knowledge its request is not inconsistent with the applicable standards. The CCC implements this requirement in § 8.1 of its TRRO proposal. However, since these determinations of eligibility can hinge on information that may be exclusively in the possession of Verizon, CLECs, if they wish, should reasonably be able to satisfy this diligence requirement upon a review of the non-impairment lists made available to them by Verizon. Accordingly, the CCC's proposed § 8.2 provides that, "If Verizon has not provided notice to CLEC of its belief

[313] *NYPSC Order Implementing TRRO Changes*, at 9-10 (attached hereto as Exhibit F).

that a request for a particular network element would be inconsistent with the Amended Agreement, CLEC is entitled to rely on the absence of such notice in satisfaction of its obligation to perform a reasonably diligent inquiry under the terms of Section 8.1."[314] As discussed above, CLECs need to be able to act quickly to determine whether they will be able to fulfill requests from their customers; therefore, it would be unreasonable to require them to undertake a further analysis for every single order, when Verizon has not asserted non-impairment and when it would be difficult for the CLEC to obtain independent verification of the wire center's eligibility in a timely manner. As the FCC explained in the *TRO* with respect to a CLEC's obligation to self-certify compliance with the EEL eligibility criteria:

> We conclude that requesting carrier self-certification to satisfying the qualifying service eligibility criteria for high-capacity EELs is the appropriate mechanism to obtain promptly the requested circuit, and consistent with our findings of impairment. A critical component of nondiscriminatory access is preventing the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process. … Due to the logistical issues inherent to provisioning new circuits, the ability of requesting carriers to begin ordering without delay is essential.[315]

Accordingly, CCC's proposal would enable CLECs in most cases to make a quick, practical determination as to whether it could self-certify a particular UNE order. Similarly, CCC's § 8.1 provides that the CLEC's submission of the order would itself constitute self-certification. The FCC specifically noted that it did not prescribe the form that certification must

[314] Of course, a CLEC would be permitted to seek additional evidence if it disagreed with Verizon's determination. The CCC TRRO § 8.2 provides that CLEC "shall not be obligated to rely upon a notice given to it by Verizon if it believes after a reasonably diligent inquiry that it remains entitled to order the network element."

[315] *TRO*, ¶ 623.

take,[316] and, as noted above, has found that ILECs should not be permitted to require cumbersome certification paperwork as a "gating mechanism that could delay" CLEC orders. CCC's proposed TRRO §§ 8.1-8.2 offer a reasonable and practical format and process for self-certification that should be adopted.

CCC proposed § 8.3 implements the explicit requirement of ¶ 234 of the *TRRO* that even when Verizon disputes a CLEC's UNE order, Verizon must provision first and dispute later.[317] An additional detail is necessary to ensure that CLECs are not unreasonably subjected to eternal uncertainty as to whether Verizon will dispute the order, especially in the event that Verizon seeks retroactive repricing of the UNE if the order ultimately is determined to be inconsistent with applicable standards. Therefore, CCC § 8.3 would afford Verizon a 30-day period to review the CLEC's eligibility and if appropriate invoke dispute resolution. This proposal is generous to Verizon; by contrast, the Michigan Public Service Commission has ordered Verizon and SBC to file such disputes within 10 days.[318]

Finally, CCC's § 8.1 would apply the self-certification and dispute process to all UNEs, not just high-capacity loops and transport. While not required by the TRRO, it is sensible and practical for the parties and for the Department to have uniform procedures, especially when those procedures have been designed as a self-enforcing means of implementing the standards of

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[316] *TRRO* at n.658.

[317] *See* CCC TRRO § 8.3 ("When Verizon disputes CLEC's right to obtain a UNE ordered in accordance with Section 8.1, Verizon must immediately process and fulfill the CLEC's request, and its sole remedy to seek discontinuance of its provisioning of such UNE is to invoke the dispute resolution procedures provided in the Amended Agreement.")

[318] *In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters Issued by SBC and Verizon*, Case No. U-14447, Order and Notice of Adoption of a Dispute Resolution Procedure, at 6 (Mich. P.U.C. Mar. 29, 2005) (attached hereto as Exhibit Q).

the Act while reducing the likelihood of litigation. Just as the FCC has found that it would be inappropriate for Verizon to delay CLEC's access to loop and transport UNEs to which they are entitled, the same policy interest applies to other UNEs as well. The Department should therefore adopt this provision of CCC § 8.1.

Supplemental Issue 2: 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?

Yes. For the same reasons provided in CCC's response to Supplemental Issue 1, the Agreement should identify the specific wire centers where high-capacity transport facilities are no longer available as § 251 UNEs.

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?

Yes, for the reasons set forth in the CCC's response to Supplemental Issue 1 above and the March 16 Motion to Expand the Procedural Schedule that was filed on behalf of numerous CLECs, the CCC has legitimate concerns regarding the validity, accuracy, and reliability of Verizon's lists along with the methodology Verizon used to derive them and the Department should too. For these reasons, the Department should investigate and render a final decision as to which wire centers should be on the lists. In performing such an investigation, the Department should apply the FCC's wire center unbundling threshold tests as further discussed in the CCC's response to Issue 4 above, which includes applying the CCC's proposed definition of Affiliate that would exclude MCI's collocations from the fiber-based collocator count given Verizon's agreement to acquire MCI. The CCC is unable at this time to provide a list of central offices that satisfy these criteria because it first needs to obtain information from Verizon, which it hopes to do through discovery in this proceeding.

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?**

The *TRRO* provides that CLECs subject to the transition rules may not obtain "new" UNE-P arrangements or "new" dedicated transport or loop UNEs have been designated for elimination, but required ILECs to continue to provide UNEs to serve the CLECs' "embedded customer base" until March or September 2006, depending on the type of UNE.[319] The FCC explained that its purpose of this transitional requirement was to assure "adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition."[320] Given this purpose, the CCC believes that it is clear that the FCC's reference to the "customer base" applies to any UNEs or changes to existing UNEs that are needed to serve these customers, and not just to the precise facilities currently used to serve those customers. Thus, the CCC's *TRRO* Amendment requires Verizon during the transition to continue to provision moves, adds and changes for the CLEC's existing customers. *See* CCC *TRO* § 7.2.4.

Verizon's proposed terms, by contrast, contravene the FCC transition rules by appearing to reject any move, add or change order needed to provide uninterrupted service to these embedded customers. As noted above, the purpose of the transition rules was to provide CLECs with adequate time to move these customers to alternative arrangements with minimal disruption to the end user customers. Verizon's proposal to deprive CLECs' embedded base of the ability to order moves, adds and changes would undermine this purpose. For example, at any moment, a CLEC using transitional UNE-P could receive a request from one of its customers to add a line or a service feature.

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[319] *TRRO,* ¶¶ 142, 195, & 227 (emphasis added).

[320] *TRRO,* ¶ 227, ¶ 143 (same for transport) and ¶ 196 (same for high-capacity loops).

Customers expect their carriers to be able to process such routine requests seamlessly and expeditiously, and a CLEC cannot decline such requests without risking losing the customer. If Verizon were permitted to reject a CLEC order to fulfill such a request on the basis that it would be a "new UNE arrangement," the CLEC would be immediately deprived of the FCC's plan to assure "adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition." The CLECs' attempts at organizing orderly transitions could constantly be disrupted by *ad hoc* needs that arise without warning to move certain arrangements every time a customer requested even trivial changes to their service before the CLEC could complete its regularly-scheduled transition of the facilities that underlie that particular customer's service. Meanwhile, the end user customer could be subjected to otherwise avoidable delays or disruptions in receiving their requested modifications, or could even be forced to change carriers in order to get the services they need on time. Such senseless disruptions would undermine the purpose of the transition rules. In addition, had the FCC intended to limit Verizon's obligations to the facilities it had already provisioned, there would have been no need to refer to the customer base. Several state commissions have agreed.[321]

Because Verizon's proposed terms to reject moves, add and changes for loops are contrary to the terms of the *TRRO* and would undermine the FCC's intent to assure "adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an

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[321] *See, e.g., Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821, Order on Clarification (Tex. P.U.C. Mar. 16, 2005) (attached hereto as Exhibit R) (ordering BOC to provision new UNE-P lines to CLECs' embedded customer base, including moves, adds, changes, and additions of UNE-P lines for such customer base at new physical locations); *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, at 10 (Mich. P.U.C. Mar. 9, 2005) (attached hereto as Exhibit S).

orderly transition,"[322] the Arbitrator should adopt the CCC's proposed transition terms in § 7.2.4 of its *TRRO* amendment.

III. CONCLUSION

For the foregoing reasons, the CCC's proposed amendments are consistent with the requirements of the Act and with the change-of-law terms of the parties' Agreements, while Verizon's proposed amendments are not. Therefore, the Department should adopt the CCC's proposed amendments.

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Dated: April 5, 2005

[322] *TRRO*, ¶ 227; *TRRO*, ¶¶ 143 (same for transport) & 196 (same for high-capacity loops).