EXHIBIT A

AMENDMENT NO. __

to the

INTERCONNECTION AGREEMENT

between

[VERIZON LEGAL ENTITY]

and

[CLEC FULL NAME]

This Amendment No. [NUMBER] (the "Amendment") is made by and between Verizon [LEGAL ENTITY] ("Verizon"), a [STATE OF INCORPORATION] corporation with offices at [VERIZON STATE ADDRESS], and [FULL CLEC NAME], a [CORPORATION/PARTNERSHIP] with offices at [CLEC ADDRESS] ("CLEC"), and shall be deemed effective **[FOR CALIFORNIA]** upon Commission approval pursuant to Section 252 of the Act (the "Amendment Effective Date").**] [FOR ALL OTHER STATES:** on ______________ (the "Amendment Effective Date").**]** Verizon and CLEC are hereinafter referred to collectively as the "Parties" and individually as a "Party." This Amendment covers services in Verizon's service territory in the [State or Commonwealth] of [STATE/COMMONWEALTH NAME OF AGREEMENT] (the "State"/"Commonwealth"). [THIS AMENDMENT DOES NOT APPLY IN PENNSYLVANIA]

WITNESSETH:

NOTE: DELETE THE FOLLOWING WHEREAS SECTION ONLY IF CLEC's AGREEMENT HAS USED AN ADOPTION LETTER:

[WHEREAS, Verizon and CLEC are Parties to an Interconnection Agreement under Sections 251 and 252 of the Communications Act of 1934, as amended [the "Act"] dated [INSERT DATE] (the "Agreement"); and**]**

NOTE: INSERT THE FOLLOWING WHEREAS SECTION ONLY IF CLEC's AGREEMENT USED AN ADOPTION LETTER:

[WHEREAS, pursuant to an adoption letter dated [INSERT DATE OF ACTUAL ADOPTION LETTER] (the "Adoption Letter"), CLEC adopted in the [State or Commonwealth] of [STATE/COMMONWEALTH NAME], the interconnection agreement between [NAME OF UNDERLYING CLEC AGREEMENT] and VERIZON (such Adoption Letter and underlying adopted interconnection agreement referred to herein collectively as the "Agreement"); and**]**

WHEREAS, the Federal Communications Commission (the "FCC") released an order on February 4, 2005 in WC Docket No 04-313 and CC Docket No. 01-338, (the "Triennial Review Remand Order" or "TRO Remand"), which became effective as of March 11, 2005;

WHEREAS, pursuant to Section 252(a)(1) of the [**NOTE: IF CLEC'S AGREEMENT IS AN ADOPTION, REPLACE "ACT" WITH: "the Communications Act of 1934, as amended, (the "Act")**] Act, the Parties wish to amend the Agreement in order to give contractual effect to the effective portions of the TRO Remand as set forth herein;

NOW, THEREFORE, in consideration of the promises and mutual agreements set forth herein, the Parties agree to amend the Agreement as follows:

1. The Parties agree that the Agreement should be amended by the addition of the terms and conditions set forth in the TRO Remand Attachment attached hereto. The term "Effective Date" as used in the TRO Remand Attachment shall mean the Amendment Effective Date as set forth in the recitals above.

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

3. In the event that this Amendment is approved by the Commission simultaneously with an Amendment containing the Triennial Review Attachment to the Agreement, Section 2 shall be applied as if the Agreement had already been amended by the Triennial Review Attachment prior to the adoption of this Amendment.

4. Counterparts. This Amendment may be executed in one or more counterparts, each of which when so executed and delivered shall be an original and all of which together shall constitute one and the same instrument.

5. Captions. The Parties acknowledge that the captions in this Amendment have been inserted solely for convenience of reference and in no way define or limit the scope or substance of any term or provision of this Amendment.

6. Scope of Amendment. This Amendment shall amend, modify and revise the Agreement only to the extent set forth expressly in Section 1 of this Amendment. As used herein, the Agreement, as revised and supplemented by this Amendment, shall be referred to as the "Amended Agreement." Nothing in this Amendment shall be deemed to amend or extend the term of the Agreement, or to affect the right of a Party to exercise any right of termination it may have under the Agreement.

7. Reservation of Rights. Notwithstanding any contrary provision in the Agreement, this Amendment, or any Verizon tariff or SGAT, nothing contained in the Agreement, this Amendment, or any Verizon tariff or SGAT shall limit either Party's right to appeal, seek reconsideration of or otherwise seek to have stayed, modified, reversed or invalidated any order, rule, regulation, decision, ordinance or statute issued by the [***State Commission TXT***], the FCC, any court or any other governmental authority related to, concerning or that may affect either Party's obligations under the Agreement, this Amendment, any Verizon tariff or SGAT, or Applicable Law. Furthermore, to the extent any terms of this Amendment are imposed by arbitration, a party's act of incorporating those terms into the agreement should not be construed as a waiver of any objections to that language and each party reserves its right to later appeal, challenge, seek reconsideration of, and/or oppose such language.

8. **[IF NEGOTIATED]** Joint Work Product. This Amendment is a joint work product, and any ambiguities in this Amendment shall not be construed by operation of law against either Party.

SIGNATURE PAGE

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed as of the Amendment Effective Date.

CLEC Full Name TXT	VERIZON
By: ______________________	By: ______________________
Printed: ______________________	Printed: ______________________
Title: ______________________	Title: ______________________

[FOR CALIFORNIA and FLORIDA ADD:]

Date: ______________________	Date: ______________________

TRO Remand Attachment

1. General Terms

1.1 Verizon's obligations to provide unbundled network elements ("UNE") pursuant to Section 251(c)(3) of the Act are amended as set forth below. Except where the provisions of this Attachment explicitly conflict with the terms of the Agreement, Verizon shall continue to provide access to UNEs in accordance with the terms of the Agreement. Nothing in this Attachment shall alter Verizon's obligations to provide access to network elements pursuant to any law or requirement other than Section 251 of the Act, and any omission of terms related to CLEC's rights pursuant to such obligations in this Attachment or the Agreement shall in no way be deemed or constitute a waiver of CLEC's rights accruing under such obligations.

1.2 The terms, conditions and rates specified in this Attachment shall not apply with respect to a particular UNE until the Merger Conditions adopted by the FCC in *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, FCC 00-221, ¶ 316, App. D ¶ 39 (2000) ("*Bell Atlantic/GTE Merger Order*") expire pursuant to Section 1.2.1 below or are otherwise determined by the FCC to be inapplicable with respect to such UNE. Nor will terms, conditions and rates specified in this Attachment supersede any other state or federal merger conditions.

1.2.1 Verizon shall continue to make available to CLEC the UNEs and UNE combinations required in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) (UNE Remand Order) and *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98 (rel. Dec. 9, 1999) (Line Sharing Order) in accordance with those Orders until the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Verizon in the relevant geographic area. The provisions of this paragraph shall become null and void and impose no further obligation on Verizon after the effective date of final and non-appealable FCC orders in the UNE Remand and Line Sharing proceedings, respectively.

1.3 Nothing in this Attachment shall reduce the period of notice that Verizon must provide under the Agreement to discontinue its provisioning of a network element as a UNE. Notwithstanding anything in the Agreement or this Attachment, Verizon shall provide at least ninety (90) days' written notice of its intent to discontinue offering any UNE.

2. Definitions

2.1 <u>Affiliate</u>. The term "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.

2.2 Business Line. A 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."

2.3 Fiber-Based Collocator. A 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.

2.4 Interexchange Service. Interexchange Service is Telecommunications Service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

2.5 Mobile Wireless Service. A mobile wireless service is any mobile wireless Telecommunications Service, including any commercial mobile radio service.

2.6 Wire Center. A 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.

3. Eligibility.

3.1 Verizon is not obligated to provide UNEs to CLEC for the exclusive provision of Mobile Wireless Service or Interexchange Services.

3.2 To the extent CLEC accesses or uses a UNE or Combination of UNEs in any manner not inconsistent with Section 3.1 of this Attachment, CLEC may also use that UNE or Combination of UNEs to provide any Telecommunications Service over the same UNE or Combination of UNEs, including but not limited to provision of Mobile Wireless Service, Interexchange Service or inputs for Mobile Wireless Service or Interexchange Service.

3.3 Verizon shall not deny CLEC access to a UNE or a combination of UNEs on the grounds that one or more of the elements:

3.3.1 Is connected to, attached to, linked to, or combined with, a facility or service obtained from Verizon; or

3.3.2 Shares part of Verizon's network with access services or inputs for mobile wireless services or Interexchange services.

4. Local Switching.

4.1 Local Switching. Except as provided in Sections 1.2.1 and 7.0 of this Attachment, Verizon is not required to provide Unbundled Local Switching.

5. Loops.

5.1 Dark Fiber Loops. Except as provided in Sections 1.2.1 or 7.0 of this Attachment, Verizon is not required to provide unbundled access to Dark Fiber Loops.

5.2 DS1 Loops.

5.2.1 Except as provided otherwise in this section, Verizon is obligated to provide CLEC with unbundled access to DS1 loops consistent with the terms of the Agreement.

5.2.2 Except as provided in Sections 1.2.1 or 7.0 of this Attachment, Verizon is not required to provide CLEC with access to UNE DS1 loops to any building served by a Wire Center listed in Schedule DS1 to this Attachment.

5.2.3 DS1 Loop Cap. Verizon is not obligated to provide CLEC with more than 10 DS1 Loops to any single building in which DS3 loops are available as UNEs under the Amended Agreement.

5.3 DS3 Loops.

5.3.1 Except as provided otherwise in this section, Verizon is obligated to provide CLEC with unbundled access to DS3 loops consistent with the terms of the Agreement.

5.3.2 Except as provided in Sections 1.2.1 or 7.0 of this Attachment, Verizon is not required to provide CLEC with access to UNE DS3 loops to any building served by a Wire Center listed in Schedule DS3 to this Attachment.

5.3.3 DS3 Loop Cap. Verizon is not obligated to provide CLEC with more than one DS3 Loop to any single building in which DS3 loops are available as UNEs under the Amended Agreement.

5.4 Fiber-to-the-Curb (FTTC) Loops.

5.4.1 Fiber-to-the-Curb Loops ("FTTC Loops") are (1) Loops serving Mass Market Customers consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or (2) Loops serving customers in a predominantly residential MDU consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the MDU's MPOE. A "predominantly residential" MDU is an apartment building, condominium building, cooperative or planned unit development that

allocates more than ninety percent of its total square footage to residences. Notwithstanding the above, a loop will only be deemed a FTTC loop if it connects to a copper distribution plant at a serving area interface from which every other copper distribution Subloop also is not more than 500 feet from the respective customer's premises.

5.4.2 Except as provided by Section 1.2.1 of this Amendment, Verizon's unbundling obligations for FTTC Loops shall be the same as for FTTH Loops as set forth in the Agreement.

6. Dedicated Transport

6.1 Except as provided otherwise in this section, Verizon is obligated to provide CLEC with unbundled access to Dedicated Transport consistent with the terms of the Agreement.

6.2 Definition: 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.

6.2.1 A 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 they pass through the same intermediate Verizon wire centers or switches, if any.

6.3 Entrance Facilities. Except for interconnection trunking as provided in Section 6.7 of this Attachment and as provided in Section 1.2.1 or Section 7.0 of this Attachment, Verizon is not obligated under Section 251(c)(3) of the Act to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of Verizon wire centers.

6.3.1 Reverse Collocation. Verizon is obligated to provide unbundled dedicated transport between Verizon switches or other equipment that is "reverse collocated" at a non-Verizon premises, including but not limited to collocation hotels.

6.4 Dedicated Dark Fiber Transport.

6.4.1 Dedicated Dark Fiber Transport consists of unactivated optical Dedicated Transport transmission facilities.

6.4.2 Verizon shall provide CLEC with unbundled Dedicated Dark Fiber Transport between any pair of Verizon wire centers or switches except where both Wire Centers at the end points of the Dedicated Transport Route are either Tier 1 or Tier 2 Wire Centers, as identified on Schedules T-1 and T-2 to this Attachment. Verizon must provide unbundled access to Dedicated Dark Fiber Transport if either wire center on a requested route not listed on either of those Schedules.

6.5 Dedicated DS1 Transport.

6.5.1 Verizon shall provide CLEC with unbundled DS1 Dedicated Transport between any pair of Verizon wire centers or switches, except where both Wire Centers defining the Dedicated Transport Route are Tier 1 wire centers as identified on Schedule T-1 to this Attachment. Verizon must provide unbundled access to DS1 Dedicated Transport if either wire center on a requested route is not a Tier 1 Wire Center.

6.5.2 Dedicated DS1 Transport Cap. There is no limit on the number of DS1 transport circuits a CLEC may obtain on a particular Dedicated Transport Routes except that Verizon is not obligated to provide CLEC with more than 10 DS1 Dedicated Transport Circuits on any single Dedicated Transport Route in which DS1 Dedicated Transport is available but DS3 Dedicated Transport as defined in Section 6.6 is not available as a UNE. Notwithstanding the above, Dedicated Transport ordered in combination with a Loop (i.e., an Enhanced Extended Loop) shall not count toward this cap.

6.6 Dedicated DS3 Transport.

6.6.1 Verizon shall provide CLEC with unbundled Dedicated DS3 Transport between any pair of Verizon wire centers or switches, except where the Wire Centers at the end points of the Dedicated Transport Route are either Tier 1 or Tier 2 Wire Centers as identified on Schedules T-1 and T-2 to this Agreement. Verizon must provide unbundled access to Dedicated DS3 Transport if either wire center on a requested route is not identified on those schedules.

6.6.2 Dedicated DS3 Transport Cap. Verizon is not obligated to provide CLEC with more than 12 Dedicated DS3 Transport Circuits on any single Dedicated Transport Route in which Dedicated DS3 Transport is available as a UNE.

6.7 Availability of Verizon Dedicated Transport Transmission Facilities for Interconnection pursuant to Section 251(c)(2) of the Act. Nothing in this Attachment is intended to alter CLEC's right to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service as provided elsewhere in the Amended Agreement.

7. Transition

7.1 The following transition terms will apply only to specific UNEs and UNE combinations that Verizon provided to CLEC that are no longer required to be unbundled at cost-based rates because the UNE (1) is no longer subject to Section 1.2.1 of this Attachment, (2) is not required under the terms of the Amended Agreement at such rates under state law or Section 271, and (3) has been designated for elimination (on the appropriate schedule, where applicable) in accordance with Sections 4, 5.1, 5,2, 5.3, 6, or 9.2 of this Attachment.

7.1.1 As used in this Section 7, the term "Transition Period" means (a) in the case of Network Elements other than Dark Fiber, the period from the Effective Date of this Attachment to March 10, 2006, and (b) in the case of Dark Fiber Network Elements, the period from the Effective Date of this Attachment to September 10, 2006; except as provided in Section 9.2.2 below.

7.1.2 As used in this Section 7, the term "Embedded Base" refers to CLEC's existing customers to whom CLEC provided service using one or more UNE arrangements that were in place as of the date that a UNE becomes subject to the terms of Section 7.1 of this Attachment.

7.1.3 Network Elements Used with Local Switching. To the extent Verizon provides Unbundled Local Switching under the provisions of this Section 7, Verizon shall also provide unbundled access to Call-Related Databases, SS7 Signaling and Shared Transport for UNE-P arrangements under the terms set forth in this Section 7.

7.2 Transitional UNEs Serving Existing CLEC Customers. During the Transition Period, Verizon shall continue to provide CLEC with access to UNEs solely for service to its Embedded Base as follows: [NOTE to Verizon: We propose that the parties establish rate tables to be attached to this amendment setting forth the rates using the formula below. In that event, the text of 7.2.1 and 7.2.2 below may not be necessary]

7.2.1 Verizon shall provide UNE Loops and UNE Dedicated Transport covered under this Section at a rate not to exceed the higher of:

7.2.1.1 115% of the rate CLEC paid for the UNE on June 15, 2004; or

7.2.1.2 115% of the rate [***State Commission TXT***] established between June 16, 2004 and March 11, 2005 for that UNE.

7.2.1.3 To the extent that a [***State Commission TXT***] order referenced in Section 7.2.1.2 raised some rates and lowered others for UNE DS1 Loops, DS3 Loops, Dark Fiber Loops, Dedicated DS1 Transport, Dedicated DS3 Transport, or Dedicated Dark Fiber Transport, Verizon must choose to apply either all or none of these rate changes and must notify CLEC within 10 days of the Effective Date of this Attachment which option Verizon selects.

7.2.2 Verizon shall provide unbundled switching under this Section according to the terms of Section 51.319 of the FCC rules, 47 C.F.R. § 51.319, as in effect of the Effective Date of this Attachment, at a rate not to exceed the higher of:

7.2.2.1 The rate CLEC was obligated to pay for unbundled switching on June 15, 2004 plus one (1) dollar; or

7.2.2.2 The rate [***State Commission TXT***] established between June 16, 2004 and March 11, 2005 for unbundled switching plus one (1) dollar.

7.2.2.3 To the extent that a [***State Commission TXT***] order referenced in Section 7.2.2.2 raised some rates and lowered others for the individual elements that comprise UNE-P (e.g. DS0 loop, unbundled switching or shared transport), Verizon must choose to apply either all or none of these UNE-P rate changes and must notify CLEC within 10 days of the Effective Date of this Attachment which option Verizon selects.

7.2.3 True-Up. Nothing in this Attachment is intended to alter any applicable provisions of the Agreement concerning the effective date of changes in rates, terms, and conditions resulting from a change of law. However, if the Amended

Agreement does not otherwise specify the effective date of such changes, the transition rates contained in this Attachment shall be applied as of the Effective Date.

7.2.4 During the Transition Period, Verizon is obligated at CLEC's request to:

7.2.4.1 Provision additional UNEs to serve CLEC's Embedded Base;

7.2.4.2 Move existing UNE arrangements serving CLEC's Embedded Base from one address to another address;

7.2.4.3 Add, remove or change features to serve an existing Embedded Base customer; and

7.2.4.4 Provision resold services that CLEC has ordered using the existing UNE-P ordering process, subject to true-up to the resale rate, until CLEC has the capability to place electronic orders for resale.

7.2.5 <u>Migrations and Conversions from Transitional UNEs to Alternative Arrangements</u>.

7.2.5.1 CLEC shall submit orders to Convert or migrate UNEs that are no longer available to alternative arrangements by the end of the Transition Period. Conversions to alternative Verizon facilities are as defined by and shall be performed in accordance with the terms of the Agreement. "Migrations" are requests to transition the UNE to a non-Verizon arrangement.

7.2.5.2 To the extent Verizon does not complete the requested Conversion or migration by the last day of the Transition Period, Verizon must continue to provide the UNE under the terms of Section 7 until such time as Verizon completes the migration of the UNE to the alternate arrangement. The effective date for Conversions requested under this section 7.2.5 shall be the last day of the Transition Period. The effective date for migrations requested under this section 7.2.5 shall be 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.

7.2.5.3 Verizon shall perform all Conversions and migrations requested under this Section 7.2.5 in a seamless manner without any customer disruption or adverse effects to service quality. The Parties agree to work together to develop a mutually agreeable, conversion process that includes agreement on the conversion request formats and associated systems, as well as agreement on what additional information is needed from Verizon to enable CLEC to identify the loop and Dedicated Interoffice Transport network elements that are to be converted.

7.2.5.4 Notwithstanding any other provision of the Agreement or any Verizon tariff or SGAT, Verizon will not impose any termination, re-connect or other charge associated with a Conversion or migration requested under this Section 7.2.5.

7.2.5.5 **[In former Bell Atlantic regions only:]** To the extent CLEC does not submit orders to Convert or migrate Discontinued UNEs to alternative arrangements in accordance with Section 7.2.5.1, Verizon may, upon 30 days written notice to CLEC, Convert UNEs to arrangements provided under Section 271 under the terms provided in the Agreement.

[In former GTE regions only:] To the extent CLEC does not submit timely orders to Convert or migrate Discontinued UNEs to alternative arrangements in accordance with Section 7.2.5.1, Verizon may, upon 30 days written notice to CLEC, Convert UNEs to similar arrangements provided under its FCC Access Tariffs and apply any term pricing or other discount plans to which CLEC has agreed.

8. Disputes Regarding Propriety of Network Element Requests

8.1 In submitting an order for any type of network element, CLEC certifies that it has undertaken a reasonably diligent inquiry to confirm that to the best of its knowledge its request is not inconsistent with the Amended Agreement. Submission of an order shall constitute such certification, and Verizon shall not require CLEC to provide additional certification.

8.2 If Verizon has not provided notice to CLEC of its belief 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. However, 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.

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 within 30 days of the date on which CLEC submitted the order. Under no circumstances may Verizon reject or delay orders where CLEC has provided the certification pursuant to Section 8.1.

8.4 Notwithstanding any other provision of the Agreement, the provisions of this Section 8 shall apply in the event that a future change of law occurs such that a UNE provided for in the Amended Agreement is no longer required under Applicable Law. In such event, during the period while the Parties negotiate and/or arbitrate an amendment to reflect the changes in law, CLEC must certify its UNE requests and Verizon must continue to provide the applicable UNE until the Amended Agreement is amended.

9. Implementation.

9.1 The following schedules are attached to, and constitute part of, this Attachment:

9.1.1 Schedule DS1: Wire Centers in [STATE/COMMONWEALTH NAME] that serve at least 60,000 Business Lines *and* have four (4) or more Fiber-Based Collocators.

9.1.2 Schedule DS3: Wire Centers in [STATE/COMMONWEALTH NAME] that serve at least 38,000 Business Lines *and* have four (4) or more Fiber-Based Collocators.

9.1.3 Schedule T-1: Wire Centers in [STATE/COMMONWEALTH NAME] (also referred to as "Tier 1 Wire Centers") that serve 38,000 or more Business Lines *or* have four (4) or more Fiber-Based Collocators; and Verizon switching locations (for instance an access tandem switch) that have no line-side switching facilities, but serve as a point of traffic aggregation accessible by competitive LECs. Where an access tandem is located in the same building as line-side switching facilities, the Business Lines and Fiber Based Collocators are used to determine whether the switch is in a Tier One Wire Center.

9.1.4 Schedule T-2. Wire Centers in [STATE/COMMONWEALTH NAME] (also referred to as "Tier 2 Wire Centers") that serve 24,000 or more Business Lines in the Wire Center *or* have three (3) or more Fiber-Based Collocators.

9.1.5 Transition Rates Schedule. [to be developed by the parties prior to execution using the formulas currently set forth in 7.2.1 and 7.2.2 above]

9.2 If either Party determines that, as a result of changed circumstances after the Effective Date of this Attachment, a Wire Center that is not listed on one of the Schedules to this Attachment meets the criteria for being listed on such Schedule, that Party shall give written notice of its determination to the other Party. The Parties will then negotiate in good faith to amend the appropriate Schedule to include all qualifying Wire Centers. If the Parties are unable to agree on which Wire Centers qualify for inclusion on one or more Schedules, they shall comply with the process set forth in the Agreement regarding resolution of disputes relating to changes of law, as amended by Section 8.4 of this Attachment.

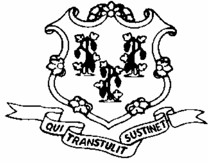
9.2.1 If the Party receiving a notice under this Section 9.22 so requests, the Party giving notice must make available for inspection all underlying data that supports its notice, including but not limited to its count of Business Lines broken down by each category of lines included in the definition; a list of the Fiber Based Collocators, including carrier names in each Wire Center; the methodology used to count Fiber Based Collocators; the methodology used to derive the Business Line count and the original source(s) of such data. The terms of the Amended Agreement regarding confidentiality shall apply.

9.2.2 The terms of Section 7 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.

[SCHEDULES DS1, DS3, T-1 and T-2

To be inserted after review of and agreement upon lists of wire centers in each category.]

EXHIBIT B



STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 00-05-06RE03 APPLICATION OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FOR A TARIFF TO INTRODUCE UNBUNDLED NETWORK ELEMENTS - TRO

August 25, 2004

By the following Commissioners:

Jack R. Goldberg
John W. Betkoski, III
Donald W. Downes

DECISION

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DECISION

I. INTRODUCTION

A. SUMMARY

In this Decision, the Department of Public Utility Control (Department) determines that the General Statutes of Connecticut §§16-247a and 16-247b provide it with the requisite authority to unbundle the Southern New England Telephone Company's d/b/a SBC Connecticut (Telco or Company) telecommunications network. Accordingly, the Department directs the Telco to continue to provision mass market switching, DS-1 and DS-3 loops for individual customers, DS-1 and DS-3 dedicated inter-office transport and dark fiber transport at their current rates until such time as Federal Communications Commission (FCC) rules and regulations have been finalized and are available for use or until such time as an interconnection agreement has been filed and approved by the Department or a binding commercial agreement has been negotiated between the Telco and respective competitive local exchange carriers (CLEC).

B. BACKGROUND

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit Court) issued its opinion in United States Telecom Ass'n v FCC, Nos. 00-1012 (consol.), 2004 WL 374262 (DC Cir., March 2, 2004) (USTA II). In that opinion, the court vacated the FCC's recently-promulgated rules and regulations by which the FCC delegated a portion of its decision-making authority to state commissions. Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01–338 et al., FCC 03–36, 18 FCC Rcd 16978 (Aug. 21, 2003); Errata, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01–338 et al., FCC 03–227, 18 FCC Rcd 19020 (Sep. 17, 2003) (Triennial Review Order or TRO). Subsequent to that ruling, the DC Circuit Court extended until June 15, 2004, the date by which its March 2, 2004 opinion would become effective. These rules and regulations serve as the authority for many of the Department Decisions issued in order to promote competition relative to the obligations of incumbent local exchange carriers to provide access to certain elements of their local network.

In the absence of clear rules and regulations, the FCC has recommended that interested parties engage in commercial negotiation to reconstitute their business relationships without reliance upon the rules and regulations vacated by the DC Circuit Court. It is unclear to the Department whether such agreements will be negotiated in the limited time period remaining before the court's order takes effect on June 15, 2004. The consequences of not reaching a commercial agreement between the various parties are unknown but are of general concern to the Department and the public. Accordingly, the Department must take the necessary action to ensure the interests of the public are not adversely affected by any irreconcilable difference that may ensue from these negotiations.

Therefore, pursuant to Conn. Gen. Stat. §§4-181a and 16-9, the Department reopened the instant docket on June 2, 2004, for the limited purpose of determining whether the Department has sufficient authority to require the continued provisioning of the specific network elements at the same terms and conditions as those required by the April 23, 1997 Decision in the above noted docket. Pending the issuance of this Decision, the Telco was directed in the June 2, 2004 Decision, to continue provisioning the network elements at their currently total service long run incremental cost-based prices until it is otherwise directed by the Department.

In the June 2, 2004 Decision reopening this proceeding, the Department sought Written Comments from interested parties concerning the continued offering of specific network elements by the Telco at their current rates and charges as previously adopted by the Department. The Department received Comments and Reply Comments from ACN Communications (ACN); AT&T Communications of New England, Inc. (AT&T); Choice One Communications of Connecticut, Inc. (Choice One); Conversent Communications of Connecticut, LLC (Conversent); CTC Communications Corp. (CTC); DSLnet Communications, LLC (DSLnet); MCI, Inc. (MCI); and the Telco.

The Department issued its Draft Decision in this docket on July 28, 2004. All parties and intervenors were offered the opportunity to file written exceptions and present oral argument concerning the draft Decision.

II. POSITIONS OF PARTIES

A. AT&T

AT&T argues that the Telco may not unilaterally discontinue offering unbundled network elements (UNE) at their current rates because it would disrupt the Connecticut telecommunications market, frustrate consumer choice and cause irreparable harm to consumers and competitive local exchange carriers (CLEC). Without access to UNE-platform (UNE-P), AT&T claims that its ability to compete would be fundamentally impaired.[1] AT&T also states that it would have no economically viable means of providing service to its customers.[2] According to AT&T, the impact of USTA II became better defined on June 23, 2004, when it announced that it would no longer compete for new residential customers in seven states.[3] AT&T argues that provisioning service through platforms other than UNE-P (e.g., resale) would not permit it to offer unique services and packages to its customers. In that case, AT&T would be forced to offer services and packages identical to that of its underlying provider (i.e., the Telco).[4] AT&T claims that such a duplication of services would deprive customers of unique and better-suited services.[5]

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[1] AT&T Comments, p. 4.

[2] Id.

[3] See AT&T press release, "AT&T To Stop Competing In the Residential Local and Long-Distance Market in Seven States," June 23, 2004.

[4] AT&T Comments, p, 6.

[5] Id., p. 6 and 7.

In an effort to retain its ability to use UNE-P, AT&T cites to a number of state commission orders issued in similar proceedings. According to AT&T, the states of Michigan, Texas, Rhode Island, and Washington have made general findings to the effect that the incumbent local exchange company (ILEC) may not unilaterally discontinue offering UNE-P which have been negotiated as part of a valid ICA unless a change of law provision within that agreement is properly invoked and commission approval secured.[6] AT&T cites to these decisions in support of its position that the Department is justified in ordering its current interim relief.

AT&T further argues that in light of USTA II, the Telco has a continuing obligation to provide UNEs, as the DC Circuit Court did not make a finding of non-impairment. Rather, that court specifically declined to make such a finding. AT&T asserts that because the Telco and other ILECs requested such relief and it was not mentioned in USTA II, it should not be inferred.[7] In the opinion of AT&T, because there has been no specific finding of non-impairment, the Telco should continue to offer UNEs until the ICAs are modified pursuant to their change of law procedures.[8]

Relative to state authority, AT&T maintains that the Department retains authority to require unbundling pursuant to Conn. Gen. Stat. § 16-247b.[9] Under this section, the Department is directed to initiate a proceeding to unbundle an incumbent's network, services, and functions when it is in the public interest, technically feasible, and consistent with federal law.[10] Pursuant to that statute, the Department is also

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[6] Michigan PUC Case No. U-14139, In the Matter of a Request for Declaratory Ruling, or in the Alternative, Complaint of Comptel/Ascent Alliance, AT&T Communications of Michigan, Inc., TCG Detroit, Mcimetro Access Transmission Services, Inc., Talk America Inc., CLEC Association of Michigan, LDMI Telecommunications, Inc., TC3 Telecom, Inc., ELNET Worldwide, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., The Zenk Group, LTD. d/b/a Planet Access, GRID 4 Communications, Inc., and C.L.Y.K., Inc., d/b/a Affinity Telecom against Michigan Bell Telephone Company, d/b/a SBC Michigan, and Verizon North Inc. and Contel of the South Inc., d/b/a Verizon North Systems, for an Order Requiring Compliance with the Terms and Conditions of Interconnection Agreements, SBC Michigan's Response in Opposition to Complainants' Request for Emergency Relief Order, filed May 25, 2004; Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Texas PUC Docket No. 28821, Order Abating Proceeding, May 5, 2004; Rhode Island Public Utilities Commission, Order No. 17990, Dockets No. 3550 and 2681, In re: Implementation of the FCC's Triennial Review Order and Review of Verizon Rhode Island's TELRIC Filings, issued March 26, 2004; In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon; Northwest Inc. with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Washington Pursuant to 47 U.S.C. Section 252(b), and the Triennial Review Order, Docket No, UT-043013, Order No. 4, May 21, 2004.

[7] AT&T Comments, p. 11.

[8] Id.

[9] Id., p. 14.

[10] Conn. Gen. Stat. §16-247b states in part that: "(a) On petition or its own motion, the department shall initiate a proceeding to unbundle a telephone company's network, services and functions that are used to provide telecommunications services and which the department determines, after notice and hearing, are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations. Any telecommunications services, functions and unbundled network elements and any combination thereof shall be offered under tariff at rates, terms and conditions that do not unreasonably discriminate among actual and potential users and actual and potential providers of such local network services."

authorized to set rates for such elements based on forward looking long-run incremental costs.[11]

Additionally, AT&T argues that the FCC recognizes the availability of localized unbundling and supports continued unbundling pursuant to state law.[12] Consequently, AT&T concludes that the Department should continue its standstill order as a necessary interim step pending consideration of whether, in the absence of FCC unbundling rules, the Telco should be required to provide unbundled mass market switching, dedicated transport, and high capacity loops under Connecticut law.[13] By requiring the Telco to continue to offer the UNEs, AT&T claims that the Department will foster competition and protect the public interest.

AT&T further states that continued provisioning of UNEs at total service long run incremental cost-based (TSLRIC) rates pursuant to Connecticut law is not preempted by federal law.[14] In support of its argument AT&T cites to the Connecticut Supreme Court's opinion in S. New England Tel. Co. v. Dep't of Pub. Util. Control (SNET Order).[15] AT&T asserts that this order supports the proposition that the Department may impose unbundling requirements that exceed the scope of current FCC rules under the Telecommunications Act of 1996 (Telcom Act).[16] AT&T maintains that the SNET Order relied on that portion of the Telcom Act that expressly permits states to adopt additional provisions that are in the furtherance of competition and are not in conflict with the federal law.[17]

Moreover, AT&T argues that the unbundling provisions of Conn. Gen. Stat. §16-247b are not in conflict with federal law as they are created to further competition and there are currently no federal rules with which they may conflict. AT&T also takes issue with the Telco's view that to be consistent with federal law, the Department's unbundling requirements must mirror federal law.[18] In the opinion of AT&T, such an interpretation renders 47 U.S.C. § 251(d)(3) without meaning.[19] Thus, AT&T argues that the Department may regulate the terms of network access as long as it does not invoke state law to create barriers to entry in violation of § 253 of the Telcom Act.[20] It is for these reasons that the Department is authorized to order the Telco, as well as all other parties to interconnection agreements in Connecticut, to continue to abide by those terms. Furthermore, AT&T affirms that the Department may order the continuing unbundling of network elements pursuant to state law.[21]

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[11] Id.
[12] AT&T Comments, p. 15.
[13] Id.
[14] Id., p. 16.
[15] S. New England Tel. Co. v. Dep't of Pub. Util. Control, 261 Conn. (2002).
[16] AT&T Comments, p. 17.
[17] Id.
[18] AT&T Reply Comments, p. 6.
[19] Id., pp. 5-8.
[20] AT&T Comments, p. 18.
[21] Id., p. 21.

B. ACN Communications Services, Choice One Communications, CTC Communications, and DSLnet Communications[22]

The Commenters argue that USTA II will not have an immediate effect on the Telco's obligations under state and federal law to provide unbundled transport or switching.[23] Rather, the Telco must continue to abide by its ICAs and amend their contracted obligations only through proper use of the change of law provisions contained in those agreements.[24] Consequently, the Commenters contend that the Department is not required to determine the effects of USTA II at this time because such a determination, prior to a Department case to consider approval of a tariff or contract amendment, would be premature.[25]

C. Conversent

Conversent supports a Department standstill order until such time as the FCC issues new rules that implement USTA II or the existing FCC rules are reinstated.[26] Conversent states that the FCC has found that carriers are impaired without access to DS-1 loops on an unbundled basis.[27] Conversent also argues that USTA II did not vacate the unbundling obligations for DS-1, DS-3 or dark fiber loops.[28]

However, Conversent acknowledges that the Telco's obligation to provide transport is now uncertain as a result of USTA II.[29] Additionally, Conversent concedes that in light of USTA II, there is an absence of federal rules dictating the terms under which the Telco must provide unbundled dedicated transport. Conversent further acknowledges its desire to negotiate with the Telco to secure transport at above-TSLRIC prices, but such negotiations have not resulted in new agreements between the two parties.

Similar to other CLECs, Conversent confirms that the Department has the authority to require unbundling under state law.[30] In the opinion of Conversent, the continuing provisioning of UNEs at their current rates would not conflict with federal law.[31] Therefore, Conversent requests that the Department exercise its authority by issuing a standstill order.[32]

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[22] ACN, Choice One, CTC and DSLnet (collectively the Commenters) filed Comments and Reply Comments, jointly with the Department.
[23] Commenters' Comments, p. 3.
[24] Id., pp. 3 and 4.
[25] Id., p. 5.
[26] Conversent Comments at 1.
[27] Id., p. 3.
[28] Id., p. 4.
[29] Id., p. 6.
[30] Id., p. 12.
[31] Id., p. 14.
[32] Id., pp. 14 and 15.

D. MCI

MCI contends that the Department may require unbundling beyond what is required as long as those unbundling requirements are consistent with the Telcom Act or the FCC's rules.[33] Specifically, MCI contends that the Department possesses the authority to order the continuing provisioning of mass market switching, dedicated transport, and high-capacity loops by making a determination that CLECs would be impaired without unbundled access to the elements.[34] MCI also argues that the Telco may not unilaterally discontinue UNE provisioning; rather, the Company must abide by the change of law provisions included in its ICAs.

Similar to AT&T, MCI asserts that USTA II is limited to the FCC's rules and findings of impairment regarding mass market switching, dedicated transport, and high capacity loops. MCI also asserts that USTA II does not decide the issue of whether impairment actually exists in certain areas without access to the UNEs. Additionally, MCI claims that USTA II does not support the proposition that ILECs are now relieved of their duty to offer the UNEs.

MCI further states that the Telcom Act remains valid statutory law, as USTA II did not find fault with the statute itself. Consequently, MCI concludes that § 251(d)(3) of the Telcom Act, preserves state regulation, remains intact and in force.[35] Accordingly, MCI requests that the Department order the Telco to provide UNEs consistent with the Telcom Act.[36]

E. TELCO

The Telco commits to adhering to the applicable provisions, including change-of-law clauses, of its existing effective interconnection agreements.[37] The Telco states that it has offered to continue providing mass-market UNE-P, DS-1 and DS-3 loops dedicated to a single customer, DS-1 and DS-3 dedicated transport and to not unilaterally increase rates for these facilities at least through the end of calendar year 2004.[38] The Telco also argues that a standstill order would not protect the industry from ILEC-induced chaos. Rather, by making these pledges, the Company has attempted to assuage any fear related to post-USTA II uncertainty and fend off any "preemptive move[s]" by the Department which it claims may be premature.[39]

Despite these pledges, the Telco argues that the Department has no authority under federal law to order the Company to continue offering UNEs at their current rates.[40] According to the Telco, such an order would directly conflict with USTA II and

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[33] MCI Comments, p. 2.
[34] Id.
[35] MCI Reply Comments, p. 3.
[36] MCI Comments, p. 4.
[37] Telco Comments, p. 3.
[38] Telco Reply Comments, p. 2.
[39] Telco Comments, p. 3.
[40] Telco Reply Comments, p. 3.

the Telcom Act.[41] The Telco premises this argument on the conclusion that USTA II stands for the proposition that only the FCC may determine which network elements must be unbundled under the Telcom Act.[42]

Moreover, the Telco argues that the Department lacks the authority to bypass change of law provisions in valid ICAs. Therefore, the Telco has taken issue with any Department order that may require UNE provisioning indefinitely, regardless of what the Telco's ICAs may provide.[43] In the opinion of the Telco, such an order would be unlawful as it would fail to reference specific terms contained in the ICAs and would be inconsistent with the Department's responsibilities of contract interpretation.[44]

Finally, the Telco argues that the Department has no authority under state law to order unbundling beyond what has been ordered by the FCC. The Telco claims that the TRO specifically questioned state commission practice of implementing additional unbundling restrictions that were inconsistent with federal law. Consequently, the Telco contends that the Department may not implement its own unbundling restrictions. [45]

IV. DEPARTMENT ANALYSIS

A. INTRODUCTION

The Department has reviewed the Comments and Reply Comments and believes that there are at least two available means by which it may lawfully order the Telco to continue providing UNEs at their current rates.[46] The first option, proposed by the Telco, offers for a limited time period, a voluntary agreement with the Department. The second, not universally accepted by the parties, is afforded by Connecticut statute provides the Department with certain authority notwithstanding the actions of USTA II.

While the Telco has indicated that it will not revise its UNE rates through the end of calendar year 2004, the Department is not confident that accepting that offer will adequately protect consumer rights or preserve the responsibilities that have been previously placed upon all service providers by the Department. Consequently, it is necessary to fully explore both options before adopting a specific course of action in this matter.[47]

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[41] Id.

[42] Id.

[43] Id., p. 8.

[44] Id., pp. 8 and 9.

[45] Telco Comments, pp. 7-10.

[46] The Department will not address the other means including merger agreements by which it has the continuing authority to issue a standstill order. The decision not to address these means is in no way a waiver of their validity or an acknowledgment of their lack thereof in this proceeding, but would be redundant to this discussion.

[47] The Department has also issued this Decision in Docket 99-03-21RE01, Application of Verizon New York Inc. – Proposed Tariff for Unbundled Network Elements – Rebundled Service, TRO, detailing Verizon New York Inc.'s (Verizon) responsibilities under federal and state law.

B. THE OFFERING OF UNEs THROUGH 2004

The Telco will offer mass market UNE-P, DS-1 and DS-3 loops for individual customers, and DS-1 and DS-3 dedicated transport between Company central offices, and to not raise the prices for these UNEs through the end of calendar year 2004. The Telco will also adhere to its existing ICAs including any applicable change-of-law provisions.[48] Consequently, it is not unreasonable for the Department to assume that the Telco would accept a "standstill" order from the Department as long as that order expires on December 31, 2004. The Department however, lacks confidence that a new regulatory framework can be implemented by the FCC before the six-month window provided by the Telco's offer expires; and past experience with FCC rulemaking efforts tends to support the Department's concern in this area. It is for these reasons that the Department cannot accept the Telco's proposal without amending that proposition. In so doing, the Department will exercise its rights provided for pursuant to Connecticut Statute and offers the following discussion for the benefit of the parties.

C. DEPARTMENT AUTHORITY TO ORDER UNBUNDLING

The Telco argues that the Department is prohibited from instituting its own unbundling restrictions because they are preempted by federal law. The Department disagrees with that argument. At the root of this issue is the difference between an affirmative finding of non-impairment and the absence of any finding. The situation the Department faces in the aftermath of USTA II is that there is no longer any finding regarding impairment which the Department must apply, or with any rules it may promulgate from which they could conflict. That requirement has been vacated by USTA II. Additionally, it is illogical that the only way two regulatory schemes may not conflict is if they are identical, which suggests that they must be identical so as to not conflict. In this matter the lack of an approved regulatory standard cannot be presented as a basis to argue that a proposed standard presents a conflict. Therefore, the Department rejects this assertion as specious and unfounded.

1. State Authority

By Public Act 94-83,[49] the Connecticut General Assembly conveyed broad powers to the Department in Conn. Gen. Stat. §§ 16-247a and 16-247b to provide greater access to the Telco's telecommunications network. It is significant that the Legislature directed the Department to pursue that goal two years before implementation of the Telcom Act. In pursuit of that goal, the Department undertook unbundling initiatives prior to any federal initiative and subsequently sought to make certain its requirements were consistent with those later prescribed by the FCC. Therefore, the Department's requirement that the Telco's network be unbundled has been made pursuant to the provisions set forth in Public Act 94-83. 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 n state statute.

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[48] Telco Reply Comments, p. 2.

[49] An Act Implementing the Recommendations of the Telecommunications Task Force.

While Conn. Gen. Stat. § 16-247a outlines the general goals the Legislature sought to achieve in its efforts to realign the state's telecommunications markets, Conn. Gen. Stat. § 16-247b expressly empowers the Department to unbundle telephone company network, services and functions which the Department has determined are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations.[50] While the existence of this provision is beyond question, the effect of it in light of the Telcom Act, the TRO, and USTA II has been disputed amongst the parties to this proceeding and is addressed below.

2. Preservation of State Access Regulations

The Telco argues that the Department possesses no authority to order additional unbundling to that prescribed by the Telcom Act. The Department disagrees and is of the opinion that the Telco has misconstrued the intent of this proceeding. First, the Department is not seeking to use the Telcom Act as an enabling statute for its actions in this proceeding. Rather, the Department is exercising its authority provided by the General Assembly prior to enactment of the federal statute as the legal foundation for its actions. Because this authority preceded the Telcom Act, the Department is not dependent upon any federal directive that might be affected by USTA II.

Additionally, the Department's authority is consistent with the Telcom Act's requirement that its actions not conflict with any current federal requirements. 47 U.S.C. § 251(d)(3) specifically states that in prescribing and enforcing its regulations to implement § 251, the FCC 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.[51]

Therefore, the Department concludes that the actions it takes in this proceeding are consistent with those provisions. In contrast, the Telco asserts that the Department "must conform to federal law and may not prevent implementation of federal policy" and that "states cannot ignore federal limits on unbundling."[52] The Department agrees; however, it disagrees with the Company suggestion that the lack of stated policy equates to an affirmative finding against such a policy.

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[50] Conn. Gen. Stat. § 16-247b.
[51] 47 U.S.C. § 251(d)(3).
[52] Telco Comments, p. 5.

3. Triennial Review Order

In support of its argument that states may not impose additional unbundling restrictions on ILECs, notwithstanding the clear language of § 251(d)(3), the Telco cited to paragraph 195 of the TRO, which states in part that:

> [i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime.

Based on its review of the TRO, the Department finds neither the above statement nor the broader opinion expressed in the TRO on this matter to conflict with the general views of the Department. The Department also disagrees with the Telco that the above statement poses a point of conflict with the requirements envisioned by the Department because the situation described above does not reflect what is being addressed in this proceeding. Specifically, unlike the situation envisioned by the above TRO reference, the Department does not seek in this proceeding to unbundle any element for which the FCC has "found no impairment," nor has it "otherwise declined to require [its] unbundling on a national basis."[53]

Therefore, the Department concludes that any assertion made by the Telco that the Department cannot impose unbundling requirements on the Company lacks relevance and is hereby rejected. In the opinion of the Department, the Telco's proposed options are predicated upon an affirmative finding or some other action on the part of the FCC. In each instance, the option requires some showing by the FCC that it has considered unbundling these network elements and has expressly elected not to do so for federal policy reasons. If such a finding were to be made, any state regulation that conflicts with the FCC's finding would certainly fail. However, because the FCC must make a finding of impairment to unbundle certain elements, the fact that there has been no discussion or decision regarding a network element does not equate to a nationwide finding of non-impairment for purposes of § 251(d)(3), just as it does not equate to a nationwide finding of impairment. Rather, by virtue of § 251(d)(3), the status of any network element is left undecided and left to the states if they are authorized under state law to determine the element's status.

It is precisely that scenario which is presented to the Department in this proceeding. To date, the FCC lacks an affirmative conclusion that competitive carriers are not impaired in the marketplace without unbundled access to those network elements at issue in the TRO. Similarly, a general finding by the FCC that carriers are impaired without unbundled access has been vacated by the DC Circuit Court,[54] which has not been replaced or supplemented as of this date.

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[53] TRO, ¶ 195.
[54] USTA II, p. 569.

In the opinion of the Department, any interpretation other than one which requires an affirmative finding of impairment or non-impairment in regard to the provisioning of each element would render § 251(d)(3) meaningless. If the FCC's lack of determination equated to a finding of non-impairment for the purposes of preemption, then state commissions can produce no independent regulations which would be "consistent with" and "not substantially prevent the implementation of" the Telcom Act.[55] Instead, for the purposes of preemption, the provisioning of every network element would have a finding of non-impairment attached to it until the FCC determined otherwise. In that context, a state regulatory body would be unable to promulgate regulations regarding that network element because it would not be consistent with the Telcom Act.[56]

Additionally, when employing the Telco's reasoning, the state would be left solely to regulate network elements that the FCC has previously determined meet an impairment standard. Furthermore, any state regulations would have to replicate federal regulations regarding the same elements and not provide for any requirement beyond that contained in the federal regulations. Finally, any state regulations that might be interpreted as more lenient would present a direct conflict with the more stringent federal regulations. 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.

It is a well-settled principle that a statute's provisions may not be read so as to render superfluous any other provision in the same enactment.[57] Reading § 251(d)(3) in the manner the Telco suggests would result in preemption which the FCC specifically denied in the TRO, stating "[w]e do not agree . . . that the states are preempted from regulating in this area as a matter of law."[58] Instead, a balance must be struck whereby the states possess the authority to regulate the field in a manner which respects the federal role and its supremacy. Consequently, § 251(d)(3) allows for the unbundling of mass market switching, DS-1 and DS-3 loops for individual customers, and DS-1 and DS-3 dedicated transport. Furthermore, based on USTA II, the TRO does not stand in the way of the Department's endeavor.

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[55] 47 U.S.C. 251(d)(3).

[56] This rationale does not conflict with the Supreme Court's determination in AT&T Corp. v. Iowa Utils. Bd., because it does not impact the FCC's determinations of impairment under the Telcom Act or the baseline presumptions. Rather, this rationale merely addresses whether such an affirmative determination has been made for the purposes of preemption.

[57] Stewart v. Tunxis Service Center, 237 Conn. 71, 79 (1996).

[58] TRO, ¶ 192.

4. USTA II

The Telco asserts that USTA II relieves the Company of its obligations to offer UNEs prescribed by the TRO. The Telco also argues that USTA II preempts the Department from ordering the continued provisioning of those UNEs because the DC Circuit Court determined that the Telcom Act "grants the FCC, not the state commissions, the authority to determine which network elements an ILEC must unbundle."[59] Again, the Department disagrees because USTA II found the FCC's delegation of authority to the states to be unlawful.[60] Once the joint implementation process proposed by the FCC was eliminated, the DC Circuit Court had no choice but to find the resulting nationwide finding of impairment to be too broad to survive.[61] Each of these factors and their effects are discussed in detail below.

First, USTA II turned on the FCC's delegation of authority to the states.[62] The DC Circuit Court vacated the FCC's rules because the FCC unlawfully delegated its decision-making authority under the § 251(d)(2) to the states.[63] That is, the FCC delegated its decision-making authority to an outside agency rather than to a subordinate. Because the Telcom Act did not contemplate the delegation of authority provided for by the FCC in the TRO, it is clear from USTA II that any responsibility to make determinations of impairment under § 251(d)(2) remains with the FCC and cannot be assigned to the states without additional legislative actions.

The Telco argues that this is proof of the DC Circuit Court's interpretation that the Telcom Act should be implemented by the FCC and not the states. While the Department is in agreement with the Telco with this aspect, it must be pointed out that it has never been, nor is it now, the intention of the Department to implement the requirements contained in the Telcom Act as a self-appointed FCC twin. Rather, the Department will protect the interests of Connecticut's consumers by using all of the authority properly delegated to it by the Legislature. Such authority is specifically recognized and protected in § 251(d)(3). The Department will exercise that authority in a manner consistent with federal law. Therefore, because the Department is not attempting to use the authority vacated by the DC Circuit Court, that portion of USTA II has no bearing on the Department's efforts in this proceeding.

Additionally, because there is no expressed authority from Congress for states to implement the finding of impairment on a localized basis, the court in USTA II vacated the FCC's national finding of impairment.[64] It is important to note that this was not a determination by the court regarding the actual state of requesting carrier impairment.

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[59] Telco Reply Comments, p. 3 (emphasis omitted).

[60] USTA II, p. 568.

[61] Id.

[62] Id., stating the general conferral of regulatory authority does not empower an agency to subdelegate to outside parties.

[63] Id., stating "[w]e therefore vacate, as an unlawful subdelegation of the Commission's § 251(d)(2) responsibilities, those portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements."

[64] Id., p. 569.

Rather, it was a rebuke by the judiciary of the broad impact of the FCC's determination that it did not properly consider the "more nuanced concept of impairment."[65]

USTA II does not supplant the FCC's right to make a determination of impairment where evidence clearly supports such a conclusion. Rather, that decision simply states that the FCC has not adequately made such a determination itself. The consequence of that situation is that the FCC lacks any finding upon which to predicate its instructions and/or its requirements. The absence of any explicit finding on the part of the FCC leaves the area open to state regulation.

Second, the DC Circuit Court specifically declined to address the issue of preemption as presented by paragraph 195 of the TRO relative to state unbundling regulations because such a claim of unlawful preemption was not ripe.[66] Therefore, this issue was not addressed and § 251(d)(3) was left intact and in force.

Third, USTA II only denied state commissions authority that it concluded was unlawfully delegated to them by the FCC. The court rendered no comment on the role of state commissions in the implementation of the Telcom Act that might be construed to further restrict the rights and responsibilities of state commissions such as the Department.

Fourth, USTA II did not suggest that evidence available to the FCC showed that impairment in the local exchange market was not problematic and unbundled network access was not necessary. Had USTA II made such a finding, the Department would have been required to refrain from any further regulatory action. The lack of such a declaration reinforces the Department's belief that an impairment finding remains to be determined and that the Department must take the necessary actions to protect the interests of the public during the interim.

Therefore, in light of the above, the Department finds that USTA II does not present a barrier to its efforts to foster competition and protect Connecticut consumers. Accordingly, the Department concludes that its actions in this proceeding do not conflict with any prescribed federal requirements.

5. SNET Order

The SNET Order specifically detailed the Department's authority to require unbundled access to networks, services, and functions beyond that which is required under federal law, as long as the Department unbundling Decisions comport with Conn. Gen. Stat. §16-247b by demonstrating that such UNEs are in the public interest, consistent with federal law, and technically feasible of being tariffed and offered separately or in combinations.[67]

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[65] Id., p. 569, quoting United States Telecom. Ass'n v. Fed. Communications Comm'n, 290 F.3d 415, 426 (D.C. Cir. 2002).

[66] Id., p. 594.

[67] SNET Order, p.36.

The Telco argues that the SNET Order is no longer a valid precedent by virtue of statements contained in the TRO.[68] The Department disagrees. In support of its claim, the Telco again refers to paragraph 195 of the TRO, as well as paragraphs 192 and 193. While these paragraphs generally indicate that federal law may not be ignored or circumvented by state regulators when pursuing additional regulation, the Department notes that this argument is virtually identical to that posed by the Company above. Specifically, the argument that states cannot regulate an element, the lack of access to which has been found to not impair requesting carriers. Therefore, for the same reasons noted above, the Department rejects the Telco's argument that state regulation must mirror federal regulation. The Department also rejects the Telco notion that a general statement made by the FCC in an administrative ruling eviscerates a state appellate court ruling when it does not conflict with the SNET Order and does not constitute final agency action. Consequently, the SNET Order remains valid law and further supports the Department's position that it has been empowered by Conn. Gen. Stat. §16-247(b) to impose unbundling restrictions so long as both state and federal law are observed. All requirements imposed on the Department by both Congress and the Connecticut General Assembly have been fully satisfied.

Therefore, in light of the above, the Department hereby determines that Conn. Gen. Stat. §§16-247a and 16-247b provide it with the requisite authority to require the unbundling of the Telco's telecommunications network. Accordingly, the Telco should continue provisioning mass market switching, DS-1 and DS-3 loops for individual customers, DS-1 and DS-3 dedicated inter-office transport and dark fiber transport at their current rates. The Company should continue provisioning these UNEs until such time as the FCC's rules and regulations have been finalized and are available for use or until such time as an interconnection agreement has been filed and approved by the Department or a binding commercial agreement has been negotiated between the Telco and respective CLEC.

V. FINDINGS OF FACT

1. The Telco will offer mass market UNE-P, DS-1 and DS-3 loops for individual customers, and DS-1 and DS-3 dedicated transport between Company central offices, and will not raise the prices for these UNEs through the end of calendar year 2004.

2. The Telco will adhere to its existing ICAs including any applicable change-of-law provisions.

3. The Connecticut Legislature directed the Department to unbundled the Telco's telecommunications network two years before implementation of the Telcom Act.

4. The Department undertook unbundling initiatives prior to any federal initiative and subsequently sought to make certain its requirements were consistent with those later prescribed by the FCC.

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[68] Telco Reply Comments, p. 11.

5. The Department's requirement that the Telco's network be unbundled has been made pursuant to the provisions set forth in Conn. Gen. Stat. §16-247b.

6. Conn. Gen. Stat. § 16-247b empowers the Department to unbundle telephone company network, services and functions which the Department has determined are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations.

7. The Department is exercising its authority provided by the Legislature prior to enactment of the federal statute as the legal foundation for its actions.

8. The Department is not requiring in this proceeding the unbundling of any element for which the FCC has found no impairment or declined to require its unbundling on a national basis.

9. By virtue of § 251(d)(3) of the Telcom Act, the status of any network element is left undecided and left to the states if they are authorized under state law to determine the element's status.

10. USTA II turned on the FCC's delegation of authority to the states.

11. The DC Circuit Court vacated the FCC's rules because the FCC unlawfully delegated to the states its decision-making authority under the § 251(d)(2).

12. The Department will protect the interests of Connecticut's consumers by using all of the authority properly delegated to it by the Legislature. Such authority is specifically recognized and protected in § 251(d)(3).

13. The Department will exercise its authority in a manner which is consistent with federal law.

14. The DC Circuit Court declined to address the issue of preemption as presented the TRO relative to state unbundling regulations because such a claim of unlawful preemption was not ripe and § 251(d)(3) was left intact and in force.

15. USTA II only denied state commissions authority that it concluded was unlawfully delegated to them by the FCC.

16. USTA II did not suggest that evidence available to the FCC showed that impairment in the local exchange market was not problematic and unbundled network access was not necessary.

17. USTA II does not present a barrier to its efforts to foster competition and protect Connecticut consumers.

18. The SNET Order specifically detailed the Department's authority to require unbundled access to networks, services, and functions beyond that which is required under federal law, as long as the Department unbundling Decisions comport with Conn. Gen. Stat. §16-247b by demonstrating that such UNEs are in

the public interest, consistent with federal law, and technically feasible of being tariffed and offered separately or in combinations.

19. The SNET Order remains valid law and further supports the Department's position that it has been empowered by Conn. Gen. Stat. §16-247(b) to impose unbundling restrictions so long as both state and federal law are observed.

VI. CONCLUSION AND ORDER

A. CONCLUSION

Conn. Gen. Stat. §§16-247a and 16-247b provide the Department with the authority to require the unbundling of the Telco's telecommunications network. That authority was granted two years prior to the implementation of the Telcom Act. Therefore, the Department is not dependent upon any federal directive that might be affected by USTA II. This authority is also consistent with the Telcom Act. Accordingly the claim made by the Telco that the Department cannot impose unbundling requirements on the Company lacks relevance and is hereby rejected. Consequently, the Department concludes that its actions in this proceeding do not conflict with any prescribed federal requirements.

B. ORDERS

1. The Telco shall continue to provision mass market switching, DS-1 and DS-3 loops for individual customers, DS-1 and DS-3 dedicated inter-office transport and dark fiber transport at their current rates.

2. The Telco shall not discontinue or alter these services or their respective rates and charges until such time as FCC rules and regulations have been finalized and are available for use or until such time as an ICA has been filed and approved by the Department or binding commercial agreement has been negotiated between the Telco and a CLEC and the Department has been notified as such.

3. The Telco shall also continue to abide by its existing ICAs until such time as the Department orders otherwise.

DOCKET NO. 00-05-06RE03 APPLICATION OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FOR A TARIFF TO INTRODUCE UNBUNDLED NETWORK ELEMENTS - TRO

This Decision is adopted by the following Commissioners:

Jack R. Goldberg

John W. Betkoski, III

Donald W. Downes

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

______________________________	August 26, 2004,
Louise E. Rickard Acting Executive Secretary Department of Public Utility Control	Date

EXHIBIT C

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

XO Illinois, Inc.	**:**	
	:	
Petition for Arbitration of an Amendment	**:**	
to an Interconnection Agreement with	**:**	**04-0371**
Illinois Bell Telephone Company Pursuant	**:**	
o Section 252(b) of the Communications	**:**	
Act of 1934, as Amended.	**:**	

AMENDATORY ARBITRATION DECISION

October 28, 2004

"an incentive for [CLECs] to request EELs only to the extent permitted by the rules we adopt here." TRO ¶623. On the other hand, the FCC strove to avoid "imposing undue burdens upon [CLECs]" with its auditing procedures. TRO ¶622. Furthermore, this Commission does not want to encourage an ILEC to initiate an audit it might not otherwise initiate, knowing that even a minor transgression will impose substantial cost and inconvenience on the CLEC. Accordingly, although we will not adopt XO's pro-rata allocation, which is unsupported in the TRO, we hold that the materiality requirement must be construed to require more than trivial violations before cost responsibility can be transferred to XO.

B. OPEN ISSUES PRESENTED BY SBC

1. Should the ICA obligate SBC to continue to provide network elements that have been declassified or should the ICA state that SBC is required to provide only "lawful" UNEs?

XO re-characterizes this issue as follows:

(a) Whether based upon the FCC's directive in the TRO, SBC may attempt to modify the Interconnection Agreement between the parties, to make changes in the law or the rules or regulations promulgated by the FCC or the [ICC] (including USTA II) self-effectuating or automatically effective without any need to negotiate those changes as required by the "Change of Law" provision in the ICA.

b) Does the issuance of USTA II mean that through this proceeding SBC may no longer make certain UNEs available under Section 251?

1. Parties' Positions and Proposals

a.) SBC

Issue SBC-1 concerns whether the interconnection agreement should obligate SBC Illinois to continue to provide network elements that are no longer required to be unbundled (*i.e.*, that have been "declassified") at the same rates, terms, and conditions that would apply if the network elements were required to be unbundled. SBC Illinois' proposed language appropriately reflects the scope of SBC Illinois' obligation to provide UNEs, stating that SBC Illinois is required to provide as UNEs only those network elements that are actually, and lawfully, UNEs. XO's proposed language, on the other hand, would have the inappropriate and unlawful effect of requiring SBC Illinois to provide, as UNEs, network elements that are not actually, lawfully UNEs.

The contract language SBC Illinois proposes provides that SBC Illinois is required to provide only "Lawful UNEs," defined as "UNEs that SBC Illinois is required to provide pursuant to Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders or lawful and effective orders and rules of the [ICC] that are necessary to further competition in the

provision of telephone exchange service or exchange access and that are not inconsistent with the [Federal Act] or the FCC's regulations to implement the [Federal Act]." Network elements that do not satisfy this standard, but were previously provided as UNEs, are considered "declassified." This language appropriately reflects SBC Illinois' obligations to provide UNEs under the *TRO* and the Federal Act.

While section 251(c)(3) of the Act requires ILECs to "unbundle" certain network elements, Congress did not specify the particular network elements that must be unbundled. Rather, it directed the FCC to determine which network elements must be unbundled by applying the "impairment" test of section 251(d)(2). Moreover, as the D.C. Circuit made clear in USTA II, it is the *FCC* that must determine which network elements satisfy the "impairment" requirement of section 251(d)(2), and thus must be offered as UNEs pursuant to section 2512(c)(3). USTA II, 359 F.3d at 561. In short, "the UNEs that SBC Illinois is required to provide pursuant to Section 251(c)(3) of the Act" are limited to those "determined by lawful and effective FCC rules and associated lawful and effective FCC . . . orders," precisely as SBC Illinois' proposed contract language provides.

SBC Illinois' proposed contract language also provides that "lawful UNEs" include those network elements that SBC Illinois is required to unbundle pursuant to "lawful and effective orders and rules of the [ICC] that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [Federal Act] or the FCC's regulations to implement the [Federal Act]." Again, such language is required by the *TRO* and the Federal Act. In the *TRO*, the FCC held that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations." *TRO*, ¶ 187. Rather, the FCC held, such actions must be "consistent with the Act" and with "the [FCC's] section 251 implementing regulations" (*TRO*, ¶ 193 & n.614), which is precisely what SBC Illinois' proposed language provides. This language is also directly supported by section 261(c) of the Act ("additional state requirements"), which states: "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* [sections 251-261 of the Act] *or the [FCC's] regulations to implement* [those sections]." 47 U.S.C. § 261(c) (emphasis added).

SBC Illinois' proposed language appropriately implements the *TRO*. XO's objection that the language might have the effect in some circumstances of creating new "change in law"-like procedures, to the extent it would apply to future UNE declassifications, is without merit. XO also proposes contract language to govern future UNE declassifications in some situations, as well as additions to the list of UNEs, instead of relegating all such events to the parties' existing change of law process. Thus, XO's assertion that SBC Illinois' language must be rejected simply because it has the same effect as XO's proposed language must be rejected.

Moreover, the *TRO* unequivocally "declassified" certain network elements, including OCn loops, OCn dedicated transport, and enterprise switching, holding that

these facilities are no longer UNEs. These new rules were either not challenged on appeal, or were not disturbed on appeal. SBC Illinois' proposed contract language appropriately implements the *TRO* by classifying these facilities as "declassified" rather than "lawful UNEs," thus making clear SBC Illinois is no longer required to provide these elements as UNEs under the parties' contract.

Finally, XO's attempt to add section 271 checklist items to the parties' contract as items SBC Illinois must provide as section 251 UNEs must be rejected. Pursuant to the *TRO*, determination of the rates, terms, and conditions for section 271 checklist items is a matter for the FCC under sections 201 and 202 of the 1934 Communications Act. And even if this Commission did have jurisdiction to address the issue, XO's proposal must be rejected because the FCC unequivocally held that section 251 rates, terms, and conditions do *not* apply to section 271 checklist items, and the D.C. Circuit unequivocally approved that determination. TRO, ¶¶ 655-59; USTA II, 359 F.3d at 589.

b.) XO

(SBC/XO-1a). As an initial matter (and as previously noted in XO's prior filings), XO does not believe that SBC's proposed language associated with SBC Issue 1 should be considered in this arbitration or that it belongs in the Amendment, because the proposed language would make changes to the Agreement that are not required to implement the *TRO,* is beyond the scope of parties' negotiation, and is beyond the scope of this arbitration.

XO and SBC agreed to negotiate conforming changes to their Agreement to implement the *TRO* and that is the subject of this arbitration. The *TRO* expressly required parties to negotiate changes pursuant to existing "change-of-law" provisions in parties' underlying Agreements. The change of law provisions of the XO/SBC Agreement require that parties agree and negotiate mutually acceptable new terms.[39] SBC's proposed language, however, does not implement the *TRO* and would instead make sweeping changes to the Agreement's underlying change-of-law provisions by defining broadly and preemptively those UNEs that SBC may in the future unilaterally decide no longer to provide.

Specifically, an overarching problem with SBC's proposed language is that it gives SBC too much subjective power to determine when it will discontinue providing a UNE to requesting carriers. For example, SBC's proposed language defines a lawful UNE as that required under Section 251(c), as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders, and effective orders and rules of the state commission "that are not inconsistent with the [Act] or the FCC's regulations." *See* SBC proposed language at Section 1.1. Under this proposed language, SBC could unilaterally disregard state decisions or requirements, to the extent that SBC deems them to be inconsistent with the FCC's rules, which would be contrary to the intent of the Act and the FCC's orders.

[39] XO/SBC Interconnection Agreement, §28.2.

Moreover, SBC does not limit the scope of its unilateral authority to discontinue providing UNEs to changes of law effected by the *TRO*, or state decisions implementing the *TRO* and instead would modify the change of law provision itself to make any favorable changes of law self-effectuating upon 30-day notice (as discussed below in SBC I ssue 2). For example, SBC's proposed language could potentially permit SBC unilaterally to discontinue providing UNEs upon any event that it argues is a "change of law" (including, for example, the issuance of the D.C. Circuit decision in USTA II – without negotiating such changes of law, as required by the Agreement and the *TRO.* SBC could improperly assert that, based on USTA II, certain UNEs are no longer required to be unbundled, or provided at cost-based TELRIC rates. Such an action would, however, be contrary to the Act and the FCC's intent. Section 251(c) establishes the requirement that ILECs provide UNEs at cost-based rates and even in the absence of FCC rules, such UNEs must be provided at TELRIC (which is the FCC-established standard for UNE prices). Indeed, the FCC has noted that it will issue very shortly interim UNE rules in light of USTA II; thus any decision by SBC to discontinue providing UNEs on the grounds that USTA II vacated certain FCC rules would be premature.

In contrast to such broad and subjective language, XO's proposed language accurately and objectively implements the *TRO* and provides that SBC may only discontinue offering a network element to the extent that SBC is no longer required to provide UNEs under applicable law, which would include Sections 251, 271, FCC's orders and rules, *and orders of this Commission*. *See* XO proposed language, Section 1.1. Moreover, the PUA mandates the unbundling of network elements where technically feasible. 220 ILCS 5/13-801(a). The Commission has pre-existing authority under Section 13-801 to require unbundling to the fullest extent possible to maximize competition among telecommunications providers. *Id*. As elucidated by this Commission, its authority is not limited to the jurisdiction of the FCC or the Act; the Commission has the power to consider and include any appropriate provisions and terms. *See* Sage Arbitration Decision in Docket 03-0570, Order, December 9, 2003, at 6 (asserting the Commission has the power to address "many matters outside federal purview"). This Commission has already rejected SBC's claim that Section 13-801 is inconsistent with the federal Act and thus preempted. As noted by the Commission in Docket 01-0614: "In our view the legislature has determined that, in Illinois, it is appropriate that [SBC] be required to bear additional obligations as the price to pay for being the only ILEC being regulated under an alternative form of regulation." *See* Illinois Bell Telephone Company, Filing to implement Tariff Provisions related to 13- 801 of the Public Utility Act, Docket 01-0614, Order, June 11, 2002, at ¶41 ("01-0614 Order"). In other words, by deciding to take advantage of alternative rate regulation under the PUA, SBC has chosen to be subject to the additional requirements of Section 13-801.

In addition, XO's proposed language would not override existing change of law provisions by making such changes of law automatically self-effectuating.

(SBC/XO-1b). As discussed above, SBC's proposed language would modify the existing change of law provisions, by allowing SBC unilaterally to discontinue providing

UNEs upon any event that it considered a change of law without undergoing the required negotiations. Nothing in the *TRO,* orders of this Commission, the FCC, or the law gives SBC the right to modify the underlying change of law provisions of the existing Agreement. Instead, the FCC rejected the ILECs' request to override the Section 252 process and "unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions." *See TRO* at ¶ 701. The FCC specifically noted "voluntary negotiations for binding interconnection agreements are the very essence of section 251 and section 252." *Id*. Thus, it would thwart the purpose of the Act to permit SBC, under the guise of implementing substantive changes resulting from the *TRO*, to modify the underlying change of law language so that SBC may automatically implement any future changes of law regarding UNEs.

This Commission has previously identified a provision as "superior" when it provides for negotiation between the parties as opposed to "immediately disrupt[ing] the working relationship created by the ICA."[40] An SBC provision was undesirable in that it allowed for "immediate disability" and "immediate invalidation in the event of regulatory change." *Id*. The Commission realized a smooth transition implementing a change in law would be elusive with a provision allowing immediate paralyzation of any agreements. "The Commission does not want ICA's, which are intended to provide stability among interconnected competitors, to rest on such a precarious foundation." *Id*.

XO's proposed language does not modify the underlying change in law language. XO's proposed Section 1.1 provides that SBC should provide UNEs to the extent required by Section 251(c)(3), Section 271(c), the FCC rules, and/or other applicable law (including orders and rules of this state commission). Such language merely establishes the applicable law that governs SBC's obligations. As discussed further below in SBC Issue 2, XO's proposed language would - consistent with the change-of-law provisions of the Agreement - require parties to negotiate and mutually agree to amend their Agreement when additional changes of law occur.

Moreover, XO's proposed language requiring a "final and nonappealable" order of the FCC or a state commission before SBC may discontinue providing access to DS1 or DS3 loops or transport at a specific customer location does not, contrary to SBC's contentions, modify the underlying change of law provisions of the Agreement, as SBC contends. *See* XO Section 3.5.2.3 and 3.5.3.7. XO/SBC Interconnection Agreement, §28.2 XO's proposed language reflects and is consistent with the underlying language in the parties' Agreement regarding changes of law. Finally, in contrast to SBC's proposed language, XO's language does not broadly and preemptively implement *all* future changes of law without negotiation, and would instead implement specific provisions of the *TRO* by recognizing that a final and nonappealable state decision pursuant to the *TRO* would relieve SBC of a UNE obligation.

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[40] Sage Petition For Arbitration, December 9, 2003, Decision in Docket 03-0570 at p. 26.

c.) Staff

SBC's proposed "Lawful" UNEs language reflects a position that goes beyond the TRO requirements. First, as the Staff noted above in XO Issue No. 2, SBC appears to be positioning itself, in its proposed contract provisions, to unilaterally withdraw UNEs when some court or tribunal determines that they no longer need be offered on an unbundled basis. Under its contract proposals, SBC appears to reserve to itself the right to determine – and, indeed, from time to time *re*-determine – what constitutes a "Lawful UNE." *See* SBC Issues Matrix at 1 *et seq.*, Contract Provisions 1.1, 2.2, 6 (SBC only required to provide UNEs as required by law, as it changes from time to time, notwithstanding contract provisions to the contrary).

In fact, SBC asks this Commission to do what SBC previously requested of the FCC, and which BOC request was specifically rejected by the FCC.[41] SBC's proposed language would have the effect of granting to SBC, alone, the authority to unilaterally implement any arguable Section 251(c)(3) changes of law based solely upon SBC's interpretation of any such potential change of law. The FCC directly declined to permit such unilateral implementation.

This Commission, like the FCC, should be loath to take the "extraordinary step" of "interfering with [the] contract process," which is the "very essence" of sections 251 and 252. XO, moreover, correctly perceives SBC's proposal to be an attempt to use a change of law to negotiate an alteration in the existing "change of law" provision, in a manner that would permit SBC to unilaterally abrogate UNE unbundling obligations. The *TRO* specifically contemplates the use of existing change of law provisions to negotiate conforming changes pursuant to the TRO. In other words, the TRO is itself a change of law, but not one that has any effect upon change of law provisions. SBC's attempt to bootstrap a change in the change of law provision should be rejected. Staff, accordingly, recommends that the Commission reject SBC's proposed language that would override the Section 252 process and allow SBC to unilaterally change the ICA to reflect its interpretation of any potential change of law regarding its obligations to provide requesting CLECs UNEs.

SBC's proposed language also limits SBC's obligations to provide CLECs with UNEs solely to any obligations formulated under Section 251(c)(3). In the TRO, the FCC stated, "we continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251." It is the Staff's position, consequently, that SBC continues to be obligated to provide UNEs under both Section 251 and under any independent obligation it has to provide UNEs under Section 271.

Further, although SBC's proposed language references orders and rules of the

[41] See TRO, ¶ 701, n. 2085, which cites a Letter from Michael K. Kellog, Counsel for SBC, Qwest, and BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338 at 3-5 (filed Jan. 21, 2003)(arguing that the FCC may "negate" certain contract terms under the Mobile-Sierra doctrine).

applicable state commission, SBC's proposed language is heavily qualified with vague limitations.

Staff recommends that the Commission reject SBC's unreasonably vague language.

Regarding the issue of whether "the issuance of USTA II means that through this proceeding SBC may no longer make certain UNEs available under section 251", the ALJ explained that:

> Regarding USTA II, although XO personnel did decline negotiations concerning that decision, the inescapable fact is that USTA II modifies and nullifies portions of the TRO. The latter cannot be properly interpreted or implemented without reference to the former. Therefore, even if USTA II, qua USTA II, were excluded from negotiations, its impact on the TRO would have to be incorporated in the Commission's analysis of the issues properly presented for arbitration. Except insofar as there may be some practical distinction between consideration of USTA II in its own right and consideration of the TRO as modified by USTA II (and the ALJ can perceive none), the instant Motion cannot be granted.

ALJ Ruling, June 23, 2004, at 2.

It is the Staff's position that, at least as far as applying the proposed language at issue in this issue is concerned, the ALJ's perception that there is likely no difference between the TRO and USTA II is accurate. The stated FCC preference for negotiations, over language that would allow the BOC to over-ride section 252 negotiations, can address TRO related issues as modified by USTA II. Staff, accordingly, recommends that the Commission adopt XO's proposed language for all of the reasons articulated in detail above.

The Staff, moreover, takes the position that SBC is also obligated to provide UNEs to CLECs under the applicable state law, including the orders and rules of this Commission but also under the applicable requirements of the PUA.

2. Analysis and Conclusions

SBC-1. The Commission rejects SBC's proposal to insert the term "lawful" in the sections of the amended ICA that SBC discusses in connection with SBC-1, and in connection with any other disputed issue in this arbitration as well. Such language is unnecessary, likely to trigger future disputes between the parties, and could be readily abused to delay XO's access to SBC services. Since XO cannot hope to successfully demand access to "unlawful" UNEs, inclusion of this term serves no constructive

purpose. Indeed, if such inclusion were necessary to the identification of what is permissible under the ICA, the "lawful" modifier would have to be inserted before every material noun in the ICA.

Similarly, SBC proposes to place the "lawful" modifier before references to the orders and/or rules of the FCC, the courts and this Commission. Unless they are under stay by a superior authority, such orders and rules are inherently lawful and effective. In effect, SBC's proposed language would empower SBC to implement the ICA by second-guessing - outside regular appellate processes - the viability of regulatory and judicial rulings.

SBC compounds its error by proposing, in SBC Section 1.1, to add the condition that "lawful" and "effective" orders and rules must also be "necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [Federal Act] or the FCC's regulations to implement the [Federal Act]." Thus, within the operation of the ICA, administrative and judicial decisions will be judged SBC for their consistency with SBC's view of the Federal Act and associated FCC regulations. At the logical extreme, nothing in SBC's proposed language would preclude SBC from holding that a conclusion in an administrative or judicial decision affronted the Federal Act, even when that decision expressly held to the contrary.

It is entirely reasonable for SBC to propose ICA language that will assure that SBC is not obligated to provide services at TELRIC prices unless those services, and the carriers requesting them, are entitled to such prices. It is entirely unreasonable to achieve the objective by empowering SBC to unilaterally adjudge the content, validity and viability of non-stayed judicial and administrative authorities[42]. Moreover, by arrogating such power, SBC will elicit disputes with XO and delay XO's access to competitive services. The far better course is to employ language providing that when SBC is relieved of the obligation to furnish a UNE under federal and state law, its corresponding obligation under the ICA will also be relieved (by the process discussed in relation to SBC-2, below).

The answer, then, to SBC-1 is that SBC is not obligated to continue providing UNEs under the ICA when no such obligation exists under federal or state law. However, SBC's "unlawful" UNE scheme is ill-suited to excluding that obligation from the ICA.

SBC-1 & SBC/XO-1a. Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis[43]. "[T]he requirements of section 271(c)(2)(B)

[42] SBC itself objects, in the context of SBC Issue 13, that "XO cannot unilaterally determine the effect of…change in law, including whether that change in law will be give any effect at all." SBC Init. Br. at 89.

[43] SBC asserts that this Commission lacks "jurisdiction" to "require the parties to include in the contract language governing access to section 271 network elements." SBC BOE at 6. We disagree. Our detailed discussion of this claim appears in our analysis of SBC Issue 4, below. That discussion fully

establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251." TRO, ¶ 653. However, the FCC also held that Section 271 "does not require TELRIC pricing" for elements unbundled pursuant to that statute. TRO ¶ 659. Instead, prices for Section 271 UNEs must be just, reasonable and non-discriminatory, per Sections 201 and 201 of the Federal Act. TRO ¶ 656.

The parties' disagreement respecting 271 UNEs is reflected in so many provisions throughout their respective proposed TRO Attachments that we cannot address them individually. Nevertheless, certain principles should be adhered to throughout the parties' ICA. Language relieving SBC of its obligation to unbundle elements under Section 271 is prohibited; correspondingly, language authorizing such unbundling (e.g., XO proposed Section 3.1.4.1) is permissible. Language requiring SBC to offer 271 UNEs, qua 271 UNEs, at TELRIC prices, is prohibited; correspondingly, language authorizing SBC to offer 271, qua 271 UNEs, at prices determined per the criteria Sections 201 and 201 of the Federal Act is permissible.

SBC contends, however, that the *Status Quo* Order precludes incorporation into the ICA of provisions pertaining to Section 271 (or state law), on the ground that such provisions would impermissibly expand the XO's contract rights, thereby altering the status quo. SBC Supp. Br. at 5. Since the ICA is not in the record, the Commission cannot assess the factual support for this claim by comparing current ICA text with XO's proposed language. In any event, the Status Quo Order addresses and "freezes" only an ILEC's unbundling obligations under Section 251. The Section 271 obligations confirmed in the TRO are not addressed and, indeed, did not need to be, since (unlike Section 251 obligations) they were not vacated by USTA II. Furthermore, Section 271 unbundling rights are not an "expansion" upon Section 251 rights. They are lesser rights, involving higher prices to the CLEC and no right to demand combinations.

This state has also established unbundling requirements, characterized in Section 13-801 of the Act[44] as "additional" to federal unbundling requirements. When the pertinent ILEC is subject to an alternative regulation plan under Section 13-506.1 of the Act[45], as SBC is, such additional obligations may exceed or be more stringent than Section 251 obligations. *Id.* We have held that we lack authority to declare that Section 13-801 is preempted by federally authority, insofar as that statute authorizes unbundling in excess of federal requirements. Docket 01-0614, Order, June 11, 2002, ¶ 42.

The *FCC* does have the power to preempt, as subsection 13-801(a) expressly acknowledges. That power is codified in Section 253(d), and the FCC observed in the TRO that "[p]arties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may" request preemption under that section. TRO ¶ 195. SBC has apparently not done so. XO Init. Br. at 28.

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applies with respect to SBC Issue 1, and to all the other open issues for which SBC makes the same assertion.

[44] 220 ILCS 5/13-801.

[45] 220 ILCS 5/13-506.1.

The FCC also explained in the TRO that:

> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment - and thus has found that unbundling that element would conflict with the limits in Section 252(d)(2) - or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.

TRO ¶195. Consequently, this Commission has reopened our Docket 01-0614 "to determine whether the Commission's unbundling decisions in this case are in conflict with federal law, and, if so, to determine the appropriate unbundling provisions to be established consistent with Illinois and federal law." Docket 01-0614, Order on Reopening, June 23, 2004, at 9.

Thus, this Commission is presently reconsidering its unbundling power and associated decisions under, *inter alia*, state law, while the FCC is simultaneously reconsidering its own unbundling decisions under federal law, after the remand in USTA II. Within this state of flux, we must nevertheless determine how *presently existing* state authority and regulatory decisions are to be reflected in the parties' ICA, without speculating about (or prejudging, with respect to Docket 01-0614) future developments. We conclude that our unbundling decisions, as well as the Section 13-801 authority on which they are premised, *presently* determine the state-based unbundling obligations of SBC (and XO's corresponding rights of access to unbundled elements). Therefore, ICA provisions that reflect these obligations and rights (e.g., XO proposed Section 1.1) should be included in the SBC-XO amended ICA.

Moreover, for purposes of the ICA, our presently effective rulings must be taken at face value. Although SBC may believe that we have required unbundling under Section 13-801 (including TELRIC-priced unbundling) that exceeds what Section 251 would allow, that belief is irrelevant at present. Similarly irrelevant is the argument that our rulings are inconsistent with Section 261(c) of the Federal Act, which would contravene Section 13-801. Our currently viable unbundling rulings were based on our judgment that they are consistent with Section 261(c). Such judgment would have to be overturned on appeal or preempted through Section 253(d), not collaterally challenged in arbitration (or worse, unilaterally by SBC, within the context of the ICA). Put simply, our unbundling mandates are effective today, and unless or until they are altered

(whether by us or by superior authority) they must be incorporated in the parties' ICA. Future unbundling developments should be accommodated through change-of-law provisions.

In view of the foregoing principles and conclusions, the Commission rejects XO's recommendation that only "final and non-appealable" non-impairment decisions will terminate an SBC unbundling obligation. The terms of a non-stayed regulatory order must be obeyed.

SBC/X0-1b. The Commission concurs with XO and Staff that SBC's proposals would essentially replace the change-of-law provisions in the parties' existing ICA with unilateral powers for SBC. XO Init. Br. at 29; Staff Init. Br. at 62. Those provisions contemplate bilateral negotiations between the signatories. In contrast, SBC's amendatory contract language (e.g., SBC proposed Section 1.1) would empower SBC to decline to provide UNEs, based upon, first, its unilateral assessment of the ramifications of regulatory and judicial authorities, and, second, its unilateral judgment of the efficacy of those authorities themselves, based on criteria we rejected above. Such provisions do not belong in the parties' ICA, whether to incorporate changes already compelled by the TRO or any future changes associated with the TRO and USTA II.

2. What is the appropriate transition and notification process for declassified UNEs?

XO re-characterizes this issue as follows:

(a) Whether SBC may attempt to modify the "Change of Law" provisions in the Agreement, in order to implement automatically any future changes in law to the agreement.

(b) What are the circumstances under which SBC may no longer be required to make certain UNEs available?

(c) May SBC unilaterally discontinue providing a UNE after a 30-day transitional period if the parties have not mutually agreed to negotiate terms and conditions regarding such UNE?

1. Parties' Positions and Proposals

a). SBC

In order to properly implement the *TRO*, the parties' contract must be amended to provide a clear, orderly, and definite process for the transition of network elements that are no longer UNEs. XO's proposed language does not provide for any real transition plan at all to implement the *TRO*'s declassifications, and thus does not appropriately implement the requirements of the *TRO*. (*See* XO Section 3.13.1.1.) In particular, XO's proposed language would allow for a transition only if the parties were

able to agree on a "transition schedule." In the event the parties could not agree on a transition schedule, the Commission would have to step in.

If that sounds familiar, it is because that is precisely where we are today. The parties were unable to agree on a transition schedule, and thus the Commission has been forced to step in to arbitrate the matter. XO's proposal to delay the creation of any transition schedule for many more months, pending more negotiation and after the Commission is forced to step in again, is unreasonable.

It is also contrary to the FCC's direction in the *TRO*. The FCC stated that, if the parties could not agree on "transition timing," state commissions should "conclude their consideration of such disputes within nine months of the effective date of this Order." *TRO*, ¶ 703. Under XO's proposal, however, the Commission's "consideration" of the transition timing dispute has not even begun. Thus, XO's proposed language, and SBC Illinois' should be adopted.

SBC Illinois' proposed transition plan language provides for a final, concrete, and well-defined transition period for those facilities that XO is no longer entitled to access as UNEs. That language appropriately defined "declassified" facilities and expressly identified network elements declassified by the *TRO* and USTA II (Sections 1.3, 1.3.1, 1.3.1.1, 2.20), and specifies that such facilities are subject to the transition procedures of the contract (Sections 1.3.1.3, 1.3.2, and 1.3.3). The transition procedures provide for written notice of a declassification, followed by a 30-day transition period where the CLEC can issue disconnect orders or agree upon an alternative arrangement (*e.g.*, resale or special access). (Section 1.3.4.) If the parties cannot agree, SBC Illinois may convert the facilities to resale or special access. (Section 1.3.4.)

XO's assertion that SBC Illinois' language would somehow inappropriately modify the parties' change in law language rather than implement the *TRO* should be rejected. As an initial matter, XO's proposed language too applies to certain future "declassifications," and to that extent would appear to supplement the parties' existing change of law process. XO cannot object merely because SBC Illinois' language might have the same effect.

In any event, SBC Illinois' proposed language appropriately implements the *TRO*'s new impairment standard and the *TRO*'s new approach to unbundling. Under this new regime, network elements are subject to frequent "de-listing," and may be de-listed at different times and in different places. XO's suggestion that each such future declassification should be followed by another round of negotiations, and likely another proceeding before this Commission, is unreasonable and inappropriate.

b.) XO

(SBC/XO-2a). To the extent that certain UNEs are no longer required by the *TRO*, XO proposes a specific mechanism for transitioning from these UNEs. Subsequent to the effective date of the Amendment, in the event that there is a change

in the status of certain UNEs pursuant to applicable law, XO proposes to incorporate these changes to the Agreement through the parties' mutual agreement.

For example, XO's proposed language in Section 3.13.2 provides that, as to network elements that the state commission determines (after the effective date of this amendment) to be no longer required to be unbundled (or "nonconforming facilities"), the parties "agree to amend the Agreement promptly to reflect the change and establish a mutually acceptable transitional mechanism if no transitional mechanism has been previously agreed upon or specifically dictated by the state commission."[46] As noted in SBC Issue 1, this is consistent with the *TRO* as it specifically requires the parties to negotiate changes to their agreements, consistent with underlying change of law provisions of their ICAs. *TRO* at ¶ 701. XO/SBC Interconnection Agreement, §28.2.

In contrast, SBC proposes a 30-day transition period for discontinuing its provision of certain UNEs that are no longer required to be provided pursuant to events that SBC deems to be changes of law. The effect of adopting SBC's language may not only be confusion but violation of the Act, the FCC's orders and rules, and this Commission's rules and requirements. For example, any attempt by SBC to discontinue providing UNEs based on USTA II would be premature and conflict with interim rules that the FCC has stated that it will promulgate within the next few weeks in the wake of USTA II. An attempt by SBC to abruptly discontinue providing UNEs is also contrary to Illinois law, which established rights to access network elements if technically feasible wherever competition would be promoted. 220 ILCS 5/13-801.

(SBC/XO-2b). Neither party may modify the underlying change of law provisions, as that is beyond the scope of the negotiations and this arbitration. However, SBC proposes unilaterally to discontinue providing UNEs, alone, or combined, upon 30 days notice to the CLEC. SBC Section 1.3.4. For the same reasons discussed above in SBC Issue 1, SBC's proposed language regarding declassified and unlawful UNEs is overly broad and improper and effectively constitutes an attempt to modify the change of law provisions, by eliminating the negotiation process specified in the change of law language in the Agreement. Thus, upon the issuance of USTA II, SBC's proposed language could potentially allow it to discontinue provision of certain UNEs, after the 30-day notice. This is inconsistent with the *TRO* and other applicable law, including past Commission decisions. Sage Telecom Arbitration, Docket No. 03-0570, Order, December 9, 2003, at 26 (preservation of parties' existing contractual rights.)

c.) Staff

The ALJ addressed the issue of future declassifications in his June 23, Ruling. In his Ruling, the ALJ found:

[46] Similarly, as noted above, to the extent that a change in applicable law requires SBC to provide UNE, combination, or commingling that is not offered under the amended agreement, XO's proposed language similarly states "the Parties shall *negotiate* an appropriate amendment to the Agreement that will contain the rates, terms and conditions for such UNE, Combination, or Commingling." Joint Matrix, XO Position, Section 1.4.

> Regarding future declassifications, a forward-looking process is not unrelated to implementation of the TRO (as modified by USTA II), to the extent that such process is designed to apply the modified TRO's principles and conclusions to future activity. Moreover (and as concluded above), the fact that amendatory provisions associated with implementation of the modified TRO may affect the operation of existing COL provisions does not mean that SBC Issue 2 exceeds the scope of the parties' pre-petition negotiations.
>
> On the other hand, future declassifications that are not based on the provisions of the modified TRO are beyond the scope of those negotiations. Accordingly, any proposed SBC text that purports to account for future declassifications required by authorities other than the modified TRO (e.g., SBC proposed section 2.20(e)) is hereby stricken.

ALJ Ruling, June 23, 2004, at 2-3.

In a footnote to the last sentence cited above, the ALJ further explained that:

> SBC may believe that the stricken text is inherently arbitrable because it concerns SBC's rights and duties under Section 251. It is not. It is inherently *negotiable*, and had it been negotiated (or even offered for negotiation), it would now be arbitrable. However, non-TRO related future rulings by, for example, any "judicial body," were not negotiated (or offered for negotiation) by the parties. *Id*.

Assuming that the language pertaining to "non-TRO related future rulings by, for example, any 'judicial body,' were not negotiated (or offered for negotiation) by the parties" is properly stricken, it is the Staff's position that the FCC has clearly articulated its preference for the parties to negotiate language to accommodate TRO related modifications. A process for future UNE declassifications could be negotiated at the same time as the current TRO related modifications, if, as the ALJ explained, it had been a subject of the parties negotiations. Staff, accordingly, recommends that the Commission adopt XO's proposed language for all of the reasons above and articulated in detail above in SBC Issue 1.

2. Analysis and Conclusions

SBC-2 is another over-broad request for guidance on a general subject matter, rather than a proper framing of specific open issues. SBC/X0-2b is similarly deficient, as well as substantively duplicative of SBC-1. Accordingly, we will specifically resolve

SBC/XO-2(a) and (c), and those related disputes concerning UNE "declassification" that we view as impediments to amending the ICA.

SBC/XO-2a & 2b. Important elements in the parties' discussion of SBC-1 more logically belong here. For instance, Staff maintains that "the TRO is itself a change of law, but not one that has any effect upon change of law provisions." Staff Init. Br. at 62. If that assertion is correct, the parties cannot establish a new "transition and notification process" in this arbitration. As Staff observes, the ALJ ruled that future UNE declassifications that are not based on the TRO (as modified by USTA II) are beyond the scope of arbitration here, because they were beyond the scope of the parties' limited negotiations. *Id.*, at 66.

SBC posits, however, that modification of the parties' existing change-of-law provisions is "consistent with implementing the requirements of the *TRO*. In other words, to the extent the *TRO* created a new legal landscape which the parties' existing change of law language is insufficient to reasonably and properly implement, then invoking the existing change of law process to negotiate a new change in law process that will accommodate the new legal landscape is perfectly appropriate."[47] SBC Init. Br. at 45. SBC's argument is conceptually valid. 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 (as modified by USTA II and superceded by the *Status Quo* Order) has determined that specific network elements no longer need to be unbundled (or offered at TELRIC prices) – 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 (or TELRIC priced). Indeed, one of the apparent purposes of this arbitration was to reflect such "declassifications" in the ICA.

On exceptions, SBC insists that it has indeed propounded contract language that directly identifies services that the modified TRO exempts from unbundling (SBC proposed subsections 1.3.1.1 and 1.3.1.2). SBC BOE at 25-26. There are several flaws in SBC's proposed text, however. First, subsection 1.3.1.2 has been overtaken by the Status Quo Order. All of the listed items must remain unbundled (assuming they presently are in the parties existing ICA) during the time periods specified in that order. That is also true for several listed items in subsection 1.3.1.1 (ii, iv).

Second, several enumerated items in Section 1.3.1.1 are infected by SBC's insertion of the counter-productive term "lawful," which we rejected in our discussion of SBC Issue 1. Third, several items in that same section (e.g., subsections (i), (ii), (iv),

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[47] To be clear, the Commission does not find that either party invoked the change of law process in their ICA in this instance. As we stated in Section II of this Decision, the ALJ ruled that this arbitration was compelled by TRO ¶ 703.

(xv)) would accommodate general, and future, regulatory directives from any source. These improperly bypass the ICA's change-of-law processes (see below). Fourth, SBC's lists contain items for which state law requirements have not been taken into account (e.g., subsections (i) & (ii) (dark fiber), (iv) and (viii)). Fifth, we have not determined that SBC is free of unbundling obligations regarding certain enumerated items in Section 1.3.1.1 (e.g., subsections (x), (xi)), or we have attached modifications and conditions that are not reflected in their bare enumeration (e.g., viii).

If the foregoing deficiencies are corrected, however, SBC's proposed Sections 1.3.1.1 and 1.3.1.2 can be included in the ICA (presumably as a single, combined section). The Commission has no preference between SBC's preferred term, "declassified," and XO's preferred term,"non-conforming." SBC's proposed Section 1.3.1.3, which is predicated on the concept of "lawful UNEs, should not be included in the ICA.

Regarding *future* identification of elements that must be "declassified" under rules and principles established in the TRO (as modified by USTA II), SBC has not demonstrated that the parties' existing change-of-law provisions are inadequate. SBC emphasizes that the TRO injected considerable granularity into the impairment analysis, so that unbundling may be discontinued for specific elements on specific routes. SBC Init. Br. at 45-46. SBC also stresses that, first, the FCC was responding to the finding in USTA I that the FCC's impairment analysis had been insufficiently granular, and, second, that USTA II did not "disturb" the FCC's revised impairment analysis in the TRO. *Id*. at 44. SBC concludes that the parties' existing change-of-law mechanism is not suitable for addressing the volume and frequency of "declassifications" that are likely to flow from the TRO's more granular analysis. *Id*., at 45-46.

However, SBC's assessment of the TRO impairment standards, and of the impact of USTA II on them, is too literal, too narrow and, in this context, self-serving. It is too literal because, although the Court of Appeals did not remand the impairment standard, it did characterize an "important" element of that standard as "vague almost to the point of being empty," and noted that "the issue of whether the standard is too open ended is likely to arise again." USTA II, 359 F.3d at 572. Consequently, while the impairment standard remains viable in its present form (at least until the release of interim rules by the FCC), its usefulness in SBC's predictions regarding the future volume and frequency of "declassifications" is placed in doubt.

More substantively, in the TRO, the FCC found *national* impairment for certain UNEs. That finding could only be overcome with an evidentiary presentation related to specific criteria provided by the FCC. There was no guarantee that any particular ILEC would prove up any non-impairment. Moreover, the FCC established the process for proving non-impairment with the expectation of significant state commission involvement. Since USTA II has overturned that process, it cannot be assumed that the FCC would have included the same level of granularity in its impairment analysis, or that the granularity it would have required - without the findings of the state commissions - would have produced the volume and frequency of "declassifications"

SBC predicts. Accordingly, we do not adopt SBC's selective assessment of the impact of USTA II on the TRO, which treats the remanded elements of the TRO as if they were dissociated from, rather than integrated with, other elements that were not expressly reversed by the court. It follows that we do not agree that the TRO is likely to generate a future quantum of legal changes that will overwhelm the parties' change-of-law processes[48].

Additionally, neither SBC nor any other participant in this proceeding created an evidentiary record that would enable us to compare the volume, frequency and pace of "declassifications" before the TRO with what SBC predicts will occur under the modified TRO. Thus, an appraisal of the sufficiency of the present ICA change-of-law provisions would be based, to an uncomfortable extent, on guesswork.

For the foregoing reasons, we cannot conclude that the parties' present change-of-law provisions would be inadequate for identifying and incorporating "declassified" UNEs (either the UNEs expressly "declassified" in the TRO or UNEs "declassified" in the future pursuant to the principles of the modified TRO) into the parties' ICA. It follows that future disputes regarding the identification of network elements that must be unbundled (or sold at TELRIC prices) per the modified TRO should be subject to existing ICA change-of-law and dispute resolution provisions. It also follows that the amended ICA should reflect the modified TRO's explicit identification of those network elements that must, or need not, be unbundled[49]. However, any such elements that must be unbundled pursuant to presently valid state law or order should not be exempted from unbundling in the ICA.

SBC-2 and SBC/X0-2C. Once it has been determined that the unbundling obligation associated with a network element has been altered (either because the TRO has already altered that status or because the principles of the modified TRO so require in the future), practical steps must be taken by the parties to effectuate that change. Those practical measures are not a change of law, but a consequence of such change. That is, a change of law re-determines what must be unbundled; practical measures implement that change.

Each arbitrating party understandably proposes an implementation process that favors its own business case. Neither is satisfactory. XO would handle implementation on a "project basis," with resort to dispute resolution if the parties cannot agree, in a period of no less than 90 days, on implementation. Given our conclusion, above, that the identification of network elements with altered unbundling obligations will be subject to ICA change-of-law and dispute resolution provisions, the Commission sees no

[48] Similarly, the Status Quo Order also suggests that the parties will not be inundated by frequent and piecemeal changes in unbundling requirements. That order posits the withdrawal of certain unbundling duties on a *national* basis, presumably supported by a blanket non-impairment finding.

[49] For example, the TRO expressly finds that OCn loops and OCn dedicated transport need not be unbundled. That finding should be incorporated into the ICA, through the amendment that is the subject of this arbitration.

reason to delay commencement of implementation for at least three months, with the likelihood of additional dispute resolution concerning implementation itself.

SBC's proposal is flawed in two respects. First, its proposed 30-day "transition" period is too short to serve the public interest. Irrespective of the impact of change on XO, the Commission's first concern is the welfare of XO's customers. Unless XO seamlessly absorbs the additional costs associated with the loss of unbundling, its customers (depending upon the available options in their agreements with XO) will likely need time to assess the effect of change on their own telecommunications budgets and to confer with XO (and, perhaps, SBC or other providers). Second, SBC's transition procedure is linked to other proposed SBC provisions (discussed above) that allow SBC to make unilateral and inappropriate judgments regarding the content and validity of federal and state laws, orders and regulations.

Accordingly, we will articulate certain conclusions. First, the amended ICA should have a standard procedure for implementing TRO-related changes in unbundling obligations. Second, as previously discussed, any such future changes must be identified through the current change-of-law and dispute resolution procedures in the ICA. Third, if it is determined through those procedures that an unbundling obligation has been changed, no such change can be implemented in less than 60 days after service of written notice by the party demanding implementation (unless otherwise agreed by the parties). Fourth, upon expiration of the 60-day interval (or any shorter interval agreed to by the parties), the party serving such notice may either implement change unilaterally or request a Commission order requiring implementation. Fifth, the "disputed" texts of the arbitrating parties pose dozens of additional issues for resolution. Yet those issues have not been properly framed – or, in most instances, even mentioned - for resolution. The Commission will not resolve disputes that have not been framed as open issues, and cannot do so without briefing by the parties.

3. (a) Does a subloop include "house and riser cable and insider wire?"

(b) When SBC retires copper loops or subloops must it provision an alternative service over any available facility?

(c) Should the ICA include terms and conditions related to the loop "caps" set forth in 47 CFR 51.319(a)(5)(iii)?

(d) Should the pricing appendix contain pricing for declassified subloops?

1. Parties' Positions and Proposals

a). SBC

The parties have several disputes regarding the proper contract language governing access to unbundled loops. However, sub-issue SBC-2a has been settled.

First, the parties disagree regarding network disclosure requirements in the event of certain loop retirements. (Section 3.3.1.5.) In the *TRO*, the FCC promulgated new

rules that require certain disclosures before an ILEC retires copper loops that are replaced with fiber-to-the-home ("FTTH") loops. *TRO*, ¶¶ 281-83. While SBC Illinois' proposed language properly tracks these rules, XO proposes additional language that finds no support in the *TRO* or the FCC's rules. In particular, XO proposes that SBC Illinois be required to "provision an alternative service" before making any retirement. But the FCC's rules, by their plain terms, only require an ILEC to make certain disclosures before effecting such retirements. Similarly, section 251(c)(5) of the Federal Act, upon which the FCC's network disclosure rules are based, only requires public notice of certain network changes. Neither the Act nor the FCC's rules require an ILEC to first make alternative service arrangements before retiring copper loops, as XO proposes.

Second, the parties disagree regarding implementation of the *TRO*'s DS3 loop cap, which provides that a CLEC may obtain a maximum of two DS3 loops at any single customer location. *TRO*, ¶ 324. While XO does not object to reflecting the *TRO*'s DS3 loop cap in the parties' contract, it does oppose some additional language proposed by SBC Illinois that more clearly spells out how that cap would be implemented if the FCC were to require the unbundling of DS3 loops at some point in the future. XO, however, has not explained its objection to this additional language, and SBC Illinois' language is reasonable and appropriate. As the FCC itself recognized, carriers may sometimes need to "negotiate specific terms and conditions necessary to translate our rules into the commercial environment." *TRO*, ¶ 700.

SBC Illinois notes that the FCC's rules requiring the unbundling of high-capacity loops have been vacated. Accordingly, SBC Illinois' language would come into play only if the FCC were to re-institute such an unbundling requirement. Nevertheless, it is reasonable to adopt SBC Illinois' language, because that language clearly defines how the DS3 loop cap would be calculated (by making clear that it applies to each end user customer premises location) and applied in a commercial environment if the FCC were to require DS3 loop unbundling at some point in the future.

Third, XO opposes SBC Illinois' proposal to delete from the parties' pricing schedule the prices for three fiber feeder subloops identified by SBC Illinois. In the *TRO*, the FCC held that ILECs are not required to unbundle fiber feeder subloops. *TRO*, ¶ 253. Thus, SBC Illinois is not required to unbundle the three fiber feeder subloops it identified, and those prices may appropriately be deleted.

b.) <u>XO</u>

(SBC-3b). XO's proposed language, which would require SBC to provision alternate service over any available facility when SBC retires a copper loop or subloop, is consistent with the *TRO*. The *TRO* provides that competitors will continue to have access to loop facilities when copper loop is retired because of the installation of fiber-to-the-home. Specifically Paragraph 281 provides that "[s]uch notification [of retirement of copper loops] will ensure that incumbent and competitive carriers can work together to ensure that competitive LECs *maintain access to loop facilities*." (Emphasis added.) Further, 47 C.F.R. § 52.319(a)(3)(ii)c provides that upon retirement of a copper loop, the

ILEC "shall provide non-discriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the fiber-to-the-home loop on an unbundled basis." XO's proposed language simply ensures that XO will have access to loop facilities consistent with the requirements of the *TRO*.

The TRO also contemplated this Commission's role in evaluating copper loop retirement, stating "that many states have their own requirements related to discontinuance of service, and our rules do not override these requirements." *TRO* at ¶ 284. The threat to access is subject to the state review process, which should "address the concerns…regarding the potential impact of an incumbent LEC retiring its copper loops." *Id.* This analysis must recognize that "the retirement of copper loop plant is a network modification that affects the ability of competitive LECs to provide service." *Id*. at ¶ 281.

(SBC-3c). XO agrees that the ICA should state that SBC is not required to provide more than two DS3 UNE local loops per requesting carrier to any single customer location, consistent with 47 C.F.R. § 51.319(a)(5)(iii) and XO's proposed language acknowledges that SBC has no obligation to provide XO more than two DS3 UNE local loops to any single customer location. However, the additional language SBC adds regarding how it may handle orders that may exceed two DS3 UNE local loops per requesting carrier to any single customer location is not necessary to implement the DS3 loop cap in 47 C.F.R. § 51.319(a)(5)(iii).

(SBC-3d). There is no basis, in light of the FCC's finding that SBC must make subloops available, for SBC to delete the pricing provisions for a wide range subloops. Paragraph 253 of the *TRO* only finds an ILEC should not be required to make feeder plant available as a subloop UNE where (1) the feeder is provided over fiber facilities and (2) where it is not necessary to provide a complete transmission path between the central office and the customer premises when ILECs provide unbundled access to the TDM-based capabilities of hybrid loops. SBC's proposed deletion of subloop pricing is not limited to subloops that meet these conditions. Thus, SBC is attempting to grant itself greater relief than the FCC granted it in the *TRO*.

c.) Staff

(SBC-3a). Staff agrees with SBC that the TRO and its accompanying implementing rules only defined the subloop to include inside wire "owned or controlled" by the SBC.

XO's proposed language, however, appears to posit that the FCC defined inside wire as facilities owned or controlled by SBC. Since the parties appear to be in agreement that a subloop includes inside wire only if SBC owns or controls such facilities, this is a non-issue and, accordingly, the Staff takes no position other than to acknowledge that it concurs with the proposition that a subloop includes inside wire only if SBC *owns or controls* such facilities.

Consequently, the issue remaining is whether House and Riser Cable are included in the FCC's definition of inside wire. As noted above, inside wire is defined as all loop plant owned or controlled by the incumbent LEC at a multiunit customer premises between the minimum point of entry as defined in § 68.105 of this chapter and the point of demarcation of the incumbent LEC's network as defined in § 68.3 of this chapter. Sections 68.105 and 68.3 provide an analysis that is fact specific.

Without the benefit of the specific facts, including the defined parameters of house and riser cable, required to determine whether house and riser cable are included in the FCC's definition of inside wire, the Staff is unable to offer an opinion on this issue.

(SBC-3b). The FCC clearly requires SBC to provide an alternative service when it retires copper loops or subloops. The Staff, accordingly, recommends that the Commission adopt language reflecting the FCC's requirements in 47 C.F.R. § 51.319(a)(3)(ii)(C).

(SBC-3c). This issue appears to the Staff to be a non-issue. The Staff agrees with SBC that XO's proposed language fails to reflect the FCC's cap on unbundling DS3 circuits. XO acknowledges the DS3 cap and also recommends that the ICA should contain language reflecting the DS 3 CAP. See Joint Issues Matrix, at 67. Staff agrees with both parties that the ICA should contain language reflecting the DS3 cap found in 47 C.F.R. § 51.319(A)(3)(iii).

(SBC-3d). Because XO has not taken issue with SBC's proposed language for § 3.10 (HFPL), the Staff takes no position on SBC's proposed language because it does not appear to be an issue in dispute. Staff, however, reserves the right to comment on SBC's proposed language in § 3.10 (HFPL) should XO object to it in XO's Initial Brief.

2. Analysis and Conclusions

SBC-3a. The parties settled this sub-issue during briefing.

SBC-3b. SBC's proposed Section 3.1.3.2.3 literally tracks the FCC's requirement in 47 CFR 51.319(A)(3)(II)(c) and should be included in the parties' ICA. XO's demand for "an alternative service over any available, compatible facility (e.g., copper or fiber)," XO proposed Section 3.3.1.5, exceeds the directives in the TRO and FCC regulations and should be excluded from the ICA.

SBC's briefings suggest that this is also a *timing* dispute[50]. If that is so, the Commission notes that customer welfare is paramount. A compliant voice-grade circuit must be available in a manner that makes the transition from copper to fiber as

[50] "[N]othing in the *TRO* or the FCC's rules requires that an ILEC actually provision alternative service *before*, and as a pre-condition to, a retirement. SBC Illinois is required only to make unbundled access to a voice-grade circuit *available*; the CLEC may or may not wish to actually take advantage of that offer." SBC Reply Br. at 43 (emphasis in original).

seamless to the customer as is technically feasible under current systems and processes. Narrowband service must not be interrupted unless, given current systems and processes, such interruption is necessary to effectuate the transition, or unless the customer requests interruption. Where service interruption is necessary, SBC shall minimize such interruption to the extent practicable.

SBC-3c. XO's principal concern with SBC's treatment of the DS3 loop cap is that SBC would be empowered to unilaterally convert an excess loop request to a special access request, without giving XO notice or an opportunity to "opt out or…challenge the cap assessment." XO Init. Br. at 37. SBC's countervailing concern is that its rights, when XO appears to have exceeded the cap, should be clearly delineated in the ICA. SBC Init. Br. at 53. Both parties' concerns are reasonable and can be accommodated in the amended ICA. Therefore, SBC's proposed Section 3.1.2.2.1 should be modified to provide written or electronic notice to XO, and a fair and specific time interval in which XO can object or select alternative treatment for an excessive DS3 loop request. Objections should be resolved through the ICA dispute resolution mechanism, and the status quo should not be altered pending such resolution.

XO's recommendation to address this issue through "industry discussions," XO Reply Br. at 37-38, is rejected. As we said in relation to XO Issue 4, *this* proceeding was initiated (by XO) for the purpose of incorporating TRO requirements, including the DS3 cap, into the parties' ICA. The Commission perceives no benefit in delaying that process, particularly for something as vague as "industry discussions."[51]

SBC's proposal to clarify the identity of the DS3 loop "customer," in SBC 3.1.2.2.1 is reasonable on its face, and XO does not support its objection to it. It should be included in the amended ICA.

SBC-3d. In the TRO, the FCC states that "the rules we adopt herein do not require [ILECs] to provide unbundled access to their *feeder* loop as stand-alone UNEs, thereby limiting [ILEC] subloop unbundling obligations to their *distribution* plant." TRO ¶ 254 (emphasis added). SBC asserts, without contradiction from XO, that the subject subloops are each part of SBC's feeder plant, not its distribution plant. SBC Init. Br. at 54. Therefore, SBC can delete subloop pricing for the three pertinent loops. However, XO will still have access to SBC's fiber feeder plant "as necessary to provide a complete a transmission path between the central office and the customer premises" under the circumstances set forth in TRO ¶ 253. However, such access does not require that the subloop component be available as a stand-alone UNE, but as part of the complete transmission path described in TRO ¶ 296.

[51] Although XO cautions that, absent industry-wide discussions, SBC is likely to "make system changes and procedures [regarding the DS3 loop cap] that it will apply to all other CLECs," XO BOE at 6, the Commission does not perceive how SBC (or any ILEC) can unilaterally alter existing ICAs or determine the terms of new ICAs.

4. (a) Must SBC provide loop conditioning free of charge?

(b) Is SBC required to provide unbundled access to the packet switched features, functions and capabilities of its hybrid loops?

(c) What terms and conditions should apply to line conditioning?

(d) What terms and conditions should apply to the high frequency portion of a copper loop ("HFPL")?

1. Parties' Positions and Proposals

a). SBC

With respect to hybrid loops, SBC Illinois proposes to precisely track the detailed new rules promulgated by the FCC in the *TRO* regarding hybrid loops. XO's proposed language, on the other hand, states that SBC Illinois shall provide access to hybrid loops on an unbundled basis, and vaguely refers to "applicable law" and section 271. That language is unreasonable, because it fails to specify the parties' rights and obligations with respect to hybrid loops. The purpose of an interconnection agreement is to translate applicable law into the commercial environment, and spell out the parties' respective rights and obligations. SBC Illinois' proposed language does just that, closely following the FCC's hybrid loop rules. Moreover, the Commission should reject XO's attempt to invoke section 271 to require SBC Illinois to provide access to hybrid loops at section 251 rates, terms, and conditions, for the reasons explained above under Issue SBC-1.

With respect to line conditioning, the Commission should approve SBC Illinois' proposed contract language. That language properly implements the FCC's line conditioning rule (FCC Rule 319(a)(1)(iii)(A)), and XO has not explained its objection to SBC Illinois' proposed language.

With respect to access to the HFPL (line sharing), the Commission should adopt SBC Illinois' proposed language. In the *TRO*, the FCC conclusively held that ILECs are not required to unbundle the HFPL, and held that such a requirement would contravene Congress' goals in the Federal Act. *TRO*, ¶¶ 258-63. Thus, the FCC established detailed rules to govern the phase-out of the HFPL. FCC Rule 319(a)(1)(i). Moreover, the D.C. Circuit upheld the FCC's findings and rules in USTA II. Therefore, the parties' contract should be amended to precisely track and implement these new FCC rules, as SBC Illinois' proposed contract language does.

XO's proposed language, on the other hand, falls far short of implementing the *TRO*'s new line sharing rules. For instance, XO would define "grandfathered" line sharing arrangements in a manner different than the definition contained in the FCC's actual rules; would require SBC Illinois to provide the HFPL under section 271, even though the HFPL is not a section 271 checklist item (and even if it were, the Commission lacks jurisdiction over section 271 checklist items, and in any event could not require the provision of a checklist item at section 251 UNE rates, terms, and conditions, as explained above); and suggests that SBC Illinois might be required to

provide the HFPL under state law, even though the FCC (and NARUC and several other state commissions) made clear that any such requirement would be preempted.

Finally, the Commission should not address the additional language that XO inserted into the parties' joint issues matrix that does not relate the any of the issues raised by XO in its arbitration petition or by SBC Illinois in its response to that petition (*e.g.*, language relating to line splitting). Section 252(b)(4)(A) of the Federal Act expressly limits the issues to be considered in this arbitration to "the issues set forth in the petition and in the response," and XO's attempt to introduce new issues is thus contrary to the Act.

b.) <u>XO</u>

(SBC-4a & c). The Parties have settled these sub-issues with the exception of the use of the "lawful" FCC rules. As stated in the context of other issues, SBC improperly attempts to amend the existing Agreement's change of law provision to automatically incorporate SBC's interpretation of future events.

(SBC-4b). XO's proposed language establishes that SBC shall be required to provide nondiscriminatory access to hybrid loops on an unbundled basis, including narrowband and/or broadband transmission capabilities pursuant to *applicable law*, including but not limited to Section 271 of the Act and state law. The *TRO* states that "competitive LECs have [the right] to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers." *TRO* at ¶ 294. In addition, the FCC requires ILEC to provide an entire non-packetized transmission path capable of voice-grade service on a hybrid loop for a requesting carrier to provide narrowband service. *TRO* at ¶ 296. XO's proposed language also identifies applicable law as including, but not limited to Section 271 and Illinois law.

XO shares the goal of the *TRO* to "prohibit incumbent LECs from engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop UNEs" (including hybrid loops); the TRO also labels any ILEC practice that disrupts or degrades access to hybrid loops "prohibited under the section 251(c)(3) duty to provide unbundled access to loops on just, reasonable and nondiscriminatory terms and conditions." *TRO* at ¶ 294. SBC does not propose any language related to hybrid loops.

(SBC-4d). XO's proposed language regarding access to the HFPL is consistent with the *TRO* and should be adopted.

c.) <u>Staff</u>

Although SBC raises a number of sub-issues here, XO, apparently, only takes issue with SBC's proposed language for line conditioning. More specifically, XO objects to SBC's line conditioning charges and its restrictive definition of line conditioning

The Staff agrees with SBC that "[t]he TRO specifically contemplates that an ILEC

may seek compensation for line conditioning." On the other hand, the Staff also agrees with XO that line conditioning is a routine network modification and line conditioning is an intrinsic part of the local loop.

It appears to the Staff, that network modifications that are only provided upon request, such as line conditioning, are network modifications for which costs would not already have been recovered by SBC in its Local Loop UNE charges. Staff, accordingly, recommends that the Commission adopt SBC's proposed language for § 3.2.1 regarding line conditioning costs.

Regarding SBC's definition of line conditioning, the Staff agrees with XO that SBC's definition is overly restrictive, based upon the FCC's definition of line conditioning.

SBC's proposed language is overly restrictive in that it limits line conditioning to removing "bridge taps, load coils, and/or repeaters." Clearly, the FCC's definition of line conditioning in FCC Rule 51.319(a)(1)(iii)(A) is not as restrictive and its list of devices that must be removed in line conditioning goes beyond SBC's proposed language and, moreover, specifically states that such devices are not limited to the devices listed.

Staff, accordingly, recommends that the Commission adopt ICA language that properly reflects the FCC's definition of line conditioning in 47 C.F.R. § 51.319(a)(1)(iii)(A). In Staff's opinion, XO's proposed language regarding line conditioning more appropriately reflects the FCC's definition of line conditioning and should, thus, be adopted by the Commission.

XO also objects to alleged limitations that SBC's proposed language imposes on *when* it will provide line conditioning. SBC's proposed language states that it will provide line conditioning "upon CLEC's request." The Staff is hard-pressed to understand why XO would object to SBC providing line conditioning when XO requests it. The Staff, nonetheless, reserves its right to address any objection XO may have regarding when SBC will provide line conditioning if XO more fully articulates its position in its Initial Brief.

Likewise, Staff reserves the right to comment on SBC's proposed language at issue in SBC Issue No. 5 should XO articulate objections in its Initial Brief that are not contained in its preliminary position.

2. Analysis and Conclusions

SBC-4a & c. The arbitrating parties appear to have settled these sub-issues.

The Commission notes that SBC-4c was improperly framed as an open issue. Furthermore, to the extent that the parties belatedly attempted to modify the many discrete disputes residing under this over-broad question, those disputes were presented as dueling texts, not as properly framed open issues. Moreover, SBC avers

that we *cannot* address issues posed outside of the Petition and Response, SBC Init. Br. at 65, and we agree. Therefore, even if those disputes have not been settled, the Commission will not address them.

SBC-4b. SBC's proposed text would essentially incorporate the language of 47 CFR 51.319(a)(2) into the ICA. Despite XO's claim to the contrary, XO Reply Br. at 41, that text includes the degree of access to broadband capabilities required by the FCC. Such language is unobjectionable and the Commission approves it.

The parties' real disagreement concerns XO's demand (in XO proposed Section 3.1.4.1) for access to the broadband transmission capabilities of hybrid loops to the extent such access is required under Section 271 of the Federal Act or under state law. SBC argues, first, that this Commission lacks authority to address the terms and conditions of access to Section 271 UNEs and, second, even if we do have such authority, the modified TRO precludes the conclusion that 271 UNEs must be offered at TELRIC prices. SBC Reply Br. at 47.

Regarding our authority, SBC contends that "the states only have authority under [S]ection 252 to arbitrate issues arising under [S]ection 251," and that issues concerning Section 271 do not arise under Section 251. SBC BOE at 9. SBC's premises are incorrect. While subsection 251(c)(1) establishes an ILEC *duty* to negotiate the items enumerated in subsection 251(b), subsection 252(a)(1) empowers the parties to "negotiate and enter into a binding contract… *without regard to the standards set forth in subsections (b) and (c) of section 251*." (Emphasis added.) Thus, although SBC *had to* negotiate the subsection 251(b) items if XO so requested, the parties *could* negotiate anything pertaining to their interconnection, including the impact of the TRO on obligations arising under Section 271.

The foregoing analysis is entirely congruent with <u>Coserv Limited Liabililty Corp. v. Southwestern Bell Telephone Co.</u>, 350 F. 2d 482 (5th Cir. 2003). There, the court stated:

> An ILEC is *required* by the [Federal] Act to negotiate about those duties listed in § 251(b) and (c). During negotiations, however, the parties are free to make any agreement they want without regard to the requirements of § 251(b) and (c). To that extent, the parties are free to include interconnection issues that are not listed in § 251(b) and (c) in their negotiations….
>
> ***
>
> …That is, Congress contemplated that voluntary negotiations might include issues other than those listed in 251(b) and (c) and still provided that *any issue* left open after unsuccessful negotiation would be subject to arbitration by the [state commission].

350 F. 3d 487 (emphasis in original).

SBC also emphasizes that subsection 252(c)(1) directs us to resolve open arbitration issues in a manner that "meet[s] the requirements of section 251." SBC BOE at 8. In SBC's view, this provision precludes us from arbitrating (or even approving) "obligations other than those set forth in section 251." *Id.*, at 9. The principles from Coserv refute this argument. The "requirements of section 251" mandate compliance with "the requirements…of section 252," including the requirement that we assess an ICA that has been negotiated, as subsection 252(a)(1) states, "without regard to the standards set forth in subsections (b) and (c) of subsection 251."

Furthermore, with specific regard to unbundled access (here, access to hybrid loops), subsection 251(c)(3) requires an ILEC to provide such access on rates, terms and conditions "that are just, reasonable, and nondiscriminatory *in accordance with the terms of the agreement* **and** the requirements of this section and section 252." (Emphasis added.) Thus, Section 251 allows incorporation, into the ICA, of standards other than those explicitly set forth in Sections 251 and 252. Within the Federal Act, the "just and reasonable" standard is imposed by Section 201, while the nondiscrimination standard derives from Section 202. These two sections apply to the rates, terms and conditions for Section 271 UNEs.

Moreover, SBC's objection to the presence of 271 UNEs in this arbitration appears newly minted. In Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission, 359 F.3d 493 (7th Cir. 2004), cited by SBC, the court observed that SBC itself had negotiated a Section 271 performance assurance plan "*as an amendment to its [ICA]*." 359 F.3d at 496 (emphasis added). We note that the court's holding had nothing to do with that plan, however. Rather, the court overturned a separate, "stand-alone" order establishing a different performance plan created by the IURC, which was available to any CLEC outside the ICA process. Significantly, the court did do on the ground that the IURC had thus "interfere[d] with…the process for [ICAs] for local service under Sections 251 and 252." *Id.*, 497. The court thus concluded that a Section 271 performance plan was properly addressed in the Section 252 ICA negotiation and arbitration process (as well as in a Section 271 application for long distance authority).

Additionally, the nature and extent of the "authority" we are exerting over Section 271 UNEs must not be exaggerated here. The only purpose of this arbitration is to incorporate into the ICA, at the FCC's direction, federal requirements set forth in the modified TRO. To resolve the parties' open issues that fall within that limited scope, we are, *inter alia*, directing the parties to incorporate in their ICA *the FCC's* substantive provisions pertaining to Section 271 UNEs. We are not altering those FCC rulings, nor are we attempting to define the extent to which Section 271 governs the parties' conduct. We are simply saying, in effect, "incorporate what the FCC said about 271 UNEs into your ICA, and it will have whatever effect the FCC said it will have." Indeed, if we permitted the parties to ignore the FCC's directives regarding 271 UNEs, *then* we would be contravening both the FCC and the Federal Act. Moreover (and in addition to

the Sections 251 and 252 authority discussed above), we can impose regulatory requirements under the power reserved to us by Section 261(c) of the Federal Act[52], so long as they are not inconsistent with FCC requirements.

Concerning the substantive content of the FCC's directives regarding Section 271 UNEs, we have already noted the FCC's view that Section 271 does contain unbundling requirements that are independent of Section 251. TRO ¶ 653. As for pricing, XO's proposed text does not request UNE access at TELRIC prices. Thus, XO's references to Section 271 and "state law" would give XO no more than whatever those authorities would provide. Since SBC correctly interprets the TRO (e.g., ¶ 656) and USTA II, TELRIC pricing is not accorded to 271 UNEs under federal law.

Therefore, we conclude that XO's references to Section 271 and state law are permissible. However, to prevent over-reaching, and to keep XO's text within the boundaries of this arbitration, we revise XO's proposed Section 3.1.4 as follows: "SBC Illinois shall provide nondiscriminatory access to hybrid loops on an unbundled basis, including narrowband and/or broadband transmission capabilities, to the extent required by 47 CFR 51.319(A)(2), Section 271 of the Act and state law."

SBC-4d. For the most part, SBC's proposed text pertaining to XO's access to the HFPL (also referred to as "line sharing") accurately mirrors the FCC's mandates in the TRO and in 47 CFR 51.319(1)(i). To that extent, it should be included in the amended ICA. However, we agree with XO that SBC proposed Section 3.10.1.2 alters the terms of subsection 47 CFR 51.319(1)(i)(A). That subsection refers to disconnection *by the customer*, not to the broader category of disconnection *of the service* (xDSL). Consequently, SBC's text should be revised to more accurately track 47 CFR 51.319(1)(i)(A). XO also appropriately complains that SBC's text automatically incorporates changes of law. Such changes should be specifically incorporated into the ICA through its existing change-of-law provisions and SBC's text must be revised accordingly.

On the other hand, the Commission agrees with SBC that XO's proposed Section 1.19.1.4 contains an "intent" provision that is not supported by the TRO, and is, in our view, unworkable. XO's text is therefore rejected, and the language in SBC proposed Section 3.10.1.1 should be placed in the ICA instead.

As for XO's contention that the ICA should reflect line-sharing obligations under Section 271 and state law, the Commission notes that the HFPL is not a 271 checklist item. SBC Init. Br. at 61; Staff Reply Br. at 27. Patently, no reference to Section 271 obligations belongs in the ICA. Regarding state law, Staff explains that:

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[52] "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 of the [FCC's] regulations to implement this part." 47 USC 261(c).

> Unlike hybrid loops and dark fiber, the Commission did not implement a state law requirement that SBC provide HFPL under mandatory statutory language found in the PUA, but, rather, the Commission exercised its prerogative authority under the discretionary language found in Section 13-506.6 of the PUA, which exercise of authority was then consistent with existing federal law. The Commission, moreover, re-opened ICC Docket No. 00-0393 because subsequent to the FCC issuing the TRO "changes to the federal scheme indicates several areas which implicate the need for a reapplication of Illinois and federal law to the issues addressed by this Commission in earlier orders in this docket."

Staff Reply Br. at 27.

However, no new final order has yet been issued in Docket 00-0093. Nor has our authority over the HFPL been preempted by the FCC pursuant to Section 253(d) of the Federal Act. Therefore, reference to state line sharing obligations can be placed in the amended ICA (although, depending on the final outcome of Docket 00-0093, XO may derive little benefit from that reference).

5. (a) What are the appropriate definitions of dark fiber loop and dark fiber transport?

(b) What terms and conditions should apply to SBC's provision of dark fiber loop and dark fiber transport?

1. Parties' Positions and Proposals

a). SBC

SBC Illinois' proposed language properly reflects the scope of SBC Illinois' obligation to provide unbundled dark fiber. In particular, SBC Illinois is required to provide unbundled dark fiber only where dark fiber is lawfully a UNE under section 251 of the Act. XO's proposed language, on the other hand, would unlawfully require SBC Illinois to provide unbundled dark fiber whether it was lawfully a UNE or not. (Section 3.5.3.1.) XO's proposed language must be rejected, and SBC Illinois' adopted, for the same reasons discussed above under Issue SBC-1.

The FCC's rules requiring the unbundling of high-capacity loops and dedicated transport (including dark fiber) have been vacated. Accordingly, SBC Illinois' language would come into play only if the FCC were to re-institute such unbundling requirements. Nevertheless, it is reasonable to adopt SBC Illinois' proposed language, because that language would most appropriately define SBC Illinois' obligations should the FCC require the unbundling of dark fiber in the future, while XO's language would not.

Additionally, we note that the transitional unbundling and pricing requirements apply only to a CLEC's "embedded customer base" and not to new customers. *Id*. Therefore, the law applicable to new customers may change before the law applicable to existing customers, and that change could trigger the ICA change-of-law provisions.

In the Post-Transition Period, the FCC's final rules will determine which UNEs must be unbundled and establish the terms and conditions for unbundling. "The specific process by which those rules shall take effect will be governed by each [ILEC's ICAs] and the applicable state commission's processes." *Id*. Presumably, if the substantive provisions of the ICA are inconsistent with the FCC's final rules, ICA change-of-law processes will apply.

VI. ARBITRATION STANDARDS

Under subsection 252(c) of the Federal Act, the Commission is required to resolve open issues, and impose conditions upon the parties, in a manner that comports with three standards. The Commission holds that the analysis in this arbitration decision satisfies that requirement.

First, subsection 252(c)(1) directs the state commissions to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." In this arbitration, the Commission has directed the parties to include provisions in their interconnection agreement that fully comport with Section 251 requirements and FCC regulations.

Second, subsection 252(c)(2) requires that we "establish any rates for interconnection, services or network elements according to subsection [252(d)]." Here, most of the pertinent rates were already established by the parties through mutual agreement. Insofar as the Commission's resolution of open issues will affect those or other rates in the parties' interconnection agreement, we require, and expect the parties to establish, rates that are in accord with subsection 252(d) of the Federal Act.

Third, pursuant to subsection 252(c)(3), the Commission must "provide a schedule for implementation of the terms and conditions by the parties to the agreement." Therefore, the Commission directs that the parties file, within 25 calendar days of the date of service of this arbitration decision, their complete interconnection agreement for Commission approval pursuant to subsection 252(e) of the Federal Act.

By Order of the Commission this 28th day of October, 2004.

(SIGNED) EDWARD C. HURLEY

Chairman

EXHIBIT D

Doing Business Products & Services Systems & Measures Resource Library

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Verizon Wholesale \ Resource Library \ Industry Letters

Re: Network Change - MD Central Office Replacement and UNE Switching Availability

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Merger Conditions

CLEC Support

December 27, 2004

Subject: Network Change - MD Central Office Replacement and UNE Switching Availability

This is to inform you of a Verizon end office replacement project in the state of Maryland, which will require you to perform certain work as described below.

Network Changes

The project will replace the existing Gaithersburg Class 5 Lucent 5ESS central office switch with a Nortel Succession packet switch. The switch replacement will be conducted in two phases; information in this letter addresses phase 1. With phase one, all customers served from the North and East outside plant routes will be disconnected from the circuit switch and placed on the packet switch. This will require that facilities meeting the demands of these customers be rehomed or disconnected, while maintaining the necessary facility requirements to the existing switch to accommodate the customers being left there during phase 1. The existing means of interconnection at Gaithersburg will be unchanged.

This notice should provide you all of the information necessary to build direct end office trunks to the new class 5 packet switch trunk gateway. The following details will allow you to submit ASR's in a timely and accurate manner:

General Information

Existing Central Office - Gaithersburg, Maryland: GTBGMDGBDS0
New Central Office - Gaithersburg, Maryland: GTBGMDGBPS0
New Central Office Point Code - Gaithersburg, Maryland: 246193137
Timeframe for ASR's to be submitted for new CLLI code: May 20, 2005
Due dates for trunks to be established on new CLLI code: July 1, 2005
ASRs should carry a project id of "GBPS0-TRUNKS" in the ASR "PROJECT" field.

Trunk Rearrangements

ASRs to disconnect and reestablish service between the existing and new Gaithersburg, Maryland Class 5 Central Office entities listed above should be related via the RPON (Related Purchase Order Number) field on the ASR (i.e., trunk order to trunk order and facility order to facility order).

ASRs should carry a project id of "GBPS0-TRUNKS" in the ASR "PROJECT" field.

SS7 Impacts

If SS7 service arrangements are provided to your company via another telecommunications provider, you must contact that provider and make arrangements for their code administrator to update the Local Exchange Routing Guide (LERG). This is a critical step to follow to ensure that your traffic will not be misrouted nor interrupted. Verizon will not make these arrangements on your company's behalf.

Unbundled Switching

In its Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, and 98-147, FCC 03-36, 18 FCC Rcd 16978, released on August 21, 2003 (the "Triennial Review Order"), the Federal Communications Commission promulgated rules and regulations pertaining to the availability of unbundled network elements pursuant to Section 251(c)(3) of the Communications Act of 1934 (the "Act"). Those rules and regulations, together with the other relevant provisions of the Triennial Review Order, took effect on October 2, 2003.

Under the rules adopted in the Triennial Review Order, as under prior FCC rules, Verizon is not required to provide unbundled packet switching. Additionally, Verizon is not required to provide unbundled shared transport where there is no unbundled switching requirement. The FCC's rules and regulations pertaining to unbundled packet switching, and the related provisions of the Triennial Review Order, were affirmed by the U.S. Court of Appeals for the D.C. Circuit on March 2, 2004.

Accordingly, Verizon is hereby providing notice that it will not accept new orders for

unbundled packet switching at the Gaithersburg, Maryland site (North and East routes) in accordance with the provisions of the Triennial Review Order beginning June 20, 2005.

If you have unbundled local circuit switching arrangements at Gaithersburg, Maryland within the impacted routes, you must submit LSRs no later than June 20, 2005 to establish alternative service arrangements, such as one of the many available resale arrangements offered commercially by Verizon. Verizon will provide you with further information in a subsequent letter regarding the impacted UNE-P's in order for you to develop the required LSRs. If you take no action before the time of the switch conversion, your current unbundled switch arrangements will be converted to resold voice service at the time those arrangements are migrated to the packet switch. The migration is scheduled to begin on July 1, 2005. If you prefer not to convert to an alternate arrangement you may submit orders no later than June 20, 2005 to terminate any unbundled local circuit switching arrangements through existing disconnect processes.

If you do not have resale terms in place with Verizon you must negotiate those terms prior to the switch conversion. Please contact your Account Manager to begin the negotiation process.

Any UNE-P dependent line splitting arrangements from the above mentioned location will not be affected.

Any questions regarding this correspondence should be directed to your Account Manager.

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EXHIBIT E

Product Brief

Nortel Networks

Voice over IP Solutions
Succession Communication Server 2000

At the heart of the next-generation packet network lies the communication server, managing calls, controlling access and trunking gateways, delivering services, and functioning as the centerpiece of an open, standards-based network.

The Succession* Communication Server 2000 delivers all of these capabilities on a proven carrier-grade platform that provides the comprehensive services, quality, availability, and resiliency carriers and subscribers have always demanded from their networks.

The Succession Communication Server 2000 is a *Superclass* softswitch, delivering market-differentiating local, long distance, and tandem services, while functioning as the intelligent core of a simplified, multiservice network that reduces both capital and operating expenses. And, most critically, it enables service providers to gracefully and economically manage the transformation from circuit to packet networks while protecting and extending their current investments.

In the highly competitive communications industry, service providers transitioning to packet networks need a softswitch platform that leverages their current investments, provides the full Class 5 and Class 4 feature set, and addresses critical regulatory requirements, such as Lawful Intercept and Emergency services.

The Nortel Networks Succession Communication Server 2000—a *Superclass* softswitch—provides all this and delivers the differentiating service set needed in today's market to attract new subscribers. Supporting regulatory, local, long distance, and tandem services on a single platform, the Succession Communication Server 2000 is the ideal platform for transitioning to packet.

NORTEL NETWORKS™

Maintain and build revenue-generating opportunities

Whether you plan to build new or transition your existing equipment, the Succession Communication Server 2000 delivers a flexible, high-performance network. Supporting a world-class feature set, the Succession Communication Server 2000 enables service providers to maintain their existing revenue stream while migrating to packet.

Flexible software options, including Succession Centrex/Centrex IP, Succession Primary Voice, and Succession Voice over IP Virtual Private Network (VPN), enable you to tailor your service portfolio to specific end-user market segments:

Succession Centrex/Centrex IP

Succession Centrex/Centrex IP provides cost-effective Voice over IP (VoIP) services for large and small businesses. Enterprise employees can access 200+ voice services, either through the Enterprise LAN or remotely via the Internet.

Succession Primary Voice

Succession Primary Voice supports a full range of CLASS services, offering revenue-generating opportunities and full regulatory compliance. Ideal for existing service providers and new market entry, Succession Primary Voice delivers a packet-enabled, feature-rich offering that presents a significant competitive advantage.

Succession Voice over IP Virtual Private Network (VPN)

Making these services available across your entire enterprise, Succession Voice over IP VPN (Virtual Private Network) delivers revenue-generating opportunities, carrier-hosted voice networking, and cost-effective converged access for traditional PBX and H.323 multi-vendor IP PBX networks. Succession Voice over IP VPN service also brings headquarters, branch offices, remote sites, and even telecommuters together onto a single dial plan and simplifies service management.

In addition, you can also deploy the Nortel Networks Multimedia Communication Server 5200 alongside the Succession Communication Server 2000 to enable SIP-based enhanced services that will allow you to differentiate your service offering with multimedia and productivity-enhancing services such as Multimedia Business Services, Broadband Multimedia Services, and Personal Communication Services. These services open a new world of revenue possibilities and provide a sustained competitive advantage.

Long Distance solutions

With the Succession Communication Server 2000 at the center of your packet-based long distance solution, today's investments become part of your next-generation network. And, you benefit from our extensive set of trunk-based services, such as routing, translations, Primary Rate Interface (PRI), and equal access.

By moving to packet, you immediately gain the operational benefits of packet-based networking—including simplified trunk engineering, node reduction, and equipment elimination.

Local solutions

In addition to its trunking advantages, the Succession Communication Server 2000 enables you to take a giant step in converting your current access investment to packet.

The Succession Communication Server 2000 delivers a rich suite of world-class DMS features, including Succession Primary Voice, Succession Centrex/Centrex IP, and Succession Voice over IP VPN services. These services can help pay for your network build-out and can finance your future growth.

This investment will allow you to address new markets with new packet access solutions such as IP phones and cable access, while bringing forward our market-leading portfolio of line-side services that drive today's revenue streams. In addition, the current installed base of TDM packet access devices—such as GR-303 and V5.2 remotes—continues to be supported.

Simplified service delivery

The Succession Communication Server 2000 provides flexible, distributed call and service control across a packet network over an IP or ATM backbone. Carriers can evolve their infrastructure gradually from multiple, single-service overlay networks to a single multiservice network that delivers integrated voice and data services.

This simplified, packetized architecture provides two key benefits:

- Reductions in capital, operating, engineering, and planning costs spring directly from increased network and bandwidth efficiency.
- The network's multiservice capability—including the ability to integrate advanced multimedia services using the Multimedia Communication Server 5200—holds the key to customer retention and fast, cost-efficient growth in both local and extended serving areas.

The Multimedia Communication Server 5200 is highly integrated with the Succession Communication Server 2000, enabling you to differentiate your service offering with multimedia and productivity-enhancing services such as Multimedia Business Services, Broadband Multimedia Services, and Personal Communication Services. These services open a new world of revenue possibilities and provide a foundation for a sustained competitive advantage.

Seamless network transformation

The Succession Communication Server 2000 performs all call control processing functions for your network, including translations, routing, SS7 (Signaling System 7) signaling, and centralized service delivery. A single Succession Communication Server 2000 can make next-generation services available to multiple markets for rapid service delivery and greater market reach.

Up-front investment expenses are also limited by allowing cost-effective upgrades of existing XA-Core-based DMS switches to full-featured softswitches.

Multivendor compatible

The Succession Communication Server 2000 adheres to industry-standard protocols, such as H.248, H.323, Media Gateway Control Protocol (MGCP), Network-based Call Signaling (NCS), Session Initiation Protocol (SIP), and Bearer Independent Call Control (BICC) interfaces. Our standards-based architecture promotes compatibility with standards-compliant packet-switching equipment, TDM circuit-switched facilities, operations support systems (OSSs), and billing operations. You leverage the best of your current investments, minimize deployment risks, and position your network for new, revenue-generating service opportunities, while making a smooth transition to packet networking.

Carrier-grade reliability

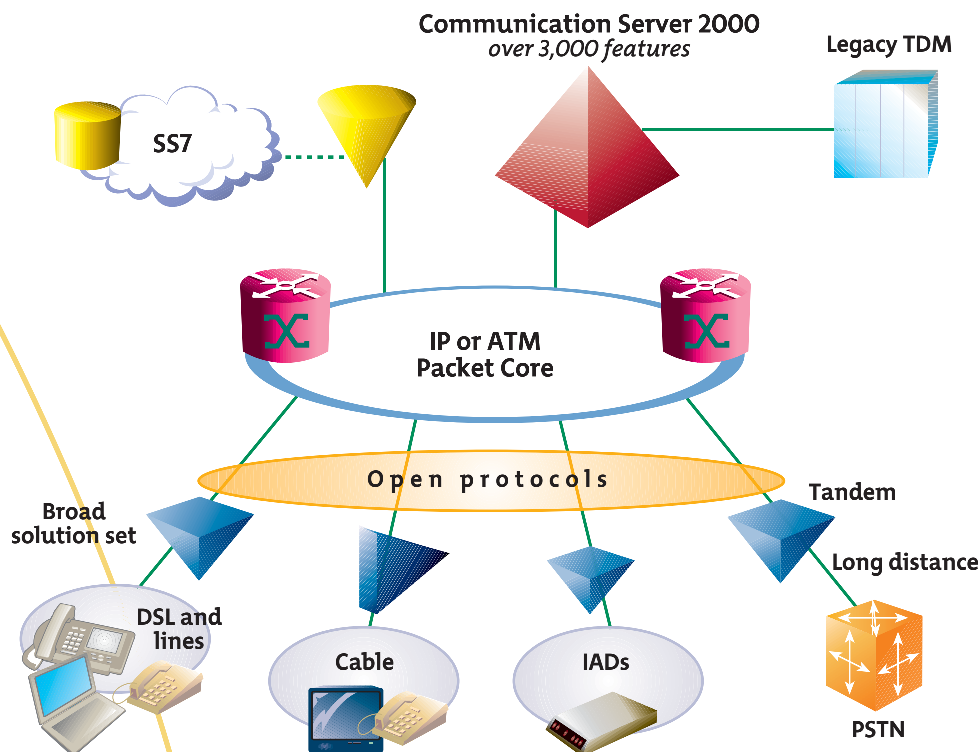
The Succession Communication Server 2000 delivers the ubiquity, quality, and reliability of a traditional TDM telephony network on a next-generation packet network. Built on proven, industry-leading software, it is both carrier-grade and fault-tolerant, with the system robustness associated with DMS SuperNode and XA-Core.

With full 99.999 percent reliability, the Succession Communication Server 2000 enables highly reliable solutions over either an IP or ATM backbone.

Scalable and modular

The Succession Communication Server 2000 distributes call processing and system overhead functions across multiple independent processors. Its modular design enables you to add capacity seamlessly by simply adding circuit packs. Scalable up to 2.0 million Busy Hour Call Attempts (BHCAs), the Succession Communication Server 2000 delivers the capacity needed to support end-office collapse and network optimization.

***Figure 1.** The Succession Communication Server 2000 is a "Superclass" softswitch delivering market-differentiating local, long distance, and tandem services.*



Specifications at a glance

Capacity

Capacity for each Succession Communication Server 2000, across all gateways, will reach:

- Up to 250,000 lines
- Up to 165,000 trunk channels (DS-0s)

Actual capacity is also determined by call processing. The Succession Communication Server 2000 will process up to 2 million BHCA (derived from North American Tandem call model).

Backbone interface

- Redundant 100BaseT Ethernet
- Redundant OC-3/STM-1

Trunk gateway control protocols

- H.248
- H.323
- MGCP
- NCS

Softswitch intercommunication protocols

- SIP and SIP-T
- BICC

Softswitch regulatory compliance

International standards

- European Union-ready CE Mark
- ETS 300 019
- AN/NZS-3548 1995, Class A AS/NZS-3260

North American standards

- FCC part 15, Class A
- UL 1950 / CSA 950
- Telcordia NEBS Level 3 criteria (GR-63-CORE, GR-1089-CORE)

Cable media standards

Achieved PacketCable 1.0 qualification based on the following specifications:

- Network-Based Call Signaling Protocol Specification (NCS) PKT-SP-EC-MGCP-I04-011221
- Dynamic Quality-of-Service Specification (DQoS) PKT-SP-DQOS-I03-020116
- Security Specification PKT-SP-SEC-I05-020116

Management

Features point-and-click GUIs with fault-tolerant Succession-enabled solutions. This suite of Telecommunications Management Network-based (TMN) solutions complies with Telcordia GR-2869, ITU M.3010, and others, providing full FCAPS functionality and more.

In the United States:
Nortel Networks
35 Davis Drive
Research Triangle Park, NC 27709
USA

In Canada:
Nortel Networks
8200 Dixie Road,
Suite 100
Brampton, Ontario L6T 5P6
Canada

In Caribbean and Latin America:
Nortel Networks
1500 Concorde Terrace
Sunrise, FL 33323
USA

In Europe:
Nortel Networks
Maidenhead Office Park
Westacott Way
Maidenhead Berkshire SL6 3QH
UK

In Asia:
Nortel Networks Asia
6/F Cityplaza 4,
Taikooshing,
12 Taikoo Wan Road,
Hong Kong

Nortel Networks is an industry leader and innovator focused on transforming how the world communicates and exchanges information. The company is supplying its service provider and enterprise customers with communications technology and infrastructure to enable value-added IP data, voice and multimedia services spanning Wireless Networks, Wireline Networks, Enterprise Networks, and Optical Networks. As a global company, Nortel Networks does business in more than 150 countries. More information about Nortel Networks can be found on the Web at:

www.nortelnetworks.com

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EXHIBIT F

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on March 16, 2005

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin

CASE 05-C-0203 – Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC'S Triennial Review Order on Remand.

ORDER IMPLEMENTING TRRO CHANGES

(Issued and Effective March 16, 2005)

BY THE COMMISSION:

INTRODUCTION

On February 10, 2005, Verizon New York Inc. (Verizon) filed proposed revisions to its P.S.C. No. 10 – Communications tariff. The changes, designed to implement the Federal Communications Commission's (FCC) Triennial Review Order on Remand (TRRO),[1] allow Verizon to discontinue providing various unbundled network elements and establish transition periods and price structures for existing services. Additionally, these tariff revisions incorporate previous Verizon commitments regarding

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[1] In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 2005 FCC Lexis 912 (released February 4, 2005) (TRRO). This action stems from the D.C. Circuit's March 2, 2004 decision which remanded and vacated several components of the FCC's earlier Triennial Review Order.

unbundled network switching which were made to the Commission in the April 5, 1998 Pre-Filing Statement of Bell Atlantic- New York in Case 97-C-0271 (PFS) in connection with Verizon's application to the FCC for relief from restrictions on providing long distance services. The tariff changes had an effective date of March 12, 2005. Inasmuch as they were not suspended, they are now in effect.

The TRRO addressed several impairment standards: mass market local circuit switching, DS1, DS3, and dark fiber transport, and high-capacity loops. Mass market local switching, and therefore the unbundled network element platform (UNE-P), was eliminated as a network element with no prospective obligation by ILECs to provide new UNE-P arrangements to competitive local exchange carriers (CLECs). In addition, a transition period for migration of CLECs' embedded customer base to new arrangements was established. During the transition period, the price for existing UNE-P lines would rise to TELRIC plus one dollar or the state commission approved rate as of June 16, 2004, plus one dollar, whichever was higher. In addition, the FCC found that CLECs are impaired without unbundled access to DS1 loops unless there are four or more fiber-based collocators and at least 60,000 business lines in the wire center. CLECs are impaired without unbundled access to DS3 loops unless there are four or more fiber-based collocators and at least 38,000 business lines in the wire center. Finally, CLECs are impaired without unbundled access to DS1 transport, except on routes connecting a pair of wire centers that both contain at least four fiber-based collocators or at least 38,000 business lines. The impairment standard for DS3 and dark fiber transport between wire centers was at least three fiber-based collocators or at least 24,000 business access lines. Transition periods were set for CLECs losing unbundled access to DS1 and DS3 and dark fiber transport and loops. The FCC also found no impairment as to dark fiber loops.

In addition to the tariff filing, on February 10, 2005, Verizon posted an industry notice on its website informing CLECs of its planned TRRO implementation and advising CLECs that no orders for new facilities or arrangements delisted as unbundled network elements by the FCC would be processed on or after March 11, 2005. CLECs

without alternative arrangements in place before March 11, 2005 would pay transitional rate increases allowed by the FCC for existing lines for delisted network elements. Verizon also offered an interim UNE-P replacement services agreement and, in its tariff, described below, committed to continue providing UNE-P in Zone 2 in New York pursuant to the PFS.

On February 25, 2005, comments were filed on the revised tariff, and related matters, by a coalition of CLECs: Allegiance of New York; A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation; BridgeCom International, Inc.; Broadview Network, Inc.; Trinsic Communications, Inc.; and XO New York, Inc. (Joint CLECs). A petition for emergency declaratory relief was filed on February 28, 2005 by MCI Metro Access Transmission Services (MCI Petition), which was subsequently withdrawn on March 10, 2005.[2] Comments on the tariff filing were also filed by Conversent Communications of New York, LLC (Conversent) on March 2, 2005. Verizon filed reply comments in support of its tariff on March 8, 2005. Additionally, on March 9, 2005, Covad Communications Company and IDT America Corp. (Covad) filed joint comments in support of the MCI Petition, as did AT&T Communications of New York, Inc., Teleport Communications Group, Inc., TC Systems, Inc., Teleport Communications New York, and ACC Corp. (AT&T).[3] Finally, on March 9, 2005, the Joint CLECs filed a Response to the Verizon Reply.

In this order we review the proposed tariff changes and filed comments. We first consider the tariff changes themselves and conclude that several modifications

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[2] Although MCI withdrew its petition for emergency declaratory relief, Covad and IDT America filed comments in support of that petition on March 9, 2005. Therefore, the issues raised in the MCI Petition will be considered.

[3] The Joint CLECs filed their comments in Case 04-C-0420 and MCI filed its comments in Case 04-C-0314. AT&T and Covad filed in support of the MCI Petition. As all comments deal, in pertinent part, with the tariff filing at issue in this case, the comments have been construed as also being filed in Case 05-C-0203.

are required. Apart from those modifications, we believe the tariff properly implements the TRRO. We also consider issues raised as to whether Verizon's tariff properly implements the PFS, and conclude that it does. Finally, we consider how the tariff changes affect Interconnection Agreements.[4]

TARIFF FILING

Local Switching and UNE-Platform Service

The TRRO allows for the phase-out of local circuit switching as an Unbundled Network Element (UNE) required to be provided by incumbent local exchange carriers. Thus, UNE-Platform service (UNE-P)[5] would no longer be available. Verizon's tariff revisions give CLECs one year (until March 11, 2006) to transition existing UNE-P customers to their own facilities or make other arrangements for local circuit switching. CLECs will pay the state approved Total Element Long Run Incremental Cost (TELRIC) rate as of June 15, 2004 plus one dollar. However, Verizon will continue to provide UNE-P arrangements to CLECs through December 21, 2007 in Zone 2 wire centers pursuant to the PFS.[6] New orders for UNE-P service will be accepted through December 21, 2005 for these wire centers only. After March 11, 2006, the rate for service in Zone 2 wire centers will transition to Verizon's applicable resale rate.

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[4] Although issues were raised regarding state unbundling authority and the effect of the Merger Order, we decline to deal with them in this tariff proceeding designed to implement the TRRO.

[5] UNE-P is a combination of network elements that includes local circuit switching, a switch port, and a subscriber loop.

[6] Zone 2 wire centers are those located in less densely populated areas and are identified in Appendix A to P.S.C. No. 10 – Network Elements tariff. The provision of local circuit switching in these wire centers is still subject to the FCC's four line carve out rule, which allowed Verizon to discontinue switching service for four lines and above (at a single customer location) from certain central offices in New York City.

Pricing proposal for Zone 2

Verizon's tariff provides that the PFS transitional pricing for Zone 2 wire centers will be in effect until March 10, 2006. During the interval of March 11, 2006 to December 21, 2007, the tariff indicates the price will be increased over time to rates equivalent to resale rates. However, no proposal for incremental price increases has been submitted. To ensure sufficient clarity exists for this transition, Verizon is required to file its proposal for price increases to resale rates for the Zone 2 wire centers by April 30, 2005.

Adding features

Joint CLECs object to Verizon's tariff on the grounds that it does not allow CLECs to submit feature change orders for their embedded UNE-P customers. Verizon responds that it does not object to making such changes, for as long as it is required to continue to maintain embedded platform arrangements. Verizon also published this clarification in "TRRO UNE-P Mass Market Discontinued Facilities Frequently Asked Questions" posted on its website. Thus, since the tariff does not preclude feature changes, no tariff revision is required.

Four Line Carve Out

Under the Triennial Review Order (TRO)[7], the FCC permitted ILECs to discontinue providing UNE-P for business customers with four or more lines (four line carve-out customers) or enterprise switching customers (those with local circuit switching

[7] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-146, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶497 (footnotes omitted) (2003) ("TRO"); Errata, 18 FCC Rcd 19020 (2003), vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), cert. denied 125 S.Ct. 313, 316, 345 (2004).

at DS1 and higher capacity levels). Last year, Verizon filed tariff revisions indicating its intent to bill for those services in a limited number of central offices at resale rates via a surcharge on tariffed TELRIC rates. However, Verizon chose not to file the rate for that surcharge for inclusion in its tariffs. Although the Commission is investigating whether the surcharge should be tariffed, it has permitted Verizon to depart from TELRIC pricing.

The Joint CLECs assert that because Verizon has not withdrawn its tariff for UNE-P service at TELRIC rates, enterprise switching and four line carve out customers are included in the embedded base of customers as of the date the TRRO was issued. Thus, the Joint CLECs argue that under the TRRO, CLECs are entitled to ongoing provision of this service until March 2006 at TELRIC plus $1, irrespective of the provisions of the earlier TRO order.

Verizon responds that switching for enterprise and four line carve out customers was eliminated as a UNE by the FCC, the courts and this Commission prior to the effective date of the TRRO. Tariff provisions were allowed to go into effect that removed the obligation to provide this UNE.

The FCC permitted ILECs to discontinue providing local circuit switching to enterprise and four line carve out customers at TELRIC rates. In Case 04-C-0861, the Commission is investigating the process by which Verizon revised its rates for a limited number of enterprise and four line carve out customers by imposing a surcharge without filing the rate in its tariff. While the process that Verizon utilized is under review, that does not require us to frustrate the clear goal of the FCC to remove the obligation to provide such services at TELRIC rates. Thus, the Joint CLECs argument is rejected.

DS1 and DS3 Loops and Transport

With respect to dedicated transport, Verizon's tariff provides that DS1 (24 voice channels per line) dedicated transport will no longer be available as a UNE at TELRIC prices where the connected wire centers (building where Verizon terminates the local wire loop) both have at least four fiber collocators or at least 38,000 business access lines. Additionally, DS3 (672 voice channels per line) and "dark fiber" (fiber that

has been lit by the CLEC using its own electronics, rather than the incumbent) transport will no longer be available as a UNE where the wire centers have at least three fiber collocators or at least 24,000 business lines. CLECs have until March 11, 2006 to transition existing lines from DS1 and DS3 dedicated transport, and until August 11, 2006 to transition from dark fiber transport. During the transition CLECs will pay 115% of the state approved TELRIC rate available on June 15, 2004.

Verizon's tariff provides that DS1 high-capacity local loops will no longer be available as a UNE at TELRIC prices where the local area is served by a wire center having at least 60,000 business lines and at least four fiber collocators. DS3 loops will no longer be available as a UNE where the wire center serving area (the area of a local exchange served by a single wire center) has at least 38,000 business lines and at least four fiber collocators. Dark fiber loops will no longer be available as a UNE, irrespective of the number of lines and collocators in the wire center. CLECs have until March 11, 2006 to transition from DS1 and DS3 UNE loops and until September 11, 2006 to transition from dark fiber UNE loops. During the transition CLECs will have to pay 115% of the state approved TELRIC rate available on June 15, 2004.

Negative construction

The Joint CLECs submitted specific objections to the language in Verizon's tariff revisions with respect to DS1 and DS3 loops and transport. For example, it took issue with language that identified when Verizon was not obligated to provide unbundled access to DS1 loops. The FCC rules were written in the affirmative, thus the CLECs argue that Verizon's tariffs should also be written in the affirmative to "define the rights of the CLEC that continue to obtain access to loops and transport". (Joint CLECs at p. 25.) Because the tariffs are written in the negative, identifying the circumstances under which Verizon is not obligated to provide various elements, the Joint CLECs contend that the CLECs' entitlement is left unclear.

Verizon's tariff identifies its obligations under the TRRO to provide UNEs in light of the applicable restrictions established by the FCC. That Verizon chose to state the obligation in the negative does not prejudice the CLECs. The CLECs failed to indicate any specific obligation for providing DS1 and DS3 loops and transport that the tariff would allow Verizon to evade. Verizon's tariff reasonably reflects the obligations set forth in the TRRO.

Certification of ineligible wire centers

Under the FCC's TRRO, CLECs are required to determine whether they can continue to place orders for loop or transport UNEs at TELRIC. Verizon has filed lists with the FCC that designate which wire centers meet the various criteria identified in the TRRO in order for CLECs to determine which dedicated transport and high –capacity loops will remain eligible as UNEs. Verizon's tariff requires CLECs, prior to submitting a request for UNE services, to review the lists in making their determinations as to whether the wire centers involved meet the applicable criteria for continued UNE eligibility. In the event an order is submitted for a location not eligible for the requested UNE (dedicated transport or high–capacity loop), the tariff provides that Verizon will institute the applicable dispute resolution process.[8] Under most of the interconnection agreements currently in effect, it is anticipated those disputes would be submitted to this Commission for resolution.

Conversent objects because Verizon does not include the list of wire centers for UNEs which are still available in the tariff. They contend that this does not meet the requirements of Public Service Law ' 92, which requires filing rates, charges,

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[8] The TRRO makes clear that an ILEC challenging a UNE request "must provision the UNE and subsequently bring any dispute regarding access to the UNE before a state commission or other appropriate authority". Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Remand 2005 FCC Lexis 912, ¶234 (issued February 4, 2005).

terms, and conditions of the services Verizon provides. Additionally, the Joint CLECs contend that the list of ineligible wire centers that Verizon filed with the FCC must be vetted by the applicable regulatory authority and that Verizon must demonstrate changes in facts prior to amending such lists.

Verizon's response contends that Public Service Law does not preclude references to information available elsewhere and that it was not required to include the list of wire centers not qualifying for UNEs in its tariff. It analogizes to methods and procedures, as well as business rules, which CLECs are able to obtain via Verizon's website.

To ensure adequate notice and process, we will direct Verizon to file the list of exempt wire centers as part of its tariff. Under the TRRO, once a wire center is determined to be a Tier 1 wire center and thus exempt from provision of DS1 service as a UNE, that wire center is not subject to reclassification as a Tier 2 or Tier 3 wire center in order to make DS1 UNEs available at a later date. This permanent classification calls for the review and approval process inherent in tariffing. Also, wire centers can be added to the list or upgraded to a different classification. Without the official records provided through tariffing, effective dates could be questioned. If the affected wire centers are included in the tariff, then there will be specific effective dates that can be used in order to resolve disputes that are allowed under the TRRO. These could result in true-ups that can be done more efficiently with "bright line" effective dates.

Verizon will be required to amend its tariff to include the list of wire centers which no longer qualify for certain UNEs. The supporting documentation also should be provided to Staff for review and analysis.[9] Verizon, of course, can request confidential treatment under the Commission's rule. Any subsequent changes to the list

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[9] Documentation includes but is not limited to the number of business lines under the FCC's ARMIS reports and wire center inspection results.

should also be provided to the Commission via tariff filings with supporting documentation.

The Joint CLECs argue that the revised tariff provides Verizon a conclusive right to determine whether to fill a CLEC order for service, which goes beyond the FCC's order. It contends that the FCC clearly instructed CLECs to perform due diligence before submitting an order for service, but that the CLEC can weigh all evidence including that which contradicts Verizon's list of exempt wire centers.

Verizon contends that the issue is not whether it will process an order submitted by a CLEC, but whether a CLEC can submit an order in bad faith for a wire center that does not meet the objective criteria established in the TRRO. Verizon notes that it has made the lists publicly available and requested that any errors be brought to its attention.

We do not agree with the Joint CLECs' assessment regarding an ILEC's responsibility to provide access to a UNE when the order is submitted by a CLEC. A CLEC will not be considered to have performed its due diligence if it submits an order for a wire center that is on the Commission approved tariff list of exempt wire centers. Thus, we will not require a tariff amendment requiring Verizon to process orders that clearly conflict with the approved tariff list of exempt wire centers.

Backbilling

The Joint CLECs object to the tariff provision that, in the event the applicable dispute resolution process found a CLEC was not entitled to a UNE at a specific location, would allow Verizon to backbill for such service. The CLEC would be billed from the provision date of the service for the difference in price between the UNE rate and the rate that would otherwise be charged for the use of such element. The Joint CLECs contend that the TRRO does not provide for such backbilling and the applicable rate is not set forth in the tariff.

Verizon responds that backbilling would only be implemented after the appropriate dispute resolution process has found the CLEC was not entitled to UNE rates

in the wire center. It notes that the rate would be the applicable charge for a non-UNE equivalent for the transport or loop facility ordered.

The CLECs are correct that the TRRO does not speak to the ability of ILECs to bill for the foregone charges when a CLEC mistakenly requests access to a UNE in an ineligible rate center. However, the TRRO does not prohibit such a provision. Without such backbilling, there is little incentive for a CLEC to refrain from placing orders in an ineligible rate center. It is reasonable for Verizon to assert its right to backbill for services for which it would otherwise be entitled to charge a higher price. However, it is expected that backbilling can be mostly avoided by having Verizon's list of exempt wire centers vetted through the tariff process.

Post-transition arrangements

Verizon's tariff requires CLECs to place orders for conversion or discontinuance of UNEs in sufficient time according to applicable intervals. These intervals are referenced in the Carrier-to-Carrier guidelines that are available to all CLECs, and links to the appropriate information were provided in Verizon's January 6, 2005 compliance filing in Case 97-C-0139.

The CLECs argue that Verizon's tariff burdens CLECs in requiring them to place orders to transition services from UNEs early enough to ensure that orders can be fulfilled by the end of the FCC mandated transition periods. It contends more appropriate language would require Verizon to process orders placed for discontinuance or conversion of UNEs within the transition period and to continue TELRIC rates if Verizon is unable to fully process the order before the end of the applicable transition period. The CLECs also argue for grooming plans and efficient processes for conversions to be developed under interconnection agreements.

Verizon's response notes that its tariff prevents CLECs from extending the TRRO mandated transition periods. It points out that the tariff provides that if an order is placed with the applicable provisioning intervals, the service will not be disconnected.

The FCC set a transition period for all the tasks, both CLEC and ILEC, necessary for an orderly transition to be completed.[10] The TRRO does not allow a carrier placing an order one day before the end of the transition period to continue to get TELRIC pricing for the service because the ILEC was unable to process the order. The grooming plans and efficient processes for conversions under interconnection agreements recommended by the CLECs are not precluded by Verizon's tariff. However, if an order were placed for conversion of the service prior to the end of the transition period, but not within the applicable provisioning interval, requiring Verizon to continue to provide the service at resale rates would seem a reasonable alternative to disconnection. If no order is placed within the transition period, disconnection, as set forth in the tariff, is reasonable. Therefore, Verizon is directed to amend its tariff to allow for conversion to analogous service at the applicable resale rate in the event an order for conversion is placed before the end of the FCC mandated transition period, even if the order cannot be completed within the transition period. This is analogous to the conversion process for interoffice transmission facilities under an earlier Triennial Review Order that Verizon proposed in Case 03-C-1442.

Dark fiber loops

The Joint CLECs submit that Verizon's tariff should be amended to recognize Verizon's obligation to perform network modifications to provision DS1 and DS3 loops to include activating dark fiber strands under the same circumstances that Verizon would perform the work for its customers.

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[10] TRRO,¶¶142-145, 195 -198.

The Commission's February 9, 2005 order in Cases 04-C-0314 and 04-C-0318 directing Verizon to perform routine network modifications is sufficient to address this concern. In that order the Commission refrained from providing an exhaustive list of work that falls within the parameters of routine network modifications. Verizon is already on notice that it must perform such work for CLECs if it does so for its own customers. Thus, the Joint CLECs' contentions are not persuasive.

DS1 transport caps

The Joint CLECs and Conversent contend that Verizon's tariff unfairly restricts the number of DS1 circuits to 10 unbundled DS1 loops. They cite the TRRO provision that indicates that the 10-loop cap is only applicable where the FCC found non-impairment for DS3 transport.[11] Verizon responds that the TRRO and its attached regulation are inconsistent. We read the TRRO as a whole as intending to apply the 10-loop cap only where the FCC found non-impairment for DS3 transport. That is the most logical and reasonable interpretation of the FCC's action. Verizon is directed to modify its tariff accordingly.

Conclusion

The changes Verizon has made to its tariff implement the FCC's designated transition periods and price structures for dedicated transport, high capacity loops, and local circuit switching. In addition, Verizon has incorporated the additional commitments it made to the Commission to provide unbundled local circuit switching in the PFS, which go beyond the requirements of the TRRO. The proposed tariff revisions are reasonable and customers have been notified. Therefore, the tariff revisions listed on Appendix A should continue in effect. Verizon is directed to amend its tariff to allow for conversion of DS1 and DS3 loop and transport services to analogous services at the applicable resale rate in the event an order for conversion is placed before the end of the

[11] TRRO, ¶ 128.

FCC mandated transition period, even if the order cannot be completed within the transition period. Further, Verizon should amend its tariff to include the list of wire centers which no longer qualify for certain UNEs. The supporting documentation also should be provided to Staff for review and analysis. Verizon should amend its tariff concerning the 10-loop cap for DS1 services. Lastly, Verizon is required to file by April 30, 2005 its proposal for price increases to resale rates for the Zone 2 wire centers.

PRE-FILING STATEMENT

Background and Comments

On April 6, 1998, in connection with its application to provide in-region long distance service, Bell Atlantic-New York (hereinafter Verizon), made additional commitments to the Commission, beyond those required by section 271, to ensure competition in New York.[12] With respect to combining network elements, Verizon committed to offer UNE-P for specified duration periods and "until such methods for permitting competitive LECs to recombine elements are demonstrated to the Commission. This commitment, when met, will permit competing carriers to purchase from Bell Atlantic-New York and connect all of the pieces of the network necessary to provide local exchange service to their customers."[13] In order to define methods available to CLECs to combine elements, the Commission instituted a proceeding.[14]

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[12] The major areas addressed were: (1) combining network elements; (2) terms and conditions enabling CLECs to connect their facilities to Verizon's; (3) testing Verizon's Operations Support Services (OSS) for pre-order, ordering, billing, customer migration, order changes, and maintenance and repair performance; and, (4) establishing an incentive system to maintain competition and service performance.

[13] Case 98-C-0690, Combining Unbundled Elements, Order Initiating Proceeding (issued May 6, 1998).

[14] Id.

Joint CLECs maintain that Verizon's Pre-filing Statement (PFS) imposes additional UNE-P provisioning obligations on Verizon in New York despite the TRRO's discontinuation of Verizon's section 251 obligations regarding UNE-P. Joint CLECs assert that the TRRO tariff filing does not reflect those PFS obligations which Joint CLECs maintain consist of providing UNE-P at TELRIC or cost-based rates until December 22, 2005 in Zone 2 and during a 2-year transition at a Commission approved increased price once the Commission finds that two conditions have been met: (1) assembly or a reasonable process enabling CLECs to combine unbundled loops; and, (2) a seamless and ubiquitous hot cut process. According to Joint CLECs, if the Commission found that both conditions had been met before December 22, 2003 in Zone 1 and December 22, 2005 in Zone 2, then the two-year transition for Zone 1 would end on December 22, 2005 and on December 22, 2007 for Zone 2. However, they claim the assembly and hot cut pre-transition conditions have not been met and, therefore, Verizon must continue to provide UNE-P at cost-based TELRIC rates in New York pursuant to the terms of the PFS.

In addition, Joint CLECs contend that the PFS requires Verizon to accept orders for new UNE-P lines after March 11, 2005 and until the two-year transition has ended. The TELRIC plus $1 dollar tariffed rate violates the terms of the PFS, according Joint CLECs, because it is not a Commission approved transitional rate.

The MCI Petition states that irreparable harm will occur if new UNE-P orders are not provisioned after March 10, 2005, and that the PFS requires Verizon to provide UNE-P in New York regardless of Verizon's federal obligations. The MCI Petition asserts that Verizon has not met the assembly condition, and therefore, the two-year transition has not begun. The MCI Petition further asserts that this failure was acknowledged by the Commission in Case 98-C-0690 when the Commission found "that only in conjunction with the continued provision of UNE combinations by Verizon pursuant to the Pre-filing Statement did Verizon provide recombination methods sufficient to support foreseeable competitive demand."

Verizon maintains that its TRRO tariff filing regarding PFS terms and rates is consistent with its PFS obligations. Verizon, the Joint CLECs and MCI agree that the PFS duration period for Zone 1 ended on December 21, 2003 and will end December 21, 2005 for Zone 2. However, Verizon contends that the transition period for each zone began automatically after the duration period ended, while Joint CLECs state that the beginning of the PFS transition period is contingent upon a Commission determination that two preconditions, assembly and hot cuts, have been fulfilled. As authority for a transition automatic start, Verizon cites a Commission Notice Requesting Comments in Case 04-C-0420 which describes Verizon's continuing obligation to provide UNE-P beyond the duration period: "[a]t the end of the duration period Verizon committed to continue the availability of the platform for an additional two years, albeit at a price that would increase to substantially the cost of resold lines."

Verizon asserts that no new customers may be added once the duration period has ended, that the PFS silence regarding new platform obligations, combined with fulfillment of the hot cut and assembly conditions, precludes any interpretation except that the transition period was intended to provide time for CLECs to find alternative arrangements for existing UNE-P customers.

As to meeting the PFS assembly and hot cut conditions, Verizon maintains that it has met both conditions and that Commission certification of that satisfaction, effected by a formal approval process, is not required by the PFS. According to Verizon, it has amply demonstrated the performance of both conditions to the Commission's satisfaction.

The price for new and existing UNE-P arrangements in Zone 2 is set at TELRIC plus one dollar during the remainder of that PFS duration period. Verizon states this FCC transition price is consistent with PFS obligations because the PFS requires UNE rates set by the Commission in accordance with federal law. According to Verizon, TELRIC plus one dollar is the price for UNE-P after March 11, 2005 until March 11, 2006.

Compliance With Assembly Condition

In Opinion 98-18,[15] the Commission examined Verizon's Pre-filing Statement combination obligations. The Commission concluded that "[a]fter exhaustive analysis of the strengths and shortcomings of these options [referring to methods CLECs could use to recombine elements themselves], consideration of competitors' proposals, and collaboration, we are requiring the provision of every technically feasible method available today. These methods, with certain modifications, are sufficient to support foreseeable competitive demand in a reasonable and non-discriminatory manner, in conjunction with its provision of element combinations pursuant to the Pre-Filing."[16] Verizon subsequently implemented its Assembly Products in tariffs, which were approved. Opinion No. 98-18 and Verizon's Assembly Products tariff were designed to permit CLECs to assemble or combine a Verizon loop and Verizon port (i.e., switch). Although the Commission's finding in Opinion No. 98-18 recognized that the assembly options would be offered in conjunction with the UNE platform, we find no reason to conclude that Verizon's assembly offerings would not continue to enable carriers to combine the Verizon link and port themselves. We also note the availability of commercial agreements for UNE-P replacement services for new UNE-P customers.[17]

In their March 9 Response, the Joint CLECs claim that Verizon has no functioning method that enable CLECs to combine a Verizon loop with a Verizon port as required by the PFS. The Joint CLECs claim that Verizon's assembly product focuses on combining a Verizon loop with a CLEC switch, not a Verizon switch. Such allegations

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[15] Opinion No. 98-18, Opinion and Order Concerning Methods for Network Element Recombination (issued November 23, 1998).

[16] Id. at 3.

[17] For example, see MCI's March 10, 2005 letter withdrawing its Petition for Emergency Declaratory Relief.

were made in the Joint CLEC original filing and accompanied by an offer of affidavits to demonstrate the alleged lack of assembly. The Joint CLECs did not, however, supply facts upon which we could conclude that Verizon does not provide a functioning method of assembly. In view of Opinion No. 98-18, which examined methods by which Verizon would combine Verizon loops and Verizon ports, and the Verizon Assembly Products tariff, which has been in effect since January 2001, conclusory contrary statements by the Joint CLECs are simply not adequate to demonstrate that Verizon has failed to provide a product that CLECs may or may not demand.

Compliance With Hot Cut Condition

Joint CLECs suggest that compliance with the PFS hot cut condition might be premised upon Commission review of Verizon's hot cut processes in Case 02-C-1425 with a concomitant transition date coinciding with issuance of the Order in August 2004. Verizon states that Commission review of hot cut processes in Case 02-C-1425 was just one determination regarding the efficacy of the hot cut process. In 2002, the Commission reviewed Verizon's hot cut process and concluded that the process was effective and "well-refined."[18] In addition, Verizon indicates Carrier-to-Carrier metrics demonstrate high levels of performance regarding Verizon's hot cut process[19] and ISO 9000 certification demonstrating conformance with best practices.[20]

We conclude that Verizon has had, since the end of the Zone 1 duration period in December 2003, a reasonable hot cut process. The loop migration process has performed well and has met our metrics. We find Verizon has met its PFS commitment for hot cuts.

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[18] Case 02-C-1425, Order Instituting Proceeding (issued November 22, 2002).

[19] See monthly C2C reports in Case 97-C-0139.

[20] Case 02-C-1425 Hearing Record, Tr. 53-55.

Demonstrated compliance with the assembly and hot cut conditions resolves the issue of Commission certification that the standards have been met and the timing of the transition period in Zones 1 and 2. Therefore, the two-year transition period in Zone 1 will end on December 21, 2005 and the two-year transition period in Zone 2 will end on December 21, 2007.

Transition Availability of UNE-P for New Customers

Joint CLECs maintain that the PFS' silence regarding availability of UNE-P for new customers during the two-year transition argues for an interpretation allowing CLECs to order new UNE-P arrangements while transitioning from the platform. Verizon maintains that the same silence precludes such interpretation.

There is no express term in the PFS authorizing CLECs to order new UNE-P services during the transition period. To imply such a term is unreasonable given the context and language of the PFS and that the transition period was intended to facilitate a smooth process for migrating existing UNE-P customers from the Verizon provided regulated platform. Adding customers while that transition is underway could undermine efforts for that smooth and seamless transition. Therefore, new UNE-P arrangements will not be available in Zone 1 pursuant to the PFS where the transition period ends on December 21, 2005 and will not be available in Zone 2 once the transition period begins on December 22, 2005.

Joint CLECs point out in their March 9 Response that Verizon's argument that the PFS doesn't apply to new customers during the two year PFS transition period is inconsistent not only with the PFS but with Verizon's own interpretation of the PFS. They note that in April 2004, in response to the Commission's March 29, 2004 Notice in Case 04-C-0420 (March 29 Notice) in connection with the USTA II vacatur of the FCC's Triennial Review Order, Verizon stated that the PFS transition charge for UNE-P should be implemented as a separate rate element to be applied to any new or existing UNE-P arrangement.

The key issue raised by the March 29 Notice was the establishment of a surcharge and not the more refined point of whether new customers would be served after

the expiration of the duration period. This plus the fact that the surcharge levels being considered in the March 29 Notice were higher than the FCC's $1 UNE-P surcharge, lead us to conclude that Verizon's April 2004 statement expresses a willingness to offer a higher rate for new customers, but is not a definitive statement concerning the scope of the PFS. Moreover, in its April 2004 pleading Verizon points to other PFS language indicating that its suppression of access charge billing will continue for *existing platforms after the expiration of the availability of new platforms.* This language more directly supports the distinction between the broad UNE-P commitment during the duration period and the more limited (i.e., existing customers only) commitment during the two year transition period following the duration period.[21]

In short, the PFS both expressly obligates Verizon to provide UNE-P for the four and six year duration periods[22] and describes the transition period as the period after the expiration of the availability of new platforms.[23] For all the reasons set forth above we reject the Joint CLECs' interpretation.

Transition Pricing

Zone 2

Joint CLECs claim that they are entitled to TELRIC or cost-based pricing in Zone 2 through December 21, 2005, the duration period for that zone. Verizon points to the fact that the Zone 2 duration period and FCC transition period run concurrently until December 21, 2005 and that the PFS transition period for Zone 2 runs concurrently with the FCC transition period after December 21, 2005 until March 11, 2006. Verizon

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[21] Even if the Joint CLECs' view of the scope of the PFS obligation were accepted, because the TRRO eliminated Verizon's obligation to provide new UNE-P arrangements, they would not be entitled to the FCC surcharge (TELRIC plus $1) for new UNE-P customers.

[22] Pre-filing Statement pp. 8-9.

[23] Id. at p. 8.

has filed a proposed FCC TRRO transition rate of TELRIC plus $1. After the FCC UNE-P transition ends on March 11, 2006, the price for UNE-P arrangements will increase to resale rates by December 21, 2007, the end of the transition period for Zone 2. This increase in price during the transition is consistent with the PFS.

Contrary to Joint CLECs' claim, the PFS does not entitle CLECs to TELRIC rates. No PFS citation has been offered to support the contention that UNE-P under the PFS can only be priced at TELRIC rates. When the PFS was filed in April 1998, the FCC's TELRIC rule was not in effect because it had been overturned by the 8th Circuit. We find that the $1 increase during the remainder of the duration period in Zone 2 is reasonable.

Zone 1

The two-year transition period in Zone 1 ends on December 21, 2005 and runs concurrently with the FCC transition period, which begins on March 11, 2005. Verizon, therefore, will apply the FCC TRRO transition rate of TELRIC plus $1 during that period and through the entire FCC transition period, rather than a higher PFS rate. After the FCC UNE-P transition ends, any remaining UNE-P arrangements will be discontinued or converted to alternative arrangements. Verizon's proposed increase in price during the Zone 1 transition is consistent with the PFS, which specifies that increases in transition rates are subject to Commission approval. The increased rate for the remainder of the transition period in Zone 1, TELRIC plus $1, is reasonable.

SECTION 271

Covad and IDT America maintain that Verizon has an obligation to continue providing access to UNE-P, apart from TRRO determinations, and cite 47 U.S.C. section 271 as authority. Although they admit that the FCC declined to require combining network elements no longer impaired pursuant to 47 U.S.C section 251, the MCI Petition contends that 47 U.S.C. section 202's nondiscrimination provisions provide a basis for combining non-impaired network elements since allowing only Verizon to

offer customers bundled switching would discriminate against CLECs. Joint CLECs also contend that Verizon's section 271 obligations remain despite the FCC's non-impairment findings and that it is essential that the PFS assembly condition be met in order to combine network elements.

In addition to jurisdictional arguments, Verizon cites the TRRO provision in which the FCC "declined to require BOCs, pursuant to section 271, to combine network elements that are no longer required to be unbundled under section 251.[24]

Given the FCC's decision to not require BOCs to combine 271 elements no longer required to be unbundled under section 251, it seems clear that there is no federal right to 271-based UNE-P arrangements.

INTERCONNECTION AGREEMENTS

Comments

Joint CLECs assert that specific provisions in their Interconnection Agreements regarding change of law and/or material change, which require bilateral negotiation, prohibit Verizon from unilaterally amending those Interconnection Agreements through its proposed tariff filing. In addition, Joint CLECs argue that the FCC's TRRO directs that changes should be implemented through the Interconnection Agreement amendment process and that Verizon's tariff filing is not a substitute for that process.

The MCI Petition states that Interconnection Agreements with Verizon cannot be abrogated by Verizon's unilateral tariff filing. Specifically, MCI states that until its Interconnection Agreement with Verizon is amended, Verizon must continue to provide UNE-P at cost based prices. The MCI Petition points to a prior instance in which Verizon sought to immediately discontinue providing services no longer required by the FCC, i.e. enterprise switching and four-line carve-out, in which Verizon acknowledged

[24] TRO ¶ 655, n. 1990.

that it had an obligation to follow change of law provisions in the MCI/Verizon Interconnection Agreement rather than summarily suspend provisioning of the service.

Conversent states that the TRO calls for implementing FCC required changes through the 47 U.S.C. Section 252 arbitration process and the TRRO mirrors that implementation and transition plan by also directing negotiated change. By precluding negotiation of key issues, e.g. wire centers where high-capacity loops and dedicated transport will or will not be provided, Conversent claims that Verizon's TRRO tariff filing usurps the process called for by the FCC in the TRRO.

AT&T contends that the specific change of law language in its Interconnection Agreements with Verizon preserves the status quo as to TRRO implementation until the Interconnection Agreements are amended. Similarly, Covad cites a section of its Interconnection Agreement that requires parties to negotiate changes in law which are then not effective unless executed in writing. According to IDT, its Interconnection Agreement specifies that regulatory and judicial changes must be negotiated and the status quo maintained during the pending negotiations. These provisions preclude Verizon from withdrawing network elements previously required pursuant to section 251, according to Covad and IDT.

Verizon states that the TRRO's directives take effect on March 11, 2005 and Interconnection Agreement terms "cannot override an FCC directive." The 12-month conversion process for UNE-P customers outlined in the TRRO, applies only to existing, not new customers, according to Verizon**.** Therefore, the FCC's decision to delist UNEs and specify that the transition period applies to embedded customers only expressly prohibits CLECs from ordering new UNE-arrangements after March 11, 2005.

In addition, Verizon argues that the FCC's intent to immediately effect discontinuation of certain UNEs is evidenced by the March 11, 2005 expiration date, of the FCC's Interim Rules Order, which imposed a temporary obligation to provide UNEs, and the effective date of the TRRO, which relieves Verizon and other ILECs of any obligation to provide certain UNEs, also March 11, 2005.

Verizon counters MCI's argument that the TRRO allows CLECs to order new UNE-P service until changes are made to existing Interconnection Agreements by pointing to the express prohibition in the TRRO against adding new UNE-P customers and the FCC's finding that continuing new UNE-P arrangements would "seriously undermine infrastructure investment and hinder the development of genuine facilities-based competition."[25]

Verizon states that it is not violating change of law provisions nor unilaterally amending Interconnection Agreements by filing its TRRO tariff because the change of law provisions invoked require compliance in the first instance with effective law, followed by a negotiation process to conform Interconnection Agreements. In addition, applicable law provisions in Verizon/CLEC Interconnection Agreements direct the CLECs to follow applicable law. In this instance, according to Verizon, applicable law eliminates its obligation to provide new UNE-P arrangements on or after March 11, 2005.

Discussion

The issue presented is whether our approval of the Verizon tariff and the clear statements of the TRRO regarding new customers for delisted UNEs satisfy or override change of law provisions in Interconnection Agreements regarding entitlement to ordering and receiving new network elements delisted in the TRRO, including UNE-P arrangements, after March 11, 2005.

The TRRO, in ¶233, makes reference to a negotiated process for implementing changes. Based on this language the TRRO should be implemented through interconnection agreements as necessary. However, for CLECs that have interconnection agreements with provisions allowing such amendment via tariff changes, changes will be effected via the tariff change process. The AT&T/Verizon

[25] TRRO ¶ 218.

Interconnection Agreement, for example, incorporates tariffs and envisions that tariff changes may flow through to the interconnection agreement.[26] In view of the notice provided by the tariff filing, the comment process thereon, and our review of both the tariff and comments, we find that this change process properly balances CLECs' interest in avoiding unilateral changes and the FCC's and Verizon's interest in avoiding unnecessary delay in implementing the TRRO's clear mandates. Therefore, the Commission declines to invoke its authority to prevent the tariff changes from flowing through to interconnection agreements, where provided for by interconnection agreements.

Further, to the extent other interconnection agreements do not incorporate tariff terms for UNE offerings and where changes must first be negotiated, we find that the change of law provision in those agreements should be followed to incorporate the transition pricing on delisted elements for the embedded base. Because the terms of the transition are clearly specified in the TRRO, this process should not be complex.[27] Moreover, to be consistent with the TRRO, the amendment should provide for a true-up to the TRRO transition rate for the embedded base of customers back to March 11, 2005, the effective date of the TRRO.[28]

Finally, with regard to new customers and interconnection agreements, based on our careful review of the TRRO, we conclude that the FCC does not intend that

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[26] See Case 01-C-0095, Joint Petition of AT&T Company of New York Inc., TCG New York, Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc., Order Resolving Arbitration Issues (issued July 30, 2001) p. 8**.** Many of the CLECs that have filed comments in this proceeding have opted into the ATT/Verizon interconnection agreement.

[27] The FCC made clear that the UNE-P price should be increased by $1 and loops and transport in affected wire centers should be increased to 115% for the transition period.

[28] TRRO n. 408, n. 524, n. 630.

new UNE-P customers can be added during the transition period as the TRRO "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to Section 251(c)(3)." TRRO ¶ 227. Although TRRO ¶233 refers to interconnection agreements as the vehicle for implementing the TRRO, had the FCC intended to use this process for new customers, we believe it would have done so more clearly. Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005. Providing a true-up for new UNE-P customers would run contrary to the express directive in TRRO ¶227 that no new UNE-P customers be added.

CONCLUSION

Based on our review of the Verizon tariffs and the comments thereon, we conclude that several modifications to Verizon's tariff are required. Apart from these modifications, we believe the tariff properly implements the TRRO and Verizon's Pre-filing Statement commitments. Finally, we decline to prevent the tariff changes from flowing through to interconnection agreements that rely on tariffs for UNE terms.

The Commission orders:

1. The tariff revisions listed on Appendix A are allowed to continue in effect as filed, and newspaper publication of the changes proposed by the amendment and further revision directed by order clauses 2, 3, 4 and 5 are waived pursuant to §92(2) of the Public Service Law.

2. Within ten days of the issuance of this Order, Verizon New York Inc. shall file tariff amendments allowing for conversion of DS1 and DS3 loop and transport services to analogous services at the applicable resale rate in the event an order for conversion is placed before the FCC-mandated transition period, even if the order for conversion cannot be completed within the transition period.

3. Within ten days of the issuance of this Order, Verizon New York Inc. shall file tariff amendments to include the list of wire centers which no longer qualify

for UNEs. The supporting data and documentation upon which it based its determinations shall be provided to Staff for review and analysis at the same time.

4. By April 30, 2005, Verizon New York Inc. shall file its proposal for UNE-P price increases to resale rates for the period between March 11, 2006 and December 21, 2007 for the Zone 2 wire centers.

5. Within ten days of the issuance of this Order, Verizon New York Inc. shall file tariff amendments to apply the 10-loop cap for DS1 service only where there is non-impairment for DS3 transport.

6. The petitions for suspension, investigation and emergency relief are denied, except to the extent consistent with the foregoing Order.

7. This proceeding is continued pending compliance with the above ordering clauses following which it shall be closed.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary

Appendix A

Tariff pages in effect March 12, 2005:

PSC NY No. 10 – COMMUNICATIONS

Preface –
    Original Page 8

Section 5 –
    2nd Revised Page 1.2
    Original Pages 1.3 through 1.12

Appendix D –
    Original Page 1

Issued: February 10, 2005 | Effective: March 12, 2005

EXHIBIT G

Elaine M. Duncan
Vice President and General Counsel – CA-NV-HI

711 Van Ness Avenue, Suite 300
San Francisco, CA 94102

Phone: 415-474-0468
Fax: 415-474-6546
elaine.duncan@verizon.com

March 22, 2005

VIA EMAIL AND HAND DELIVERY

Philip Weismehl
Assistant Chief Administrative Law Judge
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: ***Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements*, A. No. 04-03-014**

Dear Judge Weismehl:

In light of the events last week, this letter responds to the letters sent to you by AT&T Communications of California, Inc. on February 17, 2005 ("AT&T's Letter") and by MPower Communications Corp. and RCN Telecom Services of California, Inc. on March 15, 2005 ("MPower's Letter").

The CLECs offer conflicting views about whether this arbitration is the correct forum to address the *Triennial Review Remand Order* ("*TRRO*") implementation issues,[1] whether a new petition must be filed,[2] and whether parties have had sufficient opportunity to negotiate *TRRO* issues yet.[3] They claim that Verizon's scheduling proposal disregards the negotiation requirements in section 252 of the Act and contractual change of law processes. But these claims ignore the fact that Verizon has made clear that it does not intend to rewrite its *TRO* amendments "because they were designed to accommodate future changes in unbundling rules." (Verizon February 14th Letter at 2.) They also ignore the substantial opportunity for negotiation that has already occurred (from the

[1] MPower and RCN assert this is not the correct forum, while MCI acknowledges that it is.

[2] MPower and RCN assert that Verizon must start all over again with a new petition, while AT&T admits that doing so would be "inappropriate and inefficient." (AT&T Letter at 3).

[3] CLECs propose various schedules for negotiation.

February 4 release of the *TRRO* to today),[4] as well as Verizon's commitment to continue to negotiate with interested parties during the arbitration. (*Id.*)

However, these disputes have largely been mooted by the Commission's rulings last week. On March 11, 2005, parties were given until May 1, 2005 to conclude negotiations relating to transition of the embedded base of UNEs delisted in the *TRRO*. (Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders (the "March 11 ACR"), which was affirmed by the full Commission last Thursday.) Therefore, there is no question that this arbitration is the proper forum to address amendments to reflect the FCC's permanent unbundling rules and there is no question about how long parties have to negotiate these terms. To move this proceeding forward, Verizon proposes an updated schedule below.

The CLECs also apparently disagree whether Verizon's petition complies with the arbitration filing requirements in ALJ-181, Rule 3.3.[5] As Verizon explained in its Petition (and again in its February 14 Letter) the issues in this case are not factual, but legal; that is, whether Verizon's amendment correctly implements federal law. Therefore, there was no reason for Verizon to file direct testimony on any "factual predicates."

Contrary to AT&T's assertion, there are no "factual inquiries" to be resolved with respect to determining the availability of high-capacity loops and dedicated transport.[6] AT&T suggests that Verizon must show, in this arbitration, which wire centers meet the FCC's non-impairment criteria, and then the CLECs may challenge these showings. But this is not the process established in the *TRRO*. Under paragraph 234 of the *TRRO*, "to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry" in order to certify that it is entitled to unbundled access to the facility under the *TRRO* criteria. If the request "indicates that the UNE meets the relevant factual criteria," the ILEC must process the request. To the extent that an incumbent LEC seeks to challenge a particular CLEC request, *the ILEC* must bring the dispute "before a state commission or other appropriate authority." (*TRRO* ¶ 234.) At this point, Verizon has not brought any such disputes before the Commission, so there is nothing for the Commission to do, and no need for testimony from Verizon.

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4 During the period since the TRRO was issued, some CLECs in negotiations have proposed amendment langage to recognize the TRRO in explicit terms. Verizon has agreed to minor revisions to accommodate such CLECs and to facilitate prompt conclusion of negotiations.

5 AT&T claims the petition is deficient in this regard, whereas MCI suggests that parties have the opportunity to request hearings and specific the disputed issues of material facts that merit testimony.

6 Specifically, under the *TRRO*, CLECs are not impaired without unbundled access to: (1) DS1 Loops at any building location that is served by a wire center with at least 60,000 Business Lines and four Fiber-Based Collocators; (2) DS3 Loops at any building location that is served by a wire center with at least 38,000 Business Lines and four Fiber-Based Collocators; (3) Dedicated DS1 Transport between any pair of Verizon Wire Centers that each serve at least 38,000 Business Lines or four Fiber-Based Collocators; (4) Dedicated DS3 or dark fiber Transport between any pair of Verizon Wire Centers that each serve at least 24,000 Business Lines or three Fiber-Based Collocators. *See TRRO* ¶ 5.

Finally, to address the deficiencies they perceive in Verizon's proposed schedule, AT&T, MPower and RCN ask the Commission to order Verizon to negotiate *TRRO* terms with the CLECs, then to file a new arbitration petition no sooner than April 15, 2005. (AT&T's Letter at 4; *see also* MPower's Letter at 3.) The Commission has already effectively rejected the CLECs' proposal. As noted, the March 11 ACR determined that *TRRO* issues are already properly before the Commission in this case and established a negotiation window for their negotiation.

Given the May 1 date established for conclusion of negotiations, Verizon proposes the following procedural dates:

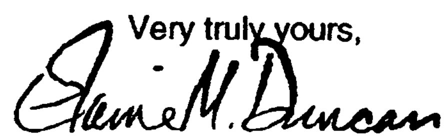
May 16, 2005:	CLECs submit responses to Verizon's arbitration petition
June 6, 2005:	Parties submit a Joint Disputed Issues List
June 16, 2005:	Initial Arbitration Meeting
July 8, 2005:	Opening briefs (and testimony, if any) due
Aug. 5, 2005	Reply briefs (and testimony, if any) due

This is very similar to the schedule agreed to by CLEC parties, including AT&T, in Verizon's arbitration in Maryland. At the initial arbitration meeting, the parties could address the appropriate form of further submissions, including whether there are any fact issues that require testimony, and a schedule for additional procedural steps.

Finally, MPower and RCN ask the Judge to deny Verizon's motion to withdraw certain parties from the arbitration, at least with respect to MPower and RCN. (MPower Letter at 1-2.) Verizon filed its motion to withdraw a number of CLECs from the arbitration because their contracts do not require amendment for Verizon to discontinue UNEs no longer required under the FCC's rules. However, if MPower and RCN (or others) nevertheless wish to arbitrate an unnecessary *TRO* amendment, there is little harm (except to administrative efficiency) in allowing them to do so. Since parties have not yet responded to Verizon's petition, those responses will allow interested parties to frame issues for arbitration.

But Verizon strongly disagrees with MPower's and RCN's suggestion that this arbitration is the proper place to resolve disputes about interpretation of *existing* interconnection agreements. As ALJ Pulsifer already ruled last April, "[t]o the extent that any CLEC believes that SBC or Verizon is violating its existing obligations under a specific ICA, the appropriate remedy is to invoke the dispute resolution process contained in that ICA," not to raise such disputes in a multi-party proceeding like this one. (Administrative Law Judge's Ruling Denying Motion in Dockets 95-04-043 and 95-04-044, at 7 (June 25, 2004).) This consolidated arbitration is intended to address amendments to existing agreements, not to interpret those agreements.

Very truly yours,



Elaine M. Duncan

cc: Service List

EXHIBIT H

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

MCI Metro Access Transmission Services, Inc., MCI WorldCom Communications, Inc., and Intermedia Communications Inc.	:	
	:	**04-0469**
Petition for Arbitration of Interconnection Rates, Terms and Conditions, and Related Arrangements with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996.	:	

ARBITRATION DECISION

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

MCI Metro Access Transmission Services, Inc., MCI WorldCom Communications, Inc., and Intermedia Communications Inc.	:	
	:	**04-0469**
Petition for Arbitration of Interconnection Rates, Terms and Conditions, and Related Arrangements with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996.	:	

ARBITRATION DECISION

By the Commission:

I. PROCEDURAL BACKGROUND

This proceeding was initiated by a Petition for Arbitration ("Petition") filed with the Commission on July 16, 2004, by MCI Metro Access Transmission Services, Inc., MCI WorldCom Communications, Inc., and Intermedia Communications Inc. (collectively "MCIm" or "MCI"), pursuant to Section 252(b) of the Telecommunications Act of 1996, 47 U.S.C. § 251, *et seq.* ("1996 Act" or "TA96") and 83 Ill. Adm. Code 761. The Petition seeks resolution by the Commission of approximately 304 disputed issues with Illinois Bell Telephone Company (SBC Illinois) ("SBC" or "SBCI") in connection with the negotiation of an interconnection agreement ("ICA"). SBC filed its Response to MCI's Petition on August 10, 2004 (hereinafter, the "Response"). SBC also identified several additional disputed issues for resolution.

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, hearings were held on July 21, 2004, and September 14, 2004, before duly authorized Administrative Law Judges ("ALJs") of the Commission at its offices in Chicago, Illinois. At the hearing, MCI, SBC and the Staff of the Commission ("Staff") appeared and were represented by counsel. The parties waived cross-examination on all issues presented for arbitration. At the conclusion of the latter hearing, the matter was marked "Heard and Taken." Initial and Reply Briefs were filed from September 20, 2004, to October 1, 2004, by MCI, SBC and Staff. The Proposed Arbitration Decision was served on October 29, 2004. Exceptions were filed by the parties on November 5, 2004.

either party is entitled to invoke the contracts change of law provisions. Staff Initial Brief, at 51.

The Commission should accept SBC's proposal to include language in the ICA that specifies that SBC must commingle to the extent required by FCC rules and orders. The Commission should specify that its acceptance of SBC's proposal is premised on the understanding that it does not confer on SBC any unilateral change-of-law rights and that, in the event of a state or federal law changes with respect to commingling, either party is entitled to invoke the contracts change of law provisions. Staff Initial Brief, at 51.

d) Commission Analysis and Conclusions

SBC maintains that its language stating that it must commingle "to the extent required by FCC rules and orders" clarifies that any commingling obligations exist "because of, and therefore, to the extent of, regulatory rule."

MCI contends that SBC's language would have the effect of subverting change of law provisions in instances in which a change in law event affects unbundling obligations. MCI proposes that such change of law events be addressed through the negotiation and amendment process in Section 23 of the GT&C portion of the interconnection agreement.

Illinois law does not require commingling. In the Section 13-801 Implementation Order, the Commission declined to require SBC to commingle UNEs with wholesale services. Therefore, the TRO governs any obligation to provide commingling and such rates, terms, and conditions. SBC's statement that it must commingle "to the extent required by FCC rules and orders" reflects the current state of the rules and regulations.

This Commission does not share MCI's concern that SBC's proposed language grants SBC unilateral change-of-law rights. However, we agree with Staff that these concerns can be addressed with additional language. The Commission therefore accepts SBC's proposal to include language in the ICA that specifies that SBC must commingle to the extent required by FCC rules and orders, and further orders that the parties include language that makes it clear that SBC's proposed language does not confer upon SBC any unilateral change-of-law rights, and clarifying that in the event of state or federal law changes with respect to commingling, either party is entitled to invoke the contracts change of law provisions.

15. UNE 18

Should the definition of Commingling include wholesale services purchased "pursuant to any method other than unbundling under Section 251 (c)(3)"?

a) MCI's Position

MCI's language concerning commingling should be used in the Agreement because it tracks the FCC's rules, and there is no reason to deviate from those rules here. *See* 47 C.F.R. § 51.5, *TRO* ¶¶ 579-84.

MCI's language also makes explicit that the services or facilities with which UNEs can be commingled include any that MCI "has obtained at wholesale from SBC ILLINOIS *pursuant to any method other than unbundling under Section 251(c)(3) of the Act.*" (Proposed ICA provision 7.2.1 (emphasis added). Exclusion of the italicized phrase, as SBC proposes, does not make this explicit.

The reason that this is important is that SBC is already attempting to impose limitations on MCI's ability to utilize commingling. (*See* UNE Issue 23 below). For example, SBC wants to preclude CLECs from commingling facilities that SBC leases to them based on its obligations under the section 271 checklist. SBC thus does not seem to think it is obliged to commingle with UNEs any services or facilities that MCI has obtained at wholesale pursuant to any method. But the *TRO* and FCC rules contain no such limitation. Indeed, all the reasons for permitting commingling generally apply to commingling with wholesale services or facilities obtained under any method.

MCI agrees with Dr. Zolnierek's reasoning discussed in his testimony at lines 671-693 and understands from his discussion that he recommends that MCI's language should be adopted, a recommendation with which MCI agrees.

For all of the above reasons, MCI respectfully requests that the Commission adopt MCI's proposed language regarding commingling.

b) SBC's Position

This issue involves the appropriate definition of "commingling" as set forth in Section 7.2.1 of the Appendix. MCI's proposed language, with the portion opposed by SBC highlighted, is:

> "Commingling" means the connecting, attaching or otherwise linking of a lawful UNE, or a combination of lawful UNEs, to one or more facilities or services that MCIm has obtained at wholesale from SBC Illinois ***pursuant to any method other than unbundling under Section 251(c)(3) of the Act***, or the combining of a Lawful UNE, or a combination of Lawful UNEs, with one or more facilities or services. "Commingling" means the act of commingling.

Read literally, MCI's proposal would appear to allow the commingling of UNEs with network elements that SBC provides pursuant to its Section 271 obligations, which are not Lawful UNEs for which unbundling is required under Section 251(c)(3) of the 1996 Act. As discussed in more detail in connection with UNE Issue 23, SBC has no obligation to commingle Section 271 network elements with Section 251 UNEs. SBC Ex. 7.0 (Fuentes) at 15. Accordingly, MCI's proposed language should be rejected.

c) Staff's Position

SBC argues that MCI's language, which defines commingling to include a combination of "Lawful UNEs" and wholesale services purchased "pursuant to any method other than unbundling under Section 251(c)(3)", promotes ambiguity and will lead to future disputes, and that SBC does not have to permit commingling of UNEs obtained pursuant to Section 251 of the 1996 Act with wholesale products and services obtained pursuant to Section 271 of the 1996 Act. 8/10/04 DPL, Issue UNE 18 and Issue UNE 23. SBC supports its position by citing to a TRO errata. SBC Ex. 21 at 22-23.

MCI argues that its proposed language which defines commingling to include a combination of "Lawful UNEs" and wholesale services purchased "pursuant to any method other than unbundling under Section 251(c)(3)", "tracks the FCC's regulation precisely and that SBC is required to permit commingling of UNEs obtained pursuant to Section 251 of the 1996 Act with wholesale products and services obtained pursuant to Section 271 of the 1996 Act. 8/10/04 DPL, Issue UNE 18 and Issue UNE 23. MCI argues that "[t]he same rationale that justifies commingling of local and access traffic applies to all sorts of commingling, including commingling of traffic on facilities leased under sections 251 and 271." MCI Ex. 6.0 at 8.

The FCC did issue an errata removing a reference to the obligation that ILECs have 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. Errata, ¶ 31, TRO Order (Sept. 17, 2003).

This errata removed a passage that would have clearly required ILECs to permit commingling of Section 271 items with Section 251 UNEs.

The FCC released a second errata at the same time. The relevant passage, in strikeout form, states:

> 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.*

This section removed a passage that would have clearly relieved ILECs of the obligation to permit commingling of Section 271 items with Section 251 UNEs.

Examination of both changes reveals that the FCC did not make it clear that SBC is not required to permit commingling of 251 UNEs and 271 items. Instead, the countervailing changes make it clear that the FCC removed contradictory statements in its order and the result is a post-errata TRO that does not explicitly speak to whether SBC is or is not required to permit commingling of Section 271 items with Section 251 UNEs. Thus, the FCC declined the opportunity to clarify its own rules in this regard.

It would be inconsistent with rationale cited by the FCC for instituting its commingling rules to require MCI to provision services over separate and distinct facilities if it elected to use both Section 251 UNEs and Section 271 UNEs to provide services to a customer. In addition, permitting SBC to deny those carriers seeking access to Section 271 items corresponding access to Section 251 loops would provide SBC with the ability to leverage control over a network element, the voice-grade loop, which has met the "necessary and impair" standards of Section 251(d)(2). In essence MCI would be forced to relinquish its right to obtain network elements under Section 251 in order to exercise its rights to obtain network elements under Section 271, a result that is clearly contradictory with Section 271 requirements of ILECs to both provide certain specific network elements and to comply with Section 251(c)(3).

In addition, MCI's proposed definition of commingling is consistent with, and derives from, the FCC's definition of commingling in the TRO. Staff Initial Brief, at 51. However, it does not follow that because a combination of a Section 251 UNE and a wholesale service is defined as commingled arrangement, SBC is therefore necessarily required to provide such a commingled arrangement to MCI.

The Commission should accept MCI's proposed definition of commingling for inclusion in the ICA because MCI's proposed definition is consistent with, and derives from, the FCC's definition of commingling in the TRO. The Commission should specify, however, that defining a combination of a Section 251 UNE and a wholesale service as a commingled arrangement does not necessarily imply that SBC must offer that commingled arrangement to MCI.

The Commission should further order the parties to include language in the ICA specifying that SBC is required to permit commingling arrangements of Section 251 UNEs and Section 271 items. Staff Initial Brief, at 52.

d) Commission Analysis and Conclusions

SBC argues that MCI's language promotes ambiguity and will lead to future disputes. SBC further professes it is not required to commingle UNEs obtained pursuant to Section 251 of the 1996 Act with wholesale products and services obtained pursuant to Section 271 of the 1996 Act. SBC supports its position by citing to a TRO errata.

MCI argues that its proposed language "tracks the FCC's regulation precisely and that SBC is required to permit commingling of UNEs obtained pursuant to Section 251 of the 1996 Act with wholesale products and services obtained pursuant to Section 271 of the 1996 Act." MCI also argues that "[t]he same rationale that justifies commingling of local and access traffic applies to all sorts of commingling, including commingling of traffic on facilities leased under sections 251 and 271."

The FCC issued an errata to the TRO. 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. Errata, ¶ 31, TRO Order (Sept. 17, 2003).

This errata, as Staff notes, removed a passage that would have clearly required ILECs to permit commingling of Section 271 items with Section 251 UNEs.

The FCC released a second errata at the same time. The relevant passage, in strikeout form, states:

> 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.*

According to Staff, this section removed a passage that would have clearly relieved ILECs of the obligation to permit commingling of Section 271 items with Section 251 UNEs.

Careful consideration of both errata shows the FCC deleted contradictory statements regarding commingling. As such, the TRO no longer contains specific guidance as to SBC's duty to allow commingling of Section 271 UNEs with Section 251 UNEs.

It would be inconsistent with the FCC's rationale to require MCI 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. Additionally, as noted by Staff, 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 SBC to deny carriers seeking access to 271 UNEs the corresponding access to Section 251

loops. This creates conflict with Section 271 requirements of ILECs to both provide certain specific network elements and to comply with Section 251(c)(3).

In addition, the Commission agrees with staff that MCI's proposed definition of commingling is consistent with the definition of commingling found in the TRO. However, it does not follow that because a combination of a Section 251 UNE and a wholesale service is defined as commingled arrangement, SBC is therefore necessarily required to provide such a commingled arrangement to MCI.

Therefore, we accept MCI's proposed definition of commingling for inclusion in the ICA because MCI's proposed definition is consistent with, and derives from, the FCC's definition of commingling in the TRO. The parties are not to interpret this decision, which approves the definition of a combination of a Section 251 UNE and a wholesale service as a commingled arrangement, as implying that SBC must offer such a commingled arrangement to MCI. We directs the parties to include language in the ICA specifying that SBC is required to permit commingling arrangements of Section 251 UNEs and Section 271 items.

16. UNE 19

Under what circumstance is SBC ILLINOIS obligated to perform the functions necessary to carry out commingling?

a) MCI's Position

SBC arduously has sought to make it as difficult as possible for CLECs to engage in commingling. Such efforts likely are because CLEC use of commingling might in some circumstances make facilities-based competition possible. Although SBC controls the facilities that would need to be connected to permit commingling, SBC proposes language under which it will have no obligation to perform commingling under six different scenarios:

> (i) the CLEC is able to perform those functions itself; or
>
> (ii) it is not technically feasible, including that network reliability and security would be impaired; or
>
> (iii) SBC Illinois' ability to retain responsibility for the management, control, and performance of its network would be impaired; or
>
> (iv) SBC Illinois would be placed at a disadvantage in operating its own network; or
>
> (v) it would undermine the ability of other Telecommunications Carriers to obtain access to UNEs or to interconnect with SBC Illinois' network; or
>
> (vi) CLEC is a new entrant and is unaware that it needs to Commingle to provide a telecommunications service.

SBC's proposed language states that a routine network modification is "an activity that SBC ILLINOIS regularly undertakes for its own end user customers where there are no additional charges or minimum term commitments." The TRO does not contemplate "additional charges" and "term commitments" as caveats for routine maintenance. Moreover, SBC's proposed language could inappropriately limit the instances in which SBC would perform work for MCI as a routine network modification. Accordingly, including these limiting factors in the description of routine network modifications is inappropriate.

As MCI mentioned, SBC's proposed language would exclude certain activities from the definition of a routine network modification, such as splicing cable at any location other than an existing splice point or at any location where a splice enclosure is not already present, securing building access arrangements, constructing/placing handholds, constructing/placing ducts, constructing/placing poles, providing new space or power for requesting carriers, and removing or reconfiguring packetized transmission facility. The FCC has yet to determine these activities to be exceptions to routine maintenance. In fact, the FCC explicitly recognized splicing cable as a routine network modification (47 C.F.R. §51.319(a)(8)(ii)).

SBC's proposed section 9.7.2.2 inappropriately includes restrictions related to packet-based facilities and the retirement of copper, which have no basis in the FCC's routine network modifications rulings. Additionally, SBC's proposed Section 9.7.3 would allow SBC to assess non-recurring charges on MCI for performing routine network modifications, when these activities are already included in the recurring charges that MCI pays to SBC for a loop. SBC has not shown that the activities for which it attempts to levy additional charges are not already recovered in the recurring loop rates. Unless SBC has demonstrated otherwise, the Commission has no way of knowing whether SBC is double recovering. To remain consistent with our XO Arbitration Order, SBC will be required to expressly certify that no cost recovered by such charge is recovered by any other rate or charge. 04-0371 Order at 12.

For these reasons, we adopt MCI's proposed language to Section 9.7.2 of the UNE Appendix and reject SBC's proposed language to Sections 9.7.1, 9.7.2 and 9.7.3.

30. UNE 35

What terms should apply for access to loops served over Integrated Digital Loop Carrier (IDLC)?

a) MCI's Position

The terms delineated in MCI's proposed language at Section 9.8.1 of the UNE Appendix should apply for access to loops served over IDLC. SBC's proposed language would require SBC, "where available," to move a customer from an IDLC to a Universal Digital Loop Carrier ("UDLC") or copper facility, so that the customer could be reached with an unbundled loop at the CLEC's request (without the need to unbundle the IDLC system). MCI does not disagree with this particular language. MCI does

disagree, however, with SBC's proposal regarding situations where moving the customer to UDLC or copper is not an "available" option. In those situations SBC proposes that it simply notify MCI within 2 business days that there are no "available facilities." MCI would then have the option of canceling the order or paying unspecified fees associated with providing other arrangements to reach the customer (in some fashion presumably chosen by SBC). SBC's rather nebulous proposal is not satisfactory and hence, MCI has proposed language (at Section 9.8.1 of the UNE Appendix) detailing the technical options that SBC should explore in providing access to IDLC facilities if neither copper nor UDLC is available.

MCI's proposed language in Section 9.8.1 is drawn almost verbatim from the FCC's Triennial Review Order. In paragraph 297 of its recent Triennial Review Order, the FCC addressed this exact issue and specified ILECs' obligations where neither copper nor UDLC is an available option. MCI's proposed language, which would require that SBC, where neither UDLC nor copper facilities are available, to provide access using one of six non-exclusive methods. This language is consistent with paragraph 297 of the FCC's order referenced above. After placing an affirmative obligation on SBC to unbundle its IDLC facilities in paragraph 297 – even where neither spare copper nor UDLC facilities are available – the FCC went on, in footnote 855, to describe how ILECs could effectuate alternatives to copper and UDLC. The options described by the FCC in footnote 855 are the same options proposed by MCI at Sections 9.8.1.1 through 9.8.1.6 of the UNE Appendix. MCI has agreed to SBC's proposed language that would require MCI to pay SBC for expenses related to implementing the options it describes in MCI's proposed language.

For all of the foregoing reasons, MCI respectfully requests that the Commission adopt MCI's proposed language at Sections 9.8.1 through 9.8.1.6 of the UNE Appendix.

b) SBC's Position

Integrated digital loop carrier ("IDLC") is a type of digital loop carrier ("DLC") technology that directly terminates the single signal into the SBC switch, without going through the main distribution frame. Unlike universal DLC ("UDLC"), IDLC technology does not require central office terminal equipment to demultiplex high capacity signals to DSO or voice grade levels. As a result, however, it is not possible to unbundle loops served over an IDLC. Consistent with the requirements of the TRO, therefore, (at 297) SBC's proposed Section 9.12 provides that where MCI requests a UNE loop served by an IDLC, SBC will, where available, move the requested loop to either a spare copper facility or to a UDLC loop at no additional charge to MCI. If no such facilities are available, SBC will notify MCI of the lack of the available facilities. As Mr. Weydeck testified, SBC's engineering guidelines have been modified to ensure that UDLC or copper cabling is available on a going-forward basis in locations where IDLC is also being utilized to provide service. Currently, areas served by IDLC only technology represent only 2,528 lines of the 6.9 million SBC access lines. SBC Ex. 17.0 (Weydeck) at 6. Accordingly, the situations in which spare unbundled loop are not available to fulfill a request by MCI for a transmission path is likely to be rare.

MCI, however, proposes language for Section 9.8.1 pursuant to which it would have the unilateral right to dictate a method of access to IDLC delivered loops, including, not limited to, six methods described in subsection 9.8.1.1 through 9.8.1.6. MCI's proposal is not supported by the TRO and would improperly usurp SBC's ability to manage and deploy its network in a most efficient and reliable manner. Contrary to MCI's claim (Ex. 8.0 (Starkey) at 93), the TRO does not give requesting CLECs the right to unilaterally specify methods of access to IDLC loops. Rather, the TRO permits ILECs to provide such access through a spare copper facility or through the availability of UDLC systems. Where such options are not available, the TRO requires only that ILECs "present requesting carriers a technically feasible method of unbundled access." TRO 297. Accordingly, the FCC leaves the choice of how a loop is unbundled in the IDLC-only architecture entirely to the ILEC's discretion, and MCI should not be entitled to dictate the terms and conditions of this unbundling. SBC Ex. 17.0 (Weydeck) at 8.

SBC's interpretation of the TRO is confirmed by the decision of the FCC's Wireline Competition Bureau (the "WCB") in the Verizon Virginia/Cavalier Arbitration. In that case, the Bureau considered contract language proposed by Cavalier, similar to the language proposed by MCI in this case, specifying certain methods by which Verizon would be required to unbundled IDLC loops. The methods proposed by Cavalier were the same as those proposed by MCI in Section 9.8.1. In rejecting Cavalier's proposed language, the Bureau made clear that "the Triennial Review Order does not require Verizon to use the particular methods proposed by Cavalier," but, rather, "gives incumbent LECs the choice whether to unbundle integrated DLC loops when spare facilities are available, and the choice of technically feasible methods of integrated DLC loop unbundling." *Id.* 131, 133. MCI's proposal should be rejected.

c) Staff's Position

Staff did not offer a statement of its position on this issue.

d) Commission Analysis and Conclusions

The Commission finds that MCI's proposed language at Section 9.8.1 of the UNE Appendix should apply for access to loops served over IDLC. SBC's proposed language would require SBC, "where available," to move a customer from an IDLC to a Universal Digital Loop Carrier ("UDLC") or copper facility, so that the customer could be reached with an unbundled loop at the CLEC's request (without the need to unbundle the IDLC system). Where not "available", SBC proposes that it would notify MCI within 2 business days that there are no "available facilities." MCI would then have the option of canceling the order or paying unspecified fees associated with providing other arrangements to reach the customer (in some fashion presumably chosen by SBC). SBC's proposal is rejected.

MCI took its proposed Section 9.8.1 almost verbatim from the TRO. In paragraph 297, the FCC addressed this exact issue and specified ILECs' obligations where neither copper nor UDLC is an available option. The Commission notes that nowhere in paragraph 297, is MCI entitled to specify which other technically feasible

method of access SBC must use. Therefore, the Commission directs the parties to strike the language "(to be specified by MCIm)" from Section 9.8.1. MCI's proposed language would require SBC to provide access using one of six non-exclusive methods where neither UDLC nor copper facilities are available.. This language is consistent with paragraph 297 of the TRO. The FCC also described, in footnote 855 of the TRO, how ILECs could effectuate alternatives to copper and UDLC. MCI proposes these same options in Sections 9.8.1.1 through 9.8.1.6 of the UNE Appendix. MCI has agreed to SBC's proposed language that would require MCI to pay SBC for expenses related to implementing the options it describes in MCI's proposed language. Accordingly, the Commission adopts MCI's proposed language at Sections 9.8.1 through 9.8.1.6 of the UNE Appendix.

31. UNE 36

Should access to loops that require high voltage protective equipment be ordered through the BFR process?

a) MCI's Position

The BFR is a process for requesting new, undefined UNEs and should not be used for what is essentially a service order process. MCI therefore objects to SBC's proposed language to the contrary and recommends that it be omitted from the Agreement.

SBC's language inappropriately attempts to expand the use of the BFR process to issues for which it was not designed. The undisputed language of Section 1.1 of the BFR Appendix provides as follows:

> *Unless another procedure or process is specifically prescribed elsewhere in this Agreement* or by order of the Commission, this schedule shall govern the submission of requests by MCIm to SBC ILLINOIS for methods of interconnection, access to Lawful Unbundled Network Elements (including Combinations thereof), or customized services that are *not otherwise addressed in this Agreement* at the time of such request. (*emphasis added*)

The process by which MCI requests access to unbundled loops clearly falls outside of scope of the BFR process described in Section 1.1 of the BFR Appendix, because loops are "otherwise addressed in this Agreement," as Section 9 of the UNE Appendix. It is disingenuous for SBC to suggest, as it does in its proposed Section 9.10, that an unbundled loop – even one ordered in a high voltage area – would qualify as a new UNE or a customized service. The BFR process should therefore not apply to unbundled loops.

Moreover, the reason SBC uses to attempt to justify subjecting an unbundled loop to the BFR process (i.e., HVPE provisioning) should fall under routine network modifications, as described in Section 9.7 of the UNE Appendix.

ticket due to the non-performance of SBC Illinois, MCI should also receive compensation for expenses incurred from SBC Illinois.

d) Commission Analysis and Conclusions

The issue of YZP is best described as what terms and conditions should apply to YZP trouble tickets. In xDSL Issue 8, SBC Illinois proposes to include language into the interconnection agreement that would specify situations in which MCI would have to compensate SBC Illinois for expenses incurred due to MCI's non-performance.

MCI argues that the same terms and conditions should apply to YZP trouble ticket dispatch as for general trouble ticket dispatch. These general requirements are set forth in the UNE Appendix of the agreement and require each party to bear the cost of its erroneous dispatches.

SBC proposes to apply the time and material charges in its FCC Tariff No. 2, as it does with all optional ordering processes not required by TA 96. As Staff points out, YZP is an alternative ordering process for CLECs ordering xDLS loops.

The Commission agrees with Staff and finds that the interconnection agreement should include the YZP trouble ticket language proposed by SBC Illinois in Sections 3.3.3.1 through 3.3.3.4. This language will have MCI compensate SBC Illinois for expenses SBC Illinois incurs due to MCI's non-performance. Furthermore, the philosophy of "cost causer pays" should extend to both parties. The Commission heeds Staff's caveat and finds to the extent MCI is unable to resolve an YZP trouble ticket due to the non-performance of SBC Illinois, MCI should also receive compensation for expenses incurred from SBC Illinois.

VI. ARBITRATION STANDARDS

Under subsection 252(c) of TA96, the Commission is required to resolve open issues, and impose conditions upon the parties, in a manner that comports with three standards. The Commission holds that the analysis in this arbitration decision satisfies that requirement.

First, subsection 252(c)(1) directs the state commissions to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." In this arbitration, the Commission has directed the parties to include provisions in their interconnection agreement that fully comport with Section 251 requirements and FCC regulations.

Second, subsection 252(c)(2) requires that we "establish any rates for interconnection, services or network elements according to subsection [252(d)]." Here, most of the pertinent rates were already established by the parties through mutual agreement. Insofar as the Commission's resolution of open issues will affect those or other rates in the parties' interconnection agreement, we require, and expect the parties to establish, rates that are in accord with subsection 252(d) of TA96.

Third, pursuant to subsection 252(c)(3), the Commission must "provide a schedule for implementation of the terms and conditions by the parties to the agreement." Therefore, the Commission directs that the parties file, within 30 calendar days of the date of service of this arbitration decision, their complete interconnection agreement for Commission approval pursuant to subsection 252(e) of TA96.

By Order of the Commission this 30th day of November, 2004.

(SIGNED) EDWARD C. HURLEY

Chairman

EXHIBIT I

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on February 9, 2005

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin

CASE 02-C-1233 - Proceeding on Motion of the Commission to Examine the Provision of High-Capacity Facilities by Verizon New York Inc.

CASE 04-C-0314 - Petition of Verizon New York Inc. for Consolidated Arbitration to Implement Changes in Unbundled Network Element Provisions in Light of the Triennial Review Order

CASE 04-C-0318 - Petition of AT&T Communications of New York, Inc. for Arbitration of Interconnection Agreement Amendments

ORDER DIRECTING ROUTINE NETWORK MODIFICATIONS

(Issued and Effective February 10, 2005)

BY THE COMMISSION:

INTRODUCTION

By this order, Verizon New York Inc. is directed to comply with the requirement set forth in the Triennial Review Order[1] (TRO) issued by the Federal Communications Commission

[1] FCC 03-36, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No. 96-98, Implementation of the Local Competitive Provisions of the Telecommunications Act of 1996; CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability (released August 21, 2003),¶632-640, rev'd and vacated in part, United States Telecom Ass'n v. Fed. Communications Comm'n, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

(FCC) that it perform routine network modifications necessary to make high capacity loops available as unbundled network elements (UNEs). Routine network modifications are defined as those activities Verizon regularly undertakes for its own customers.[2] No amendments to Verizon's interconnection agreements are necessary for Verizon to perform these network modifications.

FACTUAL AND PROCEDURAL BACKGROUND

Verizon's "No Facilities" Policy

In the spring of 2001, Verizon clarified its interpretation of its obligation to provision high-capacity (DS1 and DS3) UNE loops. At that time, Verizon offered high capacity loops two ways. As required by the Telecommunications Act of 1996, as implemented by the Federal Communications Commission, high capacity loops are unbundled network elements (UNEs) to which Verizon must offer access to competitive local exchange carriers (CLECs) at rates set at Verizon's total element long run incremental cost (TELRIC). Verizon also offered high capacity service at retail to large institutional customers as a "special service" at a considerably higher rate. Verizon sold to CLECs at this special services rate also, under circumstances where the UNE rate was not applicable. The applicability of the higher, special services rate to CLEC purchases of high capacity loops expanded considerably under Verizon's interpretation.

On May 10, 2001, Verizon sent new and revised process standards to its outside plant engineering staff.[3] Urging its staff not to confuse the two types of orders for high capacity loops, Verizon set forth different provisioning policies for each.[4] Where there was a need to add electronic equipment to provide the loop, the Verizon engineers were instructed to place these facilities to meet special services orders.[5] However, if

[2] Triennial Review Order at ¶¶632, 634.

[3] "OSP HICAP FLASH," Document No. 2001-00256-0SP, May 10, 2001, Attachment 1 to Initial Brief of Allegiance Telecom of New York, Inc. filed in Case 02-C-1233, January 24, 2003.

[4] Id.

[5] Id.

the loop had been requested as a UNE, Verizon's staff was told to reject the order on the grounds that "no facilities were available."[6]

Verizon based its "no facilities" policy on language from the Eighth Circuit's opinion in Iowa Utilities Board. v. FCC.[7] In that case, the court held that §251(c)(3) of the Telecommunications Act of 1996 requires "unbundled access only to an incumbent LEC's existing network -- not to a yet unbuilt superior one."[8] Verizon reasoned that, if it had not yet added the electronics to a regular, DS0 loop to make it function as a high-capacity loop, then the high capacity loop was not part of its "existing network," and the Iowa Utilities Board holding meant that Verizon was not obligated to build anything in response to a CLEC's request for access.

Verizon further elaborated on its interpretation on July 24, 2001, when it revised its internal instructions and also sent an industry letter to all CLECs informing them of its policy.[9] In the industry letter, Verizon explained its policies for rejecting new requests for high-capacity UNE loops. These orders would be rejected if Verizon did not have the common equipment in the central office or at the end user's location or the outside plant facilities to provision a DS1 or DS3 loop.[10] Verizon asserted that it was not obligated to construct new UNEs where such facilities had not already been deployed for Verizon's use in providing service to its own wholesale and

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[6] Id.

[7] 120 F.3d 753 (8th Cir. 1997), aff'd in part and remanded, AT&T v. Iowa Utils. Bd., 525 U.S. 366 (1999).

[8] Id. at 813.

[9] Id.; "DS1 and DS3 Unbundled Network Elements Policy," Verizon Industry Letter, July 24, 2001, attached as Exhibit A to XO's cross-motion filed in Case 02-C-1233, October 21, 2002; available at http://www22.verizon.com/regulatory/files/ds1_ds3_une.pdf.

[10] July 24, 2001 Industry Letter. The equipment at issue is characterized by the FCC as "routine electronics," including multiplexers, apparatus cases, and doublers. Triennial Review Order ¶635.

retail customers.[11] According to Verizon, this policy was clearly stated in its interconnection agreements and relevant tariffs.[12]

Verizon's letter advised that, if CLEC orders for high capacity loops were rejected to lack of facilities, CLECs could instead order Verizon's special services.[13] In that circumstance, the CLEC would pay the higher special services rate for the high capacity loop. Once Verizon provisioned the loop for this service, it would, of course, be "available" to be re-ordered as the lower-priced Unbundled Network Element. Penalties for early termination of special services kept the CLECs from converting their special services over to UNE orders until the expiration of the minimum terms for special services.

At the time Verizon articulated this policy, it had in place numerous interconnection agreements with a variety of CLECs. These agreements generally provided for the sale and purchase of UNEs, including high-capacity loops, in accordance either with the terms of the interconnection agreement and/or applicable tariffs. In implementing this policy, Verizon made no change to its tariffs, and Verizon did not invoke any change of law provision or otherwise negotiate any changes to its interconnection agreements. Rather, Verizon simply imposed the policy unilaterally, as an assertedly valid interpretation of its obligations.

CLECs soon began to complain. On August 24, 2001, XO Communications wrote to the Federal Communications Commission to complain about Verizon's "no facilities" policy.[14] On September 28, 2001, a group of CLECs -- Adelphia Business Solutions, Inc., Broadslate Networks, Inc., Focal Communications Corporation, Madison River Communications, LLC, Empower Communications Corp., and Network Plus, Inc. -- wrote to the chief of the FCC's Common Carrier Bureau to "urgently request

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[11] July 24, 2001 Industry Letter.

[12] Id.

[13] Id.

[14] Letter to Magali Roman Salas, Common Carrier Docket 96-98, August 24, 2001.

that the Commission take steps to require changes in Verizon's practice of declining to provide DS1 UNEs based on 'no facilities' available."[15] At the same time, the CLECs introduced the issue into the Verizon Incentive Plan proceeding before this Commission.[16]

FCC and NYPSC Responses

As a consequence of the CLECs' complaints, the FCC sought comment in its Triennial Review proceeding on the extent to which incumbent LECs have an obligation to modify their existing networks in order to provide access to network elements.[17]

Here in New York, the Commission-approved Verizon Incentive Plan created a task force of the parties which would address, among other things, "the provisioning of service when a UNE order is rejected due to 'lack of facilities'."[18] This so-called "UNE/EELs[19] Task Force" met in the spring of 2002 and submitted a report which we received and reviewed at our June 2002 session.[20] As we noted in our Order instituting

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[15] Letter to Dorothy Attwood, Common Carrier Dockets 96-98 and 01-138; CCB/CPD 01-06, September 28, 2001.

[16] As described in our Order Instituting Verizon Incentive Plan, Cases 00-C-1945 and 98-C-1357 (February 27, 2002) at 2-3, Verizon filed its proposal for a future regulatory plan on May 15, 2001; negotiations continued thereafter, with a hiatus following September 11, 2001, and concluded in February 2002.

[17] Notice of Proposed Rulemaking, Release Number FCC 01-361, 16 FCC Rcd 22781, CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No. 96-98, Implementation of the Local Competitive Provisions of the Telecommunications Act of 1996; and CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability (released December 20, 2001), (Triennial Review NPRM), at ¶¶52, 63 [note there are two different ¶¶63].

[18] Order Instituting Verizon Incentive Plan, supra, Appendix at 4.

[19] EELs, or Expanded Extended Links, were another means by which CLECs sought to obtain access to Verizon unbundled loops.

[20] Case 02-C-1233, Order Instituting Proceeding (September 25, 2002) at 2.

Case 02-C-1233, the UNE/EELs Task Force "largely reported frustration of its goals."[21] Its report summarized the parties' positions as follows: the CLECs asserted that Verizon's policy put them at a competitive disadvantage, that many of the "no facilities" conditions cited by Verizon could be remedied easily and inexpensively, and that the policy could lead to discrimination against a CLEC in favor of Verizon's own retail service.[22] Verizon asserted that it could not fully recover its costs if it had to construct these facilities at UNE rates and that the cost disparities undermined the incentive for CLECs to make their own investments in the state. Verizon further asserted that, under federal law and regulations, it was not required to construct any facilities to complete a high-capacity UNE loop order. Verizon asserted that the task force was an inappropriate forum for resolution of this essentially legal issue.[23]

In light of this impasse, we instituted Case 02-C-1233 (hereinafter "the Facilities Availability Proceeding") to provide the appropriate procedural forum for the issues identified but left unresolved by the UNE/EELs Task Force. In identifying the issues to be addressed in the proceeding, we included "the appropriate legal standard for determining the scope of Verizon's obligation to provide a high-capacity UNE loop upon a competitive carrier's request when Verizon declares that the facilities are not available" and the "parameters, if any, [that] should be placed upon the definition of facilities as 'not available'."[24]

The FCC's Triennial Review Order (TRO), addressing these same issues, was issued before we issued a decision in the Facilities Availability Proceeding. In the Triennial Review Order, the FCC struck down Verizon's policy as "discriminatory on its face."[25] The FCC provided an interpretation of the scope

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[21] Id. at 2.

[22] Id. at 3.

[23] Id. at 4.

[24] Id.

[25] Triennial Review Order at ¶639, n. 1940.

of the incumbent LEC network that must be unbundled consistent with the Eight Circuit’s ruling in Iowa Utilities Board.[26] Under its interpretation, the FCC required an incumbent LEC to perform all loop modification activities that it performs for its own retail customers.[27] The FCC pointed out that the "continually evolving and dynamic nature of telecommunications networks" made it unwise for it to list the precise electronics that an incumbent LEC must add to the loop in order to transform a DS0 voice-grade loop to an unbundled DS1 loop. However, by way of illustration, it noted that the sorts of "routine network modifications" that incumbent LECs performed for their own customers and thus are required to perform for CLECs include rearrangement or splicing of cable, adding a doubler or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer.[28]

Citing its Local Competition Order, the FCC noted that its "pricing rules provide incumbent LECs with the opportunity to recover the cost of the routine network modifications we require here."[29] Noting that state commissions have discretion as to whether the costs are recovered through non-recurring or recurring charges, the FCC noted that costs associated with modifications, such as equipment costs and labor expense, often are reflected in recurring loop rates.[30] The FCC noted that there should not be any double recovery of these costs, which, for example, could result if they were included in both recurring and non-recurring charges.[31]

Verizon Proposes Interconnection Agreement Amendments

Following the resolution of the "no facilities" issue by the FCC in the Triennial Review Order, Verizon requested, by

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26 Triennial Review Order at ¶¶ 631, 633.

27 Triennial Review Order at ¶¶ 632, 634.

28 Id.

29 Triennial Review Order at ¶640.

30 Id.

31 Id.

letter dated October 8, 2003, that we close the Facilities Availability Proceeding. Verizon asserted that it would implement the FCC's Triennial Review Order through proposed amendments to its interconnection agreements, sent in an industry letter to all parties on October 2, 2003. In extensive comments filed in response, numerous parties protested Verizon's implementation of the FCC rule and opposed closing of the Facilities Availability Proceeding.

The primary objection to Verizon's proposed amendment was its requirement that CLECs agree to pay approximately $1,900 for each routine network modification. Allegiance Telecom of New York, Inc., Conversent, Covad Communications Company, Choice One Communications of New York, Inc., and Cavalier Telephone LLC all protested Verizon’s imposition of these new charges to perform routine network modifications.[32] Choice One argued that, because these costs are recovered elsewhere, Verizon should not be permitted a double recovery of its costs. Choice One and Covad cited Triennial Review Order ¶640 as supporting their position that these costs are already reflected in recurring loop rates and that there should not be any double recovery. Allegiance asserted that Verizon’s position could not be reconciled with the FCC’s determination that Verizon performs the same modifications for its retail customers with relatively low expense and minimal delays. Conversent characterized Verizon’s proposed amendment as requiring CLECs to pay more than the charge mandated for UNE loops.

In a response dated November 26, 2003 in the Facilities Availability Proceeding, Verizon asserted that the CLECs had not offered any valid reason to keep the proceeding

[32] Allegiance Telecom, Inc., letter to Acting Secretary Brilling, October 29, 2003, at 1-2, 4, 5; Conversent Communications letter to Acting Secretary Brilling, October 27, 2003, at 1; Covad Communications letter to Acting Secretary Brilling, October 27, 2003, at 2; Comments of Choice One Communications of New York, Inc., November 20, 2003, at 7-8; Comments of Cavalier Telephone, LLC, November 26, 2003, at 2; all filed in Case 02-C-1233.

open.[33] Verizon asserted that the vehicle of amendment of interconnection agreements was specifically prescribed by the TRO as the means to put its provisions into effect.[34] Consequently, the parties should pursue negotiation pursuant to §252 of the Telecommunications Act to reach appropriate modifications to their interconnection agreements.[35] To the extent that CLECs complained about the continuing rejection of their high-capacity UNE loop orders, Verizon asserted that the CLECs should respond to Verizon's amendment proposal and negotiate a new agreement to resolve the issue.[36] As to Verizon's proposed new charges, this should be an issue for the parties' negotiations in the first instance. If they could not reach an agreement, Verizon asserted, the issue could be brought to the Commission in arbitration proceedings under §252.[37]

The process suggested by Verizon seemed reasonable. The statutorily prescribed period for negotiations under §252 was running from the date of Verizon's October 2, 2003 proposed amendment, and we awaited the outcome of those negotiations.

Implementation Comes Before This Commission

When Verizon and the CLECs failed to reach agreement, Verizon filed a petition for arbitration of the amendments on March 10, 2004 in Case 04-C-0314. Verizon named all parties with whom it has an interconnection agreement, totaling 200. Case 04-C-0314 was consolidated with Case 04-C-0318, in which AT&T had filed a parallel arbitration petition.[38] (We refer to these two consolidated cases hereafter as "the Arbitration Proceeding".)

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[33] Verizon letter to Acting Secretary Brilling, November 26, 2003, at 6.

[34] Id. at 3-4.

[35] Id. at 4, 6.

[36] Id. at 5.

[37] Id. at 5-6.

[38] Cases 04-C-0314 and 04-C-0318, Ruling Granting Motions for Consolidation and to Hold Proceeding in Abeyance (June 9, 2004.)

In response to Verizon's petition in the Arbitration Proceeding, CLECs again objected to Verizon's proposal to impose a substantial charge for performing the modifications.[39] CLECs also objected to language proposed by Verizon that would exempt Verizon's delivery of UNE loops from otherwise applicable performance standards and incentive mechanisms when routine network modifications were necessary.[40] CLECs further complained about Verizon's insistence upon an amendment to its interconnection agreements to implement the FCC's interpretation and its refusal to perform routine network modifications in the absence of such a signed amendment.[41]

Because it was intended to implement all aspects of the Triennial Review Order, the Arbitration Proceeding included many other issues unrelated to routine network modifications. Many of the responding CLECs filed motions to dismiss Verizon's

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[39] AT&T Communications of New York, Inc.'s Response to Verizon New York Inc.'s Petition for Arbitration, April 13, 2004, at 18-19; Competitive Carrier Coalition's Motion to Dismiss and Response to Petition for Arbitration of Verizon New York Inc., April 13, 2004, at 2, 13-14, 34; Answer of A.R.C. Networks Inc., et al. ("Competitive Carrier Group"), April 13, 2004, at 18; Conversent Communications of New York, LLC's Answer to Verizon's Petition for Arbitration, April 13, 2004, at 28-31; all filed in Case 04-C-0314. See also Response of BridgeCom International, Inc., April 13, 2004, Exhibit 1, Proposed Revisions to Verizon's Draft Amendment, p. 34, §3.12.1 (providing for routine network modifications "at no additional cost or charge"); MCI's Response to Verizon's Petition for Arbitration, attached mark-up of Verizon amendment, p. 26, §3.7.1 (deleting reference to charges).

[40] AT&T Response, supra, at 19; Competitive Carrier Coalition Response, supra, at 34-36; Competitive Carrier Group Answer, supra, at 18; MCI Response, supra, at 18; Sprint Communications Company L.P. and Sprint Spectrum L.P.'s Motion to Dismiss and Response to Verizon's Petition for Arbitration, April 13, 2004, filed in Case 04-C-0314, at 25.

[41] AT&T Response, supra, at 19; Competitive Carrier Coalition Response, supra, at 2, 13; Competitive Carrier Group Answer, supra, at 6; Conversent Answer, supra, at 28.

petition in its entirety on several different grounds.[42] In addition, most of the responding CLECs also addressed a multitude of issues on a clause-by-clause basis.

The entire status of the Arbitration Proceeding was uncertain because the U.S. Court of Appeals for the District of Columbia Circuit had reversed and vacated large portions of the Triennial Review Order but then stayed the effectiveness of its mandate.[43] Some of the CLECs cited this uncertainty as a reason to stay or dismiss the Arbitration Proceeding.[44] Although Verizon at first challenged these efforts, it later moved for a stay of the Arbitration Proceeding so that parties could engage in commercial negotiations.[45] This request was granted.[46]

On June 16, 2004, the D.C. Circuit's stay of its vacatur expired, allowing the order to go into effect.[47] As a consequence, many of the proposed changes to Verizon's interconnection agreements designed to implement the now-vacated TRO rules were no longer necessary or appropriate. On August 12, 2004, Administrative Law Judge Liebschutz issued a ruling holding most of the issues in the Arbitration Proceeding in abeyance pending amended filings to be made by the petitioners,

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[42] These motions are summarized and addressed in Cases 04-C-0314 and 04-C-0318, Ruling Holding Proceeding in Abeyance Pending Amended Filings, Denying Motion to Dismiss with Prejudice, Requiring Verizon to Rebut Proposed Resolution of Routine Network Modifications Issue, and Granting Stipulated Dismissals (August 12, 2004) (hereinafter "the August 12, 2004 Ruling").

[43] United States Telecom Ass'n v. Fed. Communications Comm'n, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

[44] Competitive Carrier Coalition Response, supra, at 9-13; Response of Cablevision Lightpath, Inc. to Verizon New York, Inc. Petition for Arbitration, April 13, 2004, at 7-8; Response of Cricket Communications, Inc. to Verizon's Petition for Consolidated Arbitration, April 13, 2004, at 3, 4-6; all filed in Case 04-C-0314.

[45] Verizon New York Inc.'s Motion to Hold Proceeding in Abeyance Until June 15, 2004, May 5, 2004, filed in Case 04-C-0314.

[46] Cases 04-C-0314 and 04-C-0318, Ruling Granting Motions for Consolidation and to Hold Proceeding in Abeyance (June 9, 2004).

[47] See United States Telecom Ass'n. v. FCC, 2004 U.S. App. LEXIS 11063 (D.C. Cir., June 4, 2004) (denying stay).

Verizon and AT&T. Her ruling noted that the FCC had already voted on interim rules and was considering permanent rules to respond to the concerns raised by the D.C. Circuit.[48] No deadline was set for the submission of the amended petitions, and the petitioning parties have not yet submitted an update to reflect issues requiring arbitration.

Resolution of Routine Network Modifications Issue

The August 12, 2004 ruling in the Arbitration Proceeding, while otherwise holding the proceeding in abeyance, singled out the routine network modifications issue as appropriate for resolution.[49] The ruling noted that that issue had not been affected by the D.C. Circuit's USTA II decision, had been the subject of extensive comments on the merits, and had been examined in detail in the Facilities Availability Proceeding.[50] The ruling noted that, at that point, "the comments in [the two cases] converge."[51] Noting that the parties agreed that Verizon must perform these routine network modifications, the Judge stated that the differences were limited to the three issues of whether Verizon could impose new charges, whether Verizon should be excused from performance standards in cases where routine network modifications were necessary, and whether Verizon's obligation to perform the modifications must await renegotiation and amendment of interconnection agreements.[52]

The August 12, 2004 ruling then set forth a proposed resolution of the routine network modifications issue, requiring Verizon to rebut the proposed resolution through evidentiary submissions and/or further comment.[53] The ruling noted that further procedures would be established depending on the nature

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[48] August 12, 2004 Ruling at 8.

[49] August 12, 2004 Ruling at 11.

[50] Id.

[51] August 12, 2004 Ruling at 14.

[52] Id.

[53] August 12, 2004 Ruling at 15.

of Verizon's filing.[54] In brief, the August 12, 2004 ruling proposed that Verizon should not be able to impose any new charges for making routine network modifications, on the theory that all such costs were already recovered in existing recurring and non-recurring charges for UNEs.[55] The ruling further proposed to dismiss Verizon's proposed interconnection agreement language excluding the provisioning of loops requiring routine network modifications from performance measures and incentive plans, without prejudice to Verizon's efforts to advocate for such exclusions in the Carrier Working Group under the auspices of Case 97-C-0139.[56] Finally, the Judge ruled that it was premature to determine whether any change in Verizon's interconnection agreements were necessary to implement whatever final ruling might issue on this matter.[57]

In response, on September 28, 2004, Verizon withdrew its claims to charge for performing routine network modifications and to be excluded from performance standards and incentive mechanisms.[58] However, it continued to insist on the necessity of an amendment to its interconnection agreement. Verizon asserted, "Because the FCC's ruling in the TRO that Verizon must perform routine network modifications was a change of law that affirmatively imposed new obligations on Verizon, and because such modifications were not contemplated in Verizon's existing interconnection agreements, an amendment to the parties' interconnection agreements is indeed necessary and would clarify the parties' rights pursuant to law."[59]

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[54] Id.

[55] August 12, 2004 Ruling at 16-17.

[56] August 12, 2004 Ruling at 18.

[57] August 12, 2004 Ruling at 19.

[58] Verizon did not concede that its existing UNE rates include recovery of the costs to perform routine network modifications and reserved its right to pursue such cost recovery in a rate proceeding at a later time. September 28, 2004 Letter to Secretary Brilling at 2.

[59] Id. at 4.

On October 14, 2004, ALJ Liebschutz issued a "Ruling Setting Further Procedures for Consideration of Routine Network Modifications Issue" in the Arbitration Proceeding. In the ruling, all parties were asked to address whether an interconnection agreement amendment was necessary and, if so, what exact language they proposed for such an amendment.[60] In response to this ruling, several CLECs further argued that the FCC's ruling in the TRO was not a "change of law" requiring re-negotiation under the terms of their interconnection agreements.[61] For its part, Verizon submitted a multi-page proposed amendment.[62] Of Verizon's proposed amendment language, however, only one section addressed the routine network modifications issue, by largely repeating the FCC's statement of Verizon's obligation.[63] The proposed amendment also refers to a schedule of charges for performing routine network modifications; however, for the high-capacity (DS1 and DS3) loops at issue here, the applicable charges are listed as $0.[64]

Both Verizon and a Joint CLEC group submitted reply comments on November 5, 2004. In its comments, Verizon

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[60] Cases 04-C-0314 and 04-C-0318, October 14, 2004 Ruling at 3.

[61] Joint CLEC (AT&T, MCI, Broadview Networks, Inc., BridgeCom, Conversent and Choice One) comments on the Routine Network Modifications Issues, October 29, 2004, at 4, 6-19; Comments of Covad Communications Company, October 29, 2004, at 2-8; all filed in Cases 04-C-0314 and 04-C-0318.

[62] Verizon Letter to Secretary Brilling, October 29, 2004, and Attachment 1, as corrected, November 2, 2004 (Letter to Secretary Brilling enclosing corrected Exhibit A) and November 5, 2004 (Letter to Secretary Brilling enclosing corrected Attachment 1), filed in Cases 04-C-0314 and 04-C-0318.

[63] Id., Attachment 1, pp. 12-13, §3.5.

[64] Id., Exhibit A to Attachment 1, at 1. In several of its filings on this issue, Verizon has reserved its right to continue to charge already-tariffed charges for such things as a routine dispatch or work order. E.g., September 28, 2004 Letter, supra, at 2, n. 4; Exhibit A to Attachment 1, supra, nn. 2 & 3. In subsequent follow-up conversations with Staff, Verizon advises that these charges would not be applicable, and therefore not imposed, in the case of performing routine network modifications necessary to provision DS1 and DS3 loops as UNEs.

emphasized its willingness at this time to perform such modifications at no charge and its good faith in making available to the CLECs an amendment indicating the charge of $0 for those modifications.[65] Given its positions, Verizon asserted that there was no need for ALJ Liebschutz to rule on whether Verizon's existing UNE rates include the costs of performing routine network modifications or whether there should be any change in Verizon's performance standards to accommodate its making these modifications.[66] Verizon asserted that an amendment to its interconnection agreements is necessary for two reasons. First, Verizon asserted that it was not required to perform routine network modifications prior to the issuance of the TRO and was so obligated after the issuance of the TRO; therefore the TRO constituted a change of law.[67] Second, Verizon asserted that an amendment "simply makes good sense" to specify just what work is to be performed by Verizon and pursuant to what terms.[68] Finally, Verizon addressed a Joint CLEC request for a monetary adjustment to credit them with the difference between UNE Loop rates and the special services rates they have paid since the TRO's issuance in October 2003.[69]

In their reply, the Joint CLECs protested that Verizon "seeks to obtain by delay what it is not entitled to by law."[70] They asserted that Verizon's Attachment 1 to its October 29, 2004 comments requires CLECs to agree to a host of other provisions unrelated to routine network modifications, in order to extend for months Verizon's policy of charging special access rates for loops requiring such modifications.[71] The Joint CLECs

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[65] Verizon Letter to Secretary Brilling, November 5, 2004 at 2-3.

[66] Id. at 4-6.

[67] Id. at 6.

[68] Id. at 7.

[69] Id. at 8-10.

[70] Joint CLEC Reply Comments on the Routine Network Modifications Issues, November 5, 2004, at 1.

[71] Id. at 2.

claimed that the TRO merely defines the local loop to include routine modifications.[72] They stated that Verizon performed these modifications prior to its change of policy in 2001 and no amendment was needed at that time.[73] The Joint CLECs asserted that Verizon's proposed amendment language is ambiguous, creating confusion and delay.[74] They argued that Verizon currently charges excessive amounts for routine network modifications, by rejecting CLEC orders for UNE loops where such modifications are required and forcing CLECs to purchase the more expensive special access circuits instead.[75]

While this issue was thus moving toward resolution in the Arbitration Proceeding, the ALJ in that proceeding allowed Verizon to withdraw the arbitration against all but 18 named parties, in addition to AT&T. Verizon asserted that it no longer wished to amend its interconnection agreements with the excluded parties, because the language of those interconnection agreements assertedly allowed Verizon to cease providing certain UNEs under certain circumstances.[76] Without ruling on Verizon's interpretation of its current agreements, the ALJ allowed the withdrawal based on a finding that no party was prejudiced.[77] Consequently, several of the parties voicing strong objections to Verizon's position on routine network modifications found themselves removed from the Arbitration Proceeding. The ALJ noted in her ruling that these parties were not prejudiced because the same issues were pending and ripe for decision in

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[72] Id. at 5, quoting TRO at ¶637.

[73] Id. at 5-6.

[74] Id. at 6-7, 9-10.

[75] Id. at 8.

[76] Cases 94-C-0314 and 94-C-0318, Ruling Allowing Verizon to Withdraw Arbitration (issued September 22, 2004) at 1.

[77] Id. at 7-8.

the Facilities Availability Proceeding and could be addressed there.[78]

DISCUSSION AND CONCLUSION

Since the issuance of the FCC's Triennial Review Order in August of 2003, it has been clear that all ILECs such as Verizon are obligated to perform routine network modifications as necessary to provision high-capacity UNE loops. It is imperative that this rule be put into practice without further delay. As the FCC found, the failure to carry out activities for CLECs that are routinely performed for retail customers is discriminatory and therefore anticompetitive. Our goal of facilities-based competition is hampered if those carriers who have invested in switches and other facilities cannot obtain an unbundled loop at the UNE-tariffed rate in the ordinary course. By implementing the FCC's interpretation of Verizon's obligations in provisioning high capacity UNE loops, we put the CLECs on an equal footing with Verizon, thus furthering our policy of open and fair competition in the telecommunications market in New York.

Implementation of the FCC's interpretation is possible without the need to amend Verizon's interconnection agreements. The TRO did not 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.

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[78] Id. at 8. On January 28, 2005, MCI submitted an affidavit to ALJ Liebschutz, served on all active parties and filed in both the Arbitration Proceeding and the Facilities Availability Proceeding. According to MCI's cover letter, the affidavit "chronicles the experience of MCI in its attempt to order high capacity UNE loops from Verizon throughout Verizon's footprint, including New York." This pleading was unauthorized and was not considered in arriving at this order.

Evidence that the change-of-law amendment process is unnecessary is found in the fact that no change in language of Verizon's interconnection agreements is necessary to implement the FCC's rule.[79] Verizon has not cited any provision of any interconnection agreement that is inconsistent and must be changed. Its current agreements and tariffs set forth Verizon's commitment to make available high capacity loops as unbundled network elements. The FCC's Triennial Review Order merely clarifies the meaning of the words already used in the agreements and tariffs.

In 2001, Verizon unilaterally interpreted the scope of its obligation to provide UNE loops by articulating its "no facilities" policy. It did so with no amendment to its agreements or invocation of change-of-law procedures. Now that it must adopt the FCC's interpretation of the same obligation, there is similarly no need for amending language. Rather, Verizon must immediately cease its "no facilities" policy, which has been declared discriminatory by the FCC, without the delay inherent in the amendment negotiation process.

We issue this order in both the Facilities Availability Proceeding and the Arbitration Proceeding in order to address the issue once with respect to all CLECs that purchase high capacity UNE loops from Verizon. Verizon has agreed in the Arbitration Proceeding to perform Routine Network Modifications at no charge and has withdrawn its claim for exemption from performance standards, but that case is now limited to only 19 parties. There is no basis for a different result with respect to the CLECs dismissed from the Arbitration Proceeding, given Verizon’s general obligation to treat all CLECs in a non-discriminatory fashion. Moreover, in light of our finding that no interconnection agreement amendments are necessary before Verizon must comply with the FCC mandate, the

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[79] Initially, Verizon claimed that amendment was necessary to provide for payment of new charges and to exempt it from applicable performance standards. However, when forced to defend this negotiating position in the arbitration proceeding, Verizon withdrew these claims.

result can be ordered by us and implemented by Verizon generally with respect to all CLECs.

The Commission orders:

1. Verizon New York Inc. shall commence immediately to make any and all routine network modifications necessary to make available high capacity (DS1 and DS3) UNE loops requested by a CLEC without imposing any charge for such modifications.

2. These proceedings are continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary

EXHIBIT J

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: PETITION OF VERIZON-RHODE ISLAND	:
FOR ARBITRATION OF AN AMENDMENT TO	:
INTERCONNECTION AGREEMENTS WITH	: DOCKET NO. 3588
COMPETITIVE LOCAL EXCHANGE CARRIERS	:
AND COMMERCIAL MOBILE RADIO SERVICE	:
PROVIDERS IN RHODE ISLAND TO IMPLEMENT	:
THE TRIENNIAL REVIEW ORDER	:

PROCEDURAL ARBITRATION DECISION

On February 23, 2004, Verizon-Rhode Island ("VZ-RI") filed a petition for arbitration to amend interconnection agreements ("ICAs") between VZ-RI and competitive local exchange carriers ("CLECs") and between VZ-RI and commercial mobile radio service providers ("wireless carriers") in Rhode Island. VZ-RI claimed that the proposed amendments would implement changes in VZ-RI's network unbundling obligations promulgated in the FCC's Triennial Review Order ("TRO"). VZ-RI's proposed amendments change specific terms and conditions; impose general conditions; contain a glossary; change obligations as to loops, subloops, circuit switching, signaling/databases and interoffice facilities; and clarified requirements related to providing combined unbundled network elements ("UNEs"), routine network modifications and non-conforming facilities.

Various CLECs filed answers to VZ-RI's petition for arbitration on March 15, 2004 and March 16, 2004. These CLECs were AT&T, MCI, Sprint, Conversent and two coalitions of CLECs that both referred to themselves as the Competitive Carrier Coalition. ("CCC").[1] Sprint and the Swidler CCC filed separate motions to dismiss VZ-

[1] In order to avoid confusion, the CCC represented by the law firm of Adler, Pollock & Sheehan will be referred to as the "Adler CCC" while the CCC represented by the law firm of Swidler, Berlin, Shereff,

RI's request for arbitration. Essentially, Sprint and the Swidler CCC made jointly or separately six arguments in favor of dismissing VZ-RI's petition. The arguments are as follows: (1) a recent decision by the D.C. Circuit Court of Appeals[2] has reversed or remanded portions of the TRO rendering an arbitration regarding ICA amendments to implement the TRO a waste of administrative resources; (2) VZ-RI did not comply with the procedural requirements of Section 252 of the Telecommunications Act of 1996 ("Act") or this Commission's Arbitration Rules regarding ICA arbitrations; (3) VZ-RI failed to negotiate in good faith with Sprint; (4) VZ-RI failed to comply with the change of law provisions contained in Sprint's ICA with VZ-RI; (5) the TRO does not constitute an effective change of law because the FCC's approval of the Bell Atlantic/GTE merger requires VZ to continue to provide current UNEs until the date of a final, non-appealable judicial decision regarding UNEs; and (6) the amendments relating to the terms and rates for VZ-RI's routine network modifications should be dismissed because the TRO only clarified that VZ-RI is currently required to make these modifications, and argued that VZ-RI's current TELRIC rates compensate VZ-RI for these modifications. On March 31, 2004, the Adler CCC, Conversent, and AT&T agreed with Swidler CCC's motion to dismiss as it pertains to VZ-RI's routine network modifications. Also, Sprint, Conversent and AT&T agreed with Swidler CCC's motion to dismiss as it pertains to VZ-RI's obligation under the FCC's Bell Atlantic/GTE Merger Order. However, AT&T requested to move forward as to other issues and MCI opposed Swidler CCC's motion to dismiss.

Friedman will be referred to as the "Swidler CCC." In addition, Verizon Wireless stated it would be soon filing a stipulation of dismissal. Also, RNK Telecom indicated their desire to participate in the arbitration.

[2] United States Telecom Ass'n v. FCC, Case No. 00-1012 (D.C. Circuit March 2, 2004).

On March 22 and 26, 2004, VZ-RI filed responses in opposition to Sprint and the Swidler CCC's motions to dismiss. In response to the arguments of Sprint and the Swidler CCC, VZ-RI argued as follows: (1) many aspects of the TRO were affirmed by the D.C. Circuit Court of Appeals; (2) to the extent VZ-RI did not comply with the procedural requirements of an arbitration, VZ-RI noted that this is a unique industry-wide proceeding required by the TRO and dismissal would be too draconian a remedy; (3) VZ-RI did not purposefully avoid meaningful discussion of Sprint's proposals and dismissal of the arbitration as to Sprint would be inefficient because there will be consolidated arbitration as to other CLECs; (4) the TRO mandates an arbitration pursuant to Section 252 of the Act timetable even if an ICA contains a change of law provision; (5) the Bell Atlantic/GTE merger condition relating to continuing UNEs expired on July 2003, did not apply to an appeal from the TRO, and was superseded by the TRO itself; and (6) changes in FCC's rules regarding routine network maintenance requires changes to ICAs.

On March 30, 2004, the Swidler CCC responded to VZ-RI's opposition to its motion to dismiss. The Swidler CCC argued that the July 2003 sunset provision does not apply to UNE obligations and that the TRO did not specifically address the Bell Atlantic/GTE merger issue. It noted that of the Regional Bell Operating Companies ("RBOCs"), only VZ is seeking to arbitrate a TRO amendment at this time. VZ-RI filed an additional response on April 5, 2004 clarifying its arguments.

On March 26, 2004, at the request of the Arbitrator, VZ-RI filed revisions to its ICA Amendment to reflect the D.C. Circuit's decision to reverse or remand various portions of the TRO. On April 5, 2004, AT&T filed a motion to dismiss or strike VZ-

RI's revisions to the ICA to reflect the recent D.C. Circuit decision. AT&T argued that the D. C. Circuit Court's decision will not go into effect until May 2004 and, therefore it is not applicable law. Also, AT&T argued VZ-RI must comply with the change of law provision of its ICA. On April 7, 2004, VZ-RI filed a response opposing AT&T's motion to strike or dismiss the updated TRO amendments.

ARBITRATOR'S FINDINGS

The Telecommunications Act of 1996 was passed by Congress to promote competition and reduce regulation. Instead, it has increased the work of regulators and encouraged attorneys in offering differing interpretations. As noted by Justice Scalia, this legislation "is in many respects a model of ambiguity or indeed even self-contradiction".[3] Congress' attempt to replace predictable state regulation of local telephone monopolies with federally mandated local telephone competition has created chaos in the regulatory universe. According to Hesiod, the ancient Greek poet, in the beginning was Chaos, which in turn gave birth to, among other things, the Underworld, where some mortals are tormented for eternity.[4] VZ-RI's petition for arbitration to implement the FCC's TRO in the ICA is an invitation to this Arbitrator and Commission to enter this underworld. Numerous CLECs have urged this Arbitrator to deny VZ-RI's petition for arbitration and not undertake this odyssey into the underworld. This Arbitrator will accept this invitation but only for the brief tour that clever Ulysses experienced.[5]

The CLECs raised six arguments in support of dismissing VZ-RI's petition for arbitration. The first issue to be considered is the failure to negotiate in good faith raised by Sprint only. The duty to negotiate in good faith in relation to ICAs is explicit under

[3] AT&T v. Iowa Utilities Bd., 525 U.S. 366 (1999).
[4] Hesiod, Theogony, verses 116-123.
[5] Homer, The Odyssey, Book XI.

Section 251 and Section 252 of the Act and the Commission's Arbitration Rule 3(f). Sprint has submitted a sworn affidavit from John Weyforth, a Sprint employee, stating that on October 29, 2003, Sprint made proposed revisions to VZ-RI's TRO amendments to its ICA and that as of March 9, 2004, VZ had neither accepted nor rejected Sprint's proposed revisions.[6] Furthermore, it appears VZ waited until February 12, 2004, about ten days before the filing of the petition, to have a detailed conference call with Sprint to discuss Sprint's proposed revisions and even then, VZ's representatives indicated they needed to speak to "higher attorneys".

VZ-RI acknowledged that Sprint did respond to VZ's request for ICA negotiations but that VZ did not purposefully avoid meaningful discussion with Sprint. Instead, VZ claims it rejected Sprint's changes, but has not provided any documentation indicating that it formally rejected Sprint's proposed revisions to the TRO amendments. Further, VZ indicated it "may disagree with the particulars of Sprint's account of the parties' discussion with respect to the TRO amendment."[7]

Based on the pleadings, Sprint has made a prima facie case that VZ did not make a good faith effort in negotiating with Sprint. VZ-RI failed to rebut Sprint's prima facie case because it can not categorically deny Sprint's factual assertions but can only state it "may disagree with the particulars" of Sprint's affidavit. It is quite possible that VZ-RI has formally rejected Sprint's proposed revisions, but it may have done so only after the petition was filed. This is <u>not</u> a good faith effort to negotiate. When a party fails to make a sufficient effort to negotiate and resolve issues prior to arbitration, it is a disservice to

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[6] Sprint's Motion to Dismiss, Attachment 1 (Affidavit).
[7] VZ-RI's Response to Sprint's Motion to Dismiss, p. 6.

the CLEC and the Arbitrator because it requires all to address issues that could possibly have been resolved before going to arbitration.

VZ-RI raises the counter-argument that if Sprint is dismissed then it would have to re-initiate negotiations with Sprint later or have a separate arbitration for Sprint. Accordingly, VZ-RI indicated it would be more efficient to conduct a consolidated arbitration which includes Sprint. VZ-RI raises a legitimate concern. Assuming the arbitration proceeds, VZ-RI fails to recognize that a separate arbitration for Sprint may never occur because Sprint could simply request the ICA terms and conditions that arise from this arbitration. In other words, Sprint can focus its resources on negotiating with VZ while VZ can arbitrate with the other CLECs and negotiate with Sprint separately. Once an arbitration decision is reached, Sprint could accept the ICA arising from the arbitration decision instead of pursuing arbitration for itself. This approach is less efficient for VZ-RI, but it is more efficient for Sprint and probably will have no impact on the Arbitrator and/or Commission's time and resources. VZ should not be rewarded for the negotiating tactics it apparently used with Sprint. A duty to make a good faith effort to negotiate precedes a right to arbitration. VZ-RI can not "skip a step" because it would be more efficient for it to arbitrate with all CLECs all at once rather than negotiate with individual CLECs. Accordingly, Sprint's motion to dismiss as to VZ-RI's petition to arbitrate with Sprint is granted. VZ-RI is directed to reinitiate negotiations with Sprint.[8]

The Arbitrator will now consider the arguments raised by the Swidler CCC in its motion to dismiss. The first issue is the effect of the recent D.C. Circuit Court decision

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[8] The Arbitrator will consider any other motions to dismiss by any CLEC in this proceeding on the basis of lack of good faith negotiation by VZ if the CLEC can present evidence that rises to the level Sprint has presented.

on the issues subject to this arbitration. The Swidler CCC is correct that portions of the TRO has been remanded and could soon be vacated. This Commission, at the request of VZ-RI, has already stayed further proceedings in the TRO docket due to the recent D.C. Circuit decision.[9] However, VZ-RI has correctly noted that certain portions of the FCC's TRO were affirmed by the D.C. Circuit.[10] Therefore, the Arbitrator and the Commission could proceed to change in ICAs in order to effectuate those portions of the TRO that will not soon be vacated by the D.C. Circuit. The Commission stayed its TRO proceedings because they pertained to aspects of the TRO that were reversed and remanded to the FCC. The Swidler CCC raised a valid concern that this ICA arbitration would be conducted on a piecemeal basis and with a fog of legal uncertainty surrounding it. Unfortunately, the status of telecommunications law is normally uncertain. Because a portion of the FCC's TRO has not been reversed, it is the law and needs to be implemented.

AT&T has made a motion to dismiss or strike VZ-RI's updated TRO amendments. AT&T's motion to strike is moot because the Arbitrator, sua sponte, will now strike VZ-RI's updated TRO amendments. AT&T argues that the updated TRO amendments are not ripe because the D.C. Circuit Court's vacatur is not in effect. Technically, AT&T is correct. However, the recently adopted Commission policy is not to attempt to implement law that will shortly be void.[11] It would be silly and an extremely inefficient use of resources to implement a law that will soon become invalid. AT&T also argues that these updated TRO amendments do not comply with the change of law provisions of its ICA. This argument is similar in some respects to one of Sprint's

[9] Order No. 17790, pp. 5-6.
[10] VZ-RI's Opp. to Swidler CCC's Motion to Dismiss, p. 9.
[11] Order No. 17990, pp. 5-6.

arguments for dismissal based on failure to conform with change of law provisions of its ICA. This argument is not persuasive. It appears that the FCC's TRO indicated that an ICA arbitration is appropriate "even in instances where a change of law provision exists."[12] Therefore, an ICA arbitration can be a forum to implement a change of law provision. Also, AT&T has misunderstood the purpose of an updated TRO amendment. An updated TRO amendment would not constitute a change of law triggered by the recent D.C. Circuit decision. Instead, it would merely not implement the change of law made by the FCC's TRO relating to issues recently reversed, remanded and soon to be vacated by the D.C. Circuit.

Unfortunately, VZ-RI seems to have also misunderstood the purpose of the updated TRO amendments. The purpose of the updated TRO amendments are not to add "a simple adjective" such as "conditional". Also, it is not to recognize a specific "obligation to provide mass market switching—even though the D. C. Circuit's vacatur of the TRO would remove the obligation."[13] VZ-RI requested that the Commission not engage in a TRO proceeding on issues reversed and remanded back to the FCC such as mass market switching. Now, VZ-RI is asking the Arbitrator to implement changes of law through an arbitration relating to issues reversed and remanded back to the FCC. The inconsistency is audacious. Possibly, VZ-RI misunderstood the Arbitrator's request at the procedural conference. VZ tends to prefer directions from this Commission to be written. Accordingly, VZ-RI is directed to file, by April 15, 2004, updated TRO amendments to ICAs which remove from consideration in this arbitration any definition,

[12] FCC's TRO, paragraph 704.
[13] VZ-RI's Opp. to AT&T's Motion to Strike, p. 2.

condition, or transition relating to concepts or obligations such as mass market switching that was reversed, remanded and soon to be vacated by the D.C. Circuit.

A review of the final paragraphs of the D.C. Circuit's decision indicates that the following have been remanded and will soon be vacated: the impairment of mass market switching and dedicated transport (DS1, DS3, and dark fiber), the impairment of dedicated transport for wireless carriers, and the distinction between qualifying and non-qualifying services. Accordingly, consistent with the stay in Docket No. 3550, this Arbitrator will not consider any issues related to these reversed, remanded and soon to be vacated decisions. Since the FCC is now considering these issues, the definitions, conditions and transitions related to these issues are likely to change. It is an immense waste of resources to arbitrate obligations likely to be changed by the FCC. Of course, the Arbitrator would include these remanded issues in this arbitration at a later date if there is a significant change in circumstances such as new guidance from the FCC, or if the D. C. Circuit decision is reversed or indefinitely stayed.

VZ-RI, AT&T, and MCI, among others, may want to proceed to implement changes to their ICA agreements to reflect reversed, remanded and soon to be vacated provisions of the FCC's TRO by claiming a right to arbitration. They can do so either through arbitration in other states where those commissions are going forward with TRO proceedings or they may make strenuous efforts to compromise through negotiation. Their right to arbitration in this state on these issues is not ripe and is contrary to the principle of judicial economy. Once some of the parties have agreed to TRO amendments reached either through negotiation or ordered by arbitration in another state, the parties can file the ICA with this Commission for approval. What these certain

parties will not be permitted to do is to expend the Arbitrator and/or Commission's time in arbitrating ICA amendments based on speculative, hypothetical or fanciful discussions as to what the FCC or the courts will do. The Arbitrator will take a pass on joining this metaphysical discussion group.

To further clarify, the current terms of ICAs with CLECs for which VZ-RI has petitioned for arbitration can continue in effect as written in regards to those issues reversed, remanded and soon to be vacated by the D.C. Circuit Court.[14] In other words, the status quo prevails. This is consistent with the Commission's recent order in the TRO docket.[15] Accordingly, the Swidler CCC's motion to dismiss as it relates to the D.C. Circuit decision is granted as to any issue reversed, remanded and soon to be vacated by the D.C. Circuit Court. This ruling applies to this arbitration with all CLECs in this docket. By April 15, 2004, VZ-RI is to update its petition in conformance with the instructions above as they relate to the recent D. C. Circuit decision. Failure to comply will result in an automatic stay of further proceedings in this arbitration.

The next issue raised by Swidler CCC's motion to dismiss relates to VZ-RI's request to include the subject of routine network modifications in its petition for arbitration. VZ-RI argues that the TRO effected a change of law by requiring VZ to make routine network modifications. Furthermore, VZ-RI argued that it is not properly compensated at current TELRIC rates to provide these routine network modifications.[16]

VZ-RI is incorrect as to its first argument. The FCC did not impose a new obligation on VZ-RI to undertake routine network modifications for CLECs. It merely

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[14] Of course, a few changes to terms and conditions may be necessary. For instance, the terms and conditions related to switching will need to be altered in order to implement the D.C. Circuit's affirmation of the TRO's elimination of enterprise switching as a UNE under Section 251 of the Act.
[15] Order No. 17990, p. 7.
[16] VZ-RI's Reply in Opp. to the Swidler CCC's Motion to Dismiss, pp. 8-9.

resolved the controversy as to whether VZ-RI had to perform routine network modifications for CLECs and then adopted rules to clarify exactly what constituted a routine network modification and associated obligations. If the TRO really did constitute a change of law and created a completely new legal obligation for VZ-RI, the question must be asked as to why, for so many years, did VZ-RI make routine network modifications at TELRIC rates? As noted by Conversent, prior to May 2001, VZ-RI routinely provisioned Conversent's DS1 loops at existing TELRIC rates whenever such routine modifications to existing VZ facilities was necessary. Only after May 2001, VZ-RI began rejecting Conversent's DS1 orders on the basis of "no facilities". In the Rhode Island Section 271 proceeding, this issue was raised by Conversent. However, VZ-RI agreed to provide these services initially at a special access rate and then convert the rates to TELRIC rates at a later date.[17] VZ-RI made routine network modifications at TELRIC rates for many years. Undoubtedly, VZ-RI performed these tasks because of some legal obligation under federal or state law whether it be in ICAs, tariffs, regulatory orders or statutes. VZ-RI is an aggressive competitor; it would not provision wholesale services merely out of compassion for unfortunate, little CLECs. The FCC's TRO by its language, and as exhibited by VZ-RI's conduct over the years, did not create a new legal obligation for VZ-RI to perform but merely clarified an old pre-existing obligation. Accordingly, there is no need to alter the current terms and conditions in ICAs, as they relate to VZ-RI's obligation to perform routine network modifications for CLECs at TELRIC rates because VZ-RI is already required under ICAs to provide UNEs at TELRIC rates.

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[17] Conversent's Answer, pp. 25-26; Conversent's Comments, p. 10; and Order No. 16815, pp. 129-132, 135-136.

As a result, the real issue of routine network modifications is one of price. St. Paul once declared that the love of money is the root of all evil.[18] He certainly was not exaggerating when it comes to litigation related to TELRIC pricing. VZ-RI claims that the TRO allows VZ-RI to obtain cost recovery of routine network modifications through TELRIC rates and that VZ-RI's current TELRIC rates do not cover the costs of these modifications. As expected, the CLECs argue to the contrary. At the outset, the Arbitrator must address VZ-RI's argument that this issue is inappropriate for a motion to dismiss, but instead must be resolved during the course of the proceeding.[19] In general a motion to dismiss can be considered the equivalent of a motion to dismiss in civil procedure under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. In this instance, the Arbitrator can not make a finding that VZ-RI lacks a basis to claim that VZ-RI's current TELRIC rates do not recover the costs associated with routine network modifications. However, the Arbitrator will note that VZ-RI's current TELRIC rates were based on interim UNE rates adopted by the Commission on August 18, 1999, and that these UNE rates were the result of a settlement entered into between VZ-RI and the Division of Public Utilities and Carriers ("Division"), which was supported to some extent by Conversent.[20] Subsequent to the settlement, until May 2001, it appears VZ-RI provided these routine network modifications at TELRIC rates to CLECs such as Conversent without any indication that these TELRIC rates did not compensate VZ-RI for these routine network modifications.

In any case, the motion to dismiss is not appropriate under the equivalent of a Rule 12(b)(6) motion but it would be appropriate under the equivalent of a Rule 12(b)(1),

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[18] I Timothy, Ch. 6, verse 10.
[19] VZ-RI's Opp. to Swidler CCC's Motion to Dismiss, p. 5, fn. 5.
[20] Order No. 15976 and Order No. 16815, p. 43.

or 12(b)(3) motion for dismissal based on lack of subject matter jurisdiction or improper venue. This type of argument was implicitly raised by Conversent when it indicated that the issue of whether the current TELRIC rates adequately cover routine network modifications should not be considered in this arbitration proceeding but in the TELRIC proceeding in Docket No. 2681.[21] Conversent is procedurally correct. This is a pricing issue that is more appropriate for VZ-RI to raise in Docket No. 2681 for various reasons. First, the Division is not a party to this arbitration and their participation and view as to whether current TELRIC rates were intended to compensate VZ-RI for routine network modification is an important consideration.[22] Second, the Division has always participated in TELRIC rate setting proceedings.[23] Third, in a past arbitration, this Commission has affirmed this Arbitrator's decision to deny VZ-RI's request to alter the status quo for intercarrier compensation in an arbitration because of the need for Division participation.[24] Fourth, even if VZ-RI were correct that current TELRIC rates do not compensate VZ-RI for routine network modifications, it is highly inefficient and awkward to conduct a mini-TELRIC proceeding in an arbitration to set new rates for routine network modifications.

Possibly, VZ-RI does not see the inconsistency of conducting a mini-TELRIC proceeding in an arbitration to implement the TRO after requesting and obtaining a stay from the Commission in the TELRIC proceeding on the basis of the uncertainty created by the TRO.[25] Maybe VZ-RI is not troubled by adopting an inconsistent position, but the

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[21] Conversent's Comments, p. 11.
[22] Order No. 17524, pp. 75-78. In this order, the Commission indicated various principles it follows in interpreting a settlement agreement such as intent and conduct of the settling parties.
[23] Accordingly, the Swidler CCC's motion to dismiss would be appropriate under the equivalent of a Rule 12(b)(7) motion for failure to join an indispensable party.
[24] Order No. 17193, pp. 25-26.
[25] Order No. 17990, pp. 2, 6-7.

Arbitrator is. The Commission has stayed the fires of the TELRIC proceeding and this Arbitrator will not reignite it. It is also consistent with maintaining the policy of the status quo.[26] Accordingly, the Swidler CCC's motion to dismiss as it relates to routine network modifications is granted on the basis that the appropriate forum for this issue is the TELRIC proceeding in Docket No. 2681. This ruling applies to all CLECs in this arbitration. The current ICAs already require VZ-RI to provide UNEs such as routine network modifications at TELRIC rates. VZ-RI is directed to file revised TRO amendments to ICAs so as to eliminate any discussion of routine network modifications. VZ-RI is not precluded from raising the issue of routine network modifications in Docket No. 2681 or asking the Commission to lift its stay in the TELRIC docket immediately.

The next issue to be addressed is whether the FCC's conditions imposed on VZ as a result of the Bell Atlantic/GTE merger precludes VZ from terminating UNE obligations until the FCC's TRO is final and not subject to further appeals. If the merger conditions preclude VZ from terminating UNEs because the TRO is still subject to appeal, then this arbitration is not ripe. This argument requires the Arbitrator, a mere state employee, to interpret and define the meaning behind the mysterious words of the FCC.

The Swidler CCC suggested that this arbitration be held in abeyance until VZ obtains clarification from the FCC as to whether the Bell Atlantic/GTE merger conditions for UNEs are still in effect. This is a very reasonable approach, but begs the question as to why the Swidler CCC or other CLECs themselves have not sought clarification from the FCC on this issue since the request for ICA negotiations was sent by VZ in October 2003. The law firm representing the Swidler CCC is in Washington, D.C. and could just as easily as VZ have filed a request for clarification. If the Swidler CCC is correct

[26] Id., p. 7.

regarding its interpretation of the Bell Atlantic/GTE Merger Order, it is understandable why VZ would not have sought clarification from the FCC. However, if the Swidler CCC believed its interpretation is correct, it should have requested a clarification from the FCC thereby ending ICA arbitrations across the nation and leaving only one proceeding at the FCC. There are two possible reasons the CLECs did not request clarification from the FCC: either they stubbornly believed that the burden is on VZ to request clarification or they feared that the FCC's clarification would favor VZ. In any case, the Arbitrator urges any party to seek clarification from the FCC on this issue.

The question now before the arbitrator is whether to proceed with the arbitration based on the best legal interpretation of the FCC's orders this Arbitrator can make. The FCC's Bell Atlantic/GTE Merger Order indicated that:

> In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, from now until the date on which the Commission's orders in those proceedings, and any subsequent proceedings, become final and non-appealable, Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNEs or combination of UNEs in all or a portion of its operating territory. This condition only would have practical effect in the event that our rules adopted in the UNE Remand and Line Sharing proceedings are stayed or vacated. Compliance with this condition includes pricing these UNEs at cost-based rates in accordance with the forward looking cost methodology first articulated by the Commission in the Local Competition Order, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide such UNEs at cost-based rates.[27]

The CLECs note that the TRO is an outgrowth of the remands by the D.C. Circuit relating to the FCC's UNE Remand and Line Sharing Orders. As a result, the CLECs argue that since the TRO constitutes a subsequent proceeding and the TRO is still subject

[27] Bell Atlantic/GTE Merger Order, para. 316

to appeal, VZ is required to provide UNEs pursuant to the Bell Atlantic/GTE Merger Order regardless of Section 251 of the Act until the TRO is no longer subject to appeal. Accordingly, the CLECs argue that VZ-RI's petition for arbitration is not ripe.[28] On its face this is a very persuasive argument but VZ-RI responded with essentially three arguments of its own.

First, VZ-RI seems to argue that the TRO was not a subsequent proceeding relating to the UNE Remand and Line Sharing orders, and therefore, the merger condition is not applicable. In support of this argument VZ-RI cites a letter from an FCC staffer indicating that the Bell Atlantic/GTE merger condition in Paragraph 316 of the Bell Atlantic/GTE Merger Order requiring VZ to provide UNEs at TELRIC rates would end upon an adverse final decision by the U.S. Supreme Court on the FCC's Order establishing TELRIC pricing for UNEs and not continue if it was remanded. VZ seems to argue that because the FCC has interpreted VZ's obligation to provide TELRIC prices under Paragraph 316 would not continue through subsequent proceedings after a remand then it must also hold true that VZ's obligation to provide UNEs under Paragraph 316 would not continue through subsequent proceedings after a remand.[29] VZ-RI's analysis is not correct.

The FCC staffer indicated that VZ's merger obligation to provide TELRIC pricing would end upon an adverse final decision by the U.S. Supreme Court on the Local Competition Order. This was accurate because the last sentence of Paragraph 316 in the Bell Atlantic/GTE Merger Order did not contain the additional condition of

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[28] Swidler CCC's Motion to Dismiss, pp. 2-6.

[29] VZ-RI's Opp. to Swidler CCC's motion, pp. 3-4.

"subsequent proceedings" in regards to TELRIC pricing.[30] The relevant sentence states: "Compliance with this condition includes pricing these UNEs at cost-based rates in accordance with the forward looking cost methodology first articulated by the Commission in the Local Competition Order, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide such UNEs at cost-based rates."[31] It is clear from the language of Paragraph 316 that the additional "subsequent proceedings" condition only applied to the requirement that VZ provide UNEs and not the requirement that VZ provide them at TELRIC rates. Therefore, the FCC staffer carefully advised VZ that the TELRIC pricing obligation based on the merger condition would cease upon an adverse final decision by the Supreme Court on the TELRIC pricing issue arising from the Local Competition Order. The merger condition to provide UNEs, however, does specifically indicate "subsequent proceedings" and therefore would still be applicable through appeals from subsequent proceedings arising from the UNE Remand and Line Sharing Orders. VZ-RI's argument fails to persuade.

The second argument raised by VZ-RI is that the merger condition requiring VZ to provide UNEs until a final non-appealable order is entered in any "subsequent proceeding" arising out of the FCC's Line Sharing or UNE Remand orders sunseted in July 2003, 36 months after the Bell Atlantic/GTE merger closing date.[32] The CLECs argue that the sunset provision is inapplicable to the UNE provisioning requirement of Paragraph 316 because the sunset provision does not apply "where other termination

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[30] Swidler CCC's Reply to VZ-RI's Opp., pp. 3-4.
[31] Bell Atlantic/GTE Merger Order, para. 316.
[32] VZ-RI's Opp. to Swidler CCC's Motion to Dismiss, p. 3.

dates are specifically established herein".[33] VZ-RI essentially countered that the date of a final non-appealable order arising from "subsequent proceedings" would not constitute a specific termination date under Paragraph 64 of the Bell Atlantic/GTE Merger Order, Appendix D.[34]

Essentially, Paragraph 64 indicates that the Bell Atlantic/GTE merger conditions remain in effect for 36 months after the merger closing date "except where other termination dates are specifically established herein." The clear intent of this introductory phrase is to sunset all merger conditions, with the exception of those related to Advanced Services, which do not have a specific termination date. The word "specifically" means "precise" or "definite".[35] Paragraph 316 provides that a merger condition will remain in effect until "the date" of a "final and non-appealable" judicial decision arising from "subsequent proceedings." The event referred to is specific. It is a "final and non-appealable" judicial decision. However, the "date" is not specific because the event could occur on any date. Paragraph 316 does not contain specific termination dates. Instead, it contains specific events that terminate obligations. A specific event is not analogous to a specific termination date. In Paragraph 64, the word "specifically" is clearly referring to "other termination dates". The intent of the sentence in Paragraph 64 is to continue obligations with specific termination dates and not to continue obligations beyond 36 months when future events will occur at some unknown date. If the FCC had omitted the word "specifically" in the introductory phrase of Paragraph 64 or had used the phrase "other terminating events or conditions" instead of "other termination dates" then the merger condition would remain in effect. However, the phrase in Paragraph 64

[33] Swidler CCC's Reply to VZ-RI's Opp., pp. 4-5.
[34] VZ-RI's Reply in Opp. to Swidler CCC's Motion to Dismiss, pp. 6-7.
[35] Black's Law Dictionary, (6th), p.1398.

has the word "specifically" in reference to "other termination dates". A specific future event is not a specific date. The sun has set on VZ's obligation to provide UNEs under the Bell Atlantic/GTE Merger Order. A new more uncertain day has dawned for the CLECs.

Although the Arbitrator has been persuaded by VZ-RI's second argument regarding the inapplicability of Paragraph 316 of the Bell Atlantic/GTE Merger Order, the Arbitrator will address VZ-RI's third argument. Essentially, VZ-RI argued that Paragraph 705 of the TRO implicitly repealed the requirement in Paragraph 316 of the Bell Atlantic/GTE Merger Order that VZ provide UNEs until there is a "final and non-appealable" judicial decision arising from a "subsequent proceeding".[36] Specifically, the TRO indicates that provisions allowing only for modifications to ICAs when there are "final and unappealable judicial orders" should be interpreted to encompass the TRO because otherwise, "it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order."[37] According to VZ-RI, the FCC's apparent intent is that the new UNE obligations arising from the TRO become immediately effective for purposes of ICA change of law provisions instead after all appeals of the TRO are exhausted. Thus, VZ-RI seems to argue that Paragraph 316 of the Bell Atlantic/GTE Merger Order would have been implicitly repealed if it were still in effect.

Certain CLECs argue that if there is a conflict in FCC orders regarding a specific provision, such as Bell Atlantic/GTE Merger Order Paragraph 316, and a general

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[36] VZ-RI's Opp. to Swidler CCC's Motion to Dismiss, pp. 4-5.
[37] TRO, paragraph 705.

provision, such as TRO Paragraph 705, the more specific provision prevails.[38] This approach to interpretation is valid. However, another equally valid approach is to give effect to the more recently approved provision and to find that the older provision was repealed by implication.[39] Therefore, even if the condition in Paragraph 316 of the Bell Atlantic/GTE Merger Order has not been sunseted by Paragraph 64, it was implicitly repealed by Paragraph 705 of the TRO. Accordingly, the Swidler CCC's Motion to dismiss as it relates to the Bell Atlantic/GTE Merger Order is denied. However, if the FCC were to render an opinion contrary to the interpretation in this decision, the Arbitrator would comply with the FCC's interpretation.

Lastly, the Swidler CCC argued for dismissal of VZ-RI's arbitration petition because of VZ-RI's failure to comply with the procedural filing requirements of Section 252 of the Act and with the Commission's Arbitration Rules. The Swidler CCC noted that the failure of VZ-RI to comply with these procedural requirements will cause the parties and the Commission to consume valuable time narrowing issues.[40] VZ-RI responded that this arbitration did comply with Section 252 and with the Commission's Arbitration Rules. To the extent VZ-RI's filing did not comply, VZ-RI maintained that the arbitration is being conducted pursuant to the TRO. Also, VZ-RI emphasized the unique circumstances of an industry-wide arbitration and stated that a dismissal was a draconian remedy.[41]

It appears that VZ-RI's filing did not strictly comply with Section 252 or with the Commission Arbitration's Rules. However, dismissal on strictly procedural grounds in

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[38] Conversent's Comments, p. 8.
[39] Prov. Water Supply Bd. v. P.U.C., 414 A.2d 465, 466 (R.I. 1980).
[40] Swidler CCC's Motion to Dismiss, pp. 6-9.
[41] VZ-RI's Opp. to Swidler CCC's Motion to Dismiss, pp. 5-8.

circumstances that could necessitate industry-wide arbitration in ICAs is too drastic a remedy. The CLECs are correct that VZ-RI's filing failed to narrow the issues. Additionally, the filing was not presented in a manner comparable to the recent arbitration between VZ-RI and GNAPs in Rhode Island. As a result, CLECs and the Arbitrator will need to expend more time and resources in narrowing and clarifying the issues presented for arbitration. Since VZ-RI failed to strictly comply with the statutory and Commission requirements for arbitration, the Arbitrator and the Commission will not strictly comply with the statutory requirements for resolving the issues submitted to arbitration within a nine-month time frame. Instead, the Arbitrator and the Commission will conclude the arbitration within a reasonable time. Accordingly, the Swidler CCC's motion to dismiss on procedural grounds is denied without prejudice. If VZ-RI were to insist on an arbitration decision within the strict statutory mandates or in a less than reasonable time period, as defined by the Arbitrator or the Commission, this motion will be granted and will be applied to all CLECs.[42]

To summarize, Sprint's motion to dismiss, as it relates to itself, is granted on the basis that VZ failed to make a good faith effort to negotiate prior to requesting arbitration. The Swidler CCC's motion to dismiss as it relates to the recent D.C. Circuit decision is granted only to those issues that were reversed, remanded and soon to be vacated, and this ruling will be applied to all CLECs. AT&T's motion to strike VZ-RI's filing to update TRO amendments to ICAs is moot because the Arbitrator, sua sponte, struck VZ-RI's filing because it did not conform with the Arbitrator's request at the procedural conference. Accordingly, VZ-RI is required to submit, no later than April 15,

[42] Of course, VZ-RI is free to withdraw its Petition, attempt negotiations with CLECs and then refile its Petition in conformance with Section 252 of the Act and with the Commission's Rules, at which time, VZ-RI could receive a decision within the statutory time frame.

2004 updated TRO amendments to ICAs removing issues from the arbitration that were reversed, remanded and soon to be vacated by the recent D.C. Circuit decision. If VZ-RI does not timely comply with this directive to the satisfaction of the Arbitrator, the arbitration is stayed. Swidler CCC's motion to dismiss as to routine network modifications is granted and VZ-RI is required to submit, no later than April 15, 2004 updated TRO amendments to ICAs removing the proposed ICA amendments relating to routine network modifications from the arbitration. If VZ-RI does not timely comply with this directive to the satisfaction of the Arbitrator, the arbitration is stayed. Swidler CCC's motion to dismiss on the basis of the Bell Atlantic/GTE Merger Order is denied. Swidler CCC's motion to dismiss on the basis of failure to comply with procedural requirements is denied without prejudice.

For eight long years, almost as long as the legendary Trojan War, the parties have litigated issues related to UNEs. In this war of attrition there are no winners, only losers. On the issues raised so far in this arbitration, all the parties have lost on at least one issue. Instead of simply litigating through arbitration over the meaning of words, maybe the parties should make an effort to negotiate. Of course, VZ-RI can proceed with what is left of its arbitration, but in many ways the petition resembles a wounded soldier left in the middle of No Man's Land.

Accordingly, it is

(17802) ORDERED:

1. Sprint's motion to dismiss is granted.

2. Swidler CCC's motion to dismiss is granted as to those issues reversed and remanded and soon to be vacated by the recent decision in United States Telecom Ass'n v. FCC, Case No. 00-1012 (D.C. Circuit March 2, 2004).
3. AT&T's motion to strike is moot because the Arbitrator, sua sponte, struck VZ-RI's filing because it did not conform with the Arbitrator's request at the procedural conference.
4. VZ-RI must file no later than April 15, 2004, revised, proposed TRO amendments to ICAs removing issues from this arbitration relative to those TRO provisions reversed, remanded and soon to be vacated by the Court's decision in United States Telecom Ass'n v. FCC, Case No. 00-102 (D.C. Circuit March 2, 2004).
5. Swidler CCC's motion to dismiss as to routine network modifications is granted.
6. VZ-RI must file, no later than April 15, 2004, revised proposed TRO amendments to ICAs removing the issue of routine network modifications from this arbitration.
7. Failure to comply with ordering paragraphs four and six will result in an automatic stay to be entered in this arbitration.
8. Swidler CCC's motion to dismiss on the basis of the Bell Atlantic/GTE Merger Order is denied.
9. Swidler CCC's motion to dismiss on procedural grounds is denied without prejudice

10. Pursuant to Commission Rules Governing Arbitration of Interconnection Agreements, within fourteen days of issuance of this Procedural Arbitration Decision, parties may submit comments regarding this Procedural Arbitration Decision.
11. Pursuant to Commission Rules Governing Arbitration of Interconnection Agreements, within twenty-one days of issuance of this Procedural Arbitration Decision, parties may submit reply comments regarding this Procedural Arbitration Decision.

DATED AND EFFECTIVE AT WARWICK, RHODE ISLAND ON APRIL 9, 2004.

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Steven Frias, Arbitrator